



Environmental Law Practice Group
GOODSILL ALERT

March 30, 2020

**RETROACTIVELY BEGINNING MARCH 23rd THE EPA HAS ENACTED A
TEMPORARY ENFORCEMENT DISCRETION POLICY THAT APPLIES TO CIVIL
VIOLATIONS DURING THE COVID-19 OUTBREAK**



The COVID-19 pandemic has created worker shortages as well as travel and social distancing restrictions to limit the spread of the virus outbreak. Accordingly, the ability of regulated facilities to meet all federal regulatory requirements has been directly impacted by the measures taken for the protection of workers and the public from COVID-19. On March 26, 2020, the U.S. Environmental Protection Agency (EPA) announced the implementation of a temporary policy regarding its enforcement of environmental legal obligations during the COVID-19 pandemic. This temporary enforcement discretion policy applies to civil violations under the current unexpected conditions surrounding COVID-19 but provides no leniency for intentional criminal violations of law. As of March 30, 2020, the State of Hawaii Department of Health has not issued a similar policy, nor has it indicated it will follow the EPA's policy.

The COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (the "EPA Discretion Policy") applies retroactively beginning March 23, 2020, and will be assessed by the EPA on a regular basis to determine any modifications or termination of the EPA Discretion Policy. The EPA will provide notice at least seven (7) days prior to terminating the EPA Discretion Policy at: <https://www.epa.gov/enforcement/enforcement-policy-guidance-publications>. The EPA Discretion Policy will be applied to actions or omissions that occur while the temporary policy is in effect, even if the act or omission is not reviewed until after the termination of the temporary policy.

The EPA Discretion Policy does not apply to the following areas:

- Criminal violations or conditions of probation in criminal sentences;
- Activities carried out under Superfund and RCRA Corrective Action enforcement instruments;
- Responsibilities to prevent, respond to, or report accidental releases of oil, hazardous substances, hazardous chemicals, hazardous waste, and other pollutants, as required by law; and
- Imports (e.g. pesticide products entering the US, or produced, manufactured, distributed in the US, claiming to address COVID-19 impacts).

The general conditions for enforcement discretion under the EPA Discretion Policy are:

1. Entities should make every effort to comply with their environmental compliance obligations.
2. If compliance is not reasonably practicable, facilities with environmental compliance obligations should:
 - a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
 - b. Identify the specific nature and dates of the noncompliance;
 - c. Identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
 - d. Return to compliance as soon as possible; and
 - e. Document the information, action, or condition specified in a. through d.

To report noncompliance with routine activities (e.g. compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification), entities should use existing procedures such as pursuant to an applicable permit, regulation, or statute. However, in the event that no such procedure is applicable or reporting is not reasonably practicable due to COVID-19, regulated entities should maintain such information internally and make it available to the EPA or an authorized state or tribe upon request. The key point here is for the entity to be able to provide supporting documentation to the EPA upon request that COVID-19 was the cause of the noncompliance.

Upon the termination of the EPA Discretion Policy, the EPA will generally not expect regulated facilities to make up for the missed monitoring or reports if the underlying requirement applies to intervals of less than three months. However, for other monitoring or reporting (e.g. annual or biannual monitoring or reports), regulated facilities will need to take reasonable measures to resume compliance as soon as possible upon the termination of the EPA Discretion Policy, including conducting late monitoring or submitting late reports. Full compliance is expected once the EPA Discretion Policy is no longer in effect. The EPA encourages facilities to indicate why required sampling and monitoring was not conducted when submitting any late reports.

While the EPA Discretion Policy is in effect, submissions to the EPA requiring an original “wet” signature of a responsible official will allow for a digital or other electronic signature. The EPA will also accept emailed submissions when paper originals are required.

As much as practicable, the EPA will continue State Review Framework reviews and other state program oversight during this period of time, taking into consideration the COVID-19 pandemic in any review of a state compliance and enforcement program.

All regulated entities are expected to continue managing and operating their facilities in a manner that is safe and that protects the public and the environment. If facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment, facilities should contact the appropriate implementing authority (EPA region, authorized state, or tribe). The appropriate implementing authority should also be notified if an affected facility (i) suffers from failure of air emission control or wastewater or waste treatment systems or other facility equipment, (ii) is a generator of hazardous waste, (iii) is

an animal feeding operation, or (iv) has operations that result in noncompliance otherwise not addressed by the EPA Discretion Policy. If your entity falls under one of the aforementioned categories, consult the EPA Discretion Policy for further information on what steps should be taken at: <https://www.epa.gov/sites/production/files/2020-03/documents/oecameooncovid19implications.pdf>.

The EPA may consider a more tailored short-term No Action Assurance, with conditions to protect the public, for facilities that are essential critical infrastructure if the EPA determines it is in the public interest. Facilities are considered essential if they employ critical infrastructure workers as determined by guidance issued by the Cybersecurity and Infrastructure Security Agency. Such determinations shall be made by the Office of Enforcement and Compliance Assurance Assistant Administrator on a case-by-case basis.

These are unprecedented times with the situation changing daily. Regulated entities should consult with counsel to ensure they are complying with the EPA and other legally mandated requirements. Goodsill attorneys are available to assist with questions or concerns you may have to get your company through these unprecedented times.

For assistance navigating these difficult issues, contact our Environmental Law Team:

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