

COVID-19 and its effects on environmental obligations in Brazil

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FEDERAL LICENSING

The Federal Institute of the Environment and Renewable Natural Resources ("IBAMA") has adopted a set of temporary guidelines for federal environmental licensing that will apply during the COVID-19 pandemic (Comunicado nº 7337671/2020-GABIN).

IBAMA's guidelines are similar to those adopted by the Environmental Protection Agency ("EPA") in the United States (COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program), as shown in the following table:

IBAMA/BR	EPA/US
CONTINUED COMPLIANCE IF POSSIBLE	
As far as possible, companies should continue to comply with their environmental obligations.	Entities should make every effort to comply with their environmental compliance obligations.
DOCUMENT AND REPORT IF COMPLIANCE NOT POSSIBLE	
If not possible to comply with an environmental obligation, companies should act promptly to minimize non-compliance effects and duration. Companies should also document the incident and its causal link with the pandemic, and report to IBAMA.	If compliance is not reasonably practicable, facilities with environmental compliance obligations should document decisions taken to prevent or mitigate non-compliance, demonstrate their causal link with the pandemic, and return to compliance as soon as possible.
PRIORITY ON IMPACT PREVENTION	
Environmental obligations directly and immediately linked to adequate levels of environmental quality should be maintained. Compliance with obligations that are not immediately and directly linked to prevention of environmental impacts should be assessed and adjusted accordingly.	The guidelines address different categories of noncompliance. For example, the EPA does not expect to seek penalties for non-compliance with routine monitoring and reporting obligations resulting from the COVID-19 pandemic but does expect operators of public water systems to continue to ensure the safety of the drinking water supplies.
DUTY TO REPORT	
The possibility of any non-compliance that could put safe operation of the activity or enterprise at risk, or compromise environmental quality and public welfare, should be reported to IBAMA immediately.	Facilities should contact the appropriate implementing authority if facility operations impacted by the COVID-19 pandemic may create an acute risk or an imminent threat to human health or the environment.

APPLICATION OF PENALTIES	
In view of the exceptional nature of the COVID-19 pandemic, before applying any administrative penalty (Decree 6514/2008), IBAMA will consider the circumstances of any failure to comply with environmental obligations (<i>force majeure</i> , as defined in the Civil Code).	The EPA will distinguish violations that facilities know are unavoidable as a result of COVID-19 restrictions from violations that are the result of an intentional disregard for the law. The policy does not apply to any criminal violations or conditions of probation in criminal sentences.
APPLICABILITY AND EXPIRATION	
The guidelines apply retroactively from March 12, 2020 and IBAMA will announce the termination of the guidelines at least 10 days in advance.	The EPA's policy will apply retroactively beginning on March 13, 2020. The EPA will post a notification on its website at least seven days prior to terminating its policy.

REGULATORY COMPLIANCE - OTHER FEDERAL AND STATE AUTHORITIES

- **Continued compliance with environmental and health quality and control requirements**

Compliance with environmental and health quality and control requirements is not suspended. Environmental and health-related inspections are considered to be essential activities and will continue during the COVID-19 public health emergency (Federal Decree 10.282/2020). Depending on the difficulties faced in specific cases, companies may be able to renegotiate regulatory requirements with the relevant authority. Where companies are facing difficulties in compliance, it is advisable to evaluate alternatives for maintaining essential activities, and to communicate with the relevant regulatory authority about the company's operational restrictions and the measures it has adopted.

- **Suspension of deadlines for administrative proceedings**

Some environmental agencies have issued rules how to proceed during the COVID-19 pandemic, or have simply determined that licensing deadlines will not run while the state of emergency persists. In some cases, it is possible to apply online to renew licenses and permits. Public water agencies (*Sistema Nacional de Gerenciamento de Recursos Hídricos* – SINGREH) have adopted similar procedures for authorizing use of water resources and related obligations. Brazil's Health Surveillance Agency, ANVISA, suspended its procedural deadlines until July 21, 2020 (RDC 355, March 23, 2020).

- **Clearance for activities and works to combat the pandemic**

ANVISA has temporarily waived sanitary authorizations for the manufacture,

import and purchase of medical devices identified as priorities for use in health services (RDC 356, March 23, 2020). It has also established new criteria and procedures for the manufacture and sale of sanitization products without prior authorization from the agency (RDC 350/2020, March 19, 2020).

The state of Rio de Janeiro has published Decree 47.008/2020, which allows environmental authorizations to be issued electronically for works or activities to combat and confront the coronavirus. In urgent cases, authorization may be requested after beginning the work or activity.

In addition, some state regulations allow emergency works or interventions to be carried out without following the general environmental licensing procedure (LP, LI, LO, or other modality): all that requires prior notice to the environmental authority, and the work or intervention can be brought into compliance at a later date (see, for example, Minas Gerais State Decree 47.749/2019).

- **Suspension of activities and decommissioning**

The licensing authority must be notified of any suspension of operations affected by the pandemic, and of measures implemented for the management of waste, effluents and other significant environmental matters. When notifying the licensing authority, owners should assess what situations are directly related to the pandemic (*force majeure*) and could have an impact on the owner's other compliance measures.

Where operations are shut down definitively, owners should consider whether it is possible to adopt the specific procedures required by the licensing authority (e.g. monitoring of contaminated areas). There are specific procedures for shutdowns in regulated sectors such as mining, where the deadline for decommissioning of upstream tailings dams was not suspended, and inspection and control requirements under the National Dam Safety Policy (ANM Res. 28, March 26, 2020) remain in effect.

CONTRACTUAL INSTRUMENTS

- **Administrative Settlements**

The possibility of extending deadlines for compliance with obligations established in Administrative Settlements, or even terminating the Administrative Settlement early, should be considered on a case-by-base basis. The COVID-19 pandemic will excuse companies' failure to comply with their obligations under Administrative Settlements, either temporarily or definitively, only if non-compliance is a necessary consequence of an event of force majeure (art. 393 et seq., Civil Code).

- **Reverse Logistics and Sectoral Agreements**

Companies subject to reverse logistics requirements should assess the

impacts of the pandemic and the difficulties it has created for implementation of reverse logistics actions and achievement of reverse logistics goals, in order to discuss the adoption of remedial measures, which should be evaluated not only in the light of the National Policy on Solid Waste but also in the light of the rules generally applicable to contracts (Civil Code).

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