

VAPOR INTRUSION INVESTIGATIONS AND EMERGENCY ACTIONS MAY CONTINUE, AS EPA ISSUES INTERIM GUIDANCE REGARDING POSSIBLE DELAYS IN SUPERFUND AND RCRA RESPONSE ACTIONS AND SITE WORK DURING COVID-19 PANDEMIC

Fri Apr 10th, 2020 | Categories: [Compliance Counseling](#) |

Today, EPA issued its “[Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19](#).” This guidance provides important information for regulated entities, consultants, EPA’s partners, and the public concerning response actions at Superfund and RCRA sites. It is a follow-up to EPA’s previous Memorandum on March 27, “[COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program](#),” which did not cover CERCLA and RCRA response actions and enforcement actions, [analyzed by Bick Law LLP in a post from last week](#).

Quick Take Aways

This post attempts to flesh out some of the more complicated or ambiguous directives in the interim guidance; the main take aways include (but do not consist of legal advice):

- Parties must communicate with EPA if they believe COVID-19 may delay response action or site work; consult the applicable enforcement document for *force majeure* notice requirements.
- Response action activities that can be performed virtually should proceed (i.e., preparing written workplans, progress reports, investigation reports, documents, modeling, financial assurance compliance and negotiations between the parties that can be done virtually).
- Emergency actions will proceed where necessary and practical.
- The protection against COVID-19 of EPA staff, consultants, performing parties, and the public will take precedence over non-emergency response action work; EPA must consider travel restrictions and social-distancing requirements when deciding if in-person activity is appropriate.
- Response action activities that are delayed will resume when appropriate.
- Continued communication with EPA is critically important—at the end of the day, when this is all over, performing parties will need a written record of their communications with EPA to avoid future unwarranted enforcement and stipulated penalties for noncompliance. *Communicate with EPA early and often and in writing.*

Areas Needing Clarification by EPA

As always, the devil is in the details, and many of the situations described in the interim guidance could be interpreted broadly. It would help the performing parties at the relevant sites to have clarity from EPA regarding certain factors in its decision making, including the following:

- The interim guidance provides that EPA may not grant a requested COVID-19 delay if the delay is “reasonably likely to adversely affect drinking water sources (private or public),” such as a temporary suspension in operation of groundwater pump and treat systems. EPA does not quantify the extent or timing (immediacy) of the “reasonably likely” adverse effect that would trigger the prioritization of the response action over the COVID-19 health risks. Interpreted broadly, suspending extraction at a contaminated groundwater Superfund site necessarily would result in plume expansion (because the plume would not be contained); such expansion may have a future adverse impact on drinking water wells once the plume reaches those wells. Yet, the short-term COVID-19 risk to public health caused by continuing to perform pump and treat operations, in some circumstances, may outweigh that groundwater expansion risk. The interim guidance also provides that “active remediation of stable groundwater plumes” (not plumes that are expanding or migrating if they are not contained by the response action) may be considered for suspension due to COVID-19. Yet, it is unclear what “stable” means to EPA. Performing parties will need to consult EPA to determine if a response action at a groundwater Superfund site is stable enough to justify suspension due to COVID-19, assuming such response actions are impacted by the virus.
- The interim guidance provides that EPA should not grant a delay for a response action if such action would lead to a reduction in human health risk/exposure within the ensuing six months. As with several other factors, this factor could exist at virtually every site depending on the level of reduction considered by EPA to justify continuing the work. It would be helpful if EPA could quantify the extent of reduction in human health risk/exposure within that six month period that would result in prioritizing such response action work over the COVID-19 health risk. Vapor intrusion monitoring, in particular, will present difficult challenges because that type of response action could lead to a reduction in risk/exposure within six months, but it also could result in immediate and severe COVID-19 health risk due to the nature of the sampling in households. EPA will be balancing those concerns, but again, it would be helpful to have clarification concerning the extent of reduction of risk/exposure EPA would require to override the risk of COVID-19.
- Response action activities that are delayed will resume when appropriate, but EPA provides no direction on how this will proceed, in particular when EPA may consider rescheduling activities. It may be premature to “reschedule” site work before more is known about the duration of the COVID-19 impacts. In some cases, a schedule may slip a full year if the window for site work is based on multiple time-sensitive considerations such as tides and tribal fishing rights – presumably this will be taken into consideration when EPA decides on a case-by-case basis whether to delay, suspend, or reschedule the work.

Because this is an interim guidance, there is no opportunity for public comment. However, EPA will be providing updates as appropriate. In addition, the California Environmental Regulatory Lawyers will seek clarification from EPA on these issues.

