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Client Alert Commentary

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# Environmental Compliance and COVID-19 – 5 Questions for Companies to Consider

***Companies should stay abreast of fast-moving changes to federal, state, and local regulatory stay-at-home orders and compliance guidance.***

While the most important consequences of the COVID-19 pandemic are undoubtedly the public health impacts, the pandemic is also having unprecedented effects on global business operations and supply chains. This *Client Alert* examines how these effects may prevent, hinder, or alter a company's ability to comply with local, state, and federal environmental laws, regulations, agreements, consent decrees, permits, and other requirements with reference to five questions for in-house counsel and environmental managers to consider when evaluating the unprecedented circumstances posed by the COVID-19 pandemic.

## 1. Are environmental compliance obligations impacted by state or local "stay-at-home" orders?

Currently, most states and localities have issued stay-at-home orders, requiring members of the public to remain at their places of residence except as necessary to maintain continuity of essential "services," "activities," or "entities." Some states initially relied upon the critical infrastructure list issued by the US Department of Homeland Security, Cybersecurity and Infrastructure Agency on March 19, 2020, to designate essential activities, but as the public health crisis has unfolded, certain states, such as California, New York, and Illinois, have adopted their own definitions of essential activities. Some individual counties and cities also are issuing their own orders, meaning regulated entities may be subject to multiple — and potentiality conflicting — definitions of what constitutes essential activities.

Moreover, state and local stay-at-home orders often lack clarity as applied to environmental compliance activities. Some orders, for example California Executive Order N-33-20 and the associated list of Essential Critical Infrastructure Workers**,** identify permissible activities that seemingly cover certain environmental compliance actions. On the other hand, many orders are less clear, and not all businesses necessary to sustain environmental compliance obligations fit neatly within an identified essential category. Companies should undertake fact-specific analyses of their environmental compliance obligations in light of the various stay-at-home orders. For companies with operations around the country,

the Council of State Governments has assembled a helpful set of links to the various executive orders and guidance.

## 2. Have federal, state, or local agencies provided guidance regarding environmental compliance obligations?

Maintaining environmental compliance while protecting employees, contractors, and other parties in the face of the extreme disruptions in business operations will prove challenging for companies in the coming weeks and months. In recognition of this new reality, various agencies have issued COVID-19-specific enforcement policies and other guidance.

On March 26, 2020, the United States Environmental Protection Agency (EPA) issued an enforcement discretion policy entitled "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" (the EPA Policy) that applies retroactively to March 13. According to the EPA Policy, EPA does not plan to enforce compliance violations if regulated entities take the steps set forth therein, which vary depending on the compliance issue. Notably, the EPA Policy is limited in several important ways. First, the policy does not apply to activities that are carried out under the federal "Superfund" program or the Resource Conservation and Recovery Act. Second, the policy does not apply to imports, including, in particular, pesticidal and public health products. Third, the policy directs regulated entitles to "make every effort to comply with their environmental compliance obligations."

Importantly, on April 2, 2020, EPA sent letters to members of Congress to "clarify the misconceptions and misreporting" regarding the EPA Policy. The letter notes that "EPA reserves the right to disagree with any assertion that noncompliance was caused by the pandemic" and that EPA will refrain from seeking penalties "for noncompliance *only* in circumstances that involve routine monitoring and reporting requirements." To take advantage of the EPA Policy, a company will need to keep a record of its compliance efforts and demonstrate that any non-compliance arose out of matters beyond its control attributable to the COVID-19 pandemic. Finally, the policy, as a federal one, does not supersede any local or state obligations.

At the regional level, many state and local agencies across the country continue to issue compliance guidance on a near-daily basis, meaning that compliance obligations may differ across jurisdictions. Given the patchwork of guidance, companies should consider evaluating their COVID-19 environmental compliance strategy across jurisdictions, as measures taken to comply in one jurisdiction might undermine a company's claim for compliance relief in other jurisdictions.

## 3. Can companies meet their consent decree, consent order, and other administrative obligations?

Federal and state regulators use a number of mechanisms to require companies to undertake cleanup activities or reimburse the government for cleanup costs. Common mechanisms include judicial consent decrees, administrative orders on consent, settlement agreements, and unilateral orders. A party may not feasibly be able to meet the obligations imposed under these enforcement mechanisms in the current COVID-19 landscape. Inability to timely perform mandatory compliance obligations can put companies at risk of stipulated penalties and other potential sanctions.

