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# COVID-19 Chaos, Environmental Noncompliance, and Presidential Elections—What’s a Regulated Entity to Do?

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Many businesses subject to U.S. Environmental Protection Agency (EPA) regulations continue to face uncertainty as they navigate environmental compliance and enforcement issues arising due to the COVID-19 pandemic. The EPA and numerous state counterparts have issued policies and guidance on their intent to exercise enforcement discretion during this unique time, but in many ways, these policies have raised as many questions as they’ve answered — what kind of compliance obligations are covered? Are businesses guaranteed immunity from penalties or prosecution? What are our options? Fortunately, businesses have several options that extend beyond these temporary policies, but each must be evaluated carefully for their applicability and associated conditions. We take a preliminary look at some of these policies in this alert, with further insights to be shared during an [upcoming webinar](#) on Thursday, Oct. 15.

## EPA’s Temporary COVID-19 Compliance and Enforcement Policy

On March 26, 2020 (retroactively applied to March 13, 2020), the EPA issued a policy statement, [COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program](#) (“EPA Temporary Policy”) stating that the EPA would relax its enforcement of certain types of environmental requirements in recognition of the fact that the “pandemic may constrain the ability of regulated entities” to meet certain compliance monitoring and reporting obligations. Following in the EPA’s footsteps, several state agencies also provided guidance policies that relied heavily on the EPA Temporary Policy. On June 29, 2020, the EPA issued an [Addendum on Termination](#), selecting August 31, 2020, as the official termination date for the temporary policy.

During the time that the EPA Temporary Policy was in effect, it was and still is, subject to much scrutiny. Some criticized it as an “[open license to pollute](#),” while others viewed it as more “[measured, temporary, and based on EPA’s longstanding enforcement discretion](#).” In April, the EPA attempted to correct the record through a [letter to all members of Congress](#), clarifying that the temporary policy is not a nationwide waiver of environmental rules but, rather, an opportunity for the EPA to consider the pandemic, on a case-by-case basis, when determining an appropriate response to noncompliance. For example, the EPA may choose to not penalize a facility for failing to meet a reporting deadline due to staffing limitations resulting from COVID-19; however, that obligation would remain in effect and legally binding. Not only would that facility be required to “document decisions made to prevent or mitigate noncompliance and demonstrate how the noncompliance was caused by the COVID-19 pandemic” but, also, return to compliance “as quickly as possible.” Nonetheless, it was subject to more than one lawsuit, and though they were ultimately dropped, the contention and confusion surrounding the policy continued.

## Election Uncertainty and Continuing Compliance Concerns

Though the EPA Temporary Policy has ended, the public health crisis continues, and regulated entities continue to experience unique challenges, including safety and health considerations as businesses reopen. Additionally, the upcoming presidential election, regardless of its outcome, raises the level of uncertainty generally, including [potential reversal of several Trump administration rules by a new Biden administration](#) or [further environmental deregulation during a second Trump Administration term](#), as well as specifically for regulated entities that expected to rely on the policy.

Fortunately, businesses may be able to look to existing and well-established policies to help manage environmental, health, and safety (EHS) risks, including risks they thought would be addressed under the Policy. For example, the [EPA’s Audit Policy](#) was issued in 2000 and has remained in effect under both Democratic and Republican administrations. This policy provides major incentives, such as penalty immunity, for businesses that voluntarily discover, disclose, and correct violations of federal environmental laws and regulations, including unique applications for new owners and small businesses. Numerous states, including [Texas](#), [Pennsylvania](#), California, and [Michigan](#), also have similar programs, as discussed by Clark Hill’s Environment, Energy, and Natural Resources (EENR) attorneys, [Christopher B. Clare](#) and [Patrick J. Larkin](#), in their [April 2020 alert](#). As always, though, each policy or program has its unique nuances and should be assessed carefully to determine its suitability for individual scenarios.

Businesses should continue striving to achieve environmental compliance while pursuing opportunities for relief that may be available through these various policies or programs. To learn more about the EPA Temporary Policy, self-audit/self-disclosure programs, and best practices for a successful in-person or virtual audit, [click here](#) to register for the upcoming webinar on Thursday, Oct. 15, or please [contact](#) Clark Hill’s EENR Practice Leaders.