GIBSON DUNN

May 27, 2020

GAPS IN THE EPA'S COVID-19 TEMPORARY ENFORCEMENT POLICY: WHAT REGULATED ENTITIES SHOULD CONSIDER AS COMPLIANCE ISSUES ARISE DUE TO THE PANDEMIC

To Our Clients and Friends:

Since the U.S Environmental Protection Agency (EPA) issued its "Temporary COVID-19 Enforcement Policy" ("temporary enforcement policy") on March 26th,[1] many regulated entities have successfully obtained extensions of consent decrees and other deadlines.[2] While federal and state enforcement discretion is welcome during this uncertain time, regulated entities should nonetheless proceed with some caution and not rely exclusively on the EPA's temporary enforcement policy. Indeed, some state regulators and many environmental organizations have expressed their displeasure with the temporary enforcement policy. For example after the EPA issued its guidance, fifteen states' attorney generals signed a letter calling on the EPA to rescind its temporary enforcement policy and vowed to "enforce [their] state['s] environmental laws in a reasonable manner, and. . . hold regulated entities accountable under critical federal environmental laws if EPA will not."[3] And, earlier this month attorney generals from the states of New York, California, Illinois, Maryland, Michigan, Minnesota, Oregon, Vermont, and Virginia sued the EPA for its "broad, open-ended [COVID-19 enforcement] policy" the states claim "gives regulated parties free rein to self-determine when compliance with federal laws is not practical because of COVID-19."[4] Likewise, a "coalition of environmental justice, public health, and public interest organizations" filed suit against the EPA and two Administrators in April condemning the temporary enforcement policy and seeking an order demanding that the EPA respond to the coalition's petition for emergency rule-making.[5]

This client alert explores aspects of enforcement liability unaffected by the EPA's temporary enforcement policy that regulated entities should consider as they pursue relief as compliance issues arise as the result of pandemic-related issues.

Gaps in the EPA's Temporary Enforcement Policy

Contrary to public perception, the EPA's temporary enforcement policy does not eliminate or waive environmental requirements.[6] Rather, regulated entities are still "expected to make every effort to comply with all applicable requirements," and the EPA "will not seek penalties for noncompliance with routine monitoring and reporting requirements if, on a case-by-case basis, the EPA agrees that such noncompliance was caused by the COVID-19 public health emergency."[7] The EPA developed the temporary enforcement policy to enable it to "prioritize its resources to respond to acute risks and imminent threats, rather than mak[e] up front case-by-case determinations regarding routine monitoring and reporting" as regulators and regulated entities deal with the unprecedented situation where

compliance and/or monitoring may be difficult, if not impossible, because employees cannot travel, are subject to stay-at-home orders, or are sick.[8]

Generally, under the temporary enforcement policy, the EPA does not anticipate seeking "penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification obligations" where COVID-19 caused the noncompliance and the regulated entity provides supporting documentation upon request.[9] That said, the EPA makes clear that nothing in the policy "relieves any entity from the responsibility to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by federal law" nor should the policy be interpreted to provide enforcement discretion in the event of such a release.[10] Moreover, the enforcement discretion described in the temporary policy does not apply to criminal violations or probation conditions in criminal sentences, activities that are carried out under Superfund and RCRA corrective action enforcement instruments, or imports.[11]

Thus, while the temporary enforcement policy shows the federal government may be willing to forgive some forms of environmental noncompliance due to COVID-19, the EPA's enforcement discretion is not absolute. Moreover, the temporary enforcement policy does not absolve regulated entities of liability arising from private citizen suits and state enforcement actions despite the EPA's noncompliance carve-out. Indeed, the temporary enforcement policy acknowledges as much, noting that "[a]uthorized states or tribes may take a different approach under their own authorities."[12] Therefore, regulated entities facing potential noncompliance as a result of the pandemic must also consider enforcement risks they may face from other actors, notwithstanding the EPA's temporary enforcement policy.

Risk of Citizen Suits

In the environmental context, citizen suits are private civil actions brought by individuals against regulated entities (and often the EPA) for failing to comply with (or in the EPA's case enforce) certain regulations. Numerous federal environmental statutes permit enforcement via citizen suits, including the Clean Water Act, the Clean Air Act, RCRA,[13] and CERCLA. For example, the Clean Water Act provides that "any citizen may commence a civil action on his own behalf…against any person…who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a state with respect to such a standard or limitation."[14] Similarly, the Clean Air Act allows any person to "commence a civil action on his own behalf…against any person…who is alleged to have violated (if there is evidence that the violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation" and "against any person who proposes to construct or constructs any new or modified major emitting facility without a permit…or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit."[15] Because the EPA's temporary enforcement policy only governs the EPA's enforcement discretion and does not supplant or replace any existing environmental statutes, citizen suit provisions in federal environmental statutes remain unaffected and therefore, enforcement liability for COVID-19-related noncompliance via citizen suits is still a threat.

