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CLIENT ALERT

EPA Issues Policy On Conditions For Enforcement Discretion During the Coronavirus Crisis

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Many businesses face mounting disruption and, in some cases, temporary shutdown as a consequence of the ongoing coronavirus (COVID-19) pandemic. As owners and operators confront these challenges, they face the added challenge of continuing to satisfy applicable federal, state, and local environmental laws and regulations. Unprecedented obstacles to maintaining routine compliance include, for example, the lack of staff to collect water samples, the inability to obtain physical signatures of documents such as air permits and compliance reports, and difficulty constructing, repairing, upgrading, and maintaining emissions controls and monitoring systems because of disruptions to the supply chain or work force.

Recognizing that such unusual circumstances *may* justify the exercise of enforcement discretion for failure to comply with a range of environmental requirements, on March 26, 2020, the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance ("OECA") issued a temporary policy, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* ("the Policy"), outlining the framework under which the Agency intends to treat COVID-19-driven noncompliance.

While the Policy does signal EPA's willingness to take into account legitimate, demonstrable COVID-19 disruptions when evaluating instances of noncompliance (particularly those involving routine testing, monitoring, and reporting requirements), it stops well short of providing any absolute waiver of compliance requirements or "license to pollute." Rather, the Policy is far more limited in several important respects, including:

- Its general requirement that entities seeking coverage must first attempt to comply with their obligations and, if they cannot do so, must take steps to minimize the effect or duration of noncompliance, identify the nature and dates of the noncompliance, identify how COVID-19 was the cause of the noncompliance, return to compliance as soon as possible, *and provide documentation of all of the above*;
- The Policy does not apply to violations that might give rise to criminal exposure (*e.g.*, those involving intentional misconduct or false statements);
- The Policy does not apply to imports or, more generally, to pesticide products produced, manufactured, distributed in the United States, that claim to address COVID-19 impacts;
- The Policy does not contemplate the exercise of enforcement discretion within the context of CERCLA or RCRA Corrective Action, which EPA intends to address separately;
- Even where COVID-19 disruptions can be established as a factor, EPA could conceivably still pursue enforcement even for routine monitoring/sampling/reporting noncompliance, as the Policy only goes so far as to make clear that EPA generally "does not expect to seek penalties" in such instances;
- Similarly, EPA *does* reserve the right to initiate an "enforcement response" where deemed necessary to prevent acute or imminent threats to human health and the environment, as well as in the case of exceedances of an emission, discharge, disposal, or release limitation; and

- The Policy recognizes that because primary enforcement responsibility typically rests with state and tribal regulators possessing delegated authority under major federal environmental regimes like the Clean Air Act and Clean Water Act, authorized states or tribes are free to adopt their own approaches to responding to environmental compliance challenges during COVID-19 pandemic.

The Policy studiously avoids (with a few exceptions) detailed discussions of media-specific compliance issues or explaining how to manage them during the pandemic. In an effort to address the Policy's evident lack of specificity, we summarize here potential COVID-related compliance issues that may arise under several major environmental programs, including consideration of flexibility that may be available both under and independent of the Policy:

Clean Air Act. The Clean Air Act does not include broad emergency waiver authority addressing issues of the sort posed by the current pandemic. The only specific waivers the Act provides for emergencies are (1) those that provide limited exceptions from requirements to use clean fuels in "extreme" nonattainment areas and (2) those that provide for suspension of state implementation plan requirements for fuel-burning stationary sources. (*See* 42 U.S.C. §§7410(f), 7511(e)(3).) Each of those, however, applies only to "energy emergencies." EPA may also waive requirements concerning fuel and fuel additives in "extreme and unusual fuel supply circumstance[s]." *Id.* §7545(c)(4)(C)(ii). Any source seeking to argue that the Policy provides a safe harbor against enforcement must take into account the very limited circumstances in which Congress saw fit to provide for exemptions from or suspensions of statutory obligations.

More generally, enforcement discretion for Clean Air Act requirements may be available where compliance is not reasonably practicable under the circumstances and other actions are taken by the source owner/operator. Critical to the ability to secure such enforcement discretion would be to maintain information as to why compliance is not "reasonably practicable." But the Policy does not offer specific examples or explicit safe harbors for various Clean Air Act programs, such as new source performance standards, limits on hazardous air pollutants, or controls related to ambient air quality. As a consequence, even with the Policy, regulated sources remain at some level of inherent risk in instances where they cannot maintain normal compliance protocols.

