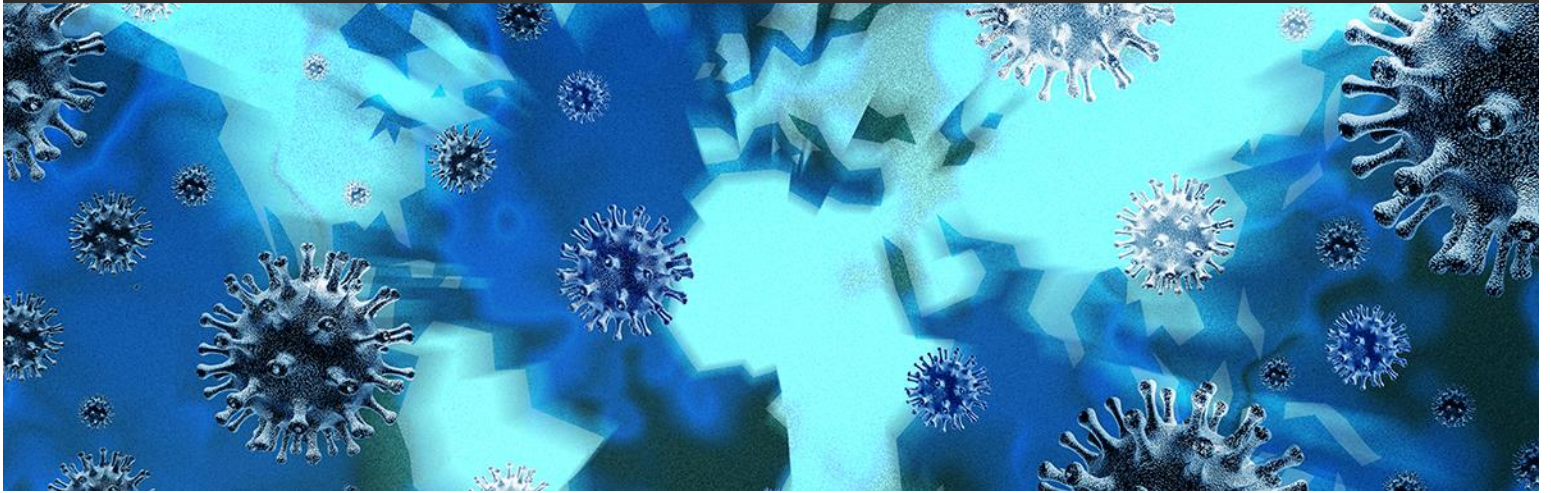


**Alert | Health Emergency Preparedness Task Force:  
Coronavirus Disease 2019**



**March 2020**

## **U.S. Environmental Protection Agency Issues Enforcement Discretion Policy to Address Civil Noncompliance during the COVID-19 Pandemic**

March 26, 2020 – The U.S. Environmental Protection Agency (EPA) today issued a memorandum ([Susan Parker Bodine, “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program,” U.S. EPA, March 26, 2020](#)) (Discretion Memo) granting enforcement discretion for virtually all civil violations of federal environmental laws during the COVID-19 pandemic.

### **Timing**

The policy will apply retroactively from March 13, 2020, the date on which the president declared a national emergency, and will last until further notice. The EPA has pledged to publish a notice on its [enforcement and compliance policy website](#) at least seven days in advance of any planned termination of the enforcement discretion policy.

### **Scope**

While the scope of the enforcement discretion is broad, it does not apply to Superfund cleanups or RCRA corrective action. The agency plans to address those circumstances in a separate document. Likewise, the Enforcement Memo does not apply to criminal violations, nor does it apply to imports.

The Discretion Memo advises the regulated community that the EPA plans to exercise its discretion not to take civil enforcement actions or seek penalties for most noncompliance during the pandemic, so long as the entities comply with certain provisions. First, entities are generally required to “make every effort to comply with their environmental compliance obligations.” If they cannot comply, then they should: (a) act “responsibly to minimize the effect and duration” of any noncompliance caused by the pandemic; (b) identify the nature and dates of the noncompliance; (c) explain how the pandemic caused the noncompliance and the decisions and actions undertaken to comply; (d) return to compliance as soon as possible; and (e) document the information identified in (a) – (d).

