

EPA Sets End Date for Temporary COVID-19 Environmental Enforcement Policy

Across the country, the COVID-19 pandemic has profoundly affected the ability of businesses to fulfill their environmental compliance obligations. The pandemic has led to worker shortages, the temporary closure of laboratories that test monthly samples, and cancellations by outside contractors scheduled to complete required performance testing. To assist businesses in responding to these challenges, in late March, the U.S. Environmental Protection Agency issued a temporary policy memorandum explaining how the EPA would exercise its enforcement discretion for environmental noncompliance during the course of the pandemic. Earlier this week, the EPA established that this temporary policy will expire on August 31, 2020.

This update describes the EPA's upcoming termination of its temporary enforcement policy and provides tips for businesses that may continue to struggle to meet environmental compliance obligations because of the COVID-19 pandemic.

EPA's March 2020 Memorandum Suspended Some Compliance Obligations for Entities Affected by the Coronavirus Pandemic

The EPA's March 26, 2020, temporary policy memorandum, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*, which applied retroactively beginning on March 13, 2020, acknowledges that the consequences of the COVID-19 pandemic may inhibit the ability of regulated entities to perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. It provides that the EPA will exercise its enforcement discretion for environmental noncompliance due to the COVID-19 pandemic. The temporary policy is intended to apply to businesses and facilities that make a good faith effort to comply. It does not offer a defense to criminal violations (an intentional disregard of the law) or relieve a facility of its obligations to comply.

Following the EPA's lead, numerous states issued their own policies addressing environmental enforcement discretion. Many of these states provided simply that they would follow the EPA's temporary policy.

The Temporary Policy Will Terminate on or Before August 31, 2020

Citing the relaxing or lifting of the state and local restrictions that made fulfilling environmental compliance obligations challenging, the EPA has now decided to terminate its temporary policy in its entirety on August 31, 2020. This means that the EPA will not use the temporary policy as the basis to exercise its enforcement discretion for any noncompliance that occurs after August 31, 2020.

The EPA notes that it may terminate the temporary policy on a state or national basis *before* August 31, 2020. In evaluating whether to do so, the EPA will look to "changing conditions" in a particular state or region, including the expiration or lifting of state or local "stay at home" orders, the status of federal and/or state COVID-19 public health emergency guidelines, and/or other relevant factors. To ensure adequate notice to affected regulated entities, the EPA will provide notification at least seven days prior to any early termination date.

In addition, while the EPA acknowledges that some states have decided to slow or reverse reopening in light of recent increases in COVID-19 cases, it does not anticipate extending the termination date beyond August 31, 2020.

Effects on Businesses

While the termination of the temporary policy means that the EPA will no longer base any exercise of enforcement discretion on the policy itself, the EPA retains its ability to exercise enforcement discretion on a case-by-case basis, including as a result of COVID-19.

Should a business have difficulty performing environmental regulatory obligations after the termination of the temporary policy, it is still important to communicate those challenges to the EPA or the relevant state agency well before any relevant compliance deadlines.

The EPA's decision to terminate its temporary policy is independent of any state enforcement policy or guidance. It is possible that some state agencies will maintain their COVID-19 guidance in effect beyond August 31, 2020. As such, we recommend that businesses check with their state to see if it is following the EPA's lead.

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