

# USEPA ISSUES GUIDANCE ON ENFORCEMENT AND COMPLIANCE AS A RESULT OF COVID-19

*Hodgson Russ Environmental Alert*  
March 27, 2020

As a complement to our March 26, 2020 alert discussing general environmental compliance considerations in the wake of the COVID-19 Pandemic (the “Pandemic”), we wanted to let you know about a new enforcement discretion guidance memorandum issued later that same day by the U.S. Environmental Protection Agency (“USEPA”) regarding violations associated with the Pandemic (the “Policy”). The Policy indicates that USEPA believes most non-compliance that occurs during the Pandemic will fall within its scope, with the exception of: (i) Resource Conservation and Recovery Act (“RCRA”) or Superfund corrective action, which it indicates will be subject to a future communication by the agency; and, (ii) criminal enforcement, which will be considered in conjunction with the U.S. Department of Justice (“DOJ”). It states that it will apply retroactively to March 13, 2020, and is intended to continue on a temporary basis until at least seven days’ advance notice is given by the agency.

You should be mindful, however, of the fact that most major environmental statutes, such as the Clean Air Act, the Clean Water Act, and RCRA to name a few, provide for delegated authority to States that have implemented a regulatory scheme that is at least as stringent as USEPA’s and have sought such authority. Most States, in turn, have done so, meaning the value of the Policy may be limited in value, as USEPA is generally not the day-to-day oversight authority, except in the case of certain non-delegable authority. This is especially true in the age of “cooperative federalism,” where USEPA has taken an affirmative step back, giving primary authority to States on compliance matters, and not utilizing their “overfile” authority often. Interestingly though, the Policy does include reference to the fact that USEPA will continue to review State programs during this period, and that States should take into account health and safety considerations in proceeding with routine inspections during this period, implicating a potential guide to States in this regard.

Regardless, it is helpful to be aware of the Policy’s details, as aspects of it may apply to your business or facility, or in turn, may guide certain State decision-making. What follows is a high-level summary of pertinent points from the Policy.

## **I. Compliance General Conditions**

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The Policy clearly states that regulated entities are expected to make every effort to comply with their environmental compliance obligations. If doing so is not reasonably practicable, then it identifies some general steps to be followed, which in general, place the responsibility on the regulated entity to document the specific non-compliance caused by the Pandemic, acts taken in response to minimize and/or address it, and the length of the non-compliance.

The Policy specifically discusses a number of non-compliance scenarios. Of particular note is that USEPA will take a relaxed approach to hazardous waste management and storage time periods, such that if transport is effected by the Pandemic, material can be kept on-site past the applicable regulatory time period without effecting a regulated entities status. The Policy also allows for greater consideration against enforcement for certain exceedances or unauthorized discharges pursuant to permitting requirements, subject to notification obligations and no specific harm to the environment. Finally, the Policy discusses the procedure to be followed where facility operations are impacted by the Pandemic insofar as it may create an “acute risk or an imminent threat to human health or the environment,” including coordination with the States and other regulatory stakeholders.

### **II. Routine Compliance Monitoring and Reporting**

The Policy indicates that the Pandemic may limit and/or prevent some regulated entities from performing routine compliance tasks, such as related monitoring and inspection activities, whether directly or through contracted resources, like laboratories and consultants. As such, the Policy indicates that any non-compliance applicable to these matters should be managed according to existing reporting obligations, as generally required. If there is no formal procedure, or if following it is not reasonably practicable, it should be documented to support non-enforcement at a later date. USEPA also indicated that it does not plan on requiring “catch up” activities with missed monitoring or reporting events, assuming the period was less than three months. And following a number of States, USEPA has agreed to relax the need for “wet” signatures, allowing the use of digital or electronic signatures for certification purposes.

### **III. Obligations Under Settlement Agreements and Consent Decrees**

Parties to settlement agreements and consent decrees are encouraged to review those documents to evaluate notice procedures, including force majeure, where applicable. For USEPA administrative settlement agreements, USEPA will use discretion as outlined in the Policy, and will not seek stipulated or other penalties with obligations concerning routine compliance, reporting or certification obligations that cannot be reasonably met due to the Pandemic. USEPA will coordinate with the DOJ to exercise enforcement discretion for stipulated penalties for compliance obligations, and will consult with any co-plaintiffs to obtain agreement with such an approach. Since these are court orders, however, courts retain their own jurisdiction and discretion, and may exercise their own authority, despite the Policy.

### **IV. Critical Infrastructure**

Essential critical infrastructure will be subject to a short-term No Action Assurance, with conditions to protect the public if USEPA deems it in the public interest.

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Hodgson Russ will continue to monitor these ongoing regulatory developments, and is ready to help you assess their applicability to you and your business. Please reach out to us with any questions or concerns, in these or any other matters, as we continue to navigate this evolving new landscape together.

If you have questions related to the Policy, or navigating any other environmental-related issue, please contact Michael Hecker (716.848.1599), Jeffrey Stravino (716.848.1394), or anyone else in the Hodgson Russ Environmental Practice, and we would be happy to help. **Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the Pandemic.**

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>.

