

EPA Virus Policies Spur Controversy and Claims They Will Increase Risk

“Senator, we do not have a non-enforcement policy. That is a fallacy,” insisted EPA Administrator Andrew Wheeler in response to questions from a member of the Environment and Public Works Committee. Critics of the administration contend that the agency’s pandemic-related policies will result in lax enforcement and increased pollution. Raising the stakes, some scientists have suggested that populations with greater exposure to certain pollutants may be more vulnerable to health effects associated with the COVID-19 virus.

But EPA has staunchly defended its announcements as merely providing a reasonable level of flexibility in the face of an unprecedented crisis, and in no way opening the floodgates. Meanwhile, environmental practitioners have been cautiously assisting their clients in navigating these challenges, while attempting to interpret the signals sent by EPA and state regulators.

On March 26, EPA Assistant Administrator Susan Bodine issued a “temporary” enforcement policy, which applies retroactively to March 13. Under that policy, EPA will exercise enforcement discretion not to pursue violations of “routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, reporting, and certification” caused by the pandemic, where best efforts are made to comply as soon as possible. Regulated parties must document the basis for any such claim and present it to EPA upon request. EPA has made clear that its policy does not excuse exceedances of pollutant limitations in permits, regulations, and statutes.

EPA has further clarified that in cases that may involve acute risks or imminent threats, or failure of pollu-

tion control or other equipment that may result in exceedances, the agency’s willingness to consider the pandemic in determining its response is conditioned on the facility’s contacting state or tribal regulators, so that EPA and those authorities may work with the facility to mitigate such risks. The agency has also made clear that it expects operators of public water systems to continue normal operations, maintenance, and sampling to ensure safe drinking water.

Many states have issued virus-related policies of their own (SEE bit.ly/covid19enviro). For example, Michigan’s environmental agency announced that facilities that face “unavoidable non-compliance directly due to the COVID-19 emergency” may submit a request for regulatory flexibility. Each request is a matter of public record on the state agency’s website. The agency will consider whether to exercise enforcement discretion on a case-by-case basis.

On April 1, a coalition of environmental groups filed a petition for emergency rulemaking with EPA. The petition requested that the federal agency promulgate emergency rules forcing companies wishing to invoke the virus as a defense for noncompliance to formally notify EPA, and for that information to be publicly available. Later that month, the groups filed suit.

Two weeks later, attorneys general from nine states (California, Illinois, Maryland, Michigan, Minnesota, New York, Oregon, Vermont, and Virginia) brought suit in the same court over what they characterized as EPA’s decision to cease requiring companies to monitor and report air and water pollution during the coronavirus pandemic, as well as its lack of transparency. They contended this action forces states to “fill EPA’s enforcement shoes at a time when they are increasingly strapped

The agency’s pronouncements have spurred numerous responses, lawsuits



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for resources, or risk the health of our residents.” They also alleged that EPA failed to consider the policy’s impact on people of color and low-income communities who are disproportionately suffering from COVID-19.

Whether anything will be resolved by these lawsuits is questionable. The Justice Department can be expected to defend the cases on numerous jurisdictional grounds, and “temporary” policies may expire long before the court has a chance to rule. In the meantime, EPA continues to issue important virus-related policies and regulations. For example, it promulgated interim guidance to its regions regarding decisions about new or ongoing cleanup activities at sites across the country. Decisions to potentially pause field work are to be made on a case-by-case basis, prioritizing the health and safety of the public, communities, state and tribal partners, EPA staff, and contractors. And EPA released an interim final rule temporarily amending the data substitution provisions of emissions monitoring and reporting regulations for the Acid Rain Program, Cross-State Air Pollution Rule, and the NOx SIP Call.

Most recently, President Trump issued an executive order directing federal agencies to address the “economic emergency by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery.” Whether that will have any impact on enforcement or other regulatory requirements is too early to tell.