

Guidance note

Managing environmental compliance in the time of COVID-19

As the country deals with COVID-19 we consider the impact on environmental compliance and discuss the importance of establishing an appropriate action plan.

All businesses are facing challenges caused by changes to the way they operate while the country is seeking to deal with COVID-19.

COVID-19 is predominantly a virus which affects human health. As a result, businesses may face choices in which they have to prioritise the health of their staff over compliance with environmental law or may be unable to comply with those obligations due to the unavailability of their own staff or other services on which they rely through illness or self-isolation of workers. Equally, they may make changes to their operations in order to help in the current crisis, such as switching production to different products. In this update, we explore the implications of these challenges.

How are the regulators responding?

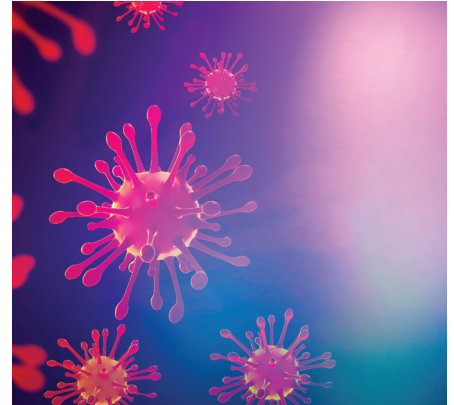
It is perhaps not surprising that there has to date been little produced from the regulators on these issues at this point. We understand that government is looking at what obligations might be relaxed and which need to be adhered to and we anticipate that, over the next weeks, there will be more guidance produced. We will update this when such guidance is available. To date there has only been one Regulatory Position Statement produced by the Environment Agency (on 27 March 2020) which allows waste from cleaning people or places infected or potentially infected with COVID-19 to be safely stored and treated at a healthcare waste management facility.

The immediate focus of the regulators has, understandably, been on protecting their own workforces and adapting their role in a time of reduced staff numbers. The following announcements have been made:

- In a letter to his staff Sir James Bevan, the Chief Executive of The Environment Agency, has stated that the Environment Agency will be focusing on major pollution incidents and flooding; maintaining assets such as the Thames Barrier and supporting the emergency services. On 3 April the Environment Agency published an "Operational Update Note" which made clear that, although there would be a drop in site visits and inspections, the Agency would continue to visit sites "that could cause serious environmental harm";
- In an updated note published on 25 March, Natural England has said that all staff are now working at home and that any contact should be via email, phone or video conferencing. It has also said it will prioritise resources towards

consents and permissions relating to sites of special scientific interest, wildlife licensing, planning and marine planning, as well as work relating to the Wildlife Incident Investigation Service. All fieldwork by itself and its contractors has been cancelled for three weeks;

- The Scottish Environmental Protection Agency has confirmed that staff should not attend operator sites for permitting discussions or compliance activity, with contact conducted by phone or email instead. Senior managers should decide if inspections should go ahead if an important deadline arises, such as for judging compliance with an enforcement notice. Monitoring, sampling and other evidence collection, either at operator sites or in the wider environment, has been suspended. Responses to environmental incidents will be judged over the phone and only considered where they appear to be category one or two incidents. SEPA has been clear that firms found to be flouting rules will have to "deal with an



uncompromising regulator” but that firms should prioritise compliance with conditions that protect the environment over those of an administrative nature;

- Natural Resources Wales has stated that it will focus all its “effort, energy and resource” on maintaining its core services. It has suspended all new work for its analytical services division and has warned that results from existing work may be delayed.

There has perhaps been a little more clarity upon the general implications for compliance in the water sector:

- The Drinking Water Inspectorate (in letters addressed directly to the water companies) has made it clear to the water companies that the taking of water samples from households should be suspended. However, it has also clarified that any requirements within legal instruments to install or upgrade operational monitoring will become even more important and must be completed on schedule or prioritised for early completion whenever possible – any anticipated delays must be notified to the enforcement team.
- Ofwat has also made it clear that regulatory obligations remain in place although it will consider the need for ex post adjustments to the regulatory system – water companies will need to “demonstrate how operations have been impacted by COVID-19 and how they made their decisions”.

What issues of environmental compliance might arise?

There are, of course, numerous areas where decisions legitimately made by businesses at this time might result in potential issues of compliance with environmental law. We have set out a number below as examples:

- A change in operation (perhaps changing the production line to make ventilators) would mean that the

operation is no longer in compliance with the description of operations in the Environmental Permit;

- Staff shortages may cause issues with strict compliance with an Environmental Permit – for example, can pollution control equipment continue to operate if it cannot be maintained or is extra time needed to provide emissions data?
- It might be difficult to comply strictly with an Environmental Management System due to lack of staff;
- Compliance with new product standards and rules if a new product is being produced may become an issue, for example compliance with the Medical Devices Regulations if a ventilator is being produced;
- There maybe an inability to use staff with key competencies, for example waste operatives;
- It might be necessary to stockpile waste beyond existing limits (particularly as result of the suspension of some waste collection activities announced by local authorities) or store new types of waste (such as clinical waste).

Many of the above potential non-compliances would be enforced as criminal offences. Any offences would be committed by the company in the case of a limited company and there is the possibility of enforcement against individuals if a business is incorporated or an offence is committed with the “consent, connivance or neglect” of an officer in the case of a limited company.

As is made clear in the guidance already issued by the Drinking Water Inspectorate and Ofwat the underlying legal obligations will remain in place whatever the external circumstances. Thus, businesses faced with potential areas of non-compliance will have to take steps to mitigate the legal risk arising from such non-compliance.

What practical steps can be taken?

Regulators have a discretion as to the enforcement action (if any) they choose to take. Depending on the nature of the enforcement action taken, the practical consequences for a business in both financial and reputational terms can vary considerably. Further, when considering whether to prosecute for an offence, all regulators (included environmental regulators) are required to consider both the probability of a conviction and whether it is in the public interest to prosecute. Those two tests are to be given equal weight.

As a result of the above, it is important to be proactive rather than reactive and to get on the front foot with the regulator. It is one thing to ignore environmental compliance but another thing to recognise a potential issue, make an informed judgment about the relative risks of compliance against non-compliance (such as the risk to staff from carrying out water sampling against the risk to the environment of not carrying out the sampling), take appropriate mitigation action in relation to any non-compliance and, crucially, document that thought process. Ideally, that thinking should be shared with the regulator, ideally in advance and, if possible, consent to the cause of action should be sought from the regulator.

A well-produced action plan and appropriate engagement with the relevant regulator should minimise the risk of enforcement by the regulator in the future or the consequences of any such enforcement action, even if there has been a technical non-compliance caused by COVID-19. We are currently working with organisations to help produce such action plans and engage with regulators on their behalf.

If you have any questions or concerns arising from issues of environmental compliance, please contact Michael Barlow or Simon Tilling.

If you would like further guidance or information mentioned above, we would be happy to help.

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