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INSIGHT: EPA Is Reasonable to Ease Reporting Amid Covid-19

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The EPA's recent move to ease monitoring and reporting obligations for those affected by the coronavirus pandemic has been called a blank check for ignoring environment laws. Sidley Austin attorneys say the guidance is reasonable and a petition by environmental groups for an emergency rulemaking and other legal challenges are unlikely to succeed.

The Environmental Protection Agency recently issued a temporary enforcement policy to ease certain monitoring and reporting obligations for facilities facing significant complications from the Covid-19 pandemic.

Although some believe the guidance does not go far enough, environmental groups have filed a petition for emergency rulemaking wrongly arguing the "unprecedented" guidance gives carte blanche to ignore environmental laws.

The petition and accompanying hyperbole in the media are not well founded, and the guidance likely would survive any legal challenges because it falls well within EPA's discretion to address these unprecedented times.

Measured, Temporary Policy

Immediately after EPA's March 26 guidance titled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" arrived, news publications were flooded with headlines claiming EPA had radically altered environmental enforcement, with former EPA officials even asserting the policy provided "a nationwide waiver of environmental rules for the indefinite future" and "an open license to pollute." In response, EPA has defended its action against those "irresponsible allegations." And for good reason.

Review of the policy shows it to be measured, temporary, and based on EPA's longstanding enforcement discretion. Recognizing that the "pandemic may constrain the ability of regulated entities to perform" compliance monitoring and reporting, the guidance provides some assurance for those that "make every effort to comply with their environmental compliance obligations."

Facilities that (1) minimize the effects and duration of noncompliance, (2) identify the nature and dates of the noncompliance, (3) identify how Covid-19 caused the noncompliance and actions taken in response, including best efforts to comply, (4) return to compliance as soon as possible, and (5) document the above, *may* not face penalties.

Far from being a "don't ask, don't tell policy for pollution," EPA directs facilities to use existing procedures to report noncompliance where procedures are available and reporting is reasonably practicable. If reporting is not possible, regulated entities should maintain the necessary information to be made available at EPA's request.

Calls for More Constraints

But some would have preferred that EPA put more constraints on the guidance. On April 1, a coalition of organizations petitioned for an emergency rulemaking, demanding that EPA require those relying on the guidance to electronically report their noncompliance—accompanied by threats of court action.

In the notification, the group said, a facility must cite the relevant standard, reasons for noncompliance and applicable law; state whether the entity's operations are continuing; and describe good faith efforts to return to compliance as soon as possible.

However, the petition and other legal challenges are unlikely to succeed. For one, the petition will likely fail as a practical matter, as EPA has no deadline to act on the petition. Under the Administrative Procedure Act, agency actions must be completed "within a reasonable time," with courts having jurisdiction to compel action unreasonably delayed. Courts generally look to the "TRAC factors" from *Telecommunications Research & Action Center v. FCC* when determining whether a delay is unreasonable. 750 F.2d 70 (D.C. Cir. 1984).

Here, EPA does not have to act by a statutorily imposed deadline and, absent a congressional deadline, courts have generally sustained lengthy agency time to consider a request—extending well beyond the expected duration of the Covid-19 pandemic.

Assuming that EPA acts on the petition, any challenge to EPA's likely denial is equally likely to fail. The APA precludes judicial review of actions that are "committed to agency discretion by law." 42 U.S.C. § 701(a)(2). The Supreme Court explained in *Heckler v. Chaney* that an agency decision not to take an enforcement action is quintessentially discretionary and "presumed immune from judicial review." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

Rebutting that presumption generally requires a clear statutory command to enforce or complete abdication of enforcement authority. *Ass'n of Irritated Residents v. E.P.A.*, 494 F.3d 1027, 1033 (D.C. Cir. 2007). Neither of these are present here. Indeed, the D.C. Circuit has held the environmental statutes' enforcement provisions fall within *Heckler's* presumption. There is simply no reason to believe these principles apply any differently in the context of a petition asking the agency to constrain its own discretion.

Although dissatisfied with EPA's Covid-19 related guidance, petitioners likely have little chance of mounting a successful challenge to the policy given the current legal landscape, created in part by the very circumstance that the guidance was designed to address.

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