KING & SPALDING

CRISIS PRACTICE

Coronavirus

MAY 1, 2020

For more information, contact:

Peter Hsiao
+1 213 443 4379
phsiao@kslaw.com

Logan MacCuish
+1 213 443 4366
lmaccuish@kslaw.com

Granta Nakayama
+1 202 626 9223
gnakayama@kslaw.com

Ilana Saltzbart
+1 202 626 9223
isaltzbart@kslaw.com

King & Spalding

Los Angeles
633 West Fifth Street
Suite 1600
Los Angeles, CA 90071
Tel: +1 213 443 4355

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

California Environmental Enforcement Changes Under COVID-19

California' Policy Is Less Specific and Stricter than the EPA Policy

California has issued a new policy providing limited relief for regulated parties from their environmental compliance and reporting obligations. The California Environmental Protection Agency ("CalEPA"), the cabinet-level agency with multiple boards, department and offices such as the Air Resources Board ("ARB"), issued a statement that regulated entities may seek "[s]pecific time-delimited remedies, such as the extension of deadlines" "under clearly articulated circumstances" associated with emergency government directives or specific hardships resulting from COVID-19.

Entities unable to meet deadlines or other obligations must contact the appropriate CalEPA board, department, or office *prior* to any noncompliance and the relevant authority will consider the requests "in an expedited fashion." There is no specific guidance regarding how entities should request relief.

CalEPA's statement differs from U.S. EPA's temporary enforcement guidance issued last month, both in its lack of specificity and its approach to the regulated community. While EPA's policy provides specific steps and actions for regulated entities invoking the policy, CalEPA relies on an *ad hoc* analysis of each potential noncompliance by agencies most familiar with the applicable legal requirements.

Also, while the U.S. EPA's policy announces that it will not pursue penalties associated with violations of "routine" obligations such as monitoring, testing, and reporting and that regulated entities need not "catch-up" with missed obligations, CalEPA states that it will continue to respond to, investigate, and, if necessary, prosecute non-compliance. CalEPA's statement echoes ARB's prior announcement that all regulations "continue to be in effect and deadlines apply." This is

consistent with California's approach of strictly enforcing reporting requirements, even those perceived as "routine," because they affect the state's ability to study those reports and the state perceives any noncompliance as a challenge to the state's larger goals of reducing pollution.

CalEPA also announced that it will "fill any enforcement gaps left by EPA's decision to reduce environmental oversight." This was not expanded upon, but it is possible that CalEPA will monitor compliance with Federal requirements and bring it could bring citizen suit actions against violators.

CalEPA's statement potentially highlights the growing distrust of EPA, evidenced by high-profile lawsuits challenging the EPA's revocation of a Clean Air Act waiver for California's vehicular greenhouse gas regulations and its recent Waters of the United States rule. Therefore, regulated entities should not assume that a lack of enforcement by U.S. EPA will result in a similar decision by CalEPA.

Entities subject to CalEPA regulation should consider all regulatory requirements, including reporting obligations, and whether they can meet those requirements in light of COVID-19. For example, vehicle manufacturers may consider whether they can meet in-use testing obligations where facilities may be closed or customer vehicles are unavailable. At a minimum, entities should consider documenting: (1) the specific obligation that it cannot meet; (2) identify the dates of the likely noncompliance; (3) describe how COVID-19 is the specific cause of the predicted noncompliance; (4) describe how the noncompliance is unavoidable; and (5) how the entity will return to compliance. The relevant board, department, or office may have additional requests so entities may also wish to reach out to staff-level regulators to discuss potential requests.

King & Spalding has one of the only national and international Environmental, Health & Safety practices with specialized attorneys experienced with California and Federal regulators. If you have questions about CalEPA's enforcement actions, please contact our lawyers noted in the contact section.