

Alert

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Environmental Compliance During the COVID-19 Pandemic

EDITOR'S NOTE: Earlier versions of this alert did not include EPA's April 10, 2020, guidance and its effect on field work performed at cleanup sites. This version has been updated to reflect EPA's most recent guidance and the current status of EPA's List N.

As the COVID-19 pandemic wreaks havoc on our daily lives, owners and operators of facilities subject to environmental reporting and other compliance obligations may face dramatically reduced staffing levels, critical supply disruptions, or other operational changes in the coming weeks that cause or contribute to environmental violations. In this alert we flag various considerations for environmental compliance in the face of these extraordinary times.

As events unfold, states have taken the lead in shutting down businesses, issuing shelter-in-place orders, and determining what can and cannot continue to operate. For example, Executive Order N-33-20 in California directs all residents to stay at home except as “needed to maintain continuity of operations of the federal critical infrastructure sectors.”¹ The list of critical sectors, available [here](#), expressly includes hazardous material responders and hazardous devices teams as part of the essential workforce. The list separately captures a “Hazardous Materials” section and includes workers who support hazardous materials response and cleanup and workers who maintain digital systems infrastructure supporting hazardous materials management operations. Similarly, businesses that transport hazardous materials are expressly listed.

Executive Order 202.8 in New York directs businesses and not-for-profit entities to reduce their in-person workforce by 100 percent.² The order exempts “[a]ny essential business or entity providing essential services or functions.”³ The Empire State Development Corporation has further defined an essential business to now expressly include building cleaning/maintenance, construction firms and professionals needed for emergency repair and safety, and emergency management and response. The online list can be found [here](#).

In Pennsylvania, all “non-life-sustaining businesses” must close their physical locations, excluding certain food and beverage services and those with exemptions.⁴ The list of those included as life-sustaining that may remain open include “waste treatment and disposal” and “remediation and other waste management services.” The full list is available [here](#).

Unlike other states, Executive Order 107 in New Jersey provides a list of businesses that must close, as opposed to a list of businesses that may remain open.⁵ On this list, “brick-and-mortar premises of all non-essential **retail** businesses must close to the public” as well as “[a]ll recreational and entertainment business.”⁶ For the remainder of businesses/not-for-profits, the order encourages telework but does not mandate in-person reduction.⁷

Force Majeure in Environmental Permits, Authorizations & Regulations

Given the extraordinary nature of the COVID-19 pandemic, the impacts of which largely are beyond



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Related Practice Areas

- Environmental Regulatory & Due Diligence

the reasonable control of companies and individuals, the inability to comply with some environmental standards may be excusable in the eyes of regulators and the courts. The notion of force majeure (i.e., an event that will be or has been caused by circumstances beyond the control of the affected facility and/or its contractors that prevents compliance with the regulatory requirement despite best efforts, including acts of nature, acts of war or terrorism, or equipment failure or safety hazard beyond the control of the affected facility) widely exists within the permits, orders, consent decrees and regulations issued by the U.S. Environmental Protection Agency (EPA), and the various states under the major environmental regulatory programs, including the Clean Air Act (CAA), Clean Water Act (CWA), and Resource Conservation and Recovery Act (RCRA).

For example, a facility operating under an air permit or otherwise subject to a New Source Performance Standard (NSPS) or National Emissions Standard for Hazardous Air Pollutants (NESHAP) may petition for force majeure relief for COVID-19 disruptions that cause or contribute to violations. While the CAA has no statutory force majeure defense, EPA's NSPS and NESHAP regulations adopt a limited defense.⁸ Various State Implementation Plans (SIPs) also may contain exemptions from emission limits during startup, shutdown, and malfunction events (SSM). If you are operating under an EPA or state agency cleanup order or settlement agreement, you should review it for force majeure provisions and any applicable notice required in the event work cannot proceed as planned. For example, EPA's most recent model Administrative Order on Consent under RCRA Section 3008(h) contains a force majeure provision.⁹ While financial inability is expressly excluded in this provision, COVID-19 closures that cause workforce and/or contractor disruptions, or critical supply shortages, may qualify as force majeure. In recent guidance, EPA has signaled that it "intends to be flexible regarding the timing of the notices" for purposes of its force majeure provisions and that determinations will continue to be made on a case-by-case basis in a prompt manner.¹⁰

Consistent with the notion of force majeure in the context of environmental compliance, on March 26, 2020, the EPA issued guidance, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program*, stating that it will exempt certain civil violations of environmental laws documented to have been caused by the COVID-19 pandemic retroactive to March 13, 2020. The policy does not apply to RCRA corrective action and Superfund activities, criminal violations, or accidental releases of oil, hazardous substances, chemicals, or waste. EPA provides several examples of excusable violations, including routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification. Also, settlement and consent decree reporting obligations and milestones disrupted by COVID-19 will be excused. Air, water, and land disposal violations caused by COVID-19 related exceedances will be excused provided they are reported as quickly as possible. EPA urges public water systems under the Safe Drinking Water Act to prioritize their resources on highest priority compliance with microbial pathogens, nitrate/nitrite, and Lead and Copper Rule monitoring. To qualify for relief under EPA's temporary policy, an entity must demonstrate it made every effort to comply, acted responsibly to minimize the effects and duration, identified the specific nature and dates, documented how COVID-19 caused the violation, and returned to compliance as soon as possible. Economic hardship alone will not suffice as EPA clearly has rigorous expectations about action and documentation to qualify for the relief.

