

ARTICLE

EPA Announces August 31 Termination of Temporary Enforcement Discretion Policy Established for COVID-19 Pandemic

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On June 29, 2020, EPA announced the termination date for its *temporary* enforcement discretion policy for certain reporting and monitoring requirements during the COVID-19 pandemic, which took effect on March 13 and was announced by EPA on March 25. That temporary policy now has a termination date of August 31, 2020. Upon termination, EPA will no longer exercise any of the enforcement discretion set forth in the temporary policy for any noncompliance with the reporting and monitoring requirements. EPA made the announcement of the termination date on the heels of states re-opening and easing of social distancing guidelines. Given that many of these states are now reevaluating whether to close certain operations and businesses, EPA's recent announcement may have been premature and will likely need to be revisited.

Wiley wrote in detail about EPA's temporary discretion policy on March 27. As readers may recall, to qualify for enforcement discretion under the policy, noncompliance must: (1) occur between March 13 and the termination of the policy; (2) result from the COVID-19 pandemic; and (3) fit within one of several categories identified in the guidance. Those guidance categories include routine compliance monitoring and reporting, compliance with settlement agreements/consent decrees, facility operations, SDWA regulated public water systems, and critical infrastructure. As written, the policy has greater utility in some areas of environmental compliance than others. For example, it has greater impact on clean air, water and waste reporting and does not provide any enforcement discretion for

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pesticide and chemical reporting obligations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA).

As a result of EPA's temporary policy, two lawsuits were filed against the agency. The Natural Resources Defense Council (NRDC), along with several other public interest groups, filed suit against EPA on April 16 in the District Court for the Southern District of New York (*Natural Resources Defense Council et al. v. Assistant Administrator Susan Parker Bodine et al.*, Case No. 1:20-cv-03058 (S.D.N.Y.)). The complaint claimed that EPA, under the Administrative Procedures Act (APA), had taken too long to respond to an emergency rulemaking petition filed by the groups on April 1 in response to EPA's temporary enforcement policy. The emergency petition asked the agency to require any entity that stops its environmental pollution monitoring and reporting practices in response to the COVID-19 pandemic to provide written notice and justification to EPA. The petition also asked EPA to make that information available to the public. Last week on July 9 the Court granted summary judgement for EPA, citing NRDC's lack of standing since the information requested in the emergency petition does not deprive the public of information to which they are entitled. The judge also opined that the assumption the public will be exposed to more pollution as a result of the agency's actions was unfounded, and therefore plaintiffs could not prove injury.

In a separate case against EPA's temporary policy, nine state attorneys' general filed suit in the same court (*State of New York et al. v. U.S. Environmental Protection Agency et al.*, Case No. 1:20-cv-03714 (S.D.N.Y.)). New York, California, Illinois, Maryland, Michigan, Minnesota, Oregon, Vermont, and Virginia claim that the temporary enforcement policy encourages pollution during a time when people with underlying conditions, such as respiratory and cardiovascular issues, are getting sick. Plaintiffs argued that the agency's temporary policy exceeded its legal authority and abandoned its responsibility to protect the environment. After EPA's announcement of the policy's tentative termination date of August 31, however, the states have asked the court for a delay in the briefing schedule and stated they will drop the suit so long as EPA terminates the policy on or before the August 31 date.

Despite EPA's announcement to end its temporary enforcement policy, it will be important for companies facing environmental reporting and recordkeeping requirements to continue to monitor developments and carefully weigh the need to use this policy. The agency's June 29 memorandum reserves EPA's ability to terminate the policy in its entirety or in part and on a state or national basis earlier than the current end date of August 31. Considerations include changes to local or national guidelines, such as "stay at home" orders and/or other contributing factors. However, given the challenges noted above, EPA may choose not to extend or reinstate this policy in the future unless economic conditions in the future take a dramatic turn for the worse due to COVID-19 – a development that our country should hope to avoid.