



1901 N. FORT MYER DRIVE • SUITE 500 • ARLINGTON, VA 22209-1604 • 703-351-8000 • FAX 703-351-9160

**TO:** PMAA Association Executives

**FROM:** Mark S. Morgan, Regulatory Counsel

**RE:** State UST Enforcement Discretion:

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PMAA has been working closely with the U.S. EPA Office of Underground Storage Tanks (OUST) in an effort to obtain regulatory relief from underground storage tank requirements that have made compliance impracticable due to the COVID-19 outbreak. While OUST does not have authority to issue enforcement discretion itself, that's the job of the EPA Office of Enforcement, it can influence enforcement policy and issue interpretative guidelines that states UST authorities can follow. PMAA has asked OUST to issue enforcement discretion guidance for states based on the EPA Notice of Enforcement Discretion issued last week. While states are not bound by EPA enforcement policies, many follow OUST's lead on enforcement discretion during emergency declarations. An OUST guideline would help states facilitate their own enforcement discretion policies and provide justification for to move forward.

### ***I. Applicability of the EPA Notice of Enforcement Discretion to UST Systems***

Enforcement of UST regulations is complicated by the overlap of authority over UST regulations and enforcement policy. Whether the EPA notice of emergency declaration applies in a state depends on **who** is conducting the inspection and in which state:

- **SPA States** – These are states with State UST Program Authority (SPA) from the EPA. There are 38 SPA states, all with their own state UST regulations and enforcement policies. These states receive federal grants from the Leaking Underground Storage Tank Trust fund (LUST).
- **Non-SPA States** – These are states that do not have State UST Program Authority (SPA) from the EPA. There are 12 non-SPA states all with their own state regulations and enforcement policies. These states receive no federal LUST grants because their regulations are less stringent than the federal UST regulations.
- **EPA Inspectors** - When an EPA inspector goes into a **SPA state** to inspect UST tank systems, the inspection is conducted according to state UST regulations but under federal enforcement policy. When an EPA inspector goes into a **non-SPA state**, the inspection is conducted according

to federal UST regulations and federal enforcement policy. EPA Inspectors conduct only about 1000 inspections per year.

- **State Inspectors** – When a state inspector inspects a UST system, the inspection is conducted according to state UST regulations and state enforcement policy. This is true in every state. State inspectors conduct the bulk of all UST inspections each year.

This means that the EPA notice of enforcement discretion applies in all 50 states **but only when an EPA inspector is conducting the inspection**. The EPA enforcement discretion does not apply in any state when a state inspector is conducting the inspection. Since state inspectors conduct nearly all UST inspections, tank owners seeking regulatory relief due to COVID 19 limitations **must obtain enforcement discretion from the state agency with enforcement authority over UST regulations**.

## **II. State UST Enforcement Discretion Notices**

Currently, only 5 states have issued UST enforcement discretion notices:

- California
- Tennessee
- Colorado
- Idaho
- Washington

Association Executives in the remaining 45 states seeking similar UST enforcement discretion must make the request **directly to their state agency with UST enforcement authority**.

## **III. Obtaining State UST Enforcement Discretion:**

- **State UST Enforcement Discretion Tools:** The five state notices of discretion can be used as templates to obtain similar enforcement discretion in the remaining 45 states that have issued no notice (see links below). The EPA Notice of Enforcement Discretion in the link below can be used to define the scope of state regulatory relief because states must meet minimum EPA enforcement criteria.
- **Factors Justifying UST Enforcement Discretion:** The factors used to justify a state issued enforcement discretion must arise from limitations created by the COVID-19 outbreak. Those factors include; shortage of workforce; limitation on movement imposed by federal, state or local authorities; shortage of vendors, equipment or employees required to perform compliance tasks; the need to maintain social distancing; lack of supplies required to achieve compliance, etc. UST system owners who are able to comply, must comply.

## **IV. Useful Templates for Obtaining State UST Enforcement Discretion:**

- [Tennessee UST Enforcement Discretion](#)

- [California UST Enforcement Discretion](#)
- [Colorado UST Enforcement Discretion](#)
- [Idaho UST Enforcement Discretion](#)
- [Washington UST Enforcement Discretion](#)
- [EPA Enforcement Discretion Notice](#)

**PMAA Contact: Mark S. Morgan, Regulatory Counsel: [mmorgan@pmaa.org](mailto:mmorgan@pmaa.org) or (202) 364-6767**