

Enviro Attorneys Pivot To Clients' Coronavirus Concerns

By Juan Carlos Rodriguez

Law360 (March 19, 2020, 7:15 PM EDT) -- Environmental attorneys are handling a surge of inquiries from clients who are wrestling with how to continue to meet pollution and reporting requirements now that many of their key employees are subject to coronavirus-related workplace safety precautions.

The COVID-19 pandemic has disrupted business practices and forced many people in private industry as well as at state and federal regulatory agencies to work remotely or curtail normal work behavior. Industry players are grappling with how to meet compliance deadlines and debating whether to seek temporary exemptions from regulators. And regulatory reaction has been mixed, with some staffers indicating they'll accommodate delays while others want to stick to prescribed deadlines.

"Everything that a facility might do related to environmental compliance might be affected, from filing discharge monitoring reports for water discharges to air monitoring and other ongoing operations," said Brian Israel, chair of Arnold & Porter's environmental practice group. "I think there's going to have to be some decisions made about what is a sufficiently high priority that it's an essential duty that needs to continue."

He said running systems that prevent environmental problems is clearly important, but companies may decide that filing the related paperwork in a timely manner doesn't rise to the same level. Businesses could seek an exemption from the U.S. Environmental Protection Agency, which has some authority to grant such requests.

There have been disasters in the past, such as 9/11 and hurricanes Katrina and Harvey, that have prompted federal and state environmental regulators to lift some requirements to help businesses contribute to response efforts, Israel said.

"When you have these national or localized emergencies, you do see a willingness to grant waivers," he said.

The EPA, for its part, has urged all of its employees who are able to telecommute to do so, and the agency confirmed Thursday that at least one of its employees, in Montana, is "presumed positive" for COVID-19.

The agency didn't have much to say this week in response to questions about what it's planning and how it may respond to industry requests.

"During the coronavirus outbreak, EPA is taking appropriate steps to ensure the safety of EPA employees and members of the public with whom they may interact while continuing our mission-critical function

to protect the public from threats to human health and the environment arising from violations of the environmental laws," EPA spokesperson Ken Labbe said Wednesday.

Nadira Clarke, a partner at Baker Botts LLP with expertise in environmental crisis management, said her clients have reported that local, state and federal regulators have shown varying degrees of responsiveness to coronavirus-related inquiries.

"It seems to be a little dependent less on a particular agency's or government's overall perspective than on specific individuals, some of whom may recognize the immediate need to delay deadlines and focus on the things of most imminent concern, and some with the view that all of the regulatory requirements and time frames apply, and who don't seem interested or invested into looking into whether those can be tolled in any way," Clarke said.

If there is confusion about whether decisions are being made according to an agency directive or the discretion of individual staffers, that can seriously complicate the decision-making process for businesses, she said.

And she said the longer the coronavirus presents a crisis situation, the more agencies are going to be confronted by the same challenges as industry in terms of figuring out how to maintain safe plant operations and simultaneously protect their workers.

While it's true that the EPA and other agencies may use enforcement discretion to provide some leeway to businesses, that may not be the best course of action for everyone, Thompson & Knight LLP partner Ashley Phillips said.

"If companies can do some planning and map out a staff and resources plan for keeping up with these obligations, and keeping up with these reporting deadlines, that will save them some time, money and effort in the long run," Phillips said.

She said if there are delays in reporting, even sanctioned ones, agencies could require additional paperwork to address the discrepancies.

Aside from agency and company employees, there's a question around the army of contractors who do essential work for both industry and agencies, said Byron Brown, senior counsel at Crowell & Moring LLP.

"The obligations under a permit or a regulation or a statute might fall on a specific company, but so many of the requirements are satisfied through a collective effort with contractors and other support personnel," Brown said. "And if people are told to work remotely or there are travel restrictions in place ... that limits the ability of people to get out into the field and do work they'd normally be doing to support environmental compliance."

Israel said that aside from statutory and regulatory issues, many companies are operating under court-ordered conditions that arose through consent decrees with the EPA. In those cases, he said lawyers and clients may start investigating whether there are provisions in the settlement agreements that may provide relief if compliance becomes a serious concern.

He said many such deals contain "force majeure" provisions that allow for some exceptions in extreme circumstances. The issue will be finding out if the provisions can be activated.

"Every force majeure provision is different," Israel said. "You have to come up with a plan. You can't just say there's a global pandemic, you have to tell them how much time you need, etc. Then EPA will decide whether it's legitimate or not."

Clarke said that in this very uncertain time, the role of environmental attorneys as advisers has become crucial.

"There seems to be a lot of engagement from companies that are relying heavily on our counsel because they have so many things coming at them in so many different areas, and they are moving so fast and have so many decisions to make," she said.

--Editing by Aaron Pelc and Emily Kokoll.