

Environment & Energy Report

INSIGHT: Delaying Environmental Compliance Because of the Coronavirus Emergency

By Brian D. Israel and Michael B. Gerrard

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The new coronavirus may cause environmental compliance challenges for many companies, like supply chain disruptions and the inability for employees to get to work. Arnold & Porter attorneys say most environmental statutes include exemptions that may apply to the pandemic.

The global coronavirus pandemic will cause unprecedented response actions and significant disruptions throughout our economy. In times of true emergency, environmental obligations are flexible enough to excuse, where appropriate, certain delays in environmental compliance.

Companies may have legitimate difficulty complying with environmental obligations as a result of the global coronavirus pandemic. Due to supply chain disruptions, the inability for employees to get to work, and other problems, a wide variety of environmental compliance challenges may ensue.

For example, if engineers and operators are unable to work on-site, some facilities may find it difficult to maintain certain pollution control equipment, stormwater and leachate management systems, and the like. Similarly, facilities may be unable to meet deadlines for installation of pollution control equipment or other compliance obligations.

Some facilities may face challenges meeting monitoring and reporting requirements. These risks are not theoretical. Already in Europe, manufacturers are announcing sweeping shutdowns of factories either because of government mandates or serious supply chain disruptions.

Exemptions

Most environmental statutes include exemptions that may apply to the coronavirus emergency. Many of these exemptions have been used after disasters like hurricanes and earthquakes. For example:

- Under the Clean Air Act (CAA), facilities may obtain waivers from national emission standards for hazardous air pollutants from stationary sources when in the interests of national security.
- The Clean Water Act has exemptions including for acts of God; emergencies that require expedited procedures permit applications; and exigent discharges of oil and hazardous substances.
- Under the Resource Conservation and Recovery Act, the Environmental Protection Agency may issue temporary emergency permits to allow treatment, storage, or disposal of hazardous wastes where there is imminent and substantial endangerment to human health or the environment.
- Under the Federal Insecticide, Fungicide, and Rodenticide Act, the EPA may modify certain requirements in emergency conditions. For instance, on March 13, the EPA announced that it had used expedited procedures to expand the list of previously-approved disinfectant products for use specifically in combating the coronavirus.
- The Safe Drinking Water Act allows states to exempt public water supply systems from maximum contaminant levels due to “compelling factors,” including “[u]rgent threats to public health.”

Furthermore, companies often have specific environmental obligations—including pollution control measures, reporting, mitigation, and other requirements—incorporated as part of a consent decree or other agreement with federal or state agencies. In most such agreements, a company may be excused of its obligation (for a period of time) if the delay is caused by a force majeure event.

For purposes of most consent decrees with the EPA, a force majeure event is “any event arising from causes beyond the control” of the relevant party. Most force majeure provisions have very strict deadlines by which parties must notify the EPA of the event that might cause a delay—often within 72 hours, sometimes even less. The EPA also frequently requires rapid follow-up in writing with a specific plan for achieving compliance as quickly as possible notwithstanding the force majeure event.

Waivers, Discretion

Finally, if the coronavirus emergency requires the rapid construction of new facilities such as hospitals (as happened in China), many environmental statutes may be waived or relaxed. For example, President Donald Trump’s declaration of a national emergency on March 13 invoked the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition to giving many powers to the Federal Emergency Management Agency, the Stafford Act provides an exemption from the National Environmental Policy Act for immediate response actions.

Additionally, after the Sept. 11 terrorist attacks, the EPA used its enforcement discretion and issued “no action assurances” to allow certain actions that would otherwise violate the CAA. This included, for example, rules regarding vapor recovery at gasoline pumps and certification rules for tank truck carriers.

Several states—including New York, California, Washington, and Massachusetts—have laws comparable to NEPA that govern actions requiring state or local approvals. As with NEPA, these states generally provide exemptions for emergencies. One example is New York’s State Environmental Quality Review Act.

Its regulations exempt “emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment.”

Similarly, after major disasters, states issue many waivers. For example, after Hurricane Katrina in 2005, the Louisiana Department of Environmental Quality granted relief from the rules applicable to wastewater discharges and hazardous waste management. Likewise, Texas suspended many environmental regulations after Hurricane Harvey in 2017.

In conclusion, most federal and state environmental laws, and most consent decrees, have exemptions that allow certain environmental obligations to be waived or delayed during true emergencies. Of course, the application of these exemptions will vary depending upon the specific legal requirements at issue as well as the continuing unfolding of the coronavirus emergency.

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