

EPA Releases Interim Guidance for Cleanup and Emergency Response Actions During COVID-19

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On April 10, 2020, the Assistant Administrators of the U.S. Environmental Protection Agency's (EPA or Agency) Office of Land and Emergency Management and Office of Enforcement and Compliance Assurance issued a memorandum entitled "[Interim Guidance on Site Field Work Decisions Due to Impacts of COVID-19](#)" to all EPA Regional Administrators. The memorandum addresses response actions related to cleanup and emergency response sites where EPA is the lead agency or has direct oversight of, or responsibility for, the work being performed. The guidance provided in the memorandum applies to field activities being performed under a broad array of EPA authorities, including the Superfund program, Resource Conservation, and Recovery Act (RCRA) corrective action, Toxic Substances Control Act (TSCA) PCB cleanup provisions, the Oil Pollution Act, and the Underground Storage Tank (UST) program.

Overview

EPA stresses that the Agency will continue to make decisions about ongoing onsite response and cleanup activities on a case-by-case basis, in accordance with priorities to protect the health and safety of the public and EPA staff while also maintaining the ability to prevent and respond to environmental emergencies. EPA will also use this case-by-case approach in responding to requests from outside parties, including states, tribes, local governments, other federal agencies, potentially responsible parties (PRPs), and property owners, for extensions or delays in performance.

General Guidance: Response Field Work

EPA has directed the 10 EPA Regional offices to evaluate, and periodically re-evaluate, the status of ongoing response work and the potential impact of COVID-19 on such work. This will include determinations to continue site operations, or instead secure the site until the COVID-19 pandemic and associated health declarations have been resolved. In addition to considering federal, state, tribal, or local health declarations and [OMB's federal travel guidance](#), EPA directs the Regions to weigh other factors such as:

- safety and availability of work crews, EPA, state, or tribal staff;

- the critical nature of the work;
- logistical challenges, including transportation and lodging; and
- any other factors particular to a site.

Where response work commences or continues, Regions must review and/or modify a response action's health and safety plan to ensure compliance with [CDC COVID-19 guidelines](#).

Parties who determine that COVID-19 restrictions may result in a delay in performance obligations are directed to consult their applicable enforcement instruments for information on requesting schedule adjustments, *force majeure* provisions, and providing requisite notice. Again, EPA states that any modifications to performance obligations will be made on a case-by-case basis, and that it expects to make such determinations promptly. EPA also notes that it intends to be flexible regarding timing of notices.

Site-Specific Factors for Consideration

In addition to the general factors above, much of EPA's memorandum discusses site-specific factors that Regions should consider in deciding whether to continue response actions as planned. These include three main factors:

- whether failure to continue response actions would pose an imminent threat to human health or the environment;
- whether maintaining response actions would lead to a reduction in human health risk/exposure within the next six months; and
- 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.

EPA warns that these site-specific factors must not override protection against unnecessary exposure to COVID-19. EPA also lists reasons why some Regions have already made decisions to reduce or suspend response actions, such as site workers testing positive for or exhibiting symptoms of COVID-19, state, tribal, or local travel restrictions, or sites where social distancing is not possible.

Impact on Non-Field Site Work

While acknowledging the need for reduction of field response actions, the Agency emphasizes that non-field work that advances cleanup of sites should continue where possible. EPA indicated that virtual work such as preparing investigation reports and progress reports, completing modeling, conducting negotiations, and complying with financial assurance will continue to be possible in many situations. In the event non-field work is impacted by COVID-19, parties should consult their applicable enforcement instruments just as they would for impacts to field response actions.

When Site Work Is Paused

EPA briefly addresses next steps for pausing site work at the end of the memorandum. Regions are encouraged to continuously monitor site conditions and make plans for resuming field work once a decision is made to temporarily reduce or suspend response action work. And, even where field work is on pause, EPA directs Regions to continue conducting Superfund community involvement at all work sites in accordance with the internal EPA document "CERCLA Interim Guidance on Public Engagement During COVID-19."

Please do not hesitate to contact Eleni Kouimelis (312-558-5133, ekouimel@winston.com) or your Winston relationship attorney if you have any questions. We will continue to provide updates as the situation evolves.

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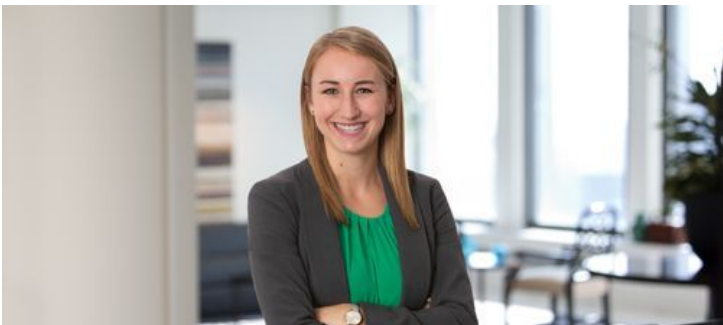
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