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Environmental Compliance During the COVID-19 Pandemic

The COVID-19 pandemic unquestionably creates a list of complex challenges for businesses and local governments to navigate. Included in this list is the requirement for entities to continue to comply with environmental laws and permits, even amid an array of health and safety concerns and operational disruptions. Many businesses may find it difficult, if not impossible, to meet certain of their environmental obligations under the current circumstances. For instance, those businesses that rely on outside contractors to complete environmental testing, monitoring and reporting may be challenged by a contractor's inability to be onsite due to travel bans and shelter-in-place orders. Added to these challenges are supply chain disruptions that may impact the maintenance of pollution control equipment or the inability to meet compliance obligations due to a complete shutdown of non-essential operations. With these challenges in mind, what should a business or local government consider when attempting to maintain compliance with state and federal environmental laws during the COVID-19 pandemic?

Have Government Agencies Relaxed Compliance Requirements for Environmental Laws?

Federal Government

Currently, the United States Environmental Protection Agency (US EPA) has not relaxed the requirements to maintain compliance with environmental laws, such as the Clean Water Act, Clean Air Act, the Resource Conservation and Recovery Act, and others. However, in acknowledgment of the cascading impacts of COVID-19 on environmental compliance, US EPA issued a temporary enforcement discretion policy on March 26, 2020 entitled "[COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program.](#)" With enforcement discretion, while the non-compliance may still be deemed a violation or deviation of the environmental

requirements, the Agency may elect to take no enforcement or reduce or eliminate penalties associated with such non-compliance.

The seven-page policy applies retroactivity from March 13 and provides enforcement discretion for certain non-compliance that can be associated with the COVID-19 pandemic, such as the inability to complete routine compliance monitoring and reporting requirements, the inability to transfer hazardous waste off-site within the prescribed time periods, or the inability to transfer animals off-site resulting in a Concentrated Animal Feeding Operation designation.

The US EPA policy sets forth conditions that must be met for enforcement discretion to apply, including but not limited to, demonstrating that COVID-19 was the cause of the noncompliance, documenting the date and nature of the noncompliance, the actions taken to minimize the effects and duration, and the steps taken to best maintain compliance and come back into compliance.

Public water systems are addressed separately under the US EPA policy, noting that the systems have heightened responsibility to protect public health during this time. As such, public water systems are expected to maintain normal operations, maintenance and sampling. In anticipation of potential worker shortage and laboratory disruptions, the policy prioritizes monitoring, with the highest priority identified as that which protects against microbial pathogens.

Finally, the US EPA policy addresses exceedances of allowable pollution limits separately. The policy emphasizes that facilities should report to the appropriate regulatory agency if any operations impacted by COVID-19 may create an “acute risk or an imminent threat to human health or the environment.” Additionally, a facility that experiences a failure of pollution control technologies that may result in exceedances of enforceable limits to air or discharges to water, land, or other unauthorized releases is also encouraged to contact the appropriate regulatory agency. US EPA stops short of providing full enforcement discretion on these types of violations, but does note that the Agency will consider

circumstances such as the COVID-19 pandemic when determining an enforcement response.

State Governments

Many states are delegated portions of federal environmental programs, in addition to implementing their own state-only environmental regulations. State responses to environmental non-compliance related to COVID-19 have varied and are continuing to evolve. Some states, such as Louisiana, have issued orders expressly extending the deadlines for environmental reports required by certain regulations. Other states are relying on the issuance of enforcement discretion policies. For instance, the [Ohio Environmental Protection Agency](#) (Ohio EPA) developed a specific email address in which the regulated community can submit requests for the Director of Ohio EPA to consider in order to provide regulatory flexibility, where possible, to assist entities in alternative approaches to maintaining compliance. Such alternative approaches may include extending reporting deadlines, waiving late fees and exercising enforcement discretion in connection with environmental compliance obligations impacted by COVID-19.

Both state and federal guidance addressing potential COVID-19 related environmental non-compliance may continue to evolve in the coming days and weeks ahead as new and unexpected impacts are identified. Regardless, the policies implemented to date highlight that in any situation of potential non-compliance it is critically important to carefully document the challenges that are being faced and the efforts taken to attempt to achieve compliance in the face of the COVID-19 challenges.

Are There Options Other Than Enforcement Discretion That Can Provide Relief from Existing Environmental Obligations?

Many federal environmental statutes incorporate emergency powers to provide for waivers or defenses to certain regulatory requirements in times of emergency situations. However, these provisions are often narrowly tailored and require certain

requirements to be met. While in no way an exhaustive list, a few examples include:

- The Clean Water Act incorporates an affirmative defense for “upset” conditions. This provision excuses non-compliance with technology-based permit effluent limitations due to factors outside the permittee’s control if specific requirements are met.
- The Clean Air Act incorporates waivers for certain testing requirements under the National Emission Standards for Hazardous Air Pollutants (NESHAP) for *force majeure* events. The NESHAP defines *force majeure* to encompass circumstances beyond the control of an affected facility that prevents them from complying with the applicable requirements despite their best efforts. The current COVID-19 restrictions may meet those criteria, on a case-specific basis.
- The Clean Air Act provides for fuel waivers for the use of prohibited fuel or fuel additive in the event of a natural disaster or Acts of God and where the waiver is in the public’s best interest.
- Certain requirements of the National Environmental Policy Act can be waived under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in the event of major disasters.

In addition, many businesses conduct operations pursuant to orders and consent decrees entered into with federal and state regulatory agencies. These documents typically include *force majeure* provisions that may provide a form of relief from performance obligations as specified in the orders and decrees.

[The US EPA policy](#) addresses the use of *force majeure* provision as a result of COVID-19, encouraging parties to utilize the notice procedures set forth in the federal settlement agreements and consent decrees as appropriate. It is important to note, however, that *force majeure* provisions often vary and require careful review and compliance with express notification requirements.

What Should Businesses or Local Governments Do if Concerned About Environmental Non-

Compliance as a Result of COVID-19 Impacts?

There is no “cookie-cutter” answer to addressing concerns about COVID-19 related non-compliance due to the complexity of the environmental laws and evolving state and federal guidance. However, often the best course of action is to be proactive.

Identifying those environmental regulatory obligations that may become a compliance problem due to employment or business shutdowns, supply chain interruptions and other issues is the first step to identifying the best solutions to addressing each concern. Regulated operations should be looking ahead and identifying both those environmental requirements that are an immediate compliance challenge, as well as those that may be a challenge in the coming weeks and possibly months ahead. From there, it will entail a case-by-case analysis, considering the environmental rules involved, the applicable agency’s current guidance and careful consideration of the pros and cons of each option identified. While many regulatory agencies have expressed a willingness to attempt to respond to questions from the regulated community, in most instances, it will be impossible to provide black and white answers under the unique circumstances that we are currently facing.

As noted above, in any situations of potential non-compliance, it is critically important for the regulated operation to carefully document the challenges they are facing and the efforts they are taking to attempt to achieve compliance in the face of the COVID-19 challenges. While there will not be a blanket “COVID-19 Defense” to non-compliance, those regulated operations that can show they used their best efforts to plan for and attempt to comply with applicable requirements, notwithstanding the challenges we are all facing from the COVID-19 virus, will be in a much better position to respond to any agency inquiries that may result from non-compliance.

Frost Brown Todd’s [Environmental Practice Group](#) continues to lend support to businesses and local governments as they navigate environmental compliance issues during this difficult time. Our team is closely monitoring the changing guidance and recommendations from both federal and state environmental agencies in order to

better assist our clients in formulating the best plan for addressing these issues.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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