

EPA Cleanup Site Guidance Recognizes COVID-19 Challenges for Response Activities

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Today, April 10, 2020, the U.S. Environmental Protection Agency (EPA) issued its anticipated interim guidance on impacts to operations at cleanup sites due to the COVID-19 pandemic. The [guidance memorandum](#), issued jointly by the heads of EPA's Office of Land and Emergency Management (OLEM) and Office of Enforcement and Compliance Assurance (OECA) and directed to Regional EPA Administrators, focuses on adjusting response activities at cleanup sites under a number of EPA administered programs and emergency responses due to the COVID-19 situation and the myriad of state and local shelter-in-place and business curtailment orders.

The memorandum follows a string of novel guidance documents from EPA to address ongoing environmental programs due to the unprecedented public health crisis. In fact, EPA indicated that it would issue this guidance in its original March 26 enforcement discretion guidance in response to the pandemic. We have previously written about other COVID-19 related enforcement policy guidance from OECA [here](#) and [here](#). As with EPA's other recent guidance documents, evaluating how this latest cleanup site guidance may apply to your cleanup actions is critical given the propensity of headlines to miscast and sensationalize the scope of EPA's temporary pandemic policies.

According to the guidance, EPA will make decisions regarding on-site activities—including whether to continue, reduce, or pause field work—"on a case-by-case basis and in consultation with other EPA offices, as appropriate"—in light of COVID-19 related challenges. The temporary policy articulates two priorities that guide case-by-case determinations: (1) protecting the health and safety of the public and EPA staff and cleanup partners, and (2) ensuring EPA's "ability to prevent and respond to environmental emergencies" and "protect public health and welfare and the environment."

EPA plans to apply this same approach to evaluate requests for extensions or other delays by entities conducting cleanup and response activities at sites led by other federal, state, tribal, or local authorities, as well as private entities (including potentially responsible parties or property owners). The stage of cleanup at a particular site will be an important factor in EPA's determination of whether to grant a requested delay or extension. For instance, the agency may be more or less inclined to allow a site to pause or delay work depending on whether the site is engaged in planning, investigation, active remediation, or post-construction maintenance/monitoring. Further, the guidance memorandum explains that any decisions to allow delays or pauses in work will be made "in accordance with the terms of the applicable enforcement instrument," and so may vary based on not just the circumstances in play at a particular site but also due to the language of the legal documents relevant to the site. Lastly, the guidance encourages the continuation of work that can be performed remotely. Reports, modeling work, negotiations, and other documentation aspects are all highlighted as efforts that can be done virtually and should carry on despite disruptions to physical on-site work.

Regional offices are directed to "evaluate, and periodically re-evaluate, the status of ongoing response work at sites and the possible impact of COVID-19 on sites, surrounding communities, EPA personnel, and response/cleanup partners." In addition, the guidance lays out a number of factors for the Regions to consider in making determinations about whether to continue or pause work at a particular site.

The following types of activities are identified as most eligible for delay, suspension or rescheduling of site work in response to limitations caused by the pandemic:

- Periodic monitoring
- Routine sampling for five-year reviews or general compliance with existing agreements
- Field sampling for remedial investigation/feasibility studies or RCRA facility investigation work
- Active remediation of otherwise stable conditions

Conversely, the guidance identifies actions less likely to be delayed, suspended or rescheduled in response to COVID-19, including (but not limited to):

- Work where failure to continue response actions would likely pose an imminent and substantial endangerment to human health or the environment, including emergency response and time critical removal actions
- Providing alternative water supplies to replace contaminated water sources
- Abatement of on-going on-site exposures, such as lead, arsenic, or other heavy metals, PCBs, asbestos
- Responses to prevent a catastrophic event
- Preventing expansion of groundwater plumes threatening drinking water
- Preventing releases to waterbodies

- Assessing and abating vapor intrusion, especially in structures with sensitive populations

There is evidence that the agency is already taking steps to curtail remedial work due to the pandemic. In a [press release](#) accompanying the OLEM/OECA guidance memorandum, EPA stated that it had “reduced or paused on-site construction work at approximately 34 EPA or [potentially responsible party]-lead Superfund National Priority List sites, or 12% of all EPA sites with ongoing remedial actions,” based on COVID-19 considerations as of the beginning of this month.

Companies engaged in cleanup activities at sites subject to EPA’s authority should evaluate whether planned response activities can proceed or are likely to face COVID-19 disruptions. As always, companies should continue to endeavor to meet environmental obligations. If you anticipate delays or the need for extension, however, you should consult with counsel now to evaluate the enforcement instruments applicable at your site and assess whether the circumstances at your site may merit forbearance under the guidance.

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