

Environmental Compliance during COVID-19 (Hint: EPA did not Suspend Environmental Laws)

Compliance with environmental regulations is challenging under the best of circumstances, but the COVID-19 crisis and measures taken in response add a new layer of complexity. The lack of a consistent message from elected officials and health officers, on the one hand, and from federal and state environmental regulators, on the other, creates a quandary for the business community. Employees are ordered to stay at home and practice social distancing, but taking samples, inspecting hazardous waste storage areas and operating waste water treatment plants and pollution control equipment are not “work from home” activities!

Despite news articles reporting that the federal Environmental Protection Agency (EPA) has “suspended enforcement of environmental laws” or “given businesses a license to pollute,” the reality is much different. EPA issued temporary civil enforcement guidance in response to COVID-19 which states that businesses are expected to make “every effort” to comply with environmental laws, regulations, and permits but if compliance is “not reasonably practicable” due to COVID-19 restrictions, EPA will take that into consideration when assessing civil enforcement.¹ Businesses that are unable to fully comply in a timely fashion are required to act responsibly to minimize the effects of any noncompliance, identify and document the noncompliance and how it is related to COVID-19, and return to compliance as soon as possible. Even if not in full compliance, facilities are required to operate in a manner that is safe and protects human health and the environment. As EPA clarified in a letter to Senator Feinstein on April 2, 2020, they continue to enforce the nation’s environmental laws during COVID-19.

Although far from a blanket “free pass,” this guidance does open some avenues for defending against future enforcement action but still leaves many questions unanswered. Most shelter-in-place orders do not include environmental protection as an “essential activity,” and the federal guidance on “essential workers” seems to limit essential “Environmental remediation/monitoring technicians” to those who support the electricity industry.² If your groundwater monitoring plan calls for quarterly sampling but your consultant is abiding by a shelter-at-home order, what constitutes “every effort” to comply with the sampling requirement and when is it not “reasonably practicable” to do so? If a crew could access the property and do the sampling but only in violation of state and county orders restricting activity, is

¹ <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>

² <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

compliance “not reasonably practicable?” If your industrial storm water permit requires you to sample Qualified Storm Events, is the person who normally collects those samples an “essential worker?”

Compounding the difficulty, particularly in California, is the fact that state agencies, not EPA, have regulatory authority over most environmental programs, including implementing many Federal regulations. The State Water Resources Control Board and the nine Regional Boards have issued guidance stating that they consider compliance with Water Board regulations, permits and orders to be “essential activities” and exempt from the various shelter-in-place orders.³ If regulated entities cannot comply in a timely fashion due to COVID-19 restrictions, they are to email a designated contact at their respective Water Board (a list is provided in the notice). The guidance says that the Water Boards will do their best to respond within 24 to 48 hours but is not clear whether that response is to approve or deny the planned noncompliance or simply to acknowledge receipt of the notification. And, since violations of the Clean Water Act can be enforced by private citizens, a local environmental group could take enforcement action even if the local Water Board exercises its discretion not to do so.

Likewise, the Bay Area Air Quality Management District (BAAQMD) has issued guidance that compliance with all BAAQMD rules and permits will continue to be required during COVID-19 restrictions on activity,⁴ and the South Coast Air Quality Management District has declared that “compliance and enforcement” are “critical functions” that will continue despite COVID-19.⁵ Neither has indicated it will show any flexibility in its enforcement actions despite the crisis. On the other hand, the Department of Toxic Substances Control (DTSC) has been silent on its approach to enforcement in the crisis, leaving businesses in the dark on how to proceed.

In Oregon, all applicable Department of Environmental Quality (DEQ) requirements remain in effect, including statutes, rules and permits. However, DEQ will exercise reasonable enforcement discretion in evaluating whether to pursue violations caused by COVID-19-related disruptions. DEQ requests that regulated entities document COVID-19 impacts and related disruptions to their operations. At the same time, DEQ requests that all regulated entities do all that is possible to maintain safe and environmentally protective operations at their facilities, including full operation of pollution control equipment, continuation or implementation of best management practices, proper operation of facilities, and monitoring, testing and reporting in compliance with specific limits as well as general

³ https://www.waterboards.ca.gov/resources/covid-19_updates/index.html

⁴ <https://www.baaqmd.gov/news-and-events/page-resources/2020-news/air-district-operations>

⁵ <https://www.aqmd.gov/>

requirements in permits, licenses or certifications. In other words, business as usual. EPA's temporary enforcement guidance is noted in DEQ's online response to COVID-19.⁶

How is a business supposed to sort out what to do when caught between conflicting governmental requirements? Unfortunately, there is no simple answer that can be applied universally. Regulated entities need to consider their compliance activities individually and assess what needs to be done case-by-case. Compliance actions that could have a significant impact on human health and the environment should be prioritized over those for which failure to comply will have less serious consequences. Permits or regulations may allow some compliance activities to be deferred if the facility or a particular system is not in operation. Guidance from the relevant regulatory agency should be reviewed and, if no clear direction is indicated, business should consider contacting the agency for clarification.

Throughout this crisis, businesses should maintain documentation of their decisions: the inability to perform the compliance activity in a timely fashion; how that was tied to COVID-19 restrictions; notification to, and consultation with, an agency; and any other relevant information, so they are prepared in the event of agency enforcement. Noncompliance reporting requirements should be followed to the best of the business' ability. Requirements that are deferred, such as conducting semi-annual groundwater sampling in July rather than May, should be tracked and completed when reasonably possible. If work is to be performed during the COVID-19 restrictions, workers need to take appropriate precautions to do the work safely and prevent the spread of the virus.

Most importantly, businesses should not rely on the COVID-19 orders or the news articles about EPA suspending environmental laws to cease compliance with environmental requirements across the board. If we can be of assistance and to discuss various options and specific situations, please feel free to contact any of the Buchalter Environmental Attorneys below.

⁶ <https://www.oregon.gov/deq/Pages/covid-19.aspx>



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