Case-By-Case Decision Making

EPA issued the interim guidance for response actions related to cleanup and emergency response sites, including Superfund and RCRA sites, where EPA is the lead agency or has direct oversight of or responsibility for the work being performed, including sites where work is being conducted by EPA, states, tribes, other agencies of the Federal Government, and by other parties, including potentially responsible parties (“PRPs”). The new guidance provides details on factors that will be considered by EPA when determining whether to allow delays, suspensions, or rescheduling of response actions. The bottom line is that responsible parties will be required to proactively request such consideration, following the terms of the applicable enforcement instrument (Consent Decree, Consent Order, Settlement Agreement, Corrective Action Agreement or Order, Closure Permit, etc.). EPA will make decisions on a case-by-case basis, balancing the health risk to workers exposed to COVID-19 as a result of performing the response action, and the imminent and substantial endangerment or acute threat to human health that may be caused if the response action is not performed on schedule.

Work at the response action sites, or travel to the sites, must take into account COVID-19 travel restrictions by state, health and safety regulations, and access to personal protective equipment and lodging. The same considerations must be taken into account for responses to releases or substantial threats of releases into the environment of chemical, oil, or other hazardous materials/substances,

as well as pollutants or contaminants that may present an imminent and substantial danger to the public health or welfare.

There is tension in the guidance that can only be resolved by weighing the risks on a case-by-case basis, which the guidance allows. The guidance specifically states, “factors should not be considered in a manner that would override protection against unnecessary potential exposure to COVID-19” suggesting that the health risks of COVID-19 take priority. On the other hand, it also states, decisions to suspend or delay response actions “do not operate to supersede or amend enforcement instruments.”

Work that Provides Near-Term Reduction in Human Health Risk Will Be Prioritized, E.g., Vapor Intrusion Sampling

Site work “that would not provide near-term reduction in human health risk” may be delayed, suspended, or rescheduled upon request by the performing parties. Work that provides “near-term reduction in human health risk” (for example, vapor intrusion investigations that could lead to a reduction in human health risk/exposure within 6 months) may move forward. EPA will weigh the two risks – COVID-19 and near-term human health impacts – in each case before deciding if a delay in work is acceptable. Weighing those risks will not be simple. Using vapor intrusion remediation as an example, if vapor intrusion sampling would provide “near-term reduction in human health risk within the next 6 months for household residents,” then the interim guidance suggests that such sampling should not be suspended or delayed. However, the guidance also directs EPA Regions to reduce or suspend response actions at sites that require “close interaction with high risk groups or those under quarantine, such as work inside homes” and “at other sites where social distancing is not possible,” which would include vapor intrusion sampling in homes. Again, the internal tension requires a balancing act that EPA will conduct on a case-by-case basis.

Many Superfund sites, particularly in California, are investigating the vapor pathway, as a result of the California State Water Resources Board’s regulation of contamination via vapor intrusion. This often requires in-door air quality monitoring in homes near the Superfund sites. Even without the COVID-19 scare, such sampling requires careful communication to manage the residents’ anxiety related to perceived risks of exposure of air contamination that is perceived to be associated with the sampling indoor air. If EPA determines that such sampling must continue because the work “provide[s] near-term reduction in human health risk,” the ongoing sampling could spawn heightened anxiety for the residents. Plus, the residents and the technicians sampling the indoor air will already be suffering from anxiety concerning possible exposure to COVID-19. Though decisions to suspend or delay such sampling will be implemented on a case-by-case basis, this is one area that could use immediate clarification by EPA to alleviate the anticipated concerns of all parties during a time of national crisis.

Communicate, Communicate, Communicate.... In Writing

Performing parties that believe COVID-19 will impact their ability to perform response actions at a site must communicate with EPA project managers about the status of their sites and associated field work and any anticipated challenges and mitigation measures, including any request for suspension, delay or rescheduling due to COVID-19. EPA will promptly decide if a modification to a party’s performance obligations is appropriate, depending on whether the response action is affected by COVID-19, and constitutes a “*force majeure*.” The party should look to the applicable enforcement document (Consent Decree or other) for directions on the requisite notice and other information to EPA, including the timing of such notice.

RCRA Sites

The Resource Conservation and Recovery Act is the public law that creates the framework for the proper management of hazardous and non-hazardous solid waste. RCRA sites include landfills, land disposal sites at facilities, and many other types of facilities that manage or dispose of hazardous and solid waste. All of these sites are subject to monitoring and reporting obligations, and some are subject to corrective action, that may be implicated by the interim guidance memo.

RCRA also governs closure and post-closure care of RCRA sites. Post-closure care is required for land disposal units that leave waste in place upon closure (i.e., landfills, land treatment units, surface impoundments, or any other hazardous waste management unit that cannot achieve the clean closure standards). These sites must monitor and maintain liners, final covers, leachate collection and removal systems, leak detection systems, and gas collection systems to protect the surrounding environment and population from releases of hazardous constituents. The standard post-closure care period is 30 years, which means there are many post-closure RCRA sites across the U.S. These sites are subject to monitoring requirements that may be impacted by COVID-19.

