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The State of Environmental Business Operations One Week Into Sheltering in Place in California

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Over the past week, most economic and business activity in California has been forced to power down almost immediately in response to Governor Newsom's Executive Order of March 19, 2020 ("Governor's Order")¹ and a panoply local public health orders ("Local Orders") in the days before and after, all addressing the COVID-19 viral pandemic. As explained below, the Governor's Order and the Local Orders have separately exempted certain sectors comprising "essential businesses" and activities relating to "critical infrastructure," but these terms lack clear and consistent definitions. Companies subject to ongoing environmental regulatory obligations and environmental response obligations (cleanup, monitoring, and otherwise) are encountering environmental consultants and contractors asserting their legal inability to continue to work, and are separately facing employee and contractor health and safety concerns over virus exposure.

This Client Alert conveys the information we have learned as of this date regarding the continuity of environmental compliance and response operations and environmental due diligence activities. The situation evolves daily, as governmental authorities scramble to provide supplemental formal or informal guidance. We will update this Alert on a regular basis as more information becomes available.

Authorities and Tools Supporting Ongoing Operation of Environmental Work and Laws

While most economic and business activity has come to a grinding halt, the operation of environmental laws and regulations has, in some respects, demonstrated surprising resiliency. Certain activities that require open public forums and input may be delayed as agencies explore and test remote meeting alternatives, but otherwise state and local authorities claim to be capable of carrying on the business of proposing new and implementing existing regulations, undertaking enforcement actions, administering grants, processing invoices, and issuing licenses and permits.²

Some of this has been facilitated by teleworking, and perhaps unburdened by in person meetings, agencies have more time to devote to processing requests. In addition to the ongoing operation of state and local government, the Governor's Order directing Californians to stay at home identified certain sectors as exempt in order to maintain continuity of critical operations and infrastructure. Currently, the Governor's Order, through incorporation of federal guidance, provides that "[h]azardous material responders" from government and the private sector, "[e]nvironmental remediation/monitoring technicians" in the energy sector, "[e]mployees needed to operate and maintain drinking water and wastewater/drainage infrastructure," and "[w]orkers who support



hazardous materials response and cleanup” are exempt altogether from the shelter in place orders currently in effect. Governor Newsom has reserved the right to “designate additional sectors as critical in order to protect the health and well-being of all Californians.”³

But the Governor’s Order only exempted 16 critical infrastructure sectors, whose “assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof.”⁴ This appears to have superseded the broader permission for any number of businesses to conduct “[t]he minimum necessary activities to maintain the value of the business’s inventory [and] ensure security,” which earlier, local orders allowed, and which could have been interpreted to facilitate environmental compliance activities.⁵ Likewise, local governments had permitted the continuation of housing construction—affordable housing, in particular—which, at brownfield redevelopment sites, typically involves preliminary remediation and subsequent monitoring work. Initially, the advice from both state and local authorities was to follow the most stringent applicable order in each jurisdiction, but the Governor’s office has indicated that they are reconsidering this approach.⁶

Permitting Prospects in the Wake and Midst of COVID-19

The good news is that project development is not necessarily dead. Agencies and environmental consultants are well equipped to continue preparing and reviewing document submissions involved in the permitting process. Even the seemingly intractable problem of holding public meetings amidst social distancing requirements has been addressed by Executive Order N-29-20, which significantly loosened the requirements local legislative bodies and executive agencies must meet when holding a public meeting via teleconferencing. While local permitting authorities may need some time to define an implementation plan, agencies have unprecedented flexibility to deal with the current circumstances. Outstanding field work may be the one activity that has not been squarely addressed, and while some might argue that these activities can be safely conducted in accordance with social distancing requirements and exemptions for hiking and similar outdoor activities, it would be prudent to seek clarification from the State or other relevant authorities before undertaking such work.

