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DEP Issues Guidance Regarding Compliance Challenges Arising from COVID-19

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On April 21, 2020, the New Jersey Department of Environmental Protection (DEP) issued two Environmental Compliance and Enforcement Alerts providing guidance to DEP-regulated entities that may be experiencing compliance obstacles due to resource constraints and virus containment measures resulting from the COVID-19 pandemic.

Compliance Alert 2020-08 is the long-anticipated memorialization of DEP's COVID-19 enforcement initiatives applicable to all entities subject to any environmental law, rule, regulation, permit or approval administered by the DEP, while Compliance Alert 2020-07 applies more specifically to solid waste and recycling facilities, collectors and transporters. Both emphasize the DEP's unwavering commitment to its mission of protecting the public health and environment, including efforts to ensure that all regulated entities maintain compliance with New Jersey's environmental laws.

The Compliance Alerts, do however, acknowledge that unique circumstances and widespread constraints arising from the COVID-19 crisis may create limitations on regulated entities and that regulatory flexibility may be required "to enable a continuity of operations while also ensuring compliance continues in a manner that protects public health, safety, and the environment."

Regulated entities will nonetheless need to maintain vigilance with respect to environmental compliance, as it is clear that relief from enforcement and penalties for non-compliance will not be readily granted. Rather, regulatory and enforcement relief will continue to be case specific and will require early and continued engagement with the NJDEP.

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Compliance & Enforcement Alert 2020-08 – All Regulated Entities

Alert 2020-08 recognizes that circumstances beyond a regulated entity's control stemming from COVID-19 may impair an entity's ability to comply with DEP compliance requirements, such as permit conditions, approvals or regulations. In order to address such circumstances, Alert 2020-08 notes that, consistent with its existing enforcement policy, the DEP intends to exercise its discretion on a "situational basis" where it determines "that an alternative, case specific compliance pathway" is appropriate to achieve the DEP's regulatory goals. Alert 2020-08 makes clear that regulatory flexibility that may be afforded will be limited in duration, is intended solely to address circumstances attributable to COVID-19 and was narrowly crafted to achieve its intended purpose.

Alert 2020-08 notes that enforcement staff remains available to provide compliance assistance and that the DEP considers it important to maintain open lines of communication between the DEP and regulated entities. In that vein, Alert 2020-08 provides that the DEP will continue to publish guidance documents and that all published guidance will be made publicly available on DEP's COVID-19 Information website. Further, Alert 2020-08 states that the DEP is reviewing its various programs and will determine on a program-specific basis if temporary regulatory adjustments are warranted.

Alert 2020-08 unambiguously asserts that during the COVID-19 crisis the DEP will continue to undertake all necessary and appropriate enforcement actions to protect the environment and that nothing in Alert 2020-08 relieves any regulated entity from existing legal obligations to prevent, respond to, or report any releases of pollutants or otherwise comply with regulatory standards.

If a regulated entity requires program-specific guidance, an email should be sent to the DEP contact with a copy to covid19help@dep.nj.gov. The DEP will review all requests on a case-by-case basis.

Alert 2020-08 provides that if compliance is at risk due to circumstances directly related to COVID-19, a regulated entity should contact the DEP immediately based upon procedures set forth in the Alert as follows:

- A notification of non-compliance must be made within two business days of discovery, unless shorter time frames are otherwise required by law, by calling the DEP Hotline at 1-877-WARN DEP (1-877-927-6337).
- DEP Hotline personnel will collect general information regarding the non-compliance and issue an incident case number.
- If the non-compliance can be corrected within 7 days, the regulated entity is required to submit a follow-up report within 14 days of notification to the program specific regional enforcement office and to DEP at covid19help@dep.nj.gov.
- The report requirements include the date and duration of noncompliance, the corrective action taken and a description of how that noncompliance was directly related or created by the COVID-19 pandemic.

