UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Natural Resources Defense Council, Environmental Justice Health Alliance, Public Citizen, Catskill Mountainkeeper, Center for Coalfield Justice, Clean Water Action, Coming Clean, Flint Rising, Indigenous Environmental Network, Just Transition Alliance, Los Jardines Institute, Southeast Environmental Task Force, Texas Environmental Justice Advocacy Services, Water You Fighting For, and West Harlem Environmental Action, Inc., Plaintiffs, v. Assistant Administrator Susan Parker Bodine, Administrator Andrew Wheeler, and the United States Environmental Protection Agency, Defendants.	Case No. 20-cv-3058 (CM) ECF Case

BRIEF OF *AMICI CURIAE*
CYNTHIA GILES AND STEVEN A. HERMAN

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The Environmental Integrity Project ("EIP") hereby submits this brief on behalf of *amici curiae* Steven A. Herman and Cynthia Giles ("*Amici*"), former Assistant Administrators of the U.S. Environmental Protection Agency ("EPA" or "Agency"), in support of Plaintiffs' Motion for Summary Judgment and for Expedited Consideration of its request that the Court compel the Agency to respond promptly to Plaintiffs' Petition for Emergency Rulemaking. On March 26, 2020, EPA's Office of Enforcement and Compliance Assurance published an enforcement policy ("March 26 Policy") that waives penalties for regulated sources that fail to monitor or report their pollution pursuant to requirements of the Clean Air Act, Clean Water Act, and other federal environmental laws, based on claims that the COVID-19 pandemic made it impractical to comply. The Petition, filed by Plaintiffs before the EPA Administrator on April 1, 2020, seeks an emergency rule requiring regulated sources to promptly disclose any monitoring or reporting violations allegedly caused by COVID-19 circumstances and indicate when they have returned to compliance, and for EPA to make such information publicly available via electronic docket.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici* state that no party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund the preparation or submission of this brief. No person—other than *Amici* or counsel—contributed money intended to fund the preparation or submission of this brief.

INTERESTS OF *AMICI CURIAE*

Amicus curiae Cynthia Giles served as the Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance ("OECA") from 2009 to 2017. She previously served as a career employee and manager in EPA Region 3, and also as a civil prosecutor for environmental violations as an Assistant United States Attorney. *Amicus curiae* Steven A. Herman held the same position from 1993 to 2001, after serving fifteen years as a litigator in the

Environment and Natural Resources Division of the Department of Justice. Both Steven A. Herman and Cynthia Giles upheld EPA's long-standing policy against providing assurances that EPA would not enforce the law, except in extremely unusual circumstances when clearly necessary to serve the public interest. Both *Amici* are intimately familiar with EPA's policy and practice concerning these rare occurrences. They recognize that the COVID-19 pandemic is a public health emergency with unusual severity and scope, and that it creates legitimate circumstances that can unavoidably delay or temporarily prevent compliance with environmental laws. But the March 26 Policy is a blanket invitation to stop monitoring and reporting pollution based on COVID-19 claims that will not be reviewed by EPA, if ever, until the opportunity to redress the harm is long past. Based on their combined sixteen years of experience leading environmental enforcement at EPA, *Amici* are convinced that the public disclosure that Plaintiffs seek in the Petition would encourage regulated sources to limit their requests for relief to justifiable circumstances, and reduce the likelihood that pollution that is no longer monitored or reported could endanger public health in communities already overwhelmed by the pandemic.

SUMMARY OF ARGUMENT

Plaintiffs' April 29 Motion establishes a strong legal foundation for the issuance of a Court order that EPA expedite review of the Petition for an emergency rulemaking. *Amici* will not repeat those arguments here, but instead draw upon their experience as former leaders of EPA's enforcement program to explain why the expedited review that Plaintiffs seek is so important. As explained further below:

- If regulated sources stop complying with federal requirements to monitor and report their pollution, neither EPA nor the public are likely to know what or how much is being

released, and whether the amounts exceed pollution limits or are dangerous to public health.