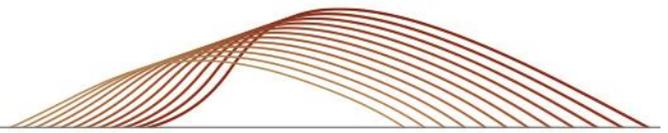
Meeting Unrelenting Environmental Compliance Challenges While Facing Escalating Hardships and Obstacles

The bad news is that, in the immediate future, there will be no reprieve from obligations to comply with environmental laws, permits, and enforcement orders or the deadlines associated with the same.

Environmental compliance is challenging under the best of circumstances, and some recent disasters, including wildfires and hurricanes with associated flooding, have thrown the critical importance of disaster planning into sharp relief. But the conventional wisdom emerging from these recent experiences—recommendations to have redundancies in place, clear governmental notification procedures, and training to implement the same⁷—is of little use when the disaster is systemic, the foundation of every contingency plan has been shaken, and both the human and economic resources to implement the plan are unavailable. Such circumstances call for new and creative thinking.

Determining Whether Workers and Their Activities Are Permitted Under Operative Orders

Environmental compliance, response, and cleanup often rely on the ability of workers to continue work progress and conduct monitoring. As noted above, “[w]orkers who support hazardous materials response and cleanup” are exempt from shelter in place requirements, but this and other similar



exemptions do not, on their face, cover workers who support mitigation and containment of non-hazardous pollutants that might be released into the air or water if not properly maintained or addressed in emergency circumstances. “Environmental remediation/monitoring technicians” are only exempt workers in the energy sector. While common sense would suggest that allowing workers to respond to and continue to manage non-hazardous environmental threats as essential operations, existing orders would benefit from some clarifying language on this point.

Upstream and Downstream Reach of Exemptions

Also requiring clarification is how far upstream and downstream exemptions might reach. In the context of essential business exemptions, local orders (e.g., County of Los Angeles) provide some evidence that suppliers of critical infrastructure sectors will be permitted to remain open (“businesses that supply other essential business with the support or supplies necessary to operate”). But how does the idea of “stepping-out” exemptions apply in the context of mandated remediation and environmental compliance monitoring, when coverage for these activities already requires a generous interpretation of the orders? For sampling efforts that require mobilization of significant equipment (e.g., drillers) and subsequent lab analysis, the subcontractors needed to perform the work may be unwilling or unable to assist. For these more complex questions, businesses will need to coordinate with relevant government officials and service providers to secure assurances that specific work can and should proceed (and, as a side note, certain agencies have already proven to be pragmatic and helpful on this score).

Ensuring Worker Safety When Performing Environmental Tasks

Simply because workers can legally conduct environmental compliance work does not, however, mean that operations should proceed under a “business as usual” approach. Employers that require workers to continue in their jobs face an unprecedented host of thorny issues involving worker safety in an era of rampant COVID-19 transmission. The California Division of Occupational Safety and Health has, thus far, released limited guidance regarding how employers must keep employees safe, aside from referencing guidance issued by the Centers for Disease Control and Prevention (“CDC”) and noting that, for general industry, there is no specific standard that covers COVID-19, although some safety standards, such as those for sanitation, personal protective equipment, and the control of harmful exposures may apply.⁸ Federal OSHA has released more detailed guidance that, in part, directs employers to evaluate the risk of COVID-19 exposure to its workforce and implement appropriate protections as a result.⁹ Ultimately, employers must not only navigate the shelter in place orders to determine if their operations are exempt, but consider whether and how continued work may result in potential exposures to employees, what steps can be taken to guard against such risks, and how to manage a workforce that is rightfully concerned about ongoing community exposure.

Funding Ongoing Compliance Work

Finding the resources to meet compliance obligations as normal business operations are restricted or shut down may present other challenges. On this front, however, there may be some unexpected good news. As companies take stock, those with pollution legal liability (“PLL”) policies, likely put in place with very different objectives in mind, should assess whether they might be of use under current circumstances. PLL policies that cover “biological contaminants,” and even some that do not, might apply to the transmission of the COVID-19 virus (as the release of a pollutant), provided that the policy does not contain an exclusion for communicable diseases.¹⁰ Such policies could provide the resources needed to disinfect and maintain a safe workspace for those on the front lines of environmental remediation, as well as potentially cover some business interruption losses.