One question, however, is whether permitting citizen suits for noncompliance resulting from a global pandemic accords with congressional intent behind citizen suits. The legislative history of the Clean Air Act, the first federal environmental statute to authorize citizen suits, indicates that Congress authorized citizen suits as an enforcement mechanism, in part because Congress recognized that the government's limited resources could hinder adequate enforcement and private enforcement could spur the government to act when it otherwise would not.[16] Under current circumstances, however, it would seem that the EPA's enforcement capabilities are not limited by resource constraints but rather public health guidelines. And, facilities and regulators are experiencing difficulty complying and monitoring compliance due to unprecedented circumstances where employees and contractors are ill and/or subject to stay-at-home orders and social distancing guidelines.

Additionally, there may be procedural barriers that limit the viability of citizen suits challenging regulated entities' COVID-19 related noncompliance, especially if such noncompliance is limited in time and scope. First, some citizen suit provisions, like those in the Clean Air Act and Clean Water Act, mandate that private litigants cannot bring a citizen suit until 60 days after they have given notice to "any alleged violator."[17] Second, some statutes limit the ability for plaintiffs to bring citizen suits when the conduct complained of has ceased. For example, the Clean Water Act does not allow citizen suits based on wholly past conduct[18] and the Clean Air Act only permits citizen suits for past violations if they are alleged to be "repeated."[19] These requirements may make it difficult to maintain a citizen suit action based on noncompliance caused by COVID-19 that may be limited to a "one-off" violation that ends as soon as workers and contractors are healthy and/or stay-at-home orders are lifted.

Relatedly, regulated entities may also attempt to dismiss citizen suits for COVID-19 related noncompliance on grounds that a citizen suit has since become moot. Admittedly, mootness in the environmental law context has been made more difficult after the Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Servs., Inc.*, in which the Court held that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."[20] However, a case may nonetheless become moot where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[21] Thus, while regulated entities may bear a "heavy burden" to satisfy the mootness standard, noncompliance caused by a global pandemic and stay-at-home orders could be sufficiently abnormal such that a court would conclude that a regulated entity's voluntary cessation of noncompliant conduct (i.e. becoming re-complaint upon the termination of stay-at-home orders) would not "reasonably be expected to recur."

Risk of State Enforcement Actions

Because the EPA and state environmental authorities retain power over public health and the environment and many environmental statutes provide for dual enforcement by the federal government and state authorities, the EPA's temporary enforcement policy cannot and does not supplant individual states' authority to police environmental noncompliance caused by COVID-19.[22] As such, regulated entities remain subject to state enforcement actions despite the EPA's temporary policy. Regulated entities should, therefore, be aware of their states' position on noncompliance stemming from the COVID-19 pandemic and determine to what extent, if any, their state's position departs from that of the EPA.

States environmental agencies have had various reactions to the EPA's temporary enforcement policy. Many state environmental agencies took a similar stance to the EPA's position and reaffirmed their commitment to protect the environment and public health, while simultaneously recognizing that the COVID-19 pandemic may present compliance challenges for regulated entities. For example, in a letter to the public, the chairman of the Texas Commission on Environmental Quality (TCEQ) noted that it had not relaxed "any limits on air emissions or discharges to water" and had not "relaxed the requirement to report emissions or discharges that exceed these limits."[23] The chairman reiterated that despite the COVID-19 pandemic, TCEQ remains "fully engaged in its mission to protect public health and the environment."[24] However, like the EPA, TCEQ stated that it would exercise enforcement discretion in certain cases as regulated entities navigate the pandemic:

> "TCEQ's Executive Director has determined that it may be inappropriate to pursue enforcement for violations that were unavoidable due to the pandemic or where compliance would create an unreasonable risk of transmitting COVID-19 or otherwise impede an appropriate response to the pandemic. Accordingly, TCEQ will consider exercising its discretion to not bring enforcement actions for such violations on a case-by-case basis. This is not a suspension of rules. . . And this is certainly not an exemption from agency rules . . . Importantly, TCEQ is not offering enforcement forbearance where an entity fails to report its noncompliance."[25]

