

**ATTORNEY-CLIENT COMMUNICATION  
PRIVILEGED AND CONFIDENTIAL**

April 18, 2020

**Via Electronic Mail Only**

Robert Smail  
E-Mail: robert.i.smail@gmail.com

Re: Opinion Letter re COVID-19 Stay-at-Home Orders

Dear Robert:

You asked us to advise the Bear Yuba Land Trust (“BYLT”) on the applicability of the Governor’s Executive Order N-33-20 (“Stay-at-Home Order”)<sup>1</sup> and the Nevada County Public Health Officer’s Order (“County Public Health Order”)<sup>2</sup> to BYLT’s field operations. You also asked us to advise whether worker’s compensation would cover a BYLT employee that contracted COVID-19 while engaging in field operations. This letter compares and analyzes the Stay-at-Home Order and the County Public Health Order to determine the scope of authorized field operations.

Specifically, BYLT is considering having its staff perform the following field operations:

- (a) monitoring preserves and conservation easements for security purposes, including compliance with easement terms (“Security Activities”);
- (b) conducting land management activities for fire mitigation and agricultural purposes (“Land Management Activities”); and

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<sup>1</sup> Executive Order N-33-20 can be accessed at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> (last accessed April 17, 2020).

<sup>2</sup> The Order of the Nevada County Public Health Officer can be accessed at <https://www.mynevadacounty.com/DocumentCenter/View/34027/PHO-Order-Stay-at-Home-April-15-002> (last accessed April 17, 2020).

(c) activities to facilitate safe public access of BYLT preserves, including monitoring trails/trailheads, conducting emergency maintenance, and posting signage to ensure social distancing (“Public Access Activities”).

We understand that after conversations with elected County officials, BYLT received a written determination that all the above activities are “essential” under the County Public Health Order. We also understand that BLYT leadership is concerned that while such activities may be deemed “essential” by the County, they may nevertheless conflict with the Stay-at-Home Order.

### **SHORT ANSWER**

As explained in more detail below, BYLT staff can lawfully engage in Security Activities and Land Management Activities under both the state and county orders. However, Public Access Activities fall in a legal grey area, as they are authorized by the County but not explicitly authorized by the State. The legal risks associated with engaging in Public Access Activities, however, appear to be low. BYLT might mitigate these risks by asking the state for additional guidance.

Please note that this determination only applies to the activities discussed above. Just because BYLT is authorized to engage in some field operations, it is not necessarily authorized to engage in *all* normal operations. Careful consideration of the various orders is required to determine whether such operations are allowed. In addition, please aware that both state and county guidance is frequently changing; BYLT should monitor for new updates.

### **DISCUSSION**

#### ***Stay-at-Home Order***

The Stay-at-Home Order directs all individuals living in California to remain at home “except as needed to maintain continuity of operations of the federal critical infrastructure sectors,” as identified by the federal government or additional sectors designated as critical by the State. Under the Stay-at-Home Order, both the federal and state designated sectors are considered “essential” and are permitted to continue. On March 22, the State Public Health Officer circulated the list of Essential

Critical Infrastructure Workers (“Essential Workers List”)<sup>3</sup> in accordance with the Stay-at-Home Order. The Essential Workers List directly covers both Land Management Activities and Security Activities.

Specifically, under the “Law Enforcement, Public Safety, and Other First Responders” category, the Essential Workers List includes “workers who support weather disaster/natural hazard mitigation and prevention activities.” And under “Food and Agriculture,” the Essential Workers List includes “farm workers,” “animal agricultural workers,” “workers who support the manufacture and distribution of forest products” and “employees engaged in the manufacture and maintenance of . . . infrastructure necessary to agricultural production . . . .” Therefore, so long as the Land Management Activities are in furtherance of either wildfire hazard mitigation or prevention or active agricultural use, they are authorized by the Stay-at-Home Order.

Second, the “Other Community- or Government-Based Operations and Essential Functions” sector includes “security staff to maintain . . . physical security measures.” This broad language includes any Security Activities to ensure the security of preserves and conservation easements. Given that conservation easements are property rights that require monitoring to ensure those rights are secure, conservation easement monitoring is also likely to fall within this category.

Notably, the Governor’s Stay-at-Home Order and the Essential Workers List do not mention what people are allowed to do besides for work purposes. Recreational activities, walks, hikes, or exercise are not included. Consequently, Public Access Activities do not appear to be explicitly authorized by the Stay-at-Home Order; the implications of this are discussed further below.

### ***County Public Health Order***

On April 15, 2020, the Nevada County Public Health Officer issued a modified County Public Health Order. This County Public Health Order is intended to ensure people stay in their homes, while enabling essential services to continue, in order to slow the spread of the coronavirus. The County Public Health Order directs “all businesses and governmental agencies to cease non-essential operations at physical locations in Nevada County” and “cessation of all non-essential travel.”

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<sup>3</sup> The list of Essential Critical Infrastructure Workers can be accessed at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> (last accessed April 17, 2020).

