ENVIRONMENTAL COMPLIANCE CONSIDERATIONS FOR BUSINESSES IN THE WAKE OF COVID-19

Hodgson Russ Environmental Alert
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During these unprecedented times, businesses may be struggling to assess their ability to comply with certain environmental operational compliance requirements, given limited staffing and/or ongoing production levels resulting from the COVID-19 pandemic and the responsive government restrictions. If these concerns arise, businesses need to be mindful of their obligations – whether arising from permits, registrations, facility plans, consent orders, and/or general regulatory requirements – and what their responsibilities may be in light of the on-the-ground circumstances, including potentially applicable regulatory waivers or exemptions that may apply, and the need to seek appropriate relief.

States across the United States are dealing with various shutdown and in-person restrictions. In New York State specifically, implementing Governor Cuomo's evolving Executive Orders defining the scope of essential in-person business has fallen on the Empire State Development, which has identified various categories of relevant operational activities, including "[e]ssential services necessary to maintain the safety, sanitation and essential operations of . . . other businesses," which would likely be interpreted to include core environmental operations. Certain other general categorical operations also can be interpreted to cover aspects of general environmental, health and safety (EHS) functions.

To alleviate some of the confusion, the New York State Department of Environmental Conservation (NYSDEC) has expressly indicated that, as identified in the Guidance on Executive Order 202.6, essential businesses or entities that are not required to reduce in-person workforce include: collection, transportation, processing and disposal activities for any solid wastes, regulated medical wastes, hazardous wastes, radioactive wastes and other associated waste categories. Thus, the guidance appears to reaffirm the State's general position that the ability to meet compliance obligations has largely been preserved, and attendant obligations (and the ability to safely meet them) must be carefully considered. For that reason, businesses need to be prepared to consider what relief may exist, whether in the form of exceptions, waivers, or administrative extensions, that can be sought and/or utilized where compliance with COVID-19 restrictions interferes with compliance mandates.

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Included below is a brief guide to auditing the general scope of relevant business compliance obligations, and potential paths forward, where compliance is threatened.

A. Permits, Registrations, and Regulatory Authorizations

Businesses should first take a close look at all relevant governing documents in assessing whether any actual non-compliance exists. If operations have ceased, or been severely disrupted, the compliance question may just concern the need to document the issue and/or provide appropriate notice consistent with a general condition or requirement, and not directly require additional action. However, the broader implications may not be apparent on its face by simply reviewing one individual clause. For that reason, this evaluation should take into consideration all express obligations, as well as a review of the embedded regulatory cross-references and applicable regulatory definitions. In doing so, there may be additional issues identified that require further consideration. In addition, there are regulatory exemptions that can also apply in circumstances of an "emergency," which may similarly be identified as being potentially applicable. And in the case of cessation of business operation in its entirety, a determination of whether any specific action is needed to be taken in the short term, or in the scope of a permanent shutdown, whether decommissioning obligations have been triggered.

Certain core requirements, such as monitoring and reporting, do not necessarily include an embedded right to simply not comply with those obligations. In fact, there may be certain notice obligations that must be abided by if such a situation arises, with various potentially applicable timeframes depending on the issue, and depending on whether it is to be documented in formal submittals or through monitoring reports, such as a deviation. However, regardless of whether a general exception right exists, there may be a basis to take the position that a non-compliance violation would be subject to certain affirmative defenses that limits the ability for a regulatory agency to seek civil penalty requests if enforcement was to be considered. For example, in the case of New York State-issued air permits, 6 NYCRR § 201-1.5 provides that an emergency, as defined in Part 201-2, is an affirmative defense to penalties sought in an enforcement action for non-compliance with emissions limitations or permit conditions for all facilities in New York State. Bear in mind that when using an affirmative defense the burden is on the facility to document the "emergency" circumstances through relevant evidence. Depending on the nature of the non-compliance, it may be difficult to do so, but given the overarching risk, it's important to be mindful of these considerations upfront so that appropriate action can be taken.

B. Existing facility plans

In addition to, and in conjunction with, permits and other authorizations, many businesses are subject to regulatorily-mandated plans, such as Stormwater Pollution Prevention Plans ("SWPPP"), Spill Prevention, Containment, and Countermeasure ("SPCC") plans, Operation and Maintenance ("O&M") plans, or other similar plans put in place and enforceable by law. As with permits, the best course of action is to evaluate these plans and ensure that the obligations contained within are met to the best of your business's ability, and necessary updates are made to reflect on-the-ground business activities. If actual deviations exist, the circumstances should be clearly documented, and all necessary notifications to regulators should be completed. If there are emergency procedures and requirements specifically set forth in those plans, they should be evaluated and followed, as appropriate. Often, these plans are not necessarily thought of in the broader emergency type circumstances, even though they often require specific action in that regard. Be mindful of this fact.

