

## **COVID-19 Evolving Updates from WOH Environmental Practice Group**

### **I. United States Environmental Protection Agency**

#### *A. EPA Issues Discretionary Enforcement Policy*

On March 26, 2020, the United States Environmental Protection Agency (“EPA”) issued a policy memorandum entitled “COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program.” The memo describes EPA’s intent to utilize enforcement discretion during the COVID-19 pandemic for certain noncompliance. The policy applies solely to actions/omissions that occur while the policy is in effect and excludes criminal violations and activities under Superfund and RCRA Corrective Action enforcement instruments. The memo acknowledges that “authorized states or tribes may take a different approach under their own authorities.”

EPA’s use of enforcement discretion is conditioned on a regulated entity making “every effort to comply with their environmental compliance obligations.” Where compliance is not “reasonably practicable” the policy directs facilities to:

- (a) act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
- (b) identify the specific nature and dates of the noncompliance;
- (c) identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
- (d) return to compliance as soon as possible; and
- (e) document the information, action, or condition specified in (a) through (d).

For routine compliance monitoring and reporting, entities should continue to use existing procedures to report noncompliance, pursuant to an applicable permit, regulation, or statute. If there’s no existing procedure, or if reporting is not reasonably practicable due to COVID-19, regulated entities should maintain this information internally and make it available to EPA or an authorized state upon request.

For required submissions, email submissions will be accepted in lieu of paper; and digital or other electronic signatures will be accepted where a “wet” signature of a responsible officer would otherwise be required.

For administrative settlement agreement reporting obligations and milestones, if parties anticipate missing enforceable milestones due to COVID-19, they should utilize the notice procedures in the agreement, including notification of a force majeure, as applicable. Under the policy, EPA will not seek stipulated or other penalties for noncompliance with such obligations.

For consent decrees, EPA staff will coordinate with the Department of Justice to exercise enforcement discretion.

Policy Memorandum is available here: <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

#### *B. EPA Issues Interim Policy regarding CERCLA Superfund Sites*

On April 10, 2020, EPA issued interim guidance to all its regional offices presenting a unified federal policy for continuing, reducing, or pausing field work for response actions related to cleanup and emergency response sites where EPA is the lead agency or has direct oversight of or responsibility for the work being performed.

Under this interim guidance, EPA will make all determinations on whether to continue, reduce, or suspend field work on a case-by-case basis. Specifically, EPA indicates that work can be reduced or suspended at sites if:

- State, tribal or local health officials have requested a stoppage;
- Any workers have tested positive for or exhibited symptoms of COVID-19;
- Workers may closely interact with high-risk groups or those under quarantine;
- Contractors are not able to work due to state, tribal or local travel restrictions or medical quarantine; or
- Workers can't maintain proper social distancing.

Interim guidance available here: [https://www.epa.gov/sites/production/files/2020-04/documents/interim\\_guidance\\_on\\_site\\_field\\_work\\_decisions\\_due\\_to\\_impacts\\_of\\_covid.pdf](https://www.epa.gov/sites/production/files/2020-04/documents/interim_guidance_on_site_field_work_decisions_due_to_impacts_of_covid.pdf)

## **II. US Army Corps of Engineers**

### *A. Waters of the United States (WOTUS)*

The final rule defining Waters of the United States (WOTUS) remains posted on the EPA website in its pre-publication form. For the rule to take effect, it must be posted in the federal register and sixty (60) days must pass from the date of publication. The new rule is widely anticipated to relax the regulation of federal wetlands and streams. The new rule follows the U.S. Supreme Court decisions and provides a stronger regulatory framework for ACOE jurisdictional determinations. The rule also clearly sets forth the exemptions that exist for waters that could otherwise have been mistakenly identified as WOTUS.

Final rule is available here: [https://www.epa.gov/sites/production/files/2020-01/documents/navigable\\_waters\\_protection\\_rule\\_prepublication.pdf](https://www.epa.gov/sites/production/files/2020-01/documents/navigable_waters_protection_rule_prepublication.pdf)

## **III. New York State Department of Environmental Conservation**

### *A. Wastewater Treatment Plants*

New York State Department of Environmental Conservation (“DEC”) confirmed that wastewater treatment is an essential public health service and, therefore, exempt from various state work-force reduction orders during the COVID-19 emergency. Permittees and wastewater facility operators are directed to continue permit and regulatory compliance. DEC is not authorizing blanket waivers of compliance requirements. However, DEC indicates it will consider the overall circumstances and extent of non-compliance and efforts to resolve issues when considering non-compliance events during this emergency period. As required under standard protocols, operators should report non-compliance, the associated circumstances related to non-compliance, and actions to address non-compliance to DEC.