Considerations for Environmental Compliance Heading Into Week Two

Obviously, on most fronts, including environmental permitting and compliance, the situation is very fluid. In his press conference on March 21, the Governor was unable to clarify whether the “essential worker” exemptions under the Governor’s Order and federal guidance are more or less stringent than the preexisting local orders. His office is reviewing this issue further. Meanwhile local governments likewise remain uncertain of the scope of their own orders. For example, although the fact that groundwater monitoring at a contaminated site is exempt seems obvious, counties have said they are not sure. More clarification will be forthcoming and, in some instances, can be expedited on a case-by-case basis by using the hotlines that have been set up by local jurisdictions to field questions. To comply at a minimum with the spirit of the shelter in place orders, all good faith determinations that the performance of a service with health and safety implications is exempt should be implemented in a manner that follows sound social distancing protocols (e.g., avoid having workers use public transportation, conduct activities outdoors or at least in unoccupied structures, wear personal protective equipment, and stay six feet apart). Furthermore, pending further guidance, if the Governor has exempted a particular activity that is required by state laws, regulations, or orders, uncertainties should be resolved in favor of the Governor’s exemptions and the continuation of environmental compliance work. Companies subject to diligence and compliance deadlines should also reach out immediately to relevant authorities to ensure that environmental sampling and mitigation are included in the next round of orders and/or guidance establishing exemptions from shelter in place orders.



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

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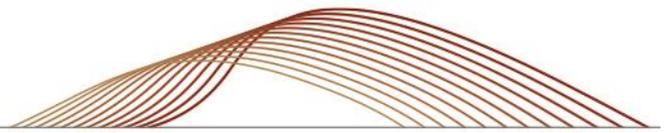
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- ¹ [Executive Order N-33-20](#) (Mar. 19, 2020).
 - ² [Message from Chair Mary D. Nichols and Executive Officer Richard W. Corey on CARB's response to COVID-19.](#)
 - ³ [Executive Order N-33-20](#) (Mar. 19, 2020); [Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response](#) from Christopher C. Krebs, Director, Cybersecurity and Infrastructure Security Agency (CISA), U.S. Department of Homeland Security (Mar. 19, 2020).
 - ⁴ [Executive Order N-33-20](#) (Mar. 19, 2020).
 - ⁵ See, e.g., [Order of the Health Officer of the County of Contra Costa Directing All Individuals Living in the County to Shelter at Their Place of Residence Except That They May Leave to Provide or Receive Certain Essential Services or Engage in Certain Essential Activities and Work for Essential Businesses and Governmental Services; Exempting Individuals Experiencing Homelessness from the Shelter in Place Order But Urging Them to Find Shelter and Government Agencies to Provide It; Directing All Businesses and Governmental Agencies to Cease Non-Essential Operations at Physical Locations in the County; Prohibiting All Non-Essential Gatherings of Any Number of Individuals; and Ordering Cessation of All Non-Essential Travel](#) (Mar. 16, 2020).
 - ⁶ California State Public Health Officer & Director of the California Department of Public Health, [California Coronavirus \(COVID-19\) Response Frequently Asked Questions](#) (as of Mar. 22, 2020) (Response to the question "How does this order interact with local orders to shelter in place? Does it supersede them?" previously stated that more stringent local orders would control, but now states only that this "is a statewide order.").
 - ⁷ Jeff Civins & Michael Scanlon, [Becoming a Master of Disasters: Environmental Issues Associated with Disaster Planning and Response](#), ABA Trends (Oct. 25, 2019).
 - ⁸ Cal/OSHA Interim Guidelines for General Industry on 2019 Novel Coronavirus Disease (COVID-19) (Mar. 4, 2020).
 - ⁹ Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03-2020 (Mar. 10, 2020).
 - ¹⁰ CAC Specialty, [A Roadmap to Finding and Negotiating Pollution Coverage for Covid-19](#) (Mar. 20, 2020).

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