

## Environmental and Utilities Update

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### Pandemic Bulletin

#### **Pandemic Flu: Operational Impacts and Regulatory Requirements**

Swine flu has spread around the globe in less than six months. Public health officials anticipate potential workplace absenteeism levels could reach 40 percent or more. It is important to remember that employees may be absent due to personal illness, the need to care for ill family members or children at home due to school closings, or travel limitations arising from government restrictions or staffing impacts that affect transportation. If you haven't already, now is the time to prepare your workforce and develop strategies for meeting your operational needs and legal obligations during a pandemic.

Businesses are subject to a wide variety of regulatory requirements regardless of whether your employees are available. Depending on your business operations, environmental and OSHA standards may require specifically trained or qualified personnel to be on-site every day or perform functions subject to regulation. Absenteeism of qualified personnel due to widespread illness creates the risk of noncompliance.

#### **Wanted: Trained and Ready Employees**

Just a few examples of OSHA requirements applicable to everyday operations include compliance with standards for asbestos awareness, HAZWOPER, respirator use, fire prevention, and bloodborne pathogen handling. Properly trained environmental compliance personnel may also be needed to address a wide variety of tasks ranging from routine record keeping to emergency response measures and surprise government inspections. Even routine sampling, monitoring, and reporting requirements under the various environmental programs also can be particularly challenging when employees familiar with such matters are absent. The need to perform such tasks in accordance with the proper schedule is a point often missed by those standing in for the regular compliance person. Real-time requirements cannot be satisfied after the fact. The untimely absence of experienced, trained personnel or measures to address their absence during a public health emergency could cost your company dearly in noncompliance exposure, penalties, shutdowns, injuries to persons, or damage to the environment.

#### **Regulatory Risks: Enforcement Exposure**

Failure to fulfill a regulatory obligation due to absent employees exposes your business to public and private enforcement actions. Government agencies have rejected employee absences as an excuse for noncompliance in enforcement proceedings. In one example, an employer had several employees called to active duty in Operation Iraqi Freedom. Employees most familiar with proper waste handling procedures, container labeling standards, inspection record procedures, and waste storage periods were all called to military service. An agency inspection during this period identified several alleged deficiencies, and the resulting enforcement action led to tens of thousands of dollars in penalties as well as defense costs. No consideration was given for the absence of personnel to military service, notwithstanding the fact that absolutely no

adverse environmental impacts occurred. Enforcement personnel may be even less sympathetic to violations related to widespread employee illnesses, given the tremendous publicity and lead time regarding potential flu-related absenteeism. You need to ensure that additional personnel are prepared to perform regulatory tasks during the absence of others.

Agency enforcement action is not the only litigation concern for those businesses operating in a heavily regulated setting. Many environmental programs also authorize any person to file a "citizen suit" based on alleged failures to meet permit requirements or comply with environmental regulations. Such actions are often based on information that a permittee is required to submit to the government as public records. Missing or erroneous filings, as well as filings that document specific violations, can then become the primary evidence used in citizen suit litigation.

### **Internal and External Planning and Mitigation Strategies**

Now is the time for planning, not when you are short-handed during the height of a pandemic event. A good first step is to take stock of your environmental permit conditions, as well as training and qualifications requirements to keep you operating, and the daily tasks of those who oversee your compliance activities. Make a checklist of the individuals who perform these tasks regularly, those qualified to do so when others are out, and additional employees to train to serve during emergencies or scheduled absences such as vacations (vacation season can be a frequent surprise inspection season). Update your formal response plans with identifications of newly trained personnel. In some cases, remote computer access or alternative communications strategies may keep you functioning properly when employees must stay at home.

Be sure to consider both scheduled and circumstantial task requirements. There is no way to predict if someone's absence will coincide with a scheduled periodic requirement. In addition to frequently scheduled tasks, be mindful of tasks requiring at least timely annual attention, including timely permit renewal applications (and the required advance preparations), annual reports of waste handling activities or chemical management information, annual training updates, renewal or modification of financial assurance documentation, and annual fee payments (to avoid permit terminations). Be sure such dates are calendared and monitored by several persons. Be sure to also include sample collection, laboratory analysis, and proper reporting deadlines in your analysis of required periodic tasks. Some tasks are unscheduled but reflect a circumstantial event such as when holding volumes trigger waste shipment requirements, when storage limits are approached, or when proactive measures must be taken to preserve your current generator status.

If your company operates more than one facility, consider your ability to swap site assignments to address unexpected employee absences. Review your facility documentation and determine if it would be appropriate to identify alternate personnel from your other facilities. Be sure that such steps are accompanied by timely and proper familiarization with facility differences, environmental plans and procedures and advance training, exercises, and personnel integration.

Consider how a loss of public services, including water, electricity, sanitation, or transportation, could impact your operations, your employees, or others you need to operate your business. All businesses will be exposed to a loss of personnel during a pandemic event. Your operations can be affected by a failure of others to plan for their losses.

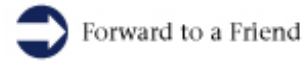
Review your regulatory obligations with respect to your supply sources and services vendors. Ask your suppliers and vendors about their contingency plans. Identify alternate vendors and determine if outside contractors could address your personnel needs. Include treatment chemical suppliers, laboratory and sampling services vendors, waste transporters, and disposal contractors in your review. Review all vendor contracts for *force majeure* /act of God provisions that may excuse performance for events beyond the reasonable control of a party to the contract. Negotiate the parameters of such provisions to account for obligations specifically intended to address pandemic events. Also consider this issue from the perspective of your own contract obligations to others. Be prepared to document your pandemic planning efforts, circumstances arising at your business during such events, and your response efforts. Such information may be useful in both analyses of your contract issues as well as compliance schedules under environmental performance orders.

Our collective ability to accurately predict the scope and severity of public health emergencies is limited. The one factor that you can control is the level of effort you invest in evaluating potential impacts to your business and putting thought into your contingency planning.

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For more information, please contact W. Richard Smith, Jr. at (860) 275-8218 or [wsmith@rc.com](mailto:wsmith@rc.com).

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