Monitoring activities at RCRA sites and RCRA closure and post-closure sites allow EPA to detect releases that may cause an imminent and substantial endangerment. EPA may assert that RCRA site and closure/post-closure monitoring is necessary to prevent an imminent and substantial endangerment. The necessity will be balanced against the possible exposure to COVID-19. While the report preparation task alone may be possible in a virtual environment, the report will depend on in-person monitoring activities, which may not be feasible until the distancing requirements are lifted.

Other sites are subject to a RCRA Corrective Action Plan. A CAP provides a site-specific schedule of compliance to be included in a permit or a corrective action order. Actions including Interim/Stabilization Measures ("ISMs") may be necessary to control or abate threats to human health and/or the environment from releases and/or to prevent or minimize the further spread of contamination while long-term remedies are pursued. Other tasks in the CAP may be able to wait until the COVID-19 pandemic is resolved to allow for in-person work again, including: RCRA Facility Investigation ("RFI"); Corrective Measures Study ("CMS") - to develop and evaluate a corrective measure alternative or alternatives and to recommend the final corrective measure(s); and Corrective Measures Implementation ("CMI") - to design, construct, operate, maintain and monitor the performance of the corrective measure(s) selected.

The interim guidance provides specifically that the following response actions will be considered by EPA for delays due to COVID-19, upon request: periodic monitoring, routine sampling activities that typically are considered for five-year reviews or compliance with existing agreements, field sampling for RCRA facility investigation work, and active remediation of otherwise stable conditions.

Superfund Sites

The National Priority List ("NPL") is a list of the sites being cleaned up pursuant to the Superfund process. The 1,178 NPL sites, 48 proposed NPL sites, 407 deleted NPL sites, and 1,134 completed NPL sites in the U.S., are in various stages of the Superfund cleanup process. The process includes: Preliminary Assessment, NPL Site Listing (identifying the site for remediation with EPA oversight), Remedial Investigation/Feasibility Study ("RI/FS") (characterization of the site and the remediation options), Records of Decision ("ROD") (selection of the remedy), Remedial Design ("RD"), Remedial Action ("RA"), Construction Completion, Ongoing Operation and Maintenance and Five-Year Review to evaluate ongoing protectiveness of the remedy, NPL Deletion, and ultimately (hopefully) Site Reuse/Redevelopment. The RI/FS, RD, RA, Construction, and O&M, all require on-site, in-person activities, including sampling soil and groundwater, monitoring groundwater and surface water, soil excavation, and groundwater extraction and treatment. These activities may be delayed during COVID-19 depending on EPA's evaluation of a performing parties' requests. Other activities, including hydrogeologic modeling, fate and transport modeling, and allocation advocacy may be able to continue "virtually."

The interim guidance provides specifically that active remediation of stable groundwater plumes (not plumes that are expanding or migrating if they are not contained by the response action) may be considered by EPA for suspension as a result of COVID-19, upon request. The question remains, what is "stable" considering most groundwater is in a dynamic state.

The guidance does not address how EPA should address contaminated sediment Superfund sites (rivers), which are, by their nature, always changing. Presumably, those activities that can be conducted virtually, should continue to be conducted, and those that require on-site in-person activity, or in-person laboratory activity, may require communication with EPA to determine if a suspension or delay is appropriate to protect workers from COVID-19 health risks. Rivers present a unique challenge in the western states because of tidal influences and fish windows that narrow the in-river sampling window. The interim guidance does not indicate if EPA will consider the

duration of suspension in a sampling activity, when it considers whether to grant that suspension. In some rivers, the sampling window may be limited to a few weeks in any given season, or potentially only a few weeks in any given year. If suspension or delay is necessary due to COVID-19, the sampling schedule (and corresponding remediation schedule) could be delayed up to a year. EPA is under political pressure at some of these sites to show progress made towards remediation, which may impact the decision making process.

The interim guidance states that parties should be able to continue negotiating allocations where there are multiple PRPs at a site, without meeting in person. In theory, that is true, but that is a naïve view of the allocation process. Most allocations involve technical data that parallels, if not relies heavily on, the RI/FS, ROD, RD, and RA process. Without the data fully characterizing the site and the selected remedy (and cost of the remedy), PRPs cannot conduct an allocation that will be agreed upon by the parties and upheld in court. As a result, it is possible EPA will see delays in negotiated settlement agreements with PRP groups as a result of COVID-19.

What Will Justify a Delay Due to COVID?