### *B. Remedial Programs*

DEC has provided its own interpretation on Empire State Development Corporation Guidance, for essential business or services as it relates to projects carried out pursuant to its remedial programs. DEC considers the following additional activities to be essential:

- Remedial construction activities, including new construction starts, at sites that DEC has determined pose a significant threat to public health and/or the environment, including Class 2 sites on the Registry of Inactive Hazardous Waste Disposal Sites and significant threat sites in the Brownfield Cleanup Program;

- Completion of remedial construction already under way at non-significant threat sites as necessary to ensure site safety and prevent exposure to site contaminants, including completion of site cover systems;
- Operation and maintenance activities for active remedial systems that are necessary for the continued protection of human health and the environment;
- Interim remedial measures to address imminent human exposures and/or threat of significant contaminant migration;
- Spill response actions;
- Investigation, including pre-design investigations, of petroleum and hazardous waste releases as determined by DEC on a case-by-case basis to be necessary to address potential human exposures and/or threat of significant contaminant migration; and
- Construction, operation, and maintenance activities at registered bulk storage facilities determined to be Essential Businesses or Services by the State of New York. This includes, but is not limited to, the repair, testing, replacement, inspection, and maintenance of system components needed to meet regulatory compliance.

ESD guidance is available here: <https://esd.ny.gov/guidance-executive-order-2026>

DEC guidance is available here: <https://www.dec.ny.gov/chemical/brownfields.html>

*C. Brownfield Cleanup Program Agreements and Amendments.*

DEC's Division of Environmental Remediation also released the following updates:

- DEC will grant reasonable extensions of time for the execution of Brownfields Agreements and Amendments on a case-by-case basis. Requests for extensions should be made to the appropriate Project Manager/Project Attorney.
- For pending amendments reflecting the transition from Generation 2 to Generation 3 of the program, DEC has granted an extension until June 1, 2020 for the submission of the executed amendment to the Department.
- DEC is not prepared to dispense with the notary requirement at this time but is currently investigating alternatives.
- DEC will accept electronically signed agreements and amendments during the COVID-19 State of Emergency and will reassess its policy of requiring original/hard copies thereafter.

*D. DEC Permitting/Uniform Procedures Act*

Executive Order 202.15 modified DEC's permit procedures to suspend public hearings provided public comments can be accepted as written submissions, either electronically or by mail, or that any required appearances may be done so by teleconferencing or other electronic means.

*E. Other DEC Public Meetings*

Executive Order 202.15 modified Environmental Conservation Law and its implementing regulations to suspend public meetings prior to the selection of a final remedy at inactive hazardous waste disposal sites and public meetings at certain Brownfield Cleanup Program sites, provided that written comments on proposed remediate may continue to be submitted and will be evaluated in decision.

*F. Waste Manifest Signatures*

On March 27, 2020, DEC issued an enforcement discretion memorandum entitled "Enforcement Discretion on Signature Procedures for Hazardous Waste and Low-level Radioactive Waste Manifests and Non-Hazardous Waste Shipping Papers during the COVID-19 Emergency." Under the policy, DEC will not pursue enforcement of regulations mandating signatures for waste shipping documents during the period the policy is in force, as long as alternative procedures set forth in the policy are followed. The policy is effective for all specified waste shipping papers used to track the shipment of waste within New York State for activities regulated by DEC. The policy does not affect signature requirements mandated by other New York State agencies, agencies of other states, or the federal government.

The policy is available here:

[https://www.dec.ny.gov/docs/materials\\_minerals\\_pdf/tempsigproccovid2.pdf](https://www.dec.ny.gov/docs/materials_minerals_pdf/tempsigproccovid2.pdf)

**IV. Adirondack Park Agency**

Governor Cuomo's Executive Order 202.11 suspended the statutory and regulatory time periods required for the Adirondack Park Agency to respond to requests for variances, permit modifications and otherwise process permit requests.

**V. Accelerated Renewable Energy Growth and Community Benefit Act**

The " Accelerated Renewable Energy Growth and Community Benefit Act " (Part JJJ Governor's Budget Bill), establishes a revised and perhaps more streamlined process for siting major renewable energy projects, largely replacing the process under Article 10 of the Public Service Law. The Act creates the Office of Renewable Energy Siting within the Department of State, replacing Empire State Development Corporation, as the lead reviewing entity.

Whiteman Osterman & Hanna LLP can assist with these issues and more, as you and your business work to navigate the novel and difficult decisions arising from the COVID-19 pandemic. For assistance with environmental issues, please contact one of our [environmental attorneys](#).

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