Similarly, on March 31, 2020, the Pennsylvania DEP announced a new *COVID-19-Emergency Request to Temporarily Suspend Regulatory Requirements and/or Permit Conditions* policy allowing entities unable to comply with environmental regulatory requirements due to the COVID-19 pandemic to request temporary waivers of environmental regulations and/or permit conditions. To request a temporary waiver, entities must fill-out a form and submit it to DEP by email demonstrating why strict compliance is not possible due to the COVID-19 pandemic.

A facility seeking to invoke a COVID-19 force majeure defense generally, or specifically under the applicable EPA or DEP policies, would do well to document efforts to prepare for and manage staffing, supply chain, and operational disruptions, prevent the violations, minimize the harm caused, and to make necessary notifications to regulators so that it is well-poised to obtain force majeure relief. As always, continue to look to language contained in permits, orders, and regulations should

your facility require an unanticipated shutdown or other disruption caused or contributed by COVID-19.

Spill Reporting and Compliance

Consistent with EPA's recent COVID-19 enforcement guidance, there is no indication that authorities will suspend spill cleanup and release reporting due to COVID-19. Emergency response vendors remain open, but such activities may prove challenging for businesses that have been ordered to reduce staffing. Facilities should prioritize safety/emergency response staff on site during workforce curtailments and slowdowns. While states have taken a variety of approaches to handling the COVID-19 crisis, proper waste management remains an essential or life-sustaining activity. As a result, proper spill procedures and waste management should remain business as usual for your facility.

Remediation and Cleanup Activities

On April 10, 2020, the EPA issued *Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19*. After many responsible parties reportedly petitioned the EPA for force majeure relief the EPA signaled in its March 26, 2020, *COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program* guidance that further instruction would be forthcoming. The most recent guidance specifically applies to field work at EPA-led remediation sites under various federal statutes, but encourages the regions to share the information with their respective states.

The guidance instructs the regions to continually re-evaluate the public health and safety when considering whether to temporarily pause field work by considering various factors "including but not limited to the safety and availability of work crews, EPA, state or tribal staff; the critical nature of the work; logistical challenges (e.g., transportation, lodging, availability of meals, etc.); and other factors particular to a site." If work continues, the health and safety plan must take into account CDC guidelines. EPA gives examples of situations where it would be appropriate to stop work, including: (1) where state, tribal, or local officials have requested that work be suspended; (2) sites with workers that have tested positive or exhibited symptoms of COVID-19; (3) sites that involve close interaction with high-risk groups or those under quarantine, such as work inside homes; (4) sites where field personnel cannot work due to travel restrictions or medical quarantine; or (5) sites where social distancing is not possible. EPA has also provided a long list of examples of work critical to protection of human health or the environment, inclusive of Emergency Response actions and Time Critical Removal Actions, sites with ongoing threat of imminent acute or direct exposure in drinking water or related to onsite exposures of contaminants, vapor intrusion investigations, drinking water work generally, residential work, and work needed to stabilize a site or prevent a catastrophic event (among other examples). In comparison, EPA signals that certain work is appropriate for delay or suspension, such as sampling and monitoring activities. EPA provides an extensive list, worthy of review prior to seeking an extension, if you intend to or anticipate that you may need to coordinate with EPA to stop or slow cleanup activities.

Remediation and cleanup projects should still be prioritized as the EPA and state agencies continue to perform oversight, albeit while working remotely and at reduced levels. We are aware that remedial design and remedial action work at Superfund sites across the nation may have been adversely impacted by the pandemic as many remedial contractors may be unable to access critical equipment necessary to complete tasks, resulting in a substantial slowdown of Superfund remedial actions at sites across the country. EPA's recent guidance is a signal that it intends to work with its contractors and responsible parties to address these concerns while maintaining public health and safety.