EPA may determine that COVID-19 justifies a delay, suspension, or rescheduling of site work if:

- Suspending or delaying the response action is not likely to pose an imminent and substantial endangerment to human health or the environment.
- It is not practical to continue certain response actions.
- Work that would not provide near-term reduction in human health risk (after coordination with state, tribal, and local officials).

EPA may not allow a COVID-19 delay if:

- There are emergency responses and time critical actions that are practical to continue.
- The site has an ongoing or a threat of imminent acute or direct human exposures that would compromise public health, then EPA will *not* be inclined to grant the delay or suspension. For example, providing alternative water supplies (e.g., bottled water, Point of Entry Systems, replacement filters, etc.) to individuals who otherwise would be exposed to or consume contaminated drinking water, and protecting individuals from ongoing on-site exposures, such as lead, arsenic, other heavy metals, PCBs, asbestos, vapor intrusion, etc., will also be prioritized to continue. Prevention of exposures that pose an imminent threat to public health and welfare and the environment will also continue, if possible.
- The response action will prevent a catastrophic event (e.g., mine blow outs, breach of gyp stacks, sites with high probability of fire or explosion, etc.).
- The response action will prevent contaminated groundwater plume expansion that is reasonably likely to adversely affect drinking water sources (private or public), including continued operation of groundwater pump and treat systems. Presumably, EPA will consider the immediacy of the adverse impacts to the drinking water source. At many Superfund sites with remedies involving extraction and treatment of groundwater with a drinking water end-use, suspending or delaying the pumping could result in plume expansion (lack of containment) that could have a future adverse impact on drinking water wells.
- The response action will prevent releases to waterbodies that are reasonably likely to adversely affect drinking water intakes or communities downstream, including treatment of acid mine drainage.
- The response action includes on-site security or activities that are necessary to prevent unauthorized access to sites for the safety of life and/or the protection of government property.
- The response action involves the disposal of materials off-site that create an imminent safety issue if not promptly removed (e.g., mine waste, chat, unsafe cylinders).
- The response action is necessary to stabilize in-process response actions to prevent unacceptable releases to the environment (e.g., deactivation and decommissioning of a former nuclear facility, soil excavation, partial closure of a landfill).

disposal cell).

- The response action would lead to a reduction in human health risk/exposure within the ensuing six months. As with several other factors, this factor could exist at virtually every site depending on the level of reduction considered by EPA to justify continuing the work, including vapor intrusion investigations, residential site work, and drinking water work. It would be helpful if EPA could quantify the extent of reduction in human health risk/exposure within six months that would result in prioritizing such response action work over the COVID-19 health risk.

The EPA interim guidance anticipates that work that can be conducted virtually will proceed without delay, despite COVID-19, including: “investigation reports, modeling, negotiations between the parties, decision documents, cleanup documentation, workplans, progress reports, and maintaining compliance with obligations such as financial assurance.” Unless the work “may be impacted because supporting operations (e.g. laboratories, equipment) and materials are unavailable or have been diverted to other uses in consideration of the national interests.”

Conclusion

The key takeaway of this guidance, despite the internal tensions and the case-by-case decision making, is that “[p]arties who believe that COVID-19 restrictions may delay their performance of non-field related work should consult the procedures set forth in the applicable enforcement instrument.” As always, communication is key.

Keep in mind the interim guidance applies to EPA actions, not state or tribal actions. The guidance directs EPA to work with states and tribes and inform them of the guidance. Although the guidance seeks to create “national consistency,” the implementation of the guidance will depend on state law, where states are implementing federal statutes. Until there is a national stay-at-home order, the guidance will also depend on state stay-at-home or social distancing orders. In states where there are no such orders, EPA will still consider the health impacts to its employees and to others when deciding whether to carry on in-person site activities. In states where there are stay-at-home orders in place, EPA will comply with those orders; however, in most states, EPA’s activities would be deemed an “essential activity” leaving EPA with the guidance to weigh when and how to proceed with site work in person.

As a reminder, this interim guidance is consistent with the March 15, 2020, EPA Administrator Andrew Wheeler announcement that as of “Monday, March 16, all employees with a telework agreement across the EPA may, to the extent possible, begin teleworking at least through Friday, April 3.” His action was affirmed on March 17 by an [OMB Memo](#) directing that “Government must immediately adjust operations and services to minimize face-to-face interactions” during the COVID-19 pandemic.

EPA will update its interim guidance as appropriate. Although Administrator Wheeler issued the telework order “at least” through April 3, it is possible that EPA will update and revise this directive and related interim guidance as the situation unfolds. The California Environmental Lawyers at Bick Law LLP are closely following the COVID-19 impacts to EPA’s operations and to the remedial work that our clients are performing and will provide updates as appropriate.