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- Where compliance cannot be achieved within 7 days the entity must immediately contact DEP following notification to develop a compliance plan which must be approved by DEP in writing.
- Entities that disclose non-compliance within two days of discovery, and expeditiously correct the violation or develop a compliance plan approved by DEP, may be eligible for a reduction of any applicable administrative penalties.

If an entity that is subject to an existing compliance and enforcement document, including in Administrative Consent Order, determines that it will miss an enforcement milestone, it should advise the DEP pursuant to the notice procedures set forth in the enforcement document, including possible notification of a force majeure event.

Lastly, Alert 2020-08 notes that the DEP is allowing paperwork and other submissions required pursuant to permits, approvals or general rules to be maintained and managed in a manner that minimizes physical contact and facilitates social distancing, including through electronic submissions or remote meetings. Program-specific guidance is available at <https://nj.gov/dep/covid19regulatorycompliance/>.

Compliance & Enforcement Alert 2020-07 – Solid Waste and Recycling Services

Alert 2020-07 is directed to regulated entities providing solid waste and recycling services. These may include solid waste and recycling processing, transfer and disposal facilities, collectors and transporters. Alert 2020-07 provides guidance on how to continue managing solid waste and recyclable materials to ensure protection of the public and the environment during the COVID-19 public health emergency and the resultant workforce reduction, logistical limitations, and potential increased waste flow.

DEP acknowledges that regulated entities may need to temporarily alter operational limits and discretionary allowances (increased tonnages, operating hours, extended storage) necessary to handle possible increases in solid waste and recyclable materials. Alert 2020-07 is consistent with the DEP's recent temporary modification of its regulations allowing the DEP to waive various provisions of its rules governing solid waste, recycling, hazardous waste and solid waste utility regulation in response to COVID-19. Such waivers are permitted on a case-by-case basis and under narrow circumstances outlined in the **April 13, 2020 rule modification**.

If a regulated solid waste or recycling entity determines that it needs to temporarily alter its operational limits or discretionary allowances due to COVID-19, it must submit a request to solidwasteemergencies@dep.nj.gov. Each request will be reviewed by the DEP on a case-by-case basis. Absent a written approval of such a request, or a written directive by the DEP, regulated entities shall continue providing solid waste and recycling services without modification and in accordance with applicable legal requirements.

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Solid waste and recycling facilities that would like to modify their operational hours due to workforce constraints must request approval from the DEP. Each request will be evaluated by the DEP on a case-by-case basis. Alert 2020-07 reminds solid waste collectors that they do not need DEP approval to revise their hours or collection cycles, but collectors must notify customers of any such changes.

Alert 2020-07 also advises solid waste and recycling entities that while delays may be experienced due to COVID-19, the DEP will continue in its ordinary course of business to complete routine administrative tasks related to vehicle registrations, decal issuance, permit application reviews and utility transactions reviews.

Like Alert 2020-08, Alert 2020-07 notes that the DEP is allowing certain paperwork to be filed electronically. For example, a facility may electronically transfer digital photographs of Origin and Destination (O&D) forms, manifests, and medical waste tracking forms to scale-houses for processing. Alternatively, to avoid person-to-person contact while handling paperwork, such forms may be placed in a drop box at the receptor facility. Again, if a regulated facility determines that it wants to implement a new document-related procedure as a COVID-19 protection measure, it must request approval directly from the DEP.

Lastly, Alert 2020-07 reminds regulated entities of their ongoing requirement to notify the DEP should emergencies require, or if notice is required by existing permits or regulations.

Summary

As the COVID-19 crisis continues to evolve, it is expected that the DEP will continue to issue guidance documents similar to the above-referenced compliance and enforcement alerts. It is clear, however, that if a regulated entity is uncertain how to address circumstances that may prohibit regulatory compliance, or has had a non-compliance event, the DEP is encouraging and requiring such entities to reach out to the DEP as soon as compliance issues arise to obtain guidance in order to potentially avail itself of any regulatory flexibility or enforcement discretion that may be provided on a case-by-case basis.

Please contact the authors of this Alert with questions, or to discuss your individual regulatory compliance concerns.

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