C. Consent Orders

There may also be concerns for certain businesses regarding obligations set forth in existing Consent Orders, Consent Decrees, or other settlement agreements executed with State or Federal agencies, which may include additional reporting, remediation, or other responsibilities that have been impacted by the COVID-19 pandemic. With reduced resource access and workforce capabilities, it may be challenging and/or even impossible to meet some of these requirements – especially those with strict time deadlines. In most administrative settlement agreements, there is either a "force majeure" clause, or a related regulatory reference to force majeure-styled provisions. A "force majeure" event is generally a defined term of art, which would more specifically refer to events (such as an act of god, war, workforce strike, to name a few) that are outside the reasonable control of a party, and prevent that party from performing its obligations under an agreement.

Circumstances created by COVID-19, and related State and Federal executive orders and directives, may constitute a force majeure event. Obviously, no court has rendered an opinion yet on whether the pandemic so qualifies, and the determination may differ across various regulatory and consent order provisions, but you can be sure that will come. Regardless, liability relief under these provisions is generally not self-effectuating, and requires notice be provided within a certain period of time to the appropriate parties, and may require a demonstration and/or discussion of activities undertaken to avoid the force majeure event effecting the ability of the party to comply. Therefore, it is critical that businesses be cognizant that the specific terms of the agreement will govern. And given the uncertainty of the times, businesses may want to consider the timing aspect associated with invoking these provisions, depending on the underlying circumstances at play, and consider the specific limitations that are likely to apply.

D. NYSDEC General Emergency Waivers of Procedures

Where there is an "emergency," as defined in 6 NYCRR § 621.2(j) ("a natural, accidental, or intentional human-caused event or circumstance which presents an immediate threat to life, health, property, general welfare or natural resources"), 6 NYCRR § 621.12 allows NYSDEC to waive procedural requirements for projects carried out in response to such an emergency, with limited exceptions. If your business identifies a situation that requires it to take any type of emergency action or project, NYSDEC must be notified with specifically enumerated information (ideally before action, but in all cases within 24 hours of commencing any such action), and then NYSDEC will deny or approve the requestwithin two business days of receipt of the required information. An emergency authorization may be issued for a term not to exceed 30 calendar days, and may be renewed for one term not to exceed 30 calendar days. On or before 60 calendar days after NYSDEC's original approval, the project must be concluded, or a complete application for any necessary permit must be filed. If the application for a permit is timely and complete the permittee may continue working pursuant to the emergency authorization until the permit is issued.

E. New York State-Specific COVID-19 Emergency Declaration and Findings from NYSDEC

If your business is involved in certain activities directly related to responding to the COVID-19 pandemic, it is important to know that certain State environmental permitting obligations have been affirmatively addressed by the NYSDEC. Specifically, Commissioner Seggos issued a March 23, 2020 Emergency Declaration and Finding Pursuant to ECL § § 70-0111(d) and 70-0116 in the matter of COVID-19, which pertains to the construction of buildings and infrastructure or related activities in response to the pandemic. The Commissioner authorized NYSDEC Regional Permit Administrators to

issue general permits or emergency authorizations where the activities are necessary to immediately facilitate construction and operation of medical facilities, infrastructure, and related facilities. They can also issue emergency authorizations to allow for changes in operations of existing facilities to control and combat the pandemic. Any permits issued under this Declaration expire on September 23, 2020, unless extended by the Commissioner.

These and any other emergency response activities also have special rules under the State Environmental Quality Review Act ("SEQRA"). Specifically, 6 NYCRR. § 617.5(c)(42) determines that emergency actions that are immediately necessary, on a limited and temporary basis, for the protection or preservation of life, health, property or natural resources, are Type II actions under SEQRA and do not require further environmental review.

Hodgson Russ is ready to help you assess the various obligations, and potential myriad of risks, that your business faces in regard to all environmental matters. Please reach out to us with any questions or concerns, in these or any other matters, as we continue to navigate this evolving new landscape together.

Our attorneys are working remotely, and ready, willing, and able to address the needs of our clients, so do not hesitate to contact us (attorney directory). **Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.**

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