USEPA Interim Guidance On Cleanup Sites During COVID-19 And Remediation In New Jersey

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On April 10, 2020, the United States Environmental Protection Agency ("EPA") issued interim guidance to its regional offices to evaluate ongoing cleanup activities while maintaining the health and safety of the public during the COVID-19 crisis. The interim guidance "focuses on decision making at emergency response and longer term cleanups sites where EPA is the lead agency or has direct oversight of, or responsibility for, the cleanup work," including, but not limited to, Superfund cleanups, Resource Conservation Recovery Act corrective actions, Toxic Substances and Control Act PCB cleanups, Oil Pollution Act spill responses, and Underground Storage Tank Program actions.

Decisions will be case-by-case consistent with protecting the health and safety of the public, EPA staff and cleanup partners. The criteria are evaluating site specific factors to determine if failure to continue will pose an imminent and substantial endangerment to human health and the environment and whether it is practical to proceed. Also, cases will be proceeding under current enforcement documents which may allow discretion to EPA's project managers and/or force majeure provisions and arrangements for notice and extensions.

Non-field site work and obligations can continue including investigation reports, modeling, negotiation between the parties, decision documents, cleanup documentation, workplans, progress reports, and maintaining compliance with obligations such as financial assurance.

Regarding site-specific work decisions, EPA regional management provided these factors for consideration:

- Whether failure to continue response actions would likely pose an imminent and substantial endangerment to human health or the environment, and whether it is practical to continue in such actions such as emergency responses, sites with ongoing or a threat of imminent acute or direct human exposures if not addressed (such as water supplies where there is exposure to or consumption of contaminated drinking water and on-site exposures such as lead, arsenic, other heavy metals, PCBs, asbestos, vapor intrusion, etc.);
- Whether maintaining any response actions would lead to a reduction in human health risk/exposure within the ensuing six months (such as vapor intrusion investigations, exposure at residential sites and drinking water work;
- Whether work that would not provide near-term reduction in human health risk could be more strongly considered for delay, suspension, or rescheduling of site work, in coordination with state, tribal, and local officials and with updated

Health and Safety Plans as appropriate (such as periodic monitoring, routine sampling active remediation systems and field sampling for remedial investigation/feasibility study work.

The Interim Guidance is available on the EPA's website here.

Notably, the EPA is sharing this guidance with states to consider as they encounter similar issues at state-lead sites.

For New Jersey, Executive Order 122, which is intended to clarify essential versus non-essential construction projects, includes the phrase “remediate a site”. New Jersey consultants and licensed site remediation professionals (“LSRPs”) and the New Jersey Department of Environmental Protection (“NJDEP”) have interpreted remediation to be an essential activity that should continue. According to environmental statutes in New Jersey, remediation is defined to include all aspects of remediation from a Preliminary Assessment through Remedial Action. Additionally for sites with Immediate Environmental Concerns (“IECs”) or potential IECs, the NJDEP has continued to stress that every effort should be made to identify and address potential exposures. The bottom line appears to be that remediation work can proceed as long as consultants and contractors can abide by social distancing requirements, and the concepts outlined in the EPA's interim guidance. In all cases, parties responsible for remediation requirements should consult any applicable enforcement instruments or orders particularly where delay because of COVID-19 will affect the ability to meet cleanup obligations.