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Risks, Risks Everywhere . . . It's Time to Stop and Think. Should ESG Investing Trends Be Part of the Calculus When Considering COVID-19 Based Stays of Environmental Compliance?

By Jill Yung

On March 26, 2020, the U.S. Environmental Protection Agency (EPA) issued an enforcement discretion policy outlining the circumstances under which it would consider temporarily easing enforcement of certain requirements in light of the COVID-19 pandemic. In particular, the EPA declared that, retroactive to March 13, 2020, for violations resulting from disrupted operations caused by COVID-19, it "generally" would not, or that it "does not expect" to, seek penalties for (1) "violations of routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification obligations;" (2) noncompliance with settlement requirements, provided that impacted parties follow the notification procedures in the applicable agreement or consent decree; (3) unpermitted air emissions, wastewater discharges, or land disposal; (4) exceedances of hazardous waste storage limitations; (5) failure to monitor all but the most critical safety measures for public water systems; and (6) any violations at essential critical infrastructure facilities that otherwise are in the public interest. This discretion explicitly does not extend to criminal violations, but the EPA nevertheless indicated that it would only prosecute in cases involving "an intentional disregard for the law" as opposed to "violations that facilities know are unavoidable as a result of COVID-19 restrictions," implying that the policy will raise the bar for enforcement against actions that might constitute a criminal violation.

The policy was immediately denounced by many, with some media outlets warning that the "EPA has stopped enforcing environmental laws." American Sustainable Business Council (ASBC) Executive Vice President Thomas Oppel accused the EPA of "exploit[ing] a public health crisis to further advance a dangerous political agenda that is stripping away the very environmental protections that science suggests are needed to combat climate change, which may have a role in generating future pandemics."

The EPA asserts that these accusations are without merit because the agency still expects any entity intending to deviate from requirements to get approval based on specific documentation explaining compliance challenges associated with COVID-19. The accusations may further be overstated with regards to long term monitoring of established and fairly stable conditions, or in circumstances where threats to human health are temporarily mitigated by building vacancies. Some of the exceptions

made based on infeasibility could, however, allow for significant departures from applicable legal requirements. Businesses electing to rely on the policy may not appreciate the high stakes involved, both in terms of what could happen if they misapply the policy and the consequences of being associated with a perceived attempt to "exploit a public health crisis." Accordingly, companies should be cautious on a variety of fronts when evaluating how to proceed.

Risks Associated with Relying On Unclear and Unprecedented Enforcement Discretion

For starters, businesses seeking relief from covered activities will need to diligently assess their obligations to qualify for the policy's protections. To secure coverage, violators must "[i]dentify [for EPA] how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity." The EPA has thus far been unable to articulate what documentation might demonstrate that pandemic-driven circumstances *caused* a release or regulatory violation and the extent to which indirect causes are relevant.[1] This lack of direction creates an environment ripe for missteps and regulatory inconsistency. To avoid unauthorized violations, regulated parties may still need to consult the EPA and State regulators on an operations-specific basis, which will defeat the stated purpose of the policy—to address an overwhelming number of case-by-case agency inquiries. Companies should also thoroughly document proof that they made every effort to comply with their obligations and minimize the extent of their noncompliance.

Reputation Risks that Could Last Long After the Pandemic Subsides

Another consideration for businesses should be the potential ramifications of availing themselves of the policy, as any decision to operate under it will be well documented and tolerance for companies that flout environmental laws is in increasingly short supply. Indeed, sustainable investing, defined by a focus on environmental, social, and governance (ESG) performance factors, was already a growing trend prior to the pandemic. The apparent resiliency of ESG funds in the midst of a financial collapse on a global scale has caused some to postulate that ESG investments might be more resilient when faced with global environmental catastrophes, including those predicted to occur with climate change.[2] Heading into this crisis, evaluating authentic ESG metrics was the subject of significant debate, as even the Security and Exchange Commission was (and still is) in the process of soliciting comments on rules to constrain what types of investments can claim to be "ESG funds." Coming out of this crisis, investors will have significantly more information about the social and governance measures companies were willing and able to implement to mitigate financial and human health impacts, including the staffing and payroll decisions that were made as well as commitments to remote work and the provision of personal protective equipment to keep workers safe. In light of the policies being offered by the EPA, companies with environmental obligations will also have to be more transparent about where environmental obligations fit within their priorities.

