

Environmental Compliance in the Time of COVID

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Practices

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Beginning in March 2020, many state environmental regulators, including those in South Carolina, announced temporary policies or compliance assistance efforts intended to assist regulated businesses that might experience compliance obstacles associated with the COVID-19 pandemic. These state regulatory decisions coincided closely in time with actions by the U.S. Environmental Protection Agency to grant temporary enforcement discretion to dispense with penalties for environmental violations occurring as a result of the virus. These temporary government actions contemplated obstacles such as personnel shortages due to quarantine, illness, or lack of childcare, governmental closure mandates, travel restrictions, or other indirect consequences stemming from the unprecedented public health crisis.

Unsurprisingly, many knee-jerk reactions interpreted these federal and state regulatory proclamations as “permission to pollute.” Prognosticators of all stripes anticipated compounding public health problems as environmental violations were allowed a free pass by the government entities that enforce laws protecting our water, air, and land.

But has that prediction materialized? We are now more than six months in to the impact of the pandemic on the U.S. This post examines what environmental compliance and the regulatory environment has looked like for South Carolina, half a year in.

Enforcement Actions - By the Numbers

South Carolina’s Department of Health and Environmental Control (SCDHEC) reports environmental enforcement actions to its governing board at each meeting of that body (generally scheduled monthly). As of the September 2020 meeting, the agency has reported enforcement data through July 2020. For purposes of this post, we will consider March 2020 – when COVID-related lockdowns began in many parts of the country – the beginning of the pandemic period in the U.S. It should be noted that the sample period involved in this analysis (March – July 2020) is small and cannot give a full picture of the state’s enforcement efforts

during the pandemic. Enforcement timelines vary widely between environmental programs, and the majority of actions reported to the SCDHEC Board in the pandemic period originated with inspections or reports that occurred before March of 2020. Similarly, inspection efforts during the pandemic period will continue to resolve in final enforcement actions (if at all) over the next several months or longer. Nonetheless, enforcement actions reported to the board during this period include numerous actions which originated during the pandemic period, and all reported actions reached final resolution since March of 2020 indicating some level of enforcement effort dedicated to the action.

On the face of the total numbers of environmental enforcement actions in South Carolina, the prognosticators would seem to have it correct. Average monthly environmental enforcement actions reported for 2020 are down to just under 70 per month from reported monthly averages in 2019 of over 100. The average number of actions reported in the pandemic period are even lower at just over 50 actions per month. This disparity is misleading though, since the monthly average of total actions reported in 2019 was itself substantially higher than the average for the 10 prior years. Most recently, 2017 and 2018 both averaged approximately 85 actions per month. No other year in the last 10 rose above a monthly average of the mid-60s.

More importantly, the granular data suggests the story behind the total numbers may not be as simple as decreased enforcement of environmental laws. For example, enforcement actions in the pandemic period related to drinking water and water pollution – program areas that encompass numerous “essential businesses” that continued operations throughout lockdown – were in line with monthly averages for those programs over the past two years. By contrast, it will surprise no one that pandemic period enforcement actions related to Food Safety, a program whose regulated businesses have been devastated by forced closures in 2020 (and which traditionally has a very high number of individual enforcement actions), are down nearly 66% over the monthly averages reported in 2019. At the other end of the spectrum, enforcement actions for onsite wastewater (read: septic systems, predominantly residential) has more than doubled during the pandemic period over the reported 2019 monthly average. This may be a result of more people being at home during lockdown and overworking older septic systems, or it could be a result of field inspectors with fewer open regulated businesses to inspect focusing on programs where activity remains steady.

These individual data points strongly suggest some or all of the total downtick in enforcement actions is simply a function of the number of businesses that slowed or closed entirely at the outset of COVID-19. Given the attention many environmental watchdogs have placed on the compliance assistance efforts of regulatory bodies, even this short data set is worth examining to see if regulators really have given carte blanche to pollute (spoiler: “No”). Mileage in other jurisdictions may vary, but environmental laws in South Carolina appear to be in full force.

Regulatory and Business Assistance

In addition to the enforcement actions reported to the board, SCDHEC has been proactive in the pandemic period in offering additional compliance assistance to regulated parties impacted by the pandemic. This has included opening a dedicated email box for case-by-case requests for regulatory relief consideration. As a result of those requests, the agency has extended the deadlines for several regular record reporting and licensure requirements in the midst of the pandemic. SCDHEC has been conducting inspections using a combination of onsite, virtual, and offsite record review to limit the amount of time inspectors spend physically at a facility. Fran Marshall, Director of Applied Science and Community Engagement with SCDHEC, stated these procedures have been generally well received by the regulated community as they give businesses a more participatory role in the inspection process, and also provide needed

compliance oversight while providing needed employee protections.

Marshall also stated that SCDHEC has been active in helping businesses re-open and remain open by facilitating conversations between regulated businesses and local government leaders. Since community spread is a significant factor in whether a business can effectively remain open, these local coalitions have proven effective at developing plans to address the unique obstacles COVID-19 presents to keeping employees safe. SCDHEC is uniquely well-situated for these conversations and the other challenges of a pandemic as one of only three combined environmental/public health agencies in the country. The Environmental Affairs staff of SCDHEC regularly consult with Public Health officials to inform re-opening guidelines for a number of business sectors including restaurants and manufacturing. SCDHEC has also collaborated with the South Carolina Chamber of Commerce and the Department of Labor, Licensing, and Regulation to provide guidance for more specific businesses such as bowling alleys, bingo halls, and fitness centers.

The environmental team at Nexsen Pruet is also ready to assist you with any compliance matters, whether or not related to global pandemics.