COVID-19 and your environmental obligations

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In this period of uncertainty, it is not always easy to set business priorities. While certain businesses are closing or shutting down their operations, voluntarily or under compulsion, environmental obligations are ongoing. Whether your compliance obligations originate from governmental statutes and regulations, or from internal standards or agreements, it is important to identify these obligations as soon as possible in order to manage the impact of the pandemic on your business.

Multiple provinces in Canada have ordered the closure of all non-essential workplaces in order to fight the spread of COVID-19, but the list of workplaces considered essential varies by province or territory. Certain tribunals and government offices may operate with reduced capacity and in-person hearings may be postponed entirely.

In this tumultuous time when new emergency measures are enacted daily, this bulletin provides a starting point for the steps to consider in order to protect your business from consequences of non-compliance, including regulatory penalties.

What you need to know

Enforcement of approval and permit conditions

While the initiative by the United States Environmental Protection Agency to suspend enforcement of some obligations in many industries has gained attention, Canadian businesses should assume monitoring, reporting and emissions control conditions remain enforceable. Requesting that regulators exercise discretion on a case-by-case basis is an option for facilities that anticipate they may be unable to comply with conditions of their approvals; however, relief from obligations cannot be presumed.

Deadlines to comply are not necessarily suspended

Several provinces including British Columbia, Ontario, and Québec have suspended limitation periods and timelines for court proceedings for the duration of the declared state of emergency. This measure provides for more time to commence a civil claim, but the same relief does not apply to deadlines contained in Minister's orders. We are aware of at least one instance where the Ontario Ministry of Environment, Conservation and Parks (the MECP) has taken the position that deadlines imposed under Orders are

not automatically extended but was nonetheless prepared to grant an extension on a discretionary basis. It would be prudent to seek an extension where deadlines under Orders and approvals may be pending.

Furthermore, neither the Ontario MECP nor the Québec Ministry of Environment and Fight against Climate Change (the MEFCC) have issued a general guideline for the postponement of reporting obligations. We also note that the contestation period for monetary administrative penalty is not suspended generally, but we are aware that during the week of March 22, 2020, the MEFCC started to issue targeted emails to defer regulatory obligations that were due for April 1, 2020. We believe that businesses should assume the reporting period is not postponed until official email or guidelines are issued directly to them.

"Essential" in one province is not essential elsewhere

The definition of essential services is under provincial jurisdiction. It is important to keep up to speed with the list of such services in each province where your business operates in order to know which employees can continue the in-person work and which part of your business needs to be fully remote.

For example, both Québec and Ontario have declared "*environmental services" to be essential workplaces. The Ontario definition includes "b*usinesses that support environmental management/monitoring and spill clean-up and response, including environmental consulting firms, professional engineers and geoscientists, septics haulers, well drillers, pesticides applicators and exterminators, management of industrial sewage/effluent (eg for mining operations), and environmental laboratories". This definition will allow much more field work to continue during the state of emergency than the Québec approach, which limits environmental services to "businesses associated with environmental emergencies".

As a practical matter, while environmental services are deemed essential in Ontario, businesses should be prepared that their capacity may be limited as staffing or equipment shortages affect their operations. Some contractors may refuse to deploy their staff to sites and project delays should be anticipated.

In both Québec and Ontario, government services including licenses and permits are exempted from the provincial closures, which means that access to the governmental representatives responsible for permits and applications should still be available. In practice, the ability of government authorities to respond and to process applications may vary from jurisdiction to jurisdiction depending on local functional capabilities, as many offices lack full remote access for their staff.

Contractual obligations in environmental agreements

Companies may also have obligations arising from agreements with third parties or with governmental authorities such as rehabilitation plans, remediation agreements, financial guarantees, representations and warranties arising from a transaction or condition precedents. The extent to which parties are able to fulfill their obligations depends on factors that may not be within their control, including external consultant availability or operational shutdown.

The available remedy may differ in each circumstance, and should be assessed on a case-by-case basis. In the current state of emergency, a *force majeure* clause may assist when an unexpected and extraordinary situation renders compliance with terms of the contract impossible. As discussed in BLG's March 11 article "Contractual risks amid the COVID-19 outbreak" contractual obligations should be approached with caution. Note that relief from limitation periods created by statute will not apply to those created by agreement. We also caution that environmental rehabilitation plans or remediation agreements rarely include a *force majeure* clause, or the clause itself is not always effective.

As businesses become more experienced in adapting to the timelines and breadth of the measures intended to limit the impact of the COVID-19 pandemic, they will be able to better navigate meeting their environmental obligations. Businesses should assess their contractual and regulatory obligations as soon as possible, anticipate and mitigate any risk of non-compliance and consider alternatives including negotiating extensions to their environmental agreements.

Takeaway

Businesses should be reviewing their current obligations and documenting the steps taken to maintain compliance. Even if general guidelines are not yet issued by governmental authorities, we suggest that you consider requesting extensions on a discretionary basis, where required. Understanding the nature of essential services in your jurisdiction will allow your business to determine which environmental obligations can be met, and where relief from compliance should be sought. A week-by-week schedule assessing your abilities to comply with your obligations as the emergency situation evolves will help you and your employees to set priorities.

BLG's environmental team can assist you with these assessments, discussions with government authorities, maintaining the confidence of regulatory authorities and business partners, and any other advice on environmental issues related to COVID-19. BLG has also created a COVID-19 Resource Centre to assist businesses on a variety of topics, including labour and employment, contractual risks, public disclosure requirements, education, and criminal law.

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