

Environmental Compliance in the Time of Coronavirus Environmental Bulletin



The Novel Coronavirus (COVID-19) pandemic has dramatically complicated companies' efforts to fully comply with the myriad of environmental regulations that affect their operations. Maintaining full environmental compliance can be challenging at the best of times; in the face of the COVID-19 pandemic, that goal may require extraordinary efforts – or may be impossible to achieve.

Environmental leaders understand the need to act in the face of the practical uncertainty. In this bulletin, we review the responses of Canadian environmental regulators to COVID-19 and provide some guidelines to assist companies in managing legal uncertainty, to prioritize their efforts, to enhance compliance and to reduce the legal risk of potential non-compliance related to the COVID-19 pandemic.

How are Environmental Regulators Responding'

Federal and provincial environmental regulators have responded to the COVID-19 pandemic in different ways. Some have suspended or deferred certain regulatory obligations, while others have announced general advice about how they will respond to non-compliance related to COVID-19. In this section, we provide a brief survey of these varied approaches.

We expect that as the pandemic continues, regulators are going to be faced with the need to adapt to the practicality of compliance and adopt more tailored (and hopefully helpful), guidance on compliance.

Federal Government

Environment and Climate Change Canada has advised industry groups that, while all environmental laws remain in effect and compliance will not be waived, the ministry will exercise enforcement discretion to take into account, on a case by case basis, any challenges that regulated parties may face as a result of the current pandemic. Moreover, companies must document the causes – and minimize the effects and duration of any environmental non-compliance resulting from the

COVID-19 pandemic, as well as seek to return to full compliance at the earliest possible date. Environment and Climate Change Canada has also emphasized that regulated parties are not relieved from their obligations to notify regulators about any unauthorized releases of pollutants, particularly where those incidents may cause a risk to human health or the environment.

British Columbia

BC environmental regulators have provided limited and vague public guidance on how corporate environmental managers should respond to challenges related to COVID-19, beyond stating that all environmental obligations in issued authorizations remain in effect and that companies are expected to take all reasonable measures to comply. Companies are encouraged to review the environmental obligations applicable to their operations and develop plans and contingencies to ensure operations are maintained in accordance with such requirements. If companies expect they will not be able to maintain full compliance with their environmental obligations, they are to provide notice of the anticipated non-compliance to Ministry of Environment staff via EnvironmentalCompliance@gov.bc.ca.

Alberta

Alberta has taken a more definitive approach and is the first to directly implement extensions and waive compliance obligations. At the end of March, the Alberta government issued three ministerial orders that provide reporting relief for holders of certain authorizations, registrations, licences and public land dispositions issued by the Alberta Energy Regulator (AER) and Alberta Ministry of Environment and Parks (AEP). All three Ministerial Orders will remain in force until the earliest of (i) August 14, 2020; (ii) 60 days after OC 080/2020 (declaring public health emergency in AB) is terminated, if it is terminated before June 15, 2020; or (iii) termination of the Ministerial Orders by the Minister or Lieutenant Governor in Council under the *Public Health Act*.

- MO 15/2020 extends deadlines to submit compliance reports and emissions reduction plan reports for 2019 as required by the *Technology Innovation and Emissions Reduction Regulation* from March 31 to June 30, 2020.
- MO 16/2000 extends deadlines for renewable fuel providers to submit reports as required by the *Renewable Fuels Standard Regulation* from March 31 to June 30, 2020.
- MO 17/2020 modifies the operation of the *Environmental Protection and Enhancement Act*, the *Water Act* and the *Public Lands Act* to suspend all requirements to report information pursuant to provisions in approvals, registrations and licences (except for drinking water facilities) under the acts and to submit returns or reports related to dispositions issued pursuant to the *Public Lands Act*. Approval holders are not exempt from complying with other reporting requirements and must be prepared to make the information required to make the report available to the AER or AEP upon request. In other words, approval holders must continue to collect the relevant data, even if the reporting deadlines have been suspended.

