



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

COVID-19/Endangered Species Act: Center for Biological Diversity Notice of Intent to Sue Regarding U.S. Environmental Protection Agency Enforcement Discretion/Compliance Assurance Policy

04/29/2020

The Center for Biological Diversity (“CBD”) sent the United States Environmental Protection Agency (“EPA”) an April 21st Notice of Intent to Sue (“Notice”) regarding the agency’s recently issued enforcement policy addressing the COVID-19 pandemic. See U.S. Environmental Protection Agency memorandum addressing *COVID-19 Implications for EPA’s Enforcement Assurance Program (“Memorandum”)* [here](#).

The CBD’s Notice alleges that the *Memorandum* violates the Endangered Species Act (“ESA”).

The March 26th EPA *Memorandum* referenced the impacts of the COVID-19 pandemic on the regulated community. Further, it outlined measures meant to provide regulatory relief to affected facilities. The federal agency stated it would only be effective during the defined period of the COVID-19 pandemic.

The issues addressed in the *Memorandum* related to several violations and included:

- General Conditions
- Routine Compliance Monitoring and Reporting by Regulated Entities
- Settlement Agreement and Consent Decree Reporting Obligations and Milestones
- Facility Operations
- Public Water Systems Regulated by the Safe Drinking Water Act
- Critical Infrastructure

CBD argues in its Notice that the EPA *Memorandum* triggers the ESA’s Section 7 requirement to consult with the United States Fish and Wildlife Service and/or National Marine Fishery Service in terms of impact on endangered or threatened species. It states in part that:

. . . EPA has taken discretionary action that effectively authorizes regulated entities to forego routine compliance monitoring, integrity testing, sampling, lab analysis, training, and reporting or certification where the affected companies maintain that such actions are “not reasonably practicable due to COVID-19.” . . . The suspension of monitoring and reporting requirements under the Clean Water Act,

Clean Air Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, and Emergency Planning and Community Right-to-Know Act creates an immediate and serious risk to imperiled wildlife.

Cited examples are the alleged harm on listed species by suspension of the Clean Water Act National Pollution Discharge Elimination System effluent sampling program and the oil tank-integrity testing requirement.

The CBD states that it will initiate a lawsuit within 14 days of receipt of the Notice under the citizen suit provisions of ESA unless the issues are resolved.

A copy of the Notice can be downloaded [here](#).