

Meeting Environmental Compliance and Cleanup Requirements During the Pandemic

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In addition to causing infection and illness, the COVID-19 pandemic is creating challenges for organizations contending with employee quarantines and isolation, supply chain and logistics disruptions, and other operational changes.

While environmental compliance may not be top-of-mind right now for most Americans, it still is a critical consideration for organizations with environmental compliance or cleanup obligations.

Many environmental laws and settlement agreements provide relief valves in certain emergency or *force majeure* situations. But given that the regulators themselves may be quarantined or teleworking in the coming weeks and months, organizations can take certain steps now to ensure they are able to maintain environmental compliance during the COVID-19 pandemic or to obtain relief based on *force majeure*, impossibility or impracticability of performance, compliance-with-all-laws clauses, enforcement discretion, or emergency relief provisions.

These steps include:

- *Review existing facility emergency or risk management plans.* While most such plans identify the individuals with primary responsibility for implementation, it may be appropriate to designate alternates or deputies to carry out those duties in case the designated person becomes ill or quarantined. This evaluation could include preparations for the potential loss or interruption of services or contractors (e.g., waste management, emergency response). This would also be a proper time to verify that protocols are in place for the safe, orderly, and compliant shutdown of facilities should that become necessary (e.g., management of materials in processes, inventories, and pollution control equipment). You may consider distributing critical plan information to a broader group of employees than ordinarily required, including making the plan and key information available electronically. Organizations can also consider cross-training employees on executing the key components of the emergency or risk management plans.
- *Review and calendar compliance or cleanup deadlines.* If they have not already done so,

organizations may want to review and calendar the next six months of regulatory and cleanup obligations. This review can include evaluating how illness, social distancing measures (like quarantines, travel bans, and work-from-home requirements) or other events (e.g., power outages, or unavailable contractors or important supplies) might affect the organization's ability to comply — and what can be done, in advance, to meet those challenges.

- *Review and analyze the terms of emergency relief provisions in relevant statutes, regulations, and legal instruments.* After determining the compliance, cleanup, or other requirements most likely to be affected, organizations may want to review the relevant statutes, regulations, and legal instruments (e.g., a cleanup agreement) to identify opportunities for relief in the event of an inability to perform, in whole or in part. Cleanup agreements, for example, often provide for relief in the event of such conditions, but organizations should analyze those provisions to ensure that any deviations from compliance expectations are covered under the relief provisions – and how to trigger those provisions.

The extent to which an organization can avail itself of a relief provision or doctrine depends on the facts and circumstances, including the terms of any contractual provision. For example, some *force majeure* provisions specifically reference epidemics or other health emergencies, but many do not. Organizations can work with legal counsel to determine, in advance, the nature and extent of opportunities for relief so that they know which deadlines and obligations may be excused and when and how to best communicate with counterparties, including regulators, in these situations.

Even if compliance relief is not formally available, federal, state, and local enforcement authorities sometimes exercise enforcement discretion in emergencies. While regulators are sometimes reluctant to exercise such discretion, requesting it can be a valuable risk management strategy when facing potential non-compliance, particularly when the justification for such discretion is well documented.

- *Develop and execute an effective communications strategy.* Communications with employees, contractors, vendors, customers, and other business partners will enhance an organization's ability to manage the challenges that will arise, many of which are difficult to anticipate. Environmental compliance frequently depends not only on the organization's own employees, but also consultants, contractors, and other third parties. Good communications can increase the likelihood of better results.

A communications strategy may specifically include other stakeholders, such as neighbors, community organizations, first responders, and regulators. It may also make sense to work with trade associations and other organizations in the same or similar sectors. Early communication may ease reasonable resolutions to compliance challenges.

Further, organizations should be aware of federal, state, and local enforcement policies (like audit policies and privileges) that eliminate or allow for significantly reduced or civil penalties for violations that are promptly disclosed and corrected.

- *Document all compliance efforts notwithstanding the emergency circumstance.* Many opportunities for relief, including *force majeure* provisions, require reasonable efforts to comply *despite* the exigent circumstance. Accordingly, organizations may consider developing and implementing a plan for documenting and communicating not only the precise nature of the circumstance, but also the reasonable efforts they used to comply.

- *Pay close attention to declarations and statements from the White House or regulators.* On March 13, 2020, the President declared a national emergency to mobilize assets to confront the COVID-19 pandemic. Many federal environmental statutes have exemption provisions that allow the President to excuse performance if considered to be in the “paramount interest” of the nation.

While the national emergency declaration is insufficient to trigger a paramount interest exemption, it may form the basis of a later paramount interest exemption. Absent a formal “paramount interest” exemption, however, the nature of the COVID-19 pandemic may lead regulators to issue broadly applicable “enforcement discretion letters.” Regulatory agencies sometimes issue these letters when compliance may be difficult or impossible because of market or other conditions.

Even though organizations cannot yet depend on an agency’s enforcement discretion to excuse performance during the pandemic, it is still prudent to marshal documentation sufficient to seek enforcement discretion later. There may also be opportunities to seek enforcement discretion on a case-by-case basis.

- *Prepare emergency relief request documentation early.* The COVID-19 pandemic is evolving rapidly. A compliance deadline that seems easily achievable today may look different just a few weeks or months hence. Accordingly, organizations may want to begin preparing the documents that must be sent to regulators, co-parties, and others to exercise relief provisions. Preparing those materials now, while many workers remain healthy and on-the-job, may help organizations avoid confusion and other challenges should conditions deteriorate.
- *Compliance is, of course, the baseline expectation.* We have outlined steps organizations can take to lay the groundwork for triggering various relief provisions during this unprecedented public health challenge. Compliance, however, obviates the need to seek accommodations from counterparties, regulators, or courts.

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