

To Our Clients and Friends

Memorandum

April 28, 2020

Environmental Diligence During a Pandemic Lockdown: Examining the Permissibility of Environmental Site Visits Under Covid-19 Stay-At-Home Orders

Stay-at-home orders related to the COVID-19 pandemic are presenting unprecedented questions to businesses, including entities conducting environmental diligence in connection with financing, acquisition and divestiture transactions. In particular, transactional parties must determine whether customary site visits in connection with ASTM-compliant Phase I and Phase II environmental site assessments and other on-site work by environmental consultants can be completed safely and in compliance with state and local shutdown orders. While certain states are beginning to relax or repeal their stay-at-home orders, other states are likely to keep their orders in place for the time being. Thus, given the absence of clear federal, state or local guidance on the issue, parties contemplating a site visit in connection with environmental diligence should consider the following questions in determining whether the visit is permitted pursuant to stay-at-home orders, whether workarounds, such as remote inspections, might satisfy diligence needs (including ASTM standards or requirements of lenders and insurers), and whether contractual protections might provide an alternate solution.

Is the environmental site visit permissible under the relevant stay-at-home order?

To determine whether an environmental site visit is permissible under the relevant state or local stay-at-home order, parties must first consider whether the target facility is “essential,” “critical” or “life-sustaining” under that order.¹ State orders vary greatly in their treatment of what is essential and, therefore, permissible. Some states have enumerated a limited number of essential businesses, while leaving others to be deemed non-essential.² Other states have enumerated non-essential business³ or defined essential businesses so broadly as to potentially include wide swaths of the economy.⁴ Parties must

¹ Terminology differs among states. For purposes of simplicity, “essential” is used in this article.

² See, e.g., [Governor Cuomo Issues Guidance on Essential Services Under the 'New York State on PAUSE' Executive Order](#); [Guidance for Determining Whether a Business or Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders](#) (updated Apr. 24, 2020), (collectively hereinafter “New York Guidance”); [California Executive Order N-33-20](#).

³ See e.g., Iowa Proclamations of Disaster Emergency ([Mar. 17, 2020](#)) ([Mar. 22, 2020](#)) ([Mar. 26, 2020](#)).

⁴ See, e.g., [Alabama Order of the State Health Officer Suspending Certain Public Gatherings](#). See also [Georgia Executive Order](#) (narrowly defining essential services, but permitting certain non-essential businesses, such as restaurants and dining services, to reopen with restrictions).

ensure that their research is current, as many states have issued multiple orders tightening or loosening restrictions over time.

To the extent a facility's operations are not essential, parties should confirm whether the target facility or business entity has applied for or been granted special permission to operate. Most states have created processes by which questionably non-essential businesses can apply for such permission or for clarification of their essentialness.⁵

Second, parties should consider whether the environmental site visit is "essential." Just because the target facility may be open does not necessarily mean that an environmental site visit can be conducted. Many stay-at-home orders emphasize that only the "essential" aspects of business are permitted to operate, and that any "non-essential" aspects must cease operations. It appears that no state orders explicitly indicate whether Phase I or Phase II-type environmental diligence is an essential function, and regulatory bodies have provided little, if any, clarity on the issue.⁶ State orders vary in their treatment of the type of work performed by environmental consultants, with some states (e.g., Virginia) permitting professional services, and other states (e.g., Pennsylvania) prohibiting certain professional services, such as engineering, while permitting waste management and remediation services. Many states, including California and Florida, define the limitations of their state closures by reference to the critical infrastructure sectors as defined by guidance issued by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency ("CISA Guidance"). The CISA Guidance defines critical infrastructure workers to include "workers who support hazardous materials response and cleanup" and "workers supporting the operations of commercial buildings that are critical to the safety, security, and the continuance of essential activities."⁷ The CISA Guidance's reference to remediation workers and state order references to remediation services may, depending on the relevant facts and circumstances, provide a basis for a Phase II investigation, which could be considered an integral part of remediation, as investigation is often a necessary precursor to response work. They may, however, not provide such support for a Phase I environmental site assessment, which is more likely to be viewed as optional.

