No single answer exists for how the regulated community is expected to meet their environmental obligations or address potential delays in environmental compliance, especially amidst shelter-in-place orders in several states due to the COVID-19 pandemic. However, relief from environmental obligations during this pandemic may be available under certain environmental laws and legal obligations. The nature of that relief will largely depend on the specific legal requirement, the impact on the source itself, and the evolving response by federal and state governments to the COVID-19 outbreak.

Most recently, for example, Illinois Governor JB Pritzker issued an executive order (EO) requiring Illinois residents to stay at their place of residence, except for “essential activities, government functions and businesses and operations.” Illinois is now among the growing number of states that have mandated residents to shelter-in-place in response to the COVID-19 pandemic. Even businesses exempted from the EO – namely those that are essential to infrastructure like utilities, including power generation, water, sewer, and gas, as well as distribution centers and oil and
biofuel refining – must grapple with how to operate their facilities with reduced staffing while meeting other continuing legal requirements.

1. Relief from environmental laws: Many environmental statutes have exemptions, waivers, and other forms of temporary relief or relaxation of substantive standards in response to emergency scenarios. Whether those forms of relief apply, how quickly they can be invoked to provide relief, and the nature and scope of relief provided differs widely depending on the law and regulated entity. Put simply, there is no single law, rule, or provision that provides absolute relief from environmental compliance during an emergency.

2. Permitting requirements: Companies should be aware of ongoing and future obligations under existing permits. Periodic testing, ongoing recordkeeping and reporting obligations, and requirements to continuously operate pollution control equipment, etc., can require substantial resources both in terms of personnel and access to resources from third-party vendors. For example, companies may experience delays in, or unavailability of, third-party materials and resources that they have typically depended on to perform required emission or pollution testing and regular plant maintenance. Many permits do not expressly provide for a delay in compliance because of commercial unavailability, even in the face of an emergency.

3. Force Majeure under settlement agreements/consent decrees: Many federal and state settlement agreements and consent decrees contain temporary relief from compliance caused by events “beyond the control” of the regulated entity. A pandemic may constitute such an event to the extent the regulated entity can demonstrate how it interferes with their ability to timely comply. “Force majeure” provisions are agreement-specific and typically require notification and approval by the regulator, which can take time. They are also limited in duration, do not provide relief from compliance with underlying environmental laws, and generally require that the entity take measures to minimize any related environmental harm.

4. Temporary suspension of operations / shutdown: For companies that do not provide an “essential” function under Governor Pritzker’s EO, or those that take precautionary measures to limit employee exposure, temporary cessation of operation may become necessary. As noted above, companies seeking to suspend operations should understand how this impacts obligations to run pollution controls, keep records and report, and comply with other environmental obligations. Discussions with state and federal regulators may be appropriate to evaluate what measures must be taken and what relief can be provided to comply with environmental requirements during shutdown. This includes measures the company may need to undertake to ensure compliance when the facility wishes to restart operations in the future.

5. Stay in enforcement/litigation: The pandemic is affecting pending litigation in courts across the country. While most courts remain open in a technical sense and continue to accept court filings, most trials and in-person hearings have been cancelled or postponed. While it is reasonable to expect regulatory enforcement litigation to continue, many short-term case deadlines are likely to be extended.
Source URL: https://www.natlawreview.com/article/environmental-compliance-relief-and-requirements-during-shelter-place-mandate