- While the March 26 Policy reserves EPA's right in future years to review and challenge claims that the pandemic made compliance impossible, the harm created by the March 26 Policy will have already occurred; enforcement actions in the future will not remedy the damage the March 26 Policy causes today.
- The assurances provided under the March 26 Policy are a radical departure from EPA's existing policy and past practices, and go well beyond what is necessary to respond to the challenges of the pandemic.
- Federal environmental law has long required that monitoring and compliance reports be publicly available, and much of that information is now accessible on EPA websites. It follows that regulated sources should at least publicly disclose when they are *suspending* compliance with those requirements at EPA's invitation.

ARGUMENT

I. Where Regulated Sources Stop Monitoring or Reporting, Determining their Compliance or Pollution Levels is Almost Impossible

Congress gave EPA clear authority to require regulated sources to demonstrate their compliance with our environmental laws by monitoring their own pollution and regularly reporting the results. For example, section 114(a) of the Clean Air Act authorizes EPA to require any emissions source "on a one-time, continuous, or periodic basis" to keep records, make reports, install, use and maintain specific monitoring equipment, sample emissions, and file compliance reports, all of which can be used to determine whether that source is violating emission limits or other Clean Air Act standards. *See* 42 U.S.C. § 7414(a)(1). Wastewater treatment plants and other "point sources" that discharge to U.S. waterways face similar

requirements under section 308 of the Clean Water Act. *See* 33 U.S.C. § 1318(a)(A). Facilities that generate or manage solid wastes must determine whether they are hazardous under federal regulations and, if so, notify EPA and comply with the standards under subtitle C of the Resource Conservation and Recovery Act. *See* 42 U.S.C. § 6921; 40 C.F.R. § 262.11. In most cases, state environmental agencies implement these federal rules with continued EPA oversight.

Consequently, almost all of the information we have about the volume or concentration of specific pollutants released to the air, land, or water is based on data gathered and submitted by regulated sources under federal environmental rules developed over the past forty years. As anticipated by statute, these rules prescribe the methods used to measure specific pollutants, either through continuous monitoring or by conducting tests or collecting samples at regular intervals. *See, e.g.,* 40 C.F.R. §§ 60.104a-60.107a (prescribing measurement methods for petroleum refineries). Where continuous monitoring of actual emissions is impractical, regulated sources are required to determine the operating conditions that will assure compliance with pollution limits, and to keep track of those parameters and report any failure to meet them. For example, combustion devices may be required to operate at or above a specific temperature to achieve maximum destruction of the organic toxins found in fuel or waste gases. *See* 40 C.F.R. §§ 63.722(e)(3)(vi)(B)(2), 63.773(d)(3).

Sources must report the results according to a format and frequency specified in the applicable regulations. For example, large industrial or municipal wastewater plants are typically required to file monitoring reports on a monthly or quarterly basis that disclose the concentration or amount of any pollutants that are discharged to rivers and streams. *See* 40 C.F.R. §§ 122.48, 123.25. On a quarterly or semi-annual basis, major air pollution sources are required to submit detailed compliance reports that flag specific violations of emission limits or other permit

requirements. *See* 40 C.F.R. §§ 71.6(a)(3), 70.6(c). Other types of data, e.g., specific test results, are reported more frequently. Generators notify EPA and state agencies through electronic manifests about the type and volume of hazardous wastes that they ship to treatment, storage, and disposal sites, to make sure this dangerous cargo reaches its destination safely. *See* 42 U.S.C. § 6939g.

These self-monitoring and disclosure requirements apply to tens of thousands of publicly and privately owned facilities spread across the United States in the air and water programs alone. For example, according to EPA's Environmental Compliance History Online ("ECHO"), 40,769 air facilities hold federal Clean Air Act operating permits that specify the applicable emission limits, pollution control standards, monitoring, and reporting; more than 56,000 "point sources" hold National Pollution Discharge Elimination System permits under the federal Clean Water Act, including 6,983 identified as "major" sources of water pollution; and the Resource Conservation and Recovery Act covers more than 45,000 generators of hazardous waste. *See* EPA, ECHO, https://echo.epa.gov/facilities/facility-search (accessed May 4, 2020). It would be impossible to assure compliance at all of these sources without the self-policing rules embedded in the statutes and regulations. Yet under EPA's March 26 Policy, any of tens of thousands of sources subject to these federally enforceable permits could unilaterally suspend monitoring and reporting based on claims that COVID-19 made compliance impractical. The same is true for the millions of other sources regulated under the full spectrum of federal environmental laws.

