



Regulated Entities Should Consider Benefits and Limitations of EPA's COVID-19 Policy in Light of Post-Publication Developments

U.S. Environmental Protection Agency's March 26, 2020 temporary COVID-19 enforcement discretion policy establishes the steps regulated parties must take to qualify for enforcement protection for noncompliance caused by COVID-19 ("COVID-19 Policy" or "Policy"). Our previous [Alert](#) outlined the Policy's scope, eligibility criteria, and expectations. In less than a month, EPA's Policy has generated significant controversy, conflicting media reports, congressional inquiries, and now a federal lawsuit. Critiques of the Policy and EPA's evolving messaging make clear that entities affected by COVID-19 should be thoughtful and strategic in their reliance on the potential relief provided by the Policy.

EPA's Response to Backlash

In response to initial criticisms, EPA initiated several steps to explain its stance on environmental compliance and enforcement during the pandemic. On March 30, 2020, EPA issued a [news release](#) to correct "the record on reckless reporting" by certain media outlets and clarify that the Policy applies on a case-by-case basis. To quell legislative opposition, EPA sent members of Congress a [letter](#) on April 2, 2020, defending the Policy. EPA has also created a [Frequently Asked Questions](#) webpage answering several questions on the scope and application of the COVID-19 Policy.

Environmental Groups Sue EPA and State Attorneys General Weigh-In

At the same time, environmental groups and the states have voiced concerns related to the Policy. On April 1, 2020, a coalition of environmental groups, led by the Natural Resources Defense Council, petitioned EPA to promulgate an emergency rule requiring regulated parties to affirmatively report COVID-19-caused noncompliance and provide information similar to what EPA requires parties to document under the Policy. On April 16, 2020, the coalition filed a lawsuit in the U.S. District Court for the Southern District of New York, requesting that the court order EPA to respond to the petition immediately and alleging that the Policy deprives the public of compliance-related information and raises environmental justice issues.

States have also entered the fray, vowing to hold regulated parties accountable for COVID-19-caused noncompliance. In an April 15, 2020 letter, attorneys general from 14 states, including Pennsylvania, urged EPA to rescind the Policy, claiming that the Policy ignores the connection between air pollution and respiratory/cardiovascular conditions with increased risk of serious harm for those who contract COVID-19. The letter follows correspondence sent by California's attorney general to EPA on April 9, 2020.

Thoughtful Consideration and Documentation Are Necessary for Protection under EPA's Policy

EPA's post-Policy communications emphasize that EPA continues to enforce federal environmental laws, and regulated entities should remain vigilant in meeting their

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compliance obligations to the extent reasonably practical. They also preview EPA's evolving consideration of enforcement discretion and reinforce the need for regulated entities to develop a sound strategy before relying on the Policy. The following points should be considered:

- **Coverage under the Policy is not guaranteed.** EPA will make case-by-case determinations on whether the circumstances of noncompliance meet the criteria of the Policy. Coverage under Policy also requires that regulated entities notify the appropriate implementing authority of COVID-19-caused noncompliance that may cause an acute risk or imminent threat to human health or the environment, and failures of treatment technology that may cause exceedances of applicable limits or thresholds. Consequently, regulated entities may be forced to self-disclose *potential* noncompliance to EPA that it later determines is not covered by the Policy.
- **Coverage is not confirmed immediately.** EPA did not commit to a time frame for making coverage determinations under the Policy. The Policy also does not address whether these individualized determinations will be made by EPA Headquarters or its Regional offices. Regulated entities will not know whether EPA agrees that they qualify for relief under the Policy for an unspecified time, potentially months or years after the Policy is lifted.
- **Coverage determinations will depend heavily on the extent of documentation.** The necessary documentation to obtain Policy coverage varies based on the complexity of the facility and the circumstances of noncompliance. There is no one-size-fits-all approach, and EPA expects the regulated community to “fully and completely explain and support the situation presented by COVID-19 public health emergency-caused noncompliance and the facility’s response to it.” Regulated entities will need to thoughtfully consider the eligibility criteria when preparing documentation, weighing the goal of obtaining Policy coverage with the possibility that this information may become subject to public review.

We note that, when considering the Policy, regulated entities must keep in mind that it applies only to EPA's discretion to enforce federal environmental laws. States, including [Pennsylvania](#), have developed their own COVID-19 policies, some of which differ significantly from EPA's.

Babst Calland's [environmental attorneys](#) can guide you through the complexities of EPA's Policy and the COVID-19 environmental regulatory landscape and assist you with related strategic decisions. For more information, please contact Lisa M. Bruderly at 724-910-1117 or lbruderly@babstcalland.com, Julie R. Domike at 301-518-0972 or jdomike@babstcalland.com, or Gary E. Steinbauer at 419-410-4286 or gsteinbauer@babstcalland.com.

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