Third, transactional parties should consider whether an environmental site visit be could deemed essential if it is required in connection with a financing or insurance transaction. Many states, including some with relatively strict executive orders, such as New York, classify banking, lending institutions, insurance and/or financial services sectors as essential.⁸ Although the CISA Guidance cautions that

⁵ For instance, Texas directs requests for inquiries to the Texas Division of Emergency Management. See [Governor Abbott Issues Executive Order Implementing Essential Services and Activities Protocols](#). On April 17, 2020, Governor Abbott issued an order directing limited reopenings of retail businesses, beginning April 24. See [Governor Abbott Issues Executive Order Establishing Strike Force to Open Texas](#).

⁶ By comparison, real estate inspectors have received guidance from some state-level real estate commissions and boards of realtors suggesting that property inspections may be included as essential (California), while others have suggested that such inspections are not permitted (Michigan) or must be limited to remote inspections unless legally necessary (New York). See [Residential Real Estate Now Listed as Essential Service](#) (California); [Updated ESD Guidance](#) (New York); [Governor Whitmer Extends "Stay at Home" Order with Increased Restrictions](#) (Michigan).

⁷ See [Florida Executive Order Number 20-91](#) (later reaffirmed by [Executive Order 20-92](#)); California Order, supra; [March 28, 2020 Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, and attached Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response, Version 3.0](#) (Apr. 17, 2020).

⁸ See New York Guidance, supra; California Order, supra.

“non-mandatory activities should be delayed until resumption of normal operations,” it also includes financial services as a critical infrastructure sector.⁹ On-site environmental diligence is, therefore, arguably permitted to the extent it is an essential part of a financial service provider’s extension of credit or an insurer’s issuance of an insurance policy. This line of reasoning would seem consistent with a general public policy goal of ensuring functioning credit and insurance markets during a national crisis.

While enforcement has been inconsistent and generally focused on the most public and egregious violations,¹⁰ we note that many states have the power to impose fines and other sanctions on businesses that do not comply with stay-at-home orders. For example, penalties for violating New York’s order include fines to individuals of \$1,000 and fines to businesses of \$2,000 (increased to \$5,000 for subsequent violations or \$10,000 for violations resulting in serious harm).¹¹ In Pennsylvania, initial penalties include low level fines, and state guidance also states that private businesses failing to comply with its order may be subject to administrative actions, such as losing access to disaster relief and state loan or grant funding, and/or suspension or revocation of a license, for violation of the law.¹²

Can the work be done safely and in compliance with social distancing requirements?

Even if an environmental site visit is essential under the relevant stay-at-home order, the visit will need to comply with the general social distancing requirements of any such order. For instance, New York’s “New York State on PAUSE” executive order and corresponding guidance have imposed general requirements that essential businesses must still implement rules that help facilitate social distancing of at least six feet.¹³ Most other states have imposed some version of these requirements. Parties should therefore confirm with their environmental consultants that the site visit or investigation in question is possible under those conditions.

In addition, parties should consider whether there are practical issues in performing an environmental site visit — particularly if the target facility is closed or there are not sufficient essential on-site personnel to accommodate the site visit and ensure that appropriate safety and security measures are undertaken. These practical limitations may be less of a concern if the target site is vacant property, for which a site visit without in-person target personnel arguably can be accomplished without similar concerns.

If an environmental site visit is arguably not permitted or practical, could a workaround solution be sufficient?

If it is unclear whether an environmental site visit is permissible or practical, parties should consider potential alternatives. Technological tools, such as the use of drones and video conferencing with on-site personnel (in place of site visits), may be partial solutions that can help parties understand target facilities

⁹ California, however, has removed references to commercial lending as critical infrastructure in its separate March 22, 2020 guidance. See [California Guidance](#).

¹⁰ [Most States Have Issued Stay-At-Home Orders, But Enforcement Varies Widely](#), PBS.org; [Enforcing the Shutdown: Law Enforcement Grapples with Policing Stay-At-Home Orders, Social Distancing, Quarantines](#), USA Today.com; [PA State Policy Clarify How They’re Enforcing the Stay-at-Home Order](#), Fox43.com; [How NJ Prosecutors Are Using Criminal Charges Against Coronavirus Order Violations](#), NJ Law Journal.