Still, other states, including those that have a high number of COVID-19 cases like California and Michigan, adopted a similar tone—recognizing that regulated entities may need additional time or assistance in order to meet their compliance obligations. For example, on April 15, CalEPA issued a statement on its expectations for regulatory compliance during the COVID-19 pandemic. The agency reaffirmed its commitment to safeguarding "public health, safety, and the environment during the COVID-19 pandemic" and acknowledged that "controlling pollution in communities with high rates of respiratory disease and multiple environmental burdens" remained a priority "especially given recent studies that suggest a correlation between these factors and COVID-19 susceptibility."[26] Nonetheless, CalEPA also recognized that "some regulated entities may need additional compliance assistance as a result of the COVID-19 pandemic."[27] CalEPA stated that some extension of deadlines "may be warranted under clearly articulated circumstances," but noted that regulated entities must affirmatively contact CalEPA "before falling out of compliance."[28]

Michigan's environmental authority, the Michigan Department of Environment, Great Lakes and Energy (EGLE), too, affirmed its commitment to protecting "public health and the environment" and stated that it "expect[s] all businesses to adhere to environmental regulations and permit requirements."[29] Much like CalEPA's response, the EGLE also indicated that it would make exceptions for entities who cannot safely meet certain environmental obligations while still adhering to Michigan's social distancing guidelines:

> "In cases where a regulated entity believes it cannot meet certain obligations without endangering the health and welfare of employees or others as a result of complications from the COVID-19 pandemic, the agency will make case-by-case determinations on temporary alterations to reporting or compliance requirements.

> Requests for temporary deviation from regulations and permit requirements may be made. . .[and] [t]hey will be asked to answer a series of questions, providing detailed information and specific rationale on the necessity of altering their obligation, after which a determination will be made."[30]

Based on the public statements, it seems that states may be willing to work with regulated entities who risk noncompliance caused by COVID-19 so long as such entities communicate their risks with state authorities and document the ways in which their noncompliance was caused by COVID-19. However, some states are exercising less enforcement discretion than others, as CalEPA has not indicated that it will not seek penalties for noncompliance but may grant specific time-delimited remedies.

In addition, regulated entities should check their state's existing laws on self-reporting and auditing as they may protect against liability resulting from COVID-19 related noncompliance so long as entities self-report. For example, Texas provides immunity for certain violations uncovered through voluntary audits under the Texas Environmental Health, and Safety Audit Privilege Act.[31]

Conclusion and Best Practices

While regulated entities may view the EPA's temporary enforcement policy as a welcome acknowledgement that the COVID-19 pandemic has made environmental compliance and monitoring difficult, if not impossible, such entities should also consider the liability risks that exist despite the EPA's policy—like citizen suits and state enforcement actions. In accordance with the temporary enforcement policy, regulated entities should ***at a minimum*** "document decisions made to prevent or mitigate noncompliance and demonstrate how the noncompliance was caused by the COVID-19 pandemic."[32] Any evidence showing that the noncompliance was or will be limited in duration or scope may also be helpful. To further mitigate liability for noncompliance caused by COVID-19, it may be prudent for regulated entities to inform the EPA and state environmental agencies of their potential noncompliance before it occurs and follow their recommended guidance.

In short, as regulated entities and regulators seek to navigate this public health crisis, facilities that find themselves risking noncompliance due to COVID-19 should take comfort in the EPA's willingness to work with them as articulated in its temporary enforcement policy. However, entities should beware of other liability risks that remain unaffected by the EPA's policy. While entities should always seek to achieve and maintain compliance with environmental regulations, now more than ever, it is imperative that they communicate the unique challenges they face to the EPA and its state corollaries early and often.

---

[1] *See* "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program," Environmental Protection Agency (available at https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf).

[2] *See, e.g.*, "TCEQ COVID-19 Enforcement Discretion Requests," Texas Commission on Environmental Quality, (available at https://www.tceq.texas.gov/downloads/response/covid-19/enforcement-discretion-list-042420.xlsx/view).

