The Coronavirus Pandemic and Environmental Compliance

By **Kenneth J. Warren** | *The Legal Intelligencer*

In the throes of the coronavirus pandemic, family health is understandably often of paramount importance. Economic security is frequently a close second priority. In contrast, environmental concerns may take a back seat. To the extent the environment is considered at all, the unintended consequences of our economic slowdown appear to benefit the environment. As stay-at-home requirements shutter factories and diminish motor vehicle traffic, the air is cleaner than it has been in decades. Similarly, greenhouse gas emissions responsible for climate disruption have markedly diminished even in the absence of a national policy promoting that objective.

In this extraordinary situation, businesses classified as life sustaining or essential to the health and safety of the public operate under difficult conditions. They may work with reduced staff cautioned to observe social distancing, and face difficulties maintaining supply chains and obtaining services of contractors. They may face challenges resulting from the need to alter product mix or dramatically increase production or the number of patients treated.

In some respects, the legal landscape is also altered. On March 13, the president declared a national emergency under the National Emergencies Act, and issued an emergency determination under the Stafford Act. As a result, the Federal Emergency Management Agency is providing federal disaster assistance. And the president's invocation of the Defense Production Act authorized the federal government to compel private companies such as 3M to prioritize government orders.

Faced with these conditions, a facility operator undertaking life-sustaining activities may conclude that complying with environmental obligations during the pandemic is unnecessary. This would be a mistake. Environmental laws, consent orders and contractual obligations continue to apply. Absent statutory exemptions or force majeure or other contractual provisions providing relief, many businesses remain legally obligated to adhere to the same environmental requirements as apply in normal times.

To be sure, regulators are well aware of the challenges of operating during a pandemic; government staff are themselves mostly working from home. As a result, environmental agencies may exercise enforcement discretion to forego penalties if certain conditions are satisfied. But how to exercise enforcement discretion is often decided months or years down the road, at a time when maintaining environmental compliance during the pandemic may not seem as challenging as it appears at present. For that reason, a prudent strategy for companies faced with challenges they conclude are likely to preclude environmental compliance is to approach federal and state agencies to seek relief.

Unfortunately, citing its limited resources, the U.S. Environmental Protection Agency has partially closed the door on reviewing requests from companies for separate enforcement discretion actions, force majeure decisions or other individualized determinations. The EPA's March 26 guidance, COVID-19 Implications for the EPA's Enforcement and Compliance Assurance Program, establishes the following policy commencing on March 13: "EPA does not expect to impose penalties for violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training and reporting or certification obligations in situations where the EPA agrees that COVID-19 was the cause of the noncompliance and the entity provides supporting documentation to the EPA upon request."

When looking behind this seemingly straightforward articulation, numerous situations exist in which the policy's application is uncertain. For example, if an employee or contractor who ordinarily conducts monitoring, sampling or reporting functions becomes unavailable due to the pandemic, what efforts must a company pursue to locate a substitute? Should the identification of the substitute already be part of the company's environmental response plans, at least since March 13 when the pandemic was declared a national emergency?

The guidance states that it applies when compliance is "not reasonably practicable," seemingly a standard encompassing a broad range of impediments to compliance. Yet if that threshold condition is met, a company must also identify its "best efforts to comply." This appears to require a company to do more than take reasonably practicable steps. How much more—the guidance does not say.

After issuing its guidance, the EPA received sharp rebukes from Sens. Dianne Feinstein, Elizabeth Warren and others who accused the EPA of rolling back emission standards. See, e.g., the March 31 letter of Feinstein to EPA Administrator Andrew Wheeler. In a pointed response, the EPA emphasized that its staff resources are limited and that making case-by-case determinations with respect to routine monitoring, recordkeeping and reporting requirements during the nationwide pandemic would divert resources from ensuring that critical services such as access to clean water continued. The EPA also expressed its intent to reserve its staff time during the pandemic to address more serious environmental violations involving acute risks, imminent threats and exceedances of enforceable limitations on emissions, discharges and releases, rather than addressing specific requests from companies. The EPA emphasized that once the pandemic concludes, the EPA would on a case-by-case basis determine whether the pandemic caused noncompliance with each company's routine environmental obligations.

When government insists on making penalty determinations months and potential years after events occur, prudent facility operators must beware. Here, the uncertainty is compounded by the upcoming national election—a Democratic administration may be less willing to moderate enforcement penalties for non-compliance which occurred during the pandemic. The potential for state enforcement also makes reliance on the EPA guidance problematic.

As a result, a company unable to comply with its environmental obligations remains at risk of penalties. As such, it should carefully document how the pandemic foreclosed compliance and the efforts made to avoid the violation If compliance cannot be achieved, the company may consider approaching state environmental agencies for an enforcement discretion determination. Although a decision by a state environmental agency may not bind the EPA, the state's decision may carry great weight, particularly in federal programs delegated to the state for administration.

A company should also give consideration to invoking existing federal and state audit policies such as the EPA's Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, and the Pennsylvania Department of Environmental Protection's Policy to Encourage Voluntary Compliance by Means of Environmental Compliance Audits and Implementation of Compliance Management Systems. These policies provide for reduction or elimination of penalties that are promptly disclosed and addressed. Particularly when a state has not expressly adopted a policy analogous to the EPA pandemic guidance, the audit policy may provide a mechanism to achieve the same result.

Companies should also review and where appropriate update their emergency management plans to consider the potential effects of a pandemic on the company's operations. Various federal and state laws require these plans to be prepared and updated. The Risk Management Plan under Section 112(r) of the Clean Air Act includes identification of the steps the facility is taking to prevent a chemical accident and the emergency response procedure the facility will follow if an accident occurs. The Spill Prevention Control and Countermeasures plan requirements involve steps to prevent oil spills.

In Pennsylvania, state environmental emergency response plan requirements include preparedness, prevention and contingency plans to implement waste and water quality requirements, a spill prevention response plan under the storage tank program and other facility planning requirements. Addressing compliance challenges unexpected before the pandemic may now be important components of these plans.

When a force majeure provision in a consent decree or contract, or a statutory exemption applies, companies should track and comply with their notice provisions and other terms. In some circumstances it may even be feasible to request courts to modify consent decrees to account for obstacles to performance created by the pandemic, such as contractor or laboratory unavailability.

Companies should be proactive and vigilant in complying with their environmental obligations during the pandemic. Where they are unable to do so, they should document the reasons for noncompliance, the efforts made to comply, and the bases for seeking any relief to which they are legally entitled, or which may be available as a matter of discretion. Staying safe and meeting environmental obligations may not always be entirely feasible, but companies who address challenges proactively are most likely to achieve successful outcomes.

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