

## **EPA Continues Temporary COVID-19 Policies Despite Senators', States', Citizens Groups' Scrutiny**

Article By:

J. Tom Boer

Samuel L. Brown

Todd S. Mikolop

Alexandra Hamilton

Lauren A. Bachtel

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The U.S. Environmental Protection Agency (EPA) is attempting to thread the needle in responding to the COVID-19 pandemic: offering clarity about ongoing federal environmental obligations to the broad swath of regulated entities faced with the threat of significant disruptions and other challenges, while contending with intense opposition from others who perceive its temporary enforcement policy as a “free pass to pollute” and a failure to enforce legal requirements. Notwithstanding the mounting scrutiny from U.S. Senators, states, and citizens groups, and now a legal challenge, EPA’s Office of Enforcement and Compliance Assurance (OECA) has continued implementing its temporary policy regarding the exercise of enforcement discretion due to the COVID-19 pandemic via issuance of additional guidance on National Pollutant Discharge Elimination System (NPDES) reporting. Other state and federal agencies, including the U.S. Department of Justice (DOJ), the Texas Commission on Environmental Quality (TCEQ), the Railroad Commission of Texas (RRC), and the California Environmental Protection Agency (CalEPA) (addressed in a separate blog post [here](#)) have followed EPA’s lead in issuing their own temporary policies related to the pandemic.

OECA’s latest guidance document, issued March 31, 2020, addresses monitoring and reporting requirement compliance under the Clean Water Act NPDES permit program. The NPDES temporary reporting advisory builds on OECA’s temporary enforcement policy, which we previously wrote about [here](#), and about OECA’s response to initial criticism of it [here](#). The guidance gives direction to EPA Regional Offices on implementing the temporary enforcement policy with respect to NPDES reporting requirements including scenarios that may impact a NPDES permittee’s ability to perform required monitoring, sampling, and reporting. It also offers recommendations to authorized state NPDES programs, which EPA “strongly encourages” to follow the guidance in order “to ensure consistent national data.”

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OECA urges both EPA Regions and authorized NPDES program states to encourage permittees to “continue to make every effort to comply with their environmental compliance obligations.” Pursuant to the guidance, EPA Regions are directed to advise permittees to report data for the monitoring period (even if incomplete) unless such reporting is not possible. To support reporting in response to unprecedented circumstances, EPA created a specific reporting code for when data is unavailable due to the COVID-19 pandemic. This will allow EPA, and state programs, to track how the unfolding pandemic has impacted reporting under the NPDES program at a national level and, more granularly, at individual facilities. The guidance also outlines the process for granting emergency electronic reporting waivers in scenarios where permittees’ ability to meet permit terms has been directly impacted by COVID-19.

Despite criticism of EPA’s enforcement policies responding to COVID-19, other agencies have proceeded to issue their own policies addressing impacts of the pandemic. In Texas, for example, TCEQ and the RRC have articulated a [policy of enforcement discretion for various reporting requirements for regulated entities](#), predominantly extending the deadlines for timely compliance reporting under several programs but also recognizing that additional enforcement discretion may be warranted based on conditions. Much like OECA, in response to opposition and calls to rescind the temporary enforcement policy, TCEQ’s chairman issued an open letter defending the policy as appropriate and clarifying that it “is not a suspension of rules” and “is certainly not an exemption from agency rules,” but a “judicious use of the agency’s existing authority.”

The Justice Department, too, has implemented a temporary penalty policy to afford relief to parties owing stipulated penalty payments to the federal government under consent decrees. In memos on [March 31](#) and [April 13](#), 2020, the Acting Director of DOJ’s Executive Office for United States Attorneys issued memorandums that first suspended its collection of civil debts and then clarified the application of the temporary suspension to affirmative civil enforcement matters. The temporary policy, which expires on May 31, 2020, directs United States Attorneys’ Offices to cease collection and enforcement activity on civil debts, but permits the collection of voluntary payments. The policy also suspends active payment plans. In the first implementation of the policy in an environmental case, DOJ’s Environment and Natural Resources Division issued a letter on [April 14](#), 2020 to parties to a particular consent decree, laying out its plan to halt debt collection activities through at least the end of May “[t]o mitigate the financial impact of the coronavirus (COVID-19) pandemic.” Notably, this relief appears to apply automatically, stating “if you do nothing, the government will not seek collection of this debt until after May 2020.”

Meanwhile, the opposition to EPA’s temporary enforcement policy has continued to grow. Shortly after the policy was released, environmental organizations and former EPA officials unleashed fervent criticism of the policy, lambasting it as “an open license to pollute.” In response to the policy, several environmental groups submitted a petition to EPA requesting “a final, enforceable rule to ensure that, at a minimum, the public receives prompt notice of any facility’s failure to conduct required monitoring or reporting in reliance on the March 26 policy” within 7 days. When EPA declined to respond to the petition, the groups filed a complaint in the U.S. District Court for the Southern District of New York, alleging that EPA has unreasonably delayed by failing to respond to their petition and requesting that the court order EPA to respond within five days of the court’s judgment. Notably, such unreasonable delay suits under the Administrative Procedure Act are generally filed after a petition remains unanswered by the agency for months or years, not days.

Some states and U.S. Senators have also critiqued or opposed the policy. In addition to the Congressional opposition discussed in our previous [post](#), California Attorney General Xavier Becerra sent an April 9, 2020 [letter](#) to EPA expressing concerns over the temporary enforcement policy, citing

impacts to vulnerable communities in particular, and supporting the environmental groups' emergency rulemaking petition. And on April 15, 2020, a group of 14 state attorneys general sent another [letter](#) to EPA, urging it to rescind the policy and pledging that states will "hold regulated entities accountable under critical federal environmental laws if EPA will not." Likewise, Senators Elizabeth Warren and Ed Markey sent EPA a [letter](#) criticizing EPA's temporary policy "as an excuse to undermine environmental regulations and impose a broad, across-the-board moratorium on environmental enforcement." Their letter urges an immediate end to the policy and requests detailed information about the authority and rationale for issuing the policy, as well as any industry communications that lead to it. They set a deadline for EPA's response of April 17, 2020.

There remains a substantial disconnect between the actual terms in EPA's temporary policy and subsequent guidance implementing that policy (e.g., the NPDES guidance) and the characterization of the policy by the popular media, politicians, and other parties on the sidelines. As stated in the policy, and as emphasized by EPA in subsequent communications, the pandemic does not suspend the requirement to comply with the nation's environmental laws or otherwise permit the endangerment of human health, safety and the environment. Rather, EPA has announced that regulated entities may benefit from enforcement discretion where "compliance is not reasonably practicable" *due to the pandemic* and where a regulated entity can show that they "act[ed] responsibly under the circumstances in order to minimize the effects and duration of any noncompliance ..." Effectively, EPA is taking an approach similar to that taken in response to other severe natural disasters that have historically disrupted compliance in more restricted geographic areas. However, because of the unprecedented scope, length, and severity of the pandemic, EPA has chosen to announce in advance that the approach will apply to all regulated entities nationwide.

Companies should continue to use all efforts to fulfill their environmental compliance obligations. If a company anticipates problems with compliance due to the pandemic, some relief may be available from EPA provided that appropriate steps are taken to minimize the consequences and document the circumstances. In such an event, you should consult counsel to appropriately assess your circumstances and response and to determine what, if any, relief may be available.

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