[3] *See* Letter from Attorneys General of New York, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin to Administrator Andrew Wheeler, April 15, 2020, (available at https://www.attorneygeneral.gov/wp-content/uploads/2020/04/2020-04-16-Final-AGs-letter-on-EPA-enforcement-discretion-policy.pdf); *see also* Letter from California Attorney General Xavier Becerra to Assistant Administrator Susan Parker Bodine, April 9, 2020, (available at https://oag.ca.gov/system/files/attachments/press-docs/CA%20Attorney%20General%20Letter%20re%20EPA%20COVID-19%20Policy%204.9.2020.pdf).

[4] *State of New York, et al., v. U.S. Env'tal Protection Agency, et al.*, No. 1:20-cv-03714, *Dkt.* 1 (S.D.N.Y. May 13, 2020).

[5] *Natural Res. Def. Council, et al., v. Bodine, et al.*, No. 1:20-cv-03058, *Dkt.* 1 (S.D.N.Y. Apr. 16, 2020).

[6] *See* "Frequent Questions About the Temporary COVID-19 Enforcement Policy," (available at https://www.epa.gov/enforcement/frequent-questions-about-temporary-covid-19-enforcement-policy).

[7] *Id.*

[8] *Id.*

[9] *See* COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program.

[10] *See id.*

[11] *See id.*

[12] *See* COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program; *see also* Frequent Questions About the Temporary COVID-19 Enforcement Policy ("The Policy acknowledges the important role played by our state, tribal and territorial partners, and specifically notes states or tribes may take a different approach under their own authorities. Some states have already issued their own guidance.").

[13] Note, however, that activities carried out pursuant to a RCRA corrective action are not subject to the enforcement discretion provided for in the temporary enforcement policy. *See* COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program.

[14] 33 U.S.C.A. § 1365(a)(1).

[15] 42 U.S.C.A. § 7604(a)(1) and (3).

[16] *See generally Natural Resources Defense Council v. Train*, 510 F.2d 692 (D.C. Cir. 1974) (quoting the legislative history of the Clean Air Act Amendments of 1970).

[17] *See* 33 U.S.C.A. § 1365(b)(1); *see also* 42 U.S.C.A. § 7604(b)(1). Note, however, that citizen suits brought under § 7604(a)(3) of the Clean Air Act, which governs issues with permits, are not subject to the 60 day notice requirement.

[18] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 54–62 (1987), *superseded by statute on other grounds as recognized by Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 529 n.18 (5th Cir. 2016).

[19] *See* 42 U.S.C.A. § 7604(a)(1) and (3).

[20] 528 U.S. 167, 174 (2000).

[21] *Id*. at 189 (quoting *U.S. v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 20003 (1968)).

[22] *See* COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program.

[23] "TCEQ message to concerned citizens, public advocates, and members of the regulated community," Texas Comm'n on Environmental Quality, April 6, 2020 (available at https://www.tceq.texas.gov/news/tceqnews/features/tceq-message-concerning-covid-19-response).

[24] *Id*.

[25] *Id*.

[26] "CalEPA Issues Statement on Compliance with Regulatory Requirements During the COVID-19 Emergency," California Environmental Protection Agency, April 15, 2020, (available at https://calepa.ca.gov/2020/04/15/calepa-statement-on-compliance-with-regulatory-requirements-during-the-covid-19-emergency/).

[27] *Id*.

[28] *Id*.

[29] "Is EGLE still enforcing pollution laws and the conditions of permits issued to entities that release pollutants?", Michigan Dept. of Env't, Great Lakes, and Energy, (available at https://www.michigan.gov/egle/0,9429,7-135-99239-525079--,00.html).

[30] "Are you making exceptions in cases where the COVID-19 crisis makes it dangerous for workers at regulated companies to adhere to their regulatory obligations?" Michigan Dept. of Env't, Great Lakes, and Energy, (available at https://www.michigan.gov/egle/0,9429,7-135-99239-525084--,00.html).

[31] *See* TX HEALTH & S § 1101.151.

[32] "EPA Announces Enforcement Discretion Policy for COVID-19 Pandemic," March 26, 2020 (available at https://www.epa.gov/newsreleases/epa-announces-enforcement-discretion-policy-covid-19-pandemic).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental Litigation and Mass Tort practice group, or the authors:

Michael K. Murphy – Washington, D.C. (+1 202-955-8238, mmurphy@gibsondunn.com)
Abbey Hudson – Los Angeles (+1 213-229-7954, ahudson@gibsondunn.com)
Dione Garlick – Los Angeles (+1 213-229-7205, dgarlick@gibsondunn.com)
Nicole R. Matthews – Los Angeles (+1 213-229-7649, nmatthews@gibsondunn.com)