Where a petrochemical plant, power station, cement kiln, incinerator, or other industrial source stops monitoring or reporting its emissions or discharges of specific air pollutants, neither EPA nor the public will know what that facility has released to the air or water and in most cases, will be unable to assess the impact that such pollution may have on communities downwind or

downstream. EPA has downplayed these consequences by insisting that "[t]he Temporary Policy does not excuse exceedances of pollutant limitations in permits, regulations and statutes due to the COVID-19 pandemic." *See* Letter from Susan Parker Bodine, Assistant Administrator, EPA Office of Enforcement and Compliance Assurance, to the Hon. Dianne Feinstein, U.S. Senator (April 2, 2020). That is a distinction without a difference. "Pollutant limitations" are meaningless absent the monitoring and reporting that that EPA and state agencies need to know whether they have been exceeded. There is virtually no way for EPA to find violations once these sources stop reporting their pollution.

II. After-the-Fact Review of Pandemic Claims Will Not Be Effective

Companies taking advantage of the March 26 Policy do not need EPA's approval to stop monitoring or reporting their pollution, but are supposed to keep internal notes that explain how the pandemic made compliance impractical. While EPA reserves the right to eventually review and challenge these determinations, that is unlikely to happen in more than a few cases and will occur long after the fact and after the harm has already happened. Even then, EPA will have no way to know what the actual pollution levels were for those periods when monitoring was suspended.

III. Requiring Disclosure of Decisions to Suspend Monitoring Consistent with "Right-to-Know" Provisions of Environmental Law

With few exceptions, federal environmental laws give the public full access to the monitoring and compliance data reported to EPA and to the state agencies implementing federal environmental programs. Without such information, citizens could not exercise their rights, guaranteed under our environmental laws, to review and challenge permits or to take violators to court to stop illegal pollution. *See* 42 U.S.C. § 7414(c); 33 U.S.C. § 1381(b); 42 U.S.C. §§ 6921(b), 6927(b). These rights have become more important as EPA has lost nearly 18 percent of

its workforce to budget cuts over the last ten years. *See, e.g.,* EPA, EPA's Budget & Spending, https://www.epa.gov/planandbudget/budget (last visited May 5, 2020). The Petition asks that EPA require regulated sources to provide public notice when monitoring and reporting is suspended the March 26 Policy and when it has resumed. That approach would not interfere with legitimate claims for relief while providing the kind of transparency needed to discourage less scrupulous operators from taking advantage of the crisis. Our environmental laws already guarantee public access to the monitoring or compliance data reported to EPA; surely the public deserves to know when that reporting has stopped under a policy that EPA has approved.

IV. EPA's March 26 Policy is Far Outside Both EPA's Written Policy and its Practice Over the Last 35 Years

A. EPA has a written policy against promising that it will not enforce the law

Sometimes companies that intend to violate an EPA rule seek an assurance that EPA will not enforce the law against that company, despite its failure to comply. These companies are not seeking an interpretation of the law that would make their actions permissible or arguing that what they plan to do is legal. They are admitting that what they intend to do is a violation and nevertheless want EPA to commit in advance that it will not pursue an injunction or penalties for the violation. They want an assurance that the agency will take no action, a so-called "no action assurance," sometimes also referred to as a statement of enforcement discretion.

There are powerful public policy reasons against agreeing to these requests. The environmental laws and regulations are there to protect the public. They reduce exposure to pollution. They mandate that companies monitor their own behavior so that risky situations can be immediately noticed and corrected. They require public disclosure so that the public knows what companies in their own back yard are doing. And they level the playing field so that all

companies have to play by the same rules. Agreeing in advance that some companies can breach these standards without consequence runs counter to all these foundational principles.