The County Public Health Order was issued under the authority of the California Health and Safety Code Sections 101040, 101085, and 120175, and title 17 of the California Code of Regulations section 2501. Health and Safety Code Section 101040 gives the local health officer the authority to take any preventative measure that may be necessary to protect and preserve the public health from any public hazard during any state of emergency or local emergency. As such, the Nevada County Public Health Officer has wide authority in a state of emergency to impose preventative measures to protect and preserve the public health. The County Public Health Order explicitly states that it is issued in accordance with the State Stay-at-Home Order.

The County Public Health Order goes into further detail regarding which actions are acceptable by members of the public and what work is considered essential. Under section 1, “all persons may leave their residences only for Essential Activities, Essential Government Functions, or to operate Essential Businesses.” Section 2 directs all businesses with a facility in the County, except Essential Businesses, to cease all activities at facilities located within the County except Minimum Basic Operations. Additionally, all travel, except Essential Travel and for Essential Activities, is prohibited.

Relevant here, the County Public Health Order again authorizes both Land Management Activities (§ 5.f.xi (removal of hazardous vegetation for wildfire safety purposes); § 5.f.iii (agriculture)) and Security Activities (§ 5.g.i (all businesses can engage in “Minimum Basic Operations” to maintain the value of the business’ inventory (here, preserve lands and conservation easements) and ensure security)).

The County Public Health Order also *explicitly* authorizes Public Access Activities. The list of allowed “Essential Activities” includes engaging in outdoor activity, provided the individuals comply with social distancing requirements, such as walking, hiking, biking, or running, as well as outdoor recreation activities at parks and other open spaces. The County Public Health Order explicitly contemplates that parks and open spaces may be run by a non-governmental entity, stating that “access and use” is to be established by “the Health Officer, government, *or other entity . . .*” (emphasis added). Moreover, the County Public Health Order includes as an “essential business” any “service provider who provides services that are necessary to maintaining the safety, sanitation, and essential operation of . . . Essential Activities,” including outdoor recreation. (§ 5.f.x; *see also* § 5.f.iv (“performing work . . . to carry out activities specifically permitted in this Order”) BYLT would qualify as an Essential Business under that definition.

### ***Is There a Conflict?***

With respect to Land Management Activities and Security Activities, there is no conflict between the Stay-at-Home Order and the County Public Health Order. BYLT should be confident in using its staff to engage in these important activities, provided that all appropriate guidelines are followed to keep staff and the public safe and to minimize exposure.

With respect to Public Access Activities, the answer is more nuanced. Unfortunately, the Stay-at-Home Order does not appear to explicitly anticipate allowing *private* entities to operate public recreation opportunities (public facilities likely would be included under the “Other Community-Based Government Operations and Essential Functions”<sup>4</sup>). However, the Governor clearly intends to allow recreation activities. For example, the State’s FAQ states that people are allowed to visit parks and go hiking. Governor Newsom said that he “encourag[es] people to go outside with intention and purpose – not linger – but to deal with the health needs that we all have of being outdoors and taking a deep breath.” It appears to be within the spirit, if not the letter, of the Stay-at-Home Order to open private recreational facilities for public use.

The risk to BYLT also appears relatively small. The County has explicitly authorized Public Access Activities, both in the County Public Health Order and in response to BYLT’s questions. According to the County Public Health Order, the County is authorized to make such determinations. (§ 1.b.i.) BYLT would be acting in good faith by following this direction. Moreover, even if the State were to enforce—which seems highly unlikely—it is most likely to first issue a warning or directive to shutdown. The only other penalties are misdemeanor citations, which are likely to be minor. However, to avoid potential risks, BYLT could continue to not engage in Public Access Activities until the Stay-at-Home Order is modified or lifted. Another option would be to reach out to the state for additional guidance on this issue.

### ***Workers Compensation***

Our firm generally does not offer employment advice. However, based on our review of publicly available information, it appears that a BYLT employee that contracted coronavirus may be able to obtain workers compensation benefits as a result

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<sup>4</sup> To the extent that BYLT is under contract to maintain *public* recreational facilities, BYLT should confirm with the relevant public agency to confirm that BYLT’s work is considered essential government operations. If so, then such activity would be explicitly authorized under both the state and federal orders.

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of that exposure, even if the exposure occurred during activities that were not authorized by the Stay-at-Home Order. Worker's compensation eligibility generally turns on whether the injury happened at work, rather than whether the employer was acting lawfully. Please note that (a) employees may have a difficult time proving that they were exposed to the coronavirus while on the job, and not in the course of other activities, which may affect eligibility, and (b) employees may be eligible for other benefits if they contract COVID-19 during the course of employment, including disability insurance or paid sick leave.<sup>5</sup>

Please let us know if you have any further questions about the State or County Orders or BYLT operations.

Very truly yours,

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<sup>5</sup> See the Labor & Workforce Development Agency's website on benefits for workers impacted by COVID -19 at <https://www.labor.ca.gov/coronavirus2019/#chart> (last accessed April 17, 2020).