Clean Water Act. EPA's new Policy plainly contemplates that, due to COVID-19, entities regulated under the Clean Water Act ("CWA") may be unable to perform routine compliance sampling (*e.g.*, effluent sampling and testing, cooling tower sampling), laboratory analysis (*e.g.*, laboratory holding times and turn-around times), training (*e.g.*, spill prevention, control, and countermeasure training), and reporting or certification. EPA advises entities to report noncompliance with such routine activities *using existing procedures*; however, if reporting is not reasonably practicable due to COVID-19, then entities should maintain internal records concerning their noncompliance and make it available upon request to regulators. *To the extent EPA agrees* that COVID-19 was indeed the cause of compliance, it does not expect to seek penalties for violations of routine requirements, but EPA makes it clear that it expects full compliance upon expiration of the new enforcement discretion policy.

Apart from routine compliance requirements, the Policy also addresses noncompliance with effluent limitations that result from failure of wastewater or waste treatment systems or other facility equipment. In such circumstances, facilities should notify the EPA regional office or authorized state or tribe as quickly as possible, specifying all pollutants discharged, the degree of the exceedances, and the expected duration and timing of the exceedances. EPA, either directly or in consultation with authorized states or tribes, will determine the appropriate response after assessing, among other things, whether the risk posed by the exceedance is acute and any actions taken in response to noncompliance. Importantly, the Policy's emphasis on the heightened

responsibility of public water systems to protect public health should serve as a major caution to upstream facilities discharging into waters that are designated (per state water quality standards promulgated under CWA Section 303) as public drinking water supply sources.

Facility owners and operators should also bear in mind that the CWA and its implementing regulations already set forth limited affirmative defenses and exemptions to permit requirements that may apply to certain emergencies. Section 311(f), for instance, provides a defense to liability for oil or hazardous substance spill removal costs if the discharge was caused solely by an "act of God," which is defined as "an act occasioned by an unanticipated grave natural disaster." Section 311(c) further exempts persons from liability for discharges and removal costs or damages that result from actions taken or not taken at the direction of an on-scene coordinator pursuant to the National Oil and Hazardous Substances Pollution Contingency Plan.

In addition, EPA's regulations implementing the Section 402 National Pollutant Discharge Elimination System ("NPDES") program provide an affirmative defense for "upset" conditions that excuses unintentional, temporary non-compliance with technology-based effluent limitations. COVID-19 could lead to an "upset" event within the meaning of EPA's regulations if there were found to be, for example, an inability to obtain equipment to replace a broken part because of supply chain or workforce disruption. In this regard, however, operators should bear in mind that nearly all states administer their own NPDES programs; thus, operators seeking to invoke the "upset" affirmative defense will need to ensure compliance not only with any EPA-imposed requirements attending an "upset," but also with any state-specific requirements.

Finally, facility owners and operators must bear in mind more generally that most states are responsible for administering the NPDES program under state law. Thus, owners and operators must look to state agencies for guidance on noncompliance with those programs due to COVID-19. Indeed the Policy cautions at the outset that authorized states or tribes may take a different approach under their own authorities.

Resource Conservation and Recovery Act. The Resource Conservation and Recovery Act ("RCRA"), which regulates solid and hazardous wastes and underground storage tanks containing petroleum or hazardous substances, contains no blanket "Act of God" defense. The statute authorizes the President to exempt solid waste management facilities and underground storage tanks *at federal facilities* from RCRA if he determines it to be in the paramount interest of the United States. No such statutory exemptions exist for private facilities.

Generators of hazardous waste may be particularly challenged at this time to meet time-sensitive regulatory requirements, such as 90-day or 180-day accumulation limits, weekly accumulation area inspections, and manifest exception reporting. The Policy specifically addresses exceedances of the accumulation limits due to the inability to transfer the waste off-site. It provides that generators should continue to properly label and store such waste and take various steps relating to the alleged force majeure, including documenting causation and taking corrective action as soon as possible. If these steps are taken, EPA will not consider these entities to be treatment, storage and disposal facilities ("TSDFs"). Additionally, EPA will consider very small quantity generators and small quantity generators to retain their generator status, even if the amount of waste accumulated on-site exceeds the generator threshold.

TSDFs may face similar compliance challenges and are encouraged to review their permits for any non-compliance reporting requirements and potential enforcement relief provisions.