Risks of Violating State Laws

As a final, and overarching consideration, businesses also must be cognizant of the fact that the EPA is not the only environmental sheriff in most towns. Although the EPA policy appears to discourage states from enforcing the requirements that it has sought to relax by bluntly suggesting that routine enforcement actions risk the safety and health of inspectors and facility personnel, the fact remains that states have their own authority and their own complementary environmental laws to enforce. Some states, not surprisingly, have elected to ignore the EPA's model.

In particular, certain resource management agencies in California made clear early on, notwithstanding a lack of clear coverage under exemptions to state and local stay-at-home/shelter-in-place orders, that environmental laws would by and large be enforced. The State Water Resources Control Board, for example, declared that "timely compliance by the regulated community with all Water Board orders and other requirements (including regulations, permits, contractual obligations, primacy delegations, and funding conditions) is generally considered to be an essential function during the COVID-19 response" and placed the burden to show that existing obligations are inconsistent with current governmental directives on the regulated community. The California Air Resources Board similarly cautioned that their "regulations continue to be in effect and deadlines apply."

More recently, the California Environmental Protection Agency (CalEPA) issued a blanket Statement on Compliance with Regulatory Requirements During the COVID-19 Emergency, in which it has committed to "to respond, investigate, and—when necessary—take action on complaints related to environmental non-compliance" and "fill any enforcement gaps left by the U.S. EPA's decision to reduce environmental oversight." Although the policy recognizes and allows for some limited "compliance assistance" (i.e., relief from deadlines "under clearly articulated circumstances"), "entities that cannot meet a specific regulatory requirement due to emergency government directives or a specific hardship must contact the appropriate CalEPA board, department or office before falling out of compliance." Unlike the federal the EPA's policy, California has not entrusted the regulated community to self-assess when compliance is not reasonably practicable.

Deciding How to Proceed

In the weeks that have followed the EPA's release of the enforcement discretion policy, the agency, and the federal government more broadly, have offered an increasing number of unprecedented measures to provide temporary relief from environmental laws. In its Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19, the EPA has committed to determine on a case-by-case basis whether the consequences of delaying fieldwork outweigh the risks of continuing. The EPA will further consider, in addition to whether the work can and should continue, whether alternative solutions are sufficiently protective in the interim (i.e., it may alter remedial/removal action plans if selected measures are no longer feasible because they cannot be accomplished with social distancing). Following suit, the Environmental Enforcement Section of the Department of Justice has prepared a form letter to offer parties obligated to pay penalties under consent decrees an opportunity to defer payments until at least May 31, 2020. As "lockdowns" endure, we may see additional concessions regarding environmental regulation.

Although the respite offered by these changes may seem attractive at first glance, before accepting the assistance, regulated companies should carefully consider whether they have a clear understanding of the qualifying criteria, appreciate the potential reputational risks, and have evaluated countermeasures that state agencies might take to fill a perceived void in enforcement. Certainly there will be instances where postponing or temporarily halting certain programs will be both a practical necessity (e.g., due to the closure of labs that process results) and the right thing to do (to keep workers safe). Businesses need not conduct indoor air monitoring to ensure the safety of occupants at non-essential offices that are now vacant. The risks clearly outweigh the benefits. Where noncompliance could allow a release to occur or go undetected, however, regulated entities should consider making more of an effort to comply, notwithstanding the obstacles thrown up by the

pandemic and notwithstanding enforcement relief options, because new tools are already in place to evaluate how companies behaved when confronting an unprecedented crisis.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings San Francisco lawyers:

Gordon E. Hart
1.415.856.7017
gordonhart@paulhastings.com

Peter H. Weiner
1.415.856.7010
peterweiner@paulhastings.com

Deborah J. Schmall
1.415.856.7005
deborahschmall@paulhastings.com

Jill E.C. Yung
1.415.856.7230
jillyung@paulhastings.com

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[1] David LaRoss, *EPA Seeks Documents For Virus Enforcement Policy But Lacks Detail*, InsideEPA (Apr. 15, 2020) (discussing an April 14 webinar hosted by the Environmental Law Institute on "Workplace Risk Management & Response to COVID-19" that included Rosemarie Kelley, director of the EPA Office of Civil Enforcement).

[2] Dan McDermott & Lyndon Park, *How ESG Impacted the COVID-19 Response - and Vice Versa* (Apr. 14, 2020) (observing that "[w]hile it is too early to make definitive judgments, emerging evidence suggests that sustainable funds with a focus on strong ESG profiles and less exposure to energy outperformed their peer groups in this difficult first quarter, and more than half of ESG funds outperformed the wider MSCI World Index.").