¹¹ [New York Executive Order 202.14](#); [New York Executive Order 202.8](#). See also PBH §12.

¹² [Failure to Comply and Enforcement](#) (Pennsylvania); 35 P.S. § 521.20(a). See also [New Jersey Executive Order 104](#); [New Jersey Executive Order 107](#). See also N.J.S.A. App. A:9-49 &50.

¹³ See New York Guidance, *supra*.

and identify accordant risks. Given the current environment, and depending on who or what is driving the need for diligence, it may also be worth considering whether a “desktop” level review will be satisfactory, particularly if the target’s environmental profile presents low risk.

A desktop review may also be appropriate for stock transactions in which a buyer is not eligible for certain CERCLA defenses (e.g., the bona fide prospective purchaser defense). Such CERCLA defenses require the performance of a Phase I environmental site assessment that satisfies the elements of “all appropriate inquiry” (“AAI”) under CERCLA and its state law equivalents. A site inspection by an environmental consultant within 180 days prior to closing is a key component of AAI. However, the AAI rule specifically states that if a visual inspection of the subject property cannot be performed because of physical limitations or other inability to obtain access to the property, an on-site inspection will not be required, provided that “good faith efforts” have been taken to obtain such access.¹⁴ Under this “good faith” exception, the environmental consultant must visually inspect the subject property via another method (such as aerial imagery for large properties) or from the nearest accessible vantage point (such as the property line or a public road for small properties). The absence of a site inspection should be documented as a data gap in the Phase I.

The EPA has issued several guidance documents relating to the COVID-19 crisis, but none have provided significant direction regarding either the permissibility of conducting site visits for Phase I assessments under state or local orders or whether parties may satisfy AAI without completing a site visit.¹⁵ Thus, it is not clear whether a ‘COVID-19-affected’ Phase I report without the traditional site visit components will pass muster under the federal defenses for innocent landowners, contiguous property owners or bona fide prospective purchasers if and when such defenses are asserted in the future. Proceeding in reliance on alternative diligence tools therefore exposes the user to some increased risk of future liability.

Could contractual remedies mitigate the risk of proceeding without a site visit?

Given the potential uncertainties regarding whether an environmental site visit is permitted and whether a Phase I environmental site assessment without such a visit would satisfy AAI (or lenders), parties should consider whether contractual risk-shifting mechanisms, such as indemnities, closing conditions or insurance, are appropriate. For example, environmental diligence (including a site visit) could be a post-signing closing condition, delaying the site visit until the relevant stay-at-home order is rescinded or loosened. Moreover, if the seller is a large, financially solvent company, the parties could proceed without an environmental site visit and instead rely on a desktop review and contractual indemnities. However, if the seller is a financially distressed entity (an increasingly likely scenario given the economic impact of COVID-19), contractual indemnities may not be a viable solution, absent an escrow sufficient to cover expected liabilities, and the estimation of such liabilities may be difficult in the absence of on-site environmental diligence. Similarly, insurers may be hesitant to provide coverage in the absence of recent environmental diligence or may provide such coverage only with a hefty premium. Premium costs may be difficult for financially distressed parties, but potentially could be funded through a reduction in purchase price.

¹⁴ See 40 C.F.R. Part 312.27.

¹⁵ See EPA, [COVID-19 Impactions for EPA's Enforcement and Compliance Assurance Program](#) (Mar. 26, 2020); EPA, [Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19](#) (Apr. 10, 2020).

Conclusion

The newness of the various executive orders and the lack of enforcement precedent or detailed guidance regarding the permissibility of site visits for Phase I and II environmental assessments implies some level of risk that the relevant state or local government will not agree that on-site transactional environmental diligence work is permissible. Given this general risk, parties should consider the strength of legal arguments supporting the permissibility of Phase I or II work, whether workaround solutions or contractual risk mitigation would be adequate and whether the environmental liabilities are potentially significant enough to warrant delaying the transaction until a time when a site visit can be performed.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

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