At the state level, the New York State Department of Environmental Conservation has closed regional offices but staff are working remotely and appointments are available on request. The New York City Department of Environmental Protection has suspended few services: namely, (1) grease and industrial inspections; (2) interior air/noise inspections; and (3) maintenance/planting of stormwater rain gardens.¹¹ There is no indication the New Jersey or Pennsylvania Departments of Environmental Protection plan to delay permit reviews or extend deadlines under their respective

remediation programs. While the Pennsylvania agency's offices are closed, most of its professionals are working remotely and it is responding to environmental emergencies and prioritizing certain field inspections.¹² The agency is suspending the time frames for providing permit decisions unless the project is critical to health and safety but does not appear to be considering offering or granting deadline extensions to others at this time. There appear to be no changes to the operations of the California Environmental Protection Agency and the California State Water Resources Control Board has advised that it considers compliance with board-established orders and other requirements to be essential. If compliance is inconsistent with the state's mandate, the agency should be notified.¹³ Thus, although we expect agency workers will be teleworking where possible, for now, it is business as usual (as modified) for many agencies.

While remediation activities in the field are generally considered critical activities under the various state directives, responsible parties, may want to prioritize high priority field work (e.g., remediation systems that control exposures) over merely discretionary field work (e.g. quarterly groundwater sampling that can be performed later and still within the reporting quarter) especially in high-risk areas, in alignment with EPA's recent guidance. Also, field teams operating in areas subject to shelter-in-place orders may wish to prepare and carry with them a letter documenting the essential nature of their public health protection activities should they be asked to explain their purpose for being in the field.

Disinfectants, Deep Cleaning and Waste

With evidence emerging that the COVID-19 virus can persist on hard surfaces for several days, it is good practice to disinfect hard surfaces to reduce potential worker exposure. Among the encouraging news is assurance by the EPA that COVID-19 "is a type of virus that is particularly susceptible to disinfection and standard treatment and disinfectant processes are expected to be effective." On March 5, the EPA released a list of disinfectant products qualified for use against SARS-CoV-2 — the novel coronavirus that causes COVID-19 — and registered with the EPA under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). These products are known as List N products as they kill a variety of viruses on surfaces including harder-to-kill varieties known as Emerging Viral Pathogens. Fortunately, EPA was prepared for this crisis, having issued Emerging Viral Pathogens Guidance in 2016 and can quickly evaluate claims that existing registered products will work against COVID-19.¹⁴

The EPA continues to rapidly expand List N bringing the total to 370 registered disinfectant products as of April 15, 2020. The updated list is organized by EPA Registration Number (on the label of all such products). Products registered to be effective against the virus can be found [here](#). The list does not include hand sanitizer, which is regulated by the Food and Drug Administration.

The EPA is also addressing the risk of infectious COVID-19 in drinking water supplies and the effectiveness of wastewater treatment processes. To date, the EPA has assured the safety of drinking water and the effectiveness of standard wastewater treatment, although it is monitoring this concern. The Centers for Disease Control and Prevention (CDC) has not proposed any enhanced recommendations for employees involved in wastewater management operations or for citizens.

Cozen O'Connor's environmental law and public strategies teams are here to help you during these challenging times. You may stay up to date on all COVID-19 legal news at the [Cozen O'Connor Coronavirus Task Force page](#).

¹ Cal. Executive Order N-33-20 (March 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.

² N.Y. Executive Order 202.8 (March 20, 2020), <https://www.governor.ny.gov/news/no-2028-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

³ *Id.*

⁴ Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses that are Not Life Sustaining (March 19, 2020),

<https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/>.

⁵ N.J. Executive Order 107 (March 21, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf>.

⁶ *Id.* §§ 6, 9 (emphasis added).

⁷ *Id.* § 11.

⁸ See EPA, *Final Rule, Revisions to Standards of Performance for New Stationary Sources, National Emission Standards for Hazardous Air Pollutants, and National Emission Standards for Hazardous Air Pollutants for Source Categories*, 72 Fed. Reg. 27437 (May 16, 2007) (allowing source owners or operators to petition for extensions of deadlines for conducting initial or subsequent performance tests in the event of force majeure).

⁹ EPA Enforcement, RCRA 3008(h) Interim Status Correction Action AOC, https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=772.

¹⁰ EPA, *Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19* (April 10, 2020), https://www.epa.gov/sites/production/files/2020-04/documents/interim_guidance_on_site_field_work_decisions_due_to_impacts_of_covid.pdf.

¹¹ City Agency Service Updates, NYC.gov (March 23, 2020 3:00 pm), <https://www1.nyc.gov/nyc-resources/city-agency-service-updates.page>.

¹² Pennsylvania Department of Environmental Protection, DEP Covid-19 Update, <https://www.dep.pa.gov/Pages/AlertDetails.aspx>.

¹³ : California State Water Resources Control Board, *Water Boards COVID-19 Updates*

¹⁴ EPA, *Coronavirus and Drinking Water and Wastewater*, <https://www.epa.gov/coronavirus/coronavirus-and-drinking-water-and-wastewater>.