For this reason, EPA has long had a "Policy Against 'No Action' Assurances," formally adopted in 1984. *See* EPA, Policy Against "No Action" Assurances (Nov. 16, 1984). Note the title. It isn't the policy about no action assurances. It is the policy *against* giving such assurances. The 1984 policy remains in effect today. EPA reiterated this policy in 1995 and again in 2014. *See* EPA, Processing Requests for Use of Enforcement Discretion (March 3, 1995); EPA, Policy Against "No Action" Assurances: Addendum (Sep. 11, 2014). EPA's policy against providing such assurances has been in force for over 35 years.

B. EPA's long-standing policy against no action assurances allows only very narrow exceptions in extremely unusual circumstances

These long-standing EPA policies allow for a narrowly circumscribed and limited exception to the prohibition on no action assurances in "extremely unusual cases" where a no action assurance is "clearly necessary to serve the public interest" *and* there is "no other mechanism" available to adequately address the situation. The most common situation that has given rise to such assurances in the past is in response to natural disasters.

EPA has developed a practice around such requests, which has guided EPA's decisions for decades. That practice has required EPA to:

- Justify why the no action assurance is in the *public* interest. The environmental regulations define what is necessary to protect public health. Is there an equally compelling *public* interest that argues for some flexibility? Harm to private interests are not sufficient.
- Substantiate why the *specific* relief is needed. The requestor must articulate a specific public threat and a specific response that is necessary to respond to that public threat. No wholesale relief from public health requirements is allowed.

- Impose enforceable conditions to mitigate any potential harm. After Hurricanes Katrina and Rita, for example, EPA agreed that hurricane-damaged structures posing a threat to public safety needed to be speedily demolished without first conducting required testing for asbestos. But in approving this flexibility, EPA imposed an enforceable obligation to handle the demolition in a manner that would prevent human exposure to a carcinogen.
- Impose a short and clearly defined end to the no action assurance. In most cases, this has been a date certain (e.g., April 30). It is always possible to extend the no action assurance if the facts justify such an extension, but it is essential that the agency be required to re-justify the need for a no action assurance before any extension, given the imperative to limit any violations of laws designed to protect the public health.

C. The March 26 Policy goes well outside the boundaries of both policy and practice that have long governed EPA's use of no action assurances

EPA's enforcement staff are experienced professionals. They have the expertise to develop practical solutions when natural disasters require additional flexibility to protect the public. That is not what happened with the March 26 Policy.

Instead of a carefully drafted policy to address demonstrated constraints in fully complying with environmental laws due to circumstances that genuinely are the result of COVID-19—like orders mandating social distancing or disruptions to the supply chain for necessary chemicals—EPA issued a blunderbuss no action assurance that relaxes compliance obligations for all environmental obligations at all companies nationwide. It does not meet any of the guideposts that have long constrained EPA's use of this exceptional tool. It does not explain how relaxing environmental monitoring and reporting serves the public interest. It does not provide evidence that companies nationwide are unable to meet their environmental obligations. It does not impose enforceable conditions to protect the public. And it has no end date.

EPA's response to the public outcry against its sweeping and overbroad relief from environmental obligations has been to assert that it will make enforcement decisions after the pandemic is over and that it might still take enforcement if it does not agree with a company's claim that its violations were "caused" by COVID-19. This argument completely misses the point. The harm caused by the enforcement policy is that it invites companies to stop monitoring and reporting *today*. Whether EPA can or ultimately does take some enforcement actions a year, or two or more in the future is of little moment to the people harmed in the intervening time. If EPA ultimately decides that some companies were not justified in discontinuing required monitoring, EPA cannot make the company go back in time and collect the monitoring data; that information about harm caused is permanently lost. Neither the government nor the people exposed will have a way to know what happened. The harm done by the March 26 Policy is happening right now, and EPA's choices about enforcement years in the future will not rectify that harm.

D. EPA knows how to write an enforcement policy that responds to COVID-19 and also protects the public. It decided not to do that here

As if to prove the point that it actually does know how to write a tailored and careful policy that responds to the emergency circumstances of COVID-19 while also protecting the public, on April 10, 2020, EPA issued a policy on site cleanup field work and the impacts of COVID-19. *See* EPA, Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19 (April 10, 2020). Unlike the March 26 Policy, the cleanup guidance takes a measured and thoughtful approach.

