

BICK LAW LLP'S ENVIRONMENTAL COMPLIANCE LAWYERS HELP COMPANIES NAVIGATE COMPLIANCE DURING COVID-19 PANDEMIC

Wed Apr 1st, 2020 | Categories: *Compliance Counseling* |

On March 26, the U.S. Environmental Protection Agency (EPA) issued “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program,” explaining how EPA plans to exercise enforcement discretion in response to certain forms of noncompliance, or delays in compliance, that are caused by COVID-19. The policy is retroactive to March 13, 2020, and EPA will provide seven days’ advance notice prior to terminating the temporary policy.

COVID-19 Compliance Policy

The purpose of the policy is to acknowledge the impact of worker shortages and social distancing requirements recommended by the Centers for Disease Control and Prevention. EPA acknowledges “there may be constraints on the ability of a facility or laboratory to carry out certain activities required by our federal environmental permits, regulations, and statutes,” as well as “reporting obligations and milestones set forth in settlements and consent decrees.”

The policy allows discretion for enforcement related to air emissions, water discharges, hazardous waste management, and safe drinking water standards. It does *not* apply to criminal violations, which will be prosecuted regardless of COVID-19 reasons. It also does *not* apply to activities that are carried out under Superfund and RCRA Corrective Action “enforcement instruments.” The policy states that “[s]uch matters will be addressed in a separate communication.”

COVID-19 Compliance And The Water World

EPA’s highest priority during this difficult time is focused on ensuring the continued operation of drinking water systems to prevent acute health risks and guarantee safe drinking water supplies. Towards that end, EPA’s policy ranked its priorities as follows: (1) the monitoring required under National Primary Drinking Water Regulations to protect against microbial pathogens; (2) nitrate/nitrite and Lead and Copper Rule monitoring; (3) contaminants for which a public drinking water system has been non-compliant. This is perhaps the most important aspect of EPA’s memo because it puts water purveyors on notice that they must comply with EPA’s regulations, regardless of COVID-19.

That said, EPA and the CDC have both stated that the water supply is safe. EPA: “Americans can continue to use and drink water from their tap as usual.” <https://www.epa.gov/coronavirus/coronavirus-and-drinking-water-and-wastewater>. CDC: “The COVID-19 virus has not been detected in drinking water. Conventional water treatment methods that use filtration and disinfection, such as those in most municipal drinking water systems, should remove or inactivate the virus that causes COVID-19.”

<https://www.cdc.gov/coronavirus/2019-ncov/php/water.html>. The Water Research Foundation reports that drinking water is not a vector for COVID-19 and the public can be assured that their water does not transmit the virus.

California's State Water Resources Control Board issued a memorandum to all Public Water Systems on March 20, 2020, stating that "the provision of potable water to customers is an essential function" and public water systems are "critical infrastructure." The memo provided guidance to assist with the continued delivery of potable water during the pandemic, noting it is necessary that ongoing water quality monitoring and reporting is continued in accordance with laws, regulations and permit requirements. Therefore, it appears noncompliance with such regulations will not be excused pursuant to EPA's discretion due to COVID-19.

Regulated Entities' Operations

For civil enforcement, EPA indicated that regulated entities must still make every effort to comply. The policy does not provide a carte blanche excuse for noncompliance. However, if compliance is "not reasonably practicable" due to COVID-19, EPA's policy provides relief, *if they*: (1) minimize the effects and duration of noncompliance; (2) identify the specific nature and dates of the noncompliance; (3) identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity; (4) return to compliance as soon as possible; and (5) document how COVID-19 caused the noncompliance, and the actions taken above.

For routine sampling, laboratory analysis, training, and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation, EPA will not seek penalties for violations. And, facilities will not be required to "catch-up" with missed monitoring or reporting if the underlying requirement applies to intervals of less than three months. Keep in mind, EPA must agree with the facilities' documentation that COVID-19 was the reason for noncompliance; therefore, it is important to fully document how COVID-19 was the cause.

If a submission to the EPA requires a "wet" signature of a responsible official, the EPA will accept a digital or other electronic signature.

If COVID-19 prevents hazardous waste generators from transferring their waste off-site within the time periods required under RCRA, the generator will maintain its generator status and the facility should continue to properly label and store such waste and take the steps identified to mitigate any delay in compliance. For example, hazardous waste generators will retain their status and will not become treatment, storage and disposal facilities, and Very Small Quantity Generators and Small Quantity Generators will retain their status, even if the amount of hazardous waste stored on site exceeds a regulatory volume threshold or duration due to COVID-19.

Similarly, in agricultural facilities, CAFOs will retain their same status regardless of the increase in number of animals in the facility as a result of COVID-19.

Facilities must contact EPA and state agencies or tribal authorities immediately if there is an acute risk or imminent threat to human health or the environment or there is a failure of a system that results in unauthorized emissions, releases or land disposal. In such notification, the facility must provide information on the pollutants emitted, discharged, discarded, or released; the comparison between the expected emissions or discharges, disposal, or release and any applicable limitation(s); and the expected duration and timing of the exceedance(s) or releases.

Consent Decrees and Consent Orders

Compliance monitoring and reporting requirements pursuant to a settlement or consent decree will be treated the same way as noted above for routine monitoring and reporting requirements at a facility, unless otherwise specifically provided by the settlement agreement.

The U.S. Department of Justice and the courts retain authority to enforce a Consent Order. In most Consent Orders, there is a "Delay in Performance" provision that requires the respondent to the order to notify EPA by telephone and email within seven days and then in writing, describing the nature of the delay, the anticipated duration of the delay, any justification for the delay, all actions taken or to be

taken to prevent or minimize the delay and the effect of the delay, a schedule for implementation of any mitigation, and any reason why Respondent should not be held strictly accountable for failing to comply. Importantly, the increased costs or expenses of compliance with the order is not a justification for any delay in performance.

It is possible the impact of COVID-19 on the global economy may place financial constraints on regulated entities. EPA does not address the COVID-19 financial impact specifically. Such impact could be in conflict with the standard Consent Order language above that does not excuse noncompliance due to financial inability. The financial implications on the global economy and the inability of some regulated entities to comply as a result, may be addressed in future policy memoranda issued by EPA, as promised, related to Superfund and RCRA. No doubt, the longer the COVID-19 pandemic causes work slowdowns, the more likely EPA will see “inability to pay” as a reason for noncompliance. As of today, EPA’s policy does not provide relief for that scenario.

State Law Still Applies

EPA’s policy does not prevent states from enforcing their own regulations or statutes.- As noted above, the California State Water Resources Control Board still requires PWS to comply with all regulations. The State Water Board’s Division of Drinking Water establishes and enforces drinking water standards that ensure the delivery of pure, safe, and potable water. In addition to health-based water quality standards, treatment facilities must comply with stringent performance measures to ensure treatment processes are continuously operating at peak performance.

With respect to general operations of regulated entities, unrelated to water purveyors, the State Water Board considers compliance with board-established orders and other requirements to be within the essential activities, essential governmental functions, or comparable exceptions to shelter-in-place directives provided by local public health officials. Therefore, regulated entities must comply with State Water Board regulations. However, if there is a specific Water Board order or requirement that cannot be timely met because it would be inconsistent with current governmental directives or guidelines related to COVID-19, the regulated entity must notify the applicable Water Board immediately and provide an explanation of the noncompliance and “any action that the entity will take in lieu of complying with the specific Water Board order or requirement.”

Bick Law LLP’s environmental compliance lawyers and regulatory lawyers are closely monitoring the implementation of EPA’s COVID-19 policy and will provide ongoing updates.

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