

## Coalition of Attorneys General File Lawsuit Challenging EPA's COVID-19 Temporary Enforcement Policy

MAY 26, 2020

On May 13, 2020, a coalition of nine attorneys general, led by New York Attorney General Letitia James, filed a [lawsuit](#) challenging the U.S. Environmental Protection Agency's (EPA, Agency) policy for exercising civil enforcement discretion during the COVID-19 pandemic. As we [previously reported](#), on March 26, 2020, Assistant Administrator for Enforcement and Compliance Assurance at EPA, Susan Bodine, released a memorandum outlining the temporary enforcement policy, which applies to civil violations of numerous federal environmental laws, including the Clean Water Act and the Clean Air Act. The policy encourages regulated entities to make every effort to comply with their environmental compliance obligations, but provides that EPA will not seek to enforce penalties for noncompliance with routine monitoring and reporting obligations caused by COVID-19.

In their complaint, the attorneys general of California, Illinois, Maryland, Michigan, Minnesota, New York, Oregon, Vermont, and Virginia argue that EPA's temporary enforcement policy effectively waives the fundamental requirements of federal environmental laws – that regulated entities demonstrate compliance through regular monitoring and reporting. The coalition argues that EPA's temporary policy violates the Administrative Procedure Act (APA) in four ways, and asks the court to vacate the unlawful policy and permanently enjoin EPA from enforcing it. More specifically, the four claims for relief include:

- **The Policy Is *Ultra Vires* Agency Action:** First, the coalition argues that EPA exceeded its statutory authority by waiving requirements that parties comply with the monitoring and reporting requirements of federal environmental laws. While federal environmental laws give EPA authority in emergency situations to take expedited action, none of the emergency provisions apply here.
- **The Policy Is an Abdication of EPA's Statutory Responsibilities:** Second, the coalition argues that by issuing this temporary policy, EPA has abdicated its responsibility to implement and enforce environmental laws and regulations.
- **The Policy Was Promulgated Without Notice and Comment:** Third, the coalition argues that the policy constitutes an agency rule. Thus, EPA's failure to provide the public with notice or an opportunity to comment on the policy violated the APA.
- **The Policy Is Arbitrary and Capricious:** Finally, the coalition argues that the policy is arbitrary and capricious for several reasons, including because EPA failed to consider the impacts of relaxing monitoring and reporting

obligations, as well as Agency enforcement of such obligations, on public health.

The concern over the effect of increased industrial pollution on public health, given the risks posed by COVID-19, is woven throughout the coalition's complaint. Similar arguments also appear in the separate lawsuit filed by environmental groups in the same New York federal court on April 16, 2020 (*NRDC, et al. v. Bodine, et al.*).

Please contact Eleni Kouimelis (312-558-5133, [ekouimel@winston.com](mailto:ekouimel@winston.com)) or your Winston relationship attorney if you have any questions. We will continue to provide updates as the situation evolves.

View all of our COVID-19 perspectives [here](#). Contact a member of our COVID-19 Legal Task Force [here](#).

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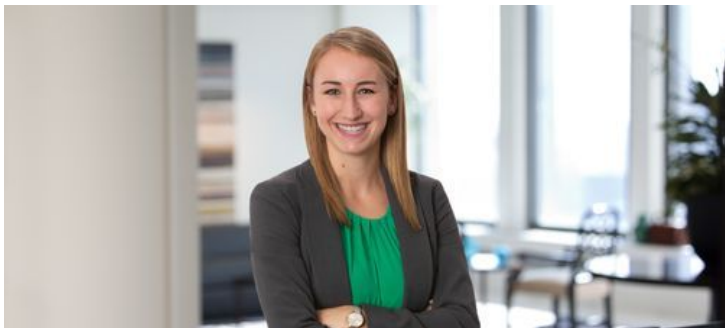
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