

EPA ISSUES SUPPLEMENTAL GUIDANCE ON RESPONSE AND ENFORCEMENT ACTIONS

Hodgson Russ Environmental Alert
April 14, 2020

On April 10, the U.S. Environmental Protection Agency (“EPA”) issued supplemental guidance to all Regional Administrators regarding cleanup and emergency response actions. The guidance specifically focused on sites regulated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund”), Resource Conservation and Recovery Act (“RCRA”) corrective action, the Toxic Substances Control Act (“TSCA”) polychlorinated biphenyl (“PCB”) cleanup provisions, the Oil Pollution Act, and the Underground Storage Tank (“UST”) program.

In light of the evolving COVID-19 response, EPA gave discretion to the Regional Administrators to make decisions about on-site activities on a case-by-case basis. Those decisions must be guided by certain priorities, including protecting the health and safety of the public, EPA staff, and cleanup partners; adherence to federal, state, tribal, and local health restrictions; and maintaining EPA’s ability to prevent and respond to environmental emergencies to protect public health and welfare and the environment.

Guidance for Field Work Decisions

EPA categorized its guidance to respond to on-site and off-site work. For on-site work, Regional offices are to continually evaluate ongoing work in light of pertinent health declarations. Even where no declarations are in effect, Regional offices have been asked to consider the availability and safety of work crews, the level of urgency associated with the actions, and any other logistical challenges such as travel restrictions, lodging concerns, and availability of personal protective equipment (“PPE”).

Where work will begin or continue, EPA expects ongoing review and modification of site Health and Safety Plans (“HASPs”) as the situation unfolds. These change requests will need to be made pursuant to the applicable provisions of the governing enforcement instrument (i.e., a Consent Order), which may include discretionary schedule adjustments or force majeure provisions.

When determining whether site activities will continue, EPA will work within any existing written arrangement, but will consider certain other factors, as appropriate. The guidance lists several factors that EPA personnel should consider when making

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a decision:

- Whether pausing or scaling down is likely to result in an imminent and substantial endangerment to human health or the environment. Examples of actions that meet this criteria may include, but are not limited to, oil spill cleanups, events that endanger drinking water, prevention of catastrophic events, and protection of sensitive populations.
- Whether continuing the action would reduce human health risk and/or exposure over the next six months, such as vapor intrusion and drinking water investigations.
- Whether work that would not provide short-term human health risk reduction could be delayed, provided that the appropriate HASPs are in place. Such work could include sites where monitoring, sampling, or active remediation of stable conditions exist.

Effects on Non-Field Site Work

Work such as modeling, documentation, work plans, negotiations, and other tasks that are remotely achievable should continue. Where COVID-19 response results in a diversion of these resources, that delay should be communicated, evaluated, and handled appropriately.

When Work is Paused

Due to the uncertainty regarding how this public health threat will develop, parties to a cleanup or response action should be prepared for constant communication and shifting responsibilities and capabilities. Communication should follow the procedures set forth in the enforcement instruments and is the key to successfully meeting EPA expectations.

What You Can Do

Based on the guidance, any entity engaged in cleanup or response actions subject to EPA oversight should be in regular communication with the assigned Project Manager on upcoming deadlines and activities to assess the appropriate path forward. Responsible parties should also be discussing scheduling and mobilization issues with its engaged consultants, and consider necessary revisions, to the extent not already done, to relevant timelines, plans and protocols (*i.e.* HASPs updates), and understand notification and emergency exemptions that may exist under guiding enforceable documents and statutory provisions.

If you have questions related to this new guidance, or navigating any other environmental-related issue, please contact Michael Hecker (716.848.1599) or anyone else on the Hodgson Russ Environmental Practice, and we would be happy to help.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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