### **Documentation**

The Discretion Memo does not require entities to submit this information to the EPA, nor does it specify the period for which it should be kept. Entities may want to consider retaining documentation for as long as the applicable statute of limitations for the underlying statute (generally, five years) or for any document retention period specified in the applicable statute or regulations.

### **Specific Circumstances**

In addition to addressing general noncompliance occasioned by the pandemic, the Discretion Memo addresses specific situations. Hazardous waste generators, for example, will not be deemed treatment, storage, and disposal facilities under RCRA simply because the COVID-19 pandemic prevents them from manifesting the waste off-site within the required timeframe. The Discretion Memo likewise signals the agency’s intention to afford similar flexibilities to animal feeding operations. Again, documentation of the specific circumstances leading to the noncompliance is key.

Even during the pandemic, the EPA expects operators to operate and maintain their facilities in a manner that protects human health and the environment. Operators who fear that worker shortages or other limitations caused by the pandemic will create an acute risk or imminent harm must notify and work with their primary regulator to abate the threat. The EPA has similar expectations for facilities that exceed water or air permit limitations.

### **Drinking Water Systems**

The Discretion Memo references the EPA’s expectation that drinking water systems continue to operate in full compliance with permits and regulations to ensure the delivery of safe water, even during the pandemic. In the event the pandemic prevents them from full compliance, the EPA sets forth a hierarchy of testing it wants performed regardless – with the top priority testing and monitoring to ensure compliance with National Primary Drinking Water Regulations, nitrite/nitrate limitations, and the Lead and Copper Rule, among others.

### **Critical Infrastructure and “No Action Assurance”**

For businesses that operate “critical infrastructure” facilities, the EPA is prepared to consider, on a case-by-case basis, “no action assurances” for certain kinds of non-compliance. “No action assurances” provide their recipients with greater certainty than enforcement discretion policies like the Discretion Memo, but as a practical memo, given the exigencies of the pandemic, the pledge of enforcement discretion may suffice for almost all regulated entities.

### **Compliance Requirements in Administrative and Judicial Settlements**

Regarding compliance deadlines set forth in administrative settlements, the EPA plans to exercise its discretion consistent with the other terms of the Discretion Memo; i.e., it generally will not seek stipulated penalties or undertake follow-on enforcement action if the respondent meets the other conditions of the policy. For judicial settlements, which not only involve the agency, but also the Department of Justice and the courts, the EPA will work with its counterparts to exercise its discretion not to seek stipulated penalties for violations, so long as the defendants have complied with the substantive conditions of Discretion Memo.

### **Criminal Enforcement**

By its terms, the Discretion Memo does not apply to criminal violations, but recognizes that the pandemic may cause shortages or other disruptions that might obviate the mens rea (or evil mind) element required in criminal prosecutions. The agency reserves its right to take criminal enforcement actions even during the pandemic.

### **Ongoing Enforcement**

While the Discretion Memo provides some guidance for businesses straining to meet deadlines during the pandemic, it does not offer relief to those entities currently engaged in enforcement negotiations with the agency. Those will continue.

While inspections may decline during the pandemic, the Discretion Memo specifically states that the agency will continue to monitor imports, particularly for products making false claims about their ability to kill or destroy the novel coronavirus. Making such claims is illegal under the federal pesticide law – called the Federal Insecticide, Rodenticide and Fungicide Act – and the EPA intends to pursue them.

### **A Final Note**

The pandemic continues to evolve, and this Discretion Memo may not be the last word from the EPA about its enforcement and compliance actions. For now, though, it provides some guidance to companies struggling to maintain compliance during the outbreak.

As always, full compliance may obviate a company's worries about EPA enforcement. Where full compliance is impossible, maintaining good documentation and undertaking other actions consistent with Discretion Policy may be key.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

## **Author**

This GT Alert was prepared by:

- [Bernadette M. Rappold](#) | +1 202.331.3127 | [rappoldb@gtlaw.com](mailto:rappoldb@gtlaw.com)

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.\* Los Angeles. Mexico City.+ Miami. Milan.\* Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.\* Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.\* Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ↯Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. \*Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. †Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*