Companies should review any force majeure provisions in consent decrees, settlement agreements, or orders, which may excuse performance obligations rendered impracticable or impossible by COVID-19-related events. Typically, a force majeure event suspends the obligation to perform until the event

terminates, but it will often require the claiming party to use best or reasonable efforts to overcome the force majeure and provide notice to the agency of the inability to perform.

In light of COVID-19 challenges, some governmental agencies have sought to exercise enforcement discretion, when appropriate. For instance, according to the recently issued EPA Policy, EPA "will generally not seek stipulated or other penalties for noncompliance" with "routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and associated reporting or certification obligations." Further, with respect to consent decrees entered into with the EPA and the US Department of Justice (DOJ), EPA will coordinate with the DOJ to exercise enforcement discretion with regard to stipulated penalties for certain routine compliance obligations. However, the EPA Policy emphasizes that "courts retain jurisdiction over consent decrees and may exercise their own authority."

On April 10, 2020, EPA issued a document titled "Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19" governing "[r]esponse field activities" under "a range of EPA authorities" including the Superfund program, RCRA corrective actions, TSCA PCB cleanup provisions, the Oil Pollution Act, and the Underground Storage Tank Program. The Interim Guidance directs parties that believe COVID-19 restrictions could delay performance obligations to "consult the applicable enforcement instrument, including provisions allowing for adjustments to schedules to be made at the discretion of EPA's project manager and/or force majeure provisions …" when seeking relief and notes that EPA will make determinations on a case-by-case basis "in accordance with the terms of the applicable enforcement instrument."

Of course, states may take different positions, and in all cases, companies should review the specific terms of any consent decree, administrative order, unilateral order, or other binding enforcement mechanism, to understand available defenses and remedies for any noncompliance.

## 4. Can companies meet permit requirements and impending regulatory deadlines?

Government-issued permits cover innumerable regulatory compliance activities, may include various standards and obligations, and often impose compliance deadlines and require self-reporting of anticipated noncompliance. If compliance with permits and regulatory deadlines is not possible, the company should consider what affirmative steps it should take to inform and obtain relief from the regulatory agency with jurisdiction. For example, the Southern California Air Quality Management District Hearing Board has been granting variance petitions for air permit conditions in response to the COVID-19 outbreak. Relief may come in the form of seeking enforcement discretion pursuant to an established COVID-19 guidance policy (*see* Question 2) or may require more traditional avenues, such as variance requests or orders for abatement.

At this time, many regulatory agencies have not suspended work and may continue with rulemaking activities. Additionally, many public workshops and hearings are now being held electronically. Companies should continue to carefully follow and respond to rule development and permit issues despite the stay-at-home orders and global impact of the COVID-19 pandemic.

## 5. Are companies thinking about statutes of limitations?

Federal and state environmental laws often include rights of action by which governments and private parties may seek to hold others responsible for certain environmental violations and costs. In light of the COVID-19 pandemic, companies should consider whether any potential claims — offensive or defensive — may be approaching the expiration of a statute of limitations period. If so, companies should consider

whether the applicable law might allow equitable tolling of the limitations period based on COVID-19 alone, or whether additional steps, such as entering a tolling agreement or commencing litigation, are necessary to protect the company's rights. Additionally, if litigation is to be commenced, companies should consider any logistical challenges relating to filing the lawsuit, as many courts have reduced the staff that typically handle filings.

## Companies should stay informed and proactive with environmental compliance responsibilities in the rapidly evolving COVID-19 landscape.

As federal, state, and local governmental authorities continue to better understand and adapt to the evolving COVID-19 circumstances, they will continue to issue new or modified stay-at-home orders and further guidance regarding environmental compliance. Companies should track closely their existing affirmative compliance requirements, maximize consistency with their compliance efforts across jurisdictions (to the extent possible), and keep up-to-date on changes to federal, state, and local regulatory stay-at-home orders and compliance guidance. Failure to take all necessary steps to either maintain compliance or seek approval for any anticipated noncompliance could place a company at significant legal and reputational risk.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Kegan A. Brown**
kegan.brown@lw.com
+1.212.906.1224
New York

**Julia A. Hatcher**
julia.hatcher@lw.com
+1.202.637.2200
Washington, D.C.

**John C. Heintz**
john.heintz@lw.com
+1.213.891.7395
Los Angeles

**Aron Potash**
aron.potash@lw.com
+1.213.891.8758
Los Angeles

**Cody M. Kermanian**
cody.kermanian@lw.com
+1.213.891.8832
Los Angeles

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