

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION*May 2020***IN THIS ISSUE**

Jeffrey Karp discusses how U.S. EPA has adjusted its enforcement approach in recognition of potential compliance difficulties experienced by stakeholders due to the COVID-19 pandemic. The following article breaks down the Agency's recent policy on discretionary civil enforcement, and its guidance on the timing of performing field work.

U.S. EPA's COVID-19 Based Discretionary Civil Enforcement Policy and Guidance on Timing of Performing Field Work**ABOUT THE AUTHOR**

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The COVID-19 pandemic has disrupted many business and governmental activities, and environmental compliance is no exception. In recognition of the potentially negative impacts of the pandemic on stakeholders' ability to meet environmental compliance and remediation obligations, the U.S. EPA has recently issued both (i) a Policy concerning the discretionary enforcement of civil violations of laws, regulations and permits, and (ii) a Guidance concerning the timing of field work for remedial investigations and cleanup activities under CERCLA as well as corrective measures under RCRA.

The Policy, entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program," is set forth in a memorandum dated March 26, 2020 and states that the Agency will exercise enforcement discretion under certain circumstances in which violations occur due to the coronavirus. By no means, however, does the Policy give regulated entities an automatic free pass. Rather, application of the Agency's enforcement discretion is incumbent on the regulated facility making every effort to fulfill its environmental compliance obligations.

The enforcement discretion under the Policy applies primarily to routine compliance and reporting activities, which U.S. EPA says may be constrained due to the COVID-19 pandemic. Regulated entities are instructed to use existing procedures to report noncompliance with routine obligations

under permits and regulations, as are respondents who missed deadlines under administrative orders and settlement agreements. EPA does not expect to seek penalties for violations of routine requirements, so long as it agrees that COVID-19 caused the noncompliant behavior and the facility provides supporting documentation upon request.

The Policy also requires that all regulated entities continue to manage and operate their facilities in a manner that is safe and protects the public and the environment. Accordingly, entities remain responsible under the Policy to prevent, address, and abate accidental releases of hazardous substances, chemicals and wastes, oil, or other pollutants. Further, the Policy requires a more detailed analysis in assessing whether enforcement discretion will be exercised for non-routine violations. Examples of the type of noncompliance requiring a more heightened Agency analysis include exceedances of limitations for air emissions, discharges to water bodies, land disposal, or other non-routine releases that could result in an acute risk or imminent threat to human health or the environment. Given the Policy's differing criteria for evaluating routine and non-routine law violations, it is essential that U.S. EPA's memorandum be carefully reviewed to understand the steps that must be taken and requirements that must be met for a particular type of violation to qualify for the Agency's exercise of enforcement discretion.

Also, it is important to note that U.S. EPA is the only government agency to which the Policy automatically applies. State environmental agencies may apply or ignore the Policy as they see fit. Thus, where U.S. EPA has granted a state authority to administer a federal permit program or enforce regulatory obligations, it is necessary to check whether that state has adopted the Policy or, perhaps, one of its own.

The Policy does not apply to remedial activities or corrective measures required under CERCLA or RCRA. To fill that gap, U.S. EPA issued an "Interim Guidance on Site Field Work Decisions Due to Impacts of Covid-19." The Guidance, issued on April 10, 2020, applies to CERCLA response actions, RCRA corrective actions, PCB remediation under TSCA, petroleum cleanup under the OPA, the UST program, and emergency actions to address releases or substantial threats of release under U.S. EPA's jurisdiction. The Agency has delegated to its regional offices discretion to decide on a case-by-case basis whether field work should continue unimpeded or the timetable should be modified to prevent unnecessary potential exposure to the coronavirus.

In light of the nationwide challenges posed by COVID-19, the Guidance recommends consideration of a series of site-specific factors to aid regional office staff in their decision-making. The goal of the Guidance is to protect the public from COVID-19, including U.S. EPA staff and parties performing remedial activities, while

maintaining the Agency's role of preventing and responding to environmental emergencies or other situations that require ongoing field work to protect human health and the environment.

Moreover, the Guidance instructs third-parties who are conducting field work pursuant to an administrative order or a settlement agreement to consult the enforcement instrument under which they are working to assess their options if they believe that COVID-19 health considerations may necessitate extending remediation timetables. Administrative orders and consent decrees may contain provisions that enable U.S. EPA's project managers to adjust schedules. Also, such orders and settlement agreements often contain force majeure provisions, although several hoops typically must be jumped through before the provision can be successfully invoked. First, a respondent must demonstrate that COVID-19 is a covered event under the force majeure provision. Then, the respondent must prove that the covered event was unforeseeable and that the inability to timely fulfill its obligations was due to COVID-19.

States that are authorized to administer U.S. EPA clean-up programs are encouraged to apply the Guidance criteria in assessing whether timetables for performing required field work should be temporarily suspended or otherwise modified due to COVID-19 impacts.



Approval of a scheduling delay, however, does not mean that a site may be ignored. If a decision is made to modify or suspend work, the Guidance instructs that site conditions must be monitored and logistical planning conducted to ensure that field work can resume in a timely manner when appropriate.

Given the uncertainty concerning how U.S. EPA will exercise its enforcement discretion, there is an important role for counsel in advising potentially affected clients and conferring with Agency staff regarding the Policy's or Guidance's application in particular circumstances.

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