

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Deputy Counsel

625 Broadway, 14th Floor, Albany, New York 12233-1500

P: (518) 402-9185 | F: (518) 402-9018

www.dec.ny.gov

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MEMORANDUM

SUBJECT: COVID-19 NYS Department of Environmental Conservation Enforcement and Compliance

FROM: Thomas Berkman, Esq.

The New York State Department of Environmental Conservation's (the Department's) stated mission is to "[t]o conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being." The State's environmental laws and regulations provide critical safeguards to protect the safety and health of New Yorkers. Public utilities and private entities whose function is to abate air, water, sanitary, toxic constituents, and similar matters, have been deemed essential during the Covid-19 emergency.¹

By Federal proclamation (Proclamation 9994 of March 13, 2020), President Trump proclaimed that the COVID-19 outbreak in the United States constitutes a national emergency, beginning March 1, 2020. On March 7, 2020 Governor Cuomo issued Executive Order 202 declaring a State disaster emergency for the entire State of New York². Subsequent Executive Orders have been issued by Governor Cuomo as to the workforce of New York State. Acknowledging these orders and restrictions on the State of New York, the Department will continue our stated agency mission to oversee the regulated community during the COVID-19 emergency, while acknowledging the impact to the actions and operations of New York State businesses and the regulated community. Against the current emergency backdrop, the Department is continuing to ensure that our core agency objectives and missions are carried out and that we protect the public health and safety, and the environment of New York State. Where necessary and appropriate, the Department will provide guidance for specific entities as to compliance and continued operations based on specific factual circumstances and the impact of the COVID-19 emergency.

The EPA issued a memorandum entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program," dated March 26, 2020, which has

¹ See <https://esd.ny.gov/guidance-executive-order-2026>.

² Note: Governor Andrew M. Cuomo has issued Executive Order 202 declaring a disaster emergency in the State of New York. Additional Executive Orders have been issued, and may continue to be issued, that suspend or mandate certain laws, regulations and other requirements. This memorandum does not interpret, change, alter, modify or otherwise inform those Executive Orders.

generally suspended federal enforcement of federal environmental laws, with exceptions for criminal laws, Superfund, RCRA Corrective Action and imports (pesticides). To be clear, nothing issued by the EPA has any bearing on compliance with state law. State environmental laws and regulations, other than modifications to deadlines and public meeting requirements, remain in full force and effect. However, recognizing the potential impacts of the COVID-19 emergency on business operations, the Department will review and evaluate requests made as to claims of non-compliance caused by such matters as business interruptions and decreased staff, and make our best efforts to promptly respond to those inquiries on a case-by-case basis. In addition, to the extent that factual circumstances justify the temporary suspension of enforcement of specific regulatory requirements, the Department will notify the affected regulated community of any such decision. The Department's decision in each such case is within the Department's discretion.

All permittees at currently operating facilities must continue to make all efforts to comply with regulatory requirements and issued permits. When issues have been raised to the Department's attention regarding current or anticipated non-compliance, the requestor must document (i) problems encountered during the timeframe of the emergency declarations with a reasonably direct connection to the COVID-19 emergency, (ii) all efforts to address the problems and/or non-compliance to end or minimize the effects and duration, (iii) any additional actions undertaken to maintain regulatory compliance, and (iv) the projected length of the anticipated non-compliance.

The Department's review and any subsequent decision on exercising enforcement discretion will include all relevant circumstances, the extent of the non-compliance and actions taken to resolve any non-compliance, and any effects of the noncompliance on public health and the environment. The Department fully retains its right to exercise enforcement of any violations that occur during this emergency period that are not determined to be eligible for discretion.