Facilities performing RCRA corrective action under an order similarly should review and comply with any force majeure provisions in the order. The Policy specifically states that it does not apply to RCRA corrective action enforcement instruments and that these will be addressed in a separate communication.

Those seeking protection from RCRA's routine inspection and reporting requirements should bear in mind the general requirements of Part I.A of the Policy—namely, that they first attempt to comply with their obligations and then, if they cannot, that they identify how COVID-19 prevents their compliance, identify the nature and dates of the noncompliance, take steps to come into compliance as soon as possible, and provide documentation of the above.

Importantly, the Policy applies only to *EPA* enforcement decisions. As discussed in more detail below, authorized states may take a different approach under their own authorities. With the exception of Iowa and Alaska, all states have been delegated authority to implement and enforce at least the base hazardous waste regulations in lieu of EPA (and many states have authorization for additional hazardous waste requirements that EPA has since promulgated). As such, almost all generators and TSDFs will be subject to their state agency's enforcement policies. Accordingly, generators and TSDFs in authorized states should keep abreast of any enforcement relief directives issued by their state agency.

Emergency Planning and Community Right-to-Know Act. The Emergency Planning and Community Right-to-Know Act ("EPCRA") contains three periodic reporting requirements: (1) Section 311, which requires facilities that have Safety Data Sheets ("SDSs") for chemicals held above certain threshold quantities to submit either copies of their SDSs or a list of these chemicals to the State Emergency Response Commission ("SERC"), Local Emergency Planning Committee ("LEPC"), and local fire department; (2) Section 312, which requires facilities covered by section 311 to submit annually an Emergency and Hazardous Chemical Inventory Form to the LEPC, SERC, and the local fire department as required under section 312; and (3) Section 313, which requires facilities in specific industry sectors that manufacture, process, or otherwise use specifically listed "toxic chemicals" to annually (on July 1) report to EPA the quantities of specifically listed "toxic chemicals" they released to air, water or land, or transferred off-site for management. For facilities shutting down, a key provision is Section 313, because the annual report required by that section is due July 1 of each year. There is no statutory or regulatory force majeure exemption from timely submission. Reporting is electronic; thus, with careful planning covered facilities can achieve compliance remotely. By the same token, the ability to submit Section 313 reports remotely may make it more difficult to prove that COVID-19 disruptions caused noncompliance with this reporting obligation.

Toxic Substances Control Act. There is no general "force majeure" provision in TSCA and the Policy does not specifically address TSCA compliance, although it does explicitly state that imports are not covered by the Policy, motivated in part by concern that such imports (but also products manufactured in the United States) may be claimed to address COVID impacts. Manufacturers, importers, and processors of chemical substances thus must be careful to comply with existing deadlines for most compliance activities, including deadlines for submitting substantial risk information under TSCA Section 8(e), deadlines for export notifications under TSCA Section 12(b), and deadlines for testing or other obligations under Section 5(e) consent orders.

In addition, since most reporting obligations under TSCA can be satisfied electronically, facilities may have difficulty demonstrating that a reporting failure is caused by COVID-19. In particular, companies must be cognizant of two upcoming reporting deadlines. Manufacturers and importers of chemical products must ensure that they submit timely reports for the Chemical Data Reporting rule ("CDR") if they exceeded production (or import) volume thresholds during any of the past 4 years. EPA has previously announced that the CDR reporting period for this year is extended to September 30, 2020, through

November 30, 2020. Also, manufacturers and importers of any of the 20 recently-announced "high priority substances" for risk evaluation must "self-identify" to EPA no later than May 27, 2020 (recently extended from the original deadline of March 27, 2020).

State Enforcement. Businesses must bear in mind that states or tribes are not bound by the constraints set forth in the Policy and may—indeed, should be expected to—take a different approach under their own authorities. Some states *(e.g.*, Texas, Virginia, and Oregon) have issued guidance or otherwise stated publicly that they intend to exercise reasonable enforcement discretion in connection with certain permitting programs where violations arise as a result of COVID-19-driven disruptions. However, other states (*e.g.*, California and Pennsylvania) continue to reiterate that environmental compliance remains a top priority, all environmental regulations remain in effect, and all applicable deadlines still apply. Accordingly, facilities should quickly identify and document compliance issues that are reasonably traceable to disruptions caused by the COVID-19 pandemic, determine if emergency exemptions from compliance might be available, document the compliance issue in accordance with the EPA protocol and, where necessary, seek to engage appropriate federal and state regulators and permitting authorities.

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