Ontario

The Ontario Ministry of the Environment, Conservation and Parks has yet to provide formal guidance to the regulated community regarding compliance obligations in the midst of COVID-19. There is a Compliance Policy that the

Ministry generally relies on, which provides that the response to any incident must be proportionate to the risk presented by the incident, the compliance history and the response of the violator to the incident. The Ministry's tools for compliance include education and outreach, warnings, orders and prosecutions. In our view, the "response of the violator" would allow the Ministry to exercise discretion in circumstances where COVID-19 has created compliance challenges for a company where they otherwise have a good compliance history. To date, the Ministry is considering extensions to deadlines on a case-by-case basis and it is important for companies to contact the Ministry as early as possible to request an extension and explain why the circumstances of COVID-19 have made it difficult or impossible to meet the prescribed deadline.

Qu^ébec

The Qu^ébec ministry of Environment and Fight Against Climate Change (MEQ) has decided to temporarily modify its approach regarding compliance with environmental legislation. General guidelines (French only) have been provided on the MEQ website, but no ministerial order has been issued. According to the authorities, this approach is consistent with the government's position focused on social distancing. On-site inspections, other than those related to environmental emergencies, will be limited and carried out only in situations presenting a significant risk to the environment or to human health and safety. Off-site administrative inspections will be carried out when possible. For companies who have environmental obligations and who, following the directive of the Qu^ébec Government, have temporarily ceased their operations, or for those providing priority services, the MEQ states that it will exercise its discretion in the application of the various enforcement tools in the context of a non-compliance event. Although the MEQ reserves the right to use one of the applicable enforcement tool if the situation so requires, issuance of notices of non-compliance, administrative monetary penalties (AMPs) or any other remedy, will be limited during this period.

What can companies do to reduce COVID-19 related environmental compliance issues'

Absent clear and consistent guidance from environmental regulators, environmental managers are left with one clear legal obligation ' exercise all due diligence ' effectively, do *everything* that you reasonably can in the circumstances to maintain compliance with environmental obligations.

This will include the following:

- **First, and Always – Remain Committed to Compliance** – Regulators will expect to see a good faith effort to comply with permits and regulatory requirements, so maintain an approach that seeks to maximize compliance to the greatest extent possible.
- **Prepare Contingency Plans** – Facilities commonly rely on a limited number of designated environmental staff for a wide range of compliance tasks. Plan now for staff shortages that may result from illness or self-isolation. Develop strategies that meet the spirit of environmental requirements, if perfect compliance cannot be achieved. Regulators may be less sympathetic when non-compliance occurs at facilities that fail to plan for the unprecedented but foreseeable impacts of COVID-19.
- **Know the Statutory and Regulatory Timelines** – Check operating permits and

the legislation and regulations you operate under for mandatory timelines. Do not assume that all timelines will be suspended or excused. Good faith efforts should be made to meet all timelines, or, if full timely compliance is not possible in the circumstances, then efforts must be made to prioritize amongst competing timelines on a reasonable basis.

- **Stay Informed** – Track the publicly stated positions of regulators on compliance in the face of the COVID-19 pandemic. As noted above, some Canadian regulators have suspended or deferred deadlines or compliance obligations. Others have indicated that they expect full compliance but are willing to respond flexibly where COVID-19 impacts render full compliance impossible to achieve. Outside legal counsel may be able to assist by informally contacting regulators on a “no names” basis to determine the agency’s position on certain compliance issues and openness to alternative approaches.
- **Don’t Wait** – Be proactive and approach regulators early to discuss potential challenges in meeting regulatory or permitting requirements. Legal advice can be helpful to reduce the risk of approaching regulators in respect of any non-compliance events that may have occurred or are anticipated and cannot be avoided. In assessing penalties, regulators will likely take into consideration those facilities that were proactive and reached out appropriately to discuss options.
- **And Always Document** – Keep real-time written records of (1) specific environmental compliance challenges, (2) how COVID-19 caused or contributed to the delay and potential non-compliance, and (3) the efforts to mitigate or correct the delay and potential non-compliance. Failing to keep track of compliance issues and responses now may reduce the company’s ability to respond to future enforcement actions by limiting its ability to effectively make out defences that may be available such as due diligence, necessity and impossibility.

Conclusion

When we emerge from the COVID-19 pandemic, companies that have made diligent, good faith efforts to minimize non-compliance or any potential environmental impacts of non-compliance (and have documented their efforts), will be better positioned to avoid or defend any enforcement actions, even if those efforts ultimately fall short of full compliance.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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