CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Ohio Businesses Should be Aware that Environmental Agencies Have Terminated COVID-19 Enforcement Discretion Policies

SEPTEMBER 10, 2020

Authors: Reed W. Sirak

In late March 2020, as many states adopted responses to the coronavirus pandemic that either encouraged or mandated "work from home" practices, U.S. EPA and other environmental regulators developed temporary enforcement discretion policies to mitigate the impact of the pandemic on their own employees and on the employees of regulated companies and their contractors. Recognizing that travel to many sites and workplaces was either legally prohibited or simply imprudent in light of the risk of viral exposure, U.S. EPA published "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" on March 26, 2020. States such as Ohio adopted their own enforcement discretion policies to address companies' compliance with state environmental requirements. Both U.S. EPA and Ohio EPA have now terminated their policies.

U.S. EPA's COVID-19 enforcement discretion policy did not include an expiration date when adopted. In late June 2020, U.S. EPA announced a presumptive termination date of August 31, 2020. When U.S. EPA took no action to extend the federal policy, it terminated as scheduled at the end of August 2020. However, U.S. EPA expressly reserved its inherent authority to exercise enforcement discretion on a case-by-case basis, "including noncompliance caused by the COVID-19 public health emergency, before or after the temporary policy is terminated."

Ohio EPA also decided to terminate its "regulatory flexibility" request system as of August 31, 2020, announcing on its website:

> With the lifting of Ohio's stay at home order and the reopening of businesses under Ohio's Responsible RestartOhio Plan, Ohio EPA discontinued considering any new COVID-19 regulatory flexibility requests effective Aug. 31, 2020. This deadline is also consistent with U.S. EPA's termination of federally related regulatory flexibility requests.

Although Ohio EPA's announcement did not include an explicit reference to its inherent enforcement discretion, it's safe to assume that Ohio EPA believes it possesses such authority, including in situations involving COVID-19.

Ohio businesses, many still actively reconfiguring their workplaces and payrolls in response to the pandemic's gut punch to the economy, would be wise to assume that environmental regulators will now be deeply skeptical of claims that any ongoing difficulties collecting wastewater samples, submitting timely reports, complying with cleanup schedules, or meeting other legal obligations are attributable to pandemic-related disruptions. Future enforcement relief will only be available, at

most, on a case-by-case basis and will require a demonstration of highly compelling and unique circumstances.

For more information, please contact a member of Benesch's Environmental Law & Litigation Group.

Reed W. Sirak at rsirak@beneschlaw.com or 216.363.6256

***

Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