EPA's cleanup guidance essentially says that EPA field managers should consider the public health protections provided by compliance with EPA cleanup requirements and assess these against the public health risks of COVID-19 at specific sites. Where the public health

benefits of compliance with EPA requirements are critically important—for example at sites where there is an ongoing threat of exposure that would compromise public health, or continued action is necessary to prevent contamination from reaching a drinking water source—the clean-up work should continue. Where the risks created by COVID-19 are high, and the risks of delaying or postponing the complying action are low—for example where there is a public health declaration that prohibits or discourages travel necessary to conduct the work, or the work would require close interaction with high risk groups or those under quarantine, such as work inside homes—the work should be temporarily paused. The cleanup guidance states that all required work that can be performed off site at remote workstations should continue. In all cases, EPA is directed to continue to monitor site conditions and to conduct community involvement, so the public is aware of what is going on.

EPA's cleanup guidance is exactly the kind of balanced weighing of competing public health priorities that EPA's policies have long demanded. Yes, there can be times when emergencies require a more flexible response from EPA about compliance with environmental requirements. COVID-19 is an emergency that raises such questions. But that flexibility must recognize that complying with environmental standards is also essential for protecting public health. And it must uphold the foundational obligation of transparency, so the public knows about actions that can affect them, and companies are inspired to more responsible behavior. EPA's cleanup guidance proves that EPA knows how to do that. In the March 26 Policy, it just decided not to.

V. The Modest Change to EPA's Approach Sought in Plaintiffs' Petition Can Ameliorate Much of the Harm

Here's the reason for the public uproar about the March 26 Policy: its overall message, even if not explicitly stated this way, is a shift from the usual expectation that everyone will

comply with the monitoring and reporting obligations designed to protect the public, to an expectation that they will not. That shift in policy today—not whether EPA takes enforcement cases months or years from now—is what creates the real risk of immediate harm to the public. It throws open the doors to widespread violations, with the possibility that no one will ever know how bad they were.

The federal government's brake on pollution threats through monitoring and reporting comes not just from EPA's enforcement cases but from the regulated companies' knowledge that their violations will be visible and noticed. The government will know, and so will the public. That is an essential role that monitoring and reporting play in protecting the public.

Research has proven that public disclosure motivates better compliance by regulated companies. One often-referenced study demonstrated that drinking water providers who were required to notify their customers about violations in mailed reports reduced the most serious kind of drinking water violations by between 40 and 57 percent. *See* Lori Snyder Bennear & Sheila M. Olmstead, *The impacts of "right to know": Information disclosure and the violation of drinking water standards*, 56 J. Envtl. Econ. & Mgmt. 129 (2008). This is powerful evidence that companies that know their actions will be public find a way to do a better job complying with important public health laws. Monitoring and reporting use the power of public accountability to reduce pollution and risk.

The modest change sought in Plaintiffs' Petition solves two important problems at the same time. By requiring every company that believes it is protected from enforcement by EPA's March 26 Policy to say so publicly in real time, it allows EPA and states to know what choices companies are making and to intervene if those choices appear unwarranted. Equally important, it assures that companies know their choices will face public scrutiny. Under the March 26

Policy, companies know that their choices may never see the light of day, and that EPA will never have the capacity to investigate every instance of violation. This near-complete privacy for companies deciding whether to comply with environmental laws provides substantial room for the private interest in reducing costs to trump the public interest in compliance.

EPA has said publicly that it expects companies will be responsible in taking advantage of the opportunity to avoid complying that the March 26 Policy creates. To this we say: prove it. If companies are being responsible and only making minimum use of the rollback and only when clearly justified, require them to say so in real time. EPA's current approach allows these choices to happen completely behind closed doors, with the barely credible idea that someday they may be asked to explain themselves.

EPA's March 26 Policy takes EPA's foot off the brake that keeps pollution in check and fails to impose mandatory public disclosure that would allow government and the public to see how serious the consequences are. Requiring companies to raise their hand if they elect to violate existing rules, and to make their explanation for doing so public, will restore much of the accountability that EPA's March 26 Policy so dangerously lacks.

Respectfully submitted this 6th day of May, 2020.

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