



COVID-19 ENVIRONMENTAL ENFORCEMENT

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- Attorney, Licensed in the US states of Oklahoma, Arkansas, South Carolina and the District of Columbia
 - *Fellow and President Elect*, American College of Environmental Lawyers
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- EPA CERCLA (Superfund) On-Scene Coordinator (Response and Remediation);
 - EPA RCRA Permit Writer for Hazardous Waste Incineration;
 - Commercial hazardous waste incineration corporate compliance officer (CAA PSD, RCRA TSD and Subpart O, TSCA);
 - EPA Office of General Counsel, Summer Honors Program, Air and Radiation Division;
 - Since 1995, Industry Environmental Defense Counsel in regulatory permitting, compliance and enforcement, disaster and release response, litigation and transactions.



Environmental Enforcement Agenda

- EPA Coronavirus Disease 2019 (COVID-19), <https://www.epa.gov/coronavirus>
- Susan Parker Bodine, EPA Enforcement Discretion Memo: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program (March 26, 2020), <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>
- Susan Parker Bodine, EPA Enforcement Discretion Memo Termination: COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program: Addendum on Termination (June 29, 2020), <https://www.epa.gov/sites/production/files/2020-06/documents/covid19addendumontermination.pdf>
- COVID-19 Implications for regulated entities
 - Compliance programs – EPA Enforcement Discretion Memo
 - Continuity of operations
 - Limited Scope of Statutory and Regulatory Exemptions
 - "Force Majeure"
 - Emergency Operations
 - Negligence and Recklessness: Lessons Learned from Hurricane Harvey

EPA Enforcement Discretion Memo

- Term: March 13, 2020 through August 31, 2020
- Scope: Civil violations
 - General Conditions
 - Routine Compliance Monitoring and Reporting
 - Settlement Agreement and Consent Decree Reporting Obligations and Milestones
 - Facility Operations
 - Public Water Systems
 - Critical Infrastructure
- State Oversight
- EPA Actions
- Accidental Releases
- Criminal Violations

Continuity of Operations

- Staffing Interruptions: Movement restrictions and quarantine impacting Personnel, Contractors, Essential Personnel; interruption of critical connections
- Supply chain interruption: Raw Materials, Equipment, Services, especially waste management
- Distribution interruption: Purchaser cancellation, Shippers unavailable
- Regulatory authorization interruption
- Revenue freeze, Payroll and other expenditures challenged
- Communications during remote operations: General information accessibility, reliability and recordkeeping at risk due to normal SOP interruption; Networking capabilities challenged; Cybersecurity vulnerable
- Transactions – deals slowed, representations in doubt
- Litigation – court schedules bumped

Limited Scope of Statutory and Regulatory Exemptions

- Clean Air Act – Limited defined exemptions for e.g., fuel burning stationary sources, hazardous air pollutant emissions, fuel additives, transportation conformity, federal emission sources, defense department vehicles for specific reasons including national emergency, issue of national security and if “in the paramount interest of the United States.”
- Clean Water Act – Act of God; during upset; other emergencies following approval of the Corps; exigent discharges of oil and hazardous substance responses.
- Resource Conservation and Recovery Act (RCRA) – Exemptions from federal waste management and UST where in “paramount interest” of the US; temporary emergency permits where “imminent and substantial endangerment”; exemption from RCRA TSD standards during emergencies.
- CERCLA (Superfund) – Act of God or War; Emergency Removal Actions; Exemptions from Remedial Standards to protect the public health; Exemptions for DOE and DOD due to national security issues.
- Safe Drinking Water Act – Exemption for public water systems from Maximum Contaminant Levels or treatment technique due to compelling factors as long as exemption will not result in an unreasonable risk to health.

Force Majeure (EPA example text)

- “Force Majeure” for purposes of this Settlement, is defined as any event arising from causes beyond the control of Respondents, of any entity controlled by Respondents, or of Respondents’ contractors that delays or prevents the performance of any obligation under this Settlement despite Respondents’ best efforts to fulfill the obligation. The requirement that Respondents exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. “Force majeure” does not include financial inability to complete the Work [,] [or] increased cost of performance [insert, if applicable: , or a failure to attain [performance standards] set forth in the Action Memorandum].

Emergency Operations

- Regulated Substances (flammable/toxic) above Threshold Quantities - OSHA PSM and CAA 112 RMP Emergency Response Planning, 40 CFR Part 68
 - Review Plans for Personnel, Equipment, Communications, and Off-Site Receptors – Any New Popup Hospitals?
- State and Local Emergency Planning Commissions and Committees – HazMat responders, communication trees - EPCRA Emergency Preparedness and Planning Requirements, 40 CFR Part 355
- Hazardous waste - RCRA Emergency Response Plans, 40 CFR Part 262, 264, 265
- Hazardous substance releases - CERCLA Emergency Response provisions, 40 CFR Part 300
- Oil spills - CWA 311 (hazardous substance and oil spill), 40 CFR 112 SPCC and FRP, SWPPP
- Potential Site Security issues - CFATS, 6 CFR 27

Lessons Learned from Hurricane Harvey

- Despite Hurricane Harvey operating scenario, Houston area chemical plant experiencing hurricane related fire was sued for:
 - Negligence, Gross Negligence, Negligence Per Se
 - Negligent Misrepresentation
 - Nuisance
 - Trespass
 - Conversion
 - Intentional Infliction of Emotional Distress
 - Assault
 - Fraud by Non-Disclosure
 - Common law Fraud
 - Strict Liability
- Criminal claim, “Reckless Emission of an Air Contaminant”