

NYSDEC ISSUES GUIDANCE ON “ESSENTIAL ACTIVITIES” FOR REMEDIAL AND BROWNFIELDS PROJECTS DURING THE COVID-19 PANDEMIC

Hodgson Russ Environmental and Brownfield Redevelopment Alert
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Non-essential in-person activities have been restricted in New York State during the ongoing COVID-19 pandemic through a series of Executive Orders issued by Governor Cuomo. To supplement the plain language of the orders, Empire State Development Corporation (ESD) has provided further guidance on the State’s interpretation of these designations. In the context of remedial projects, there has been some confusion as to the scope of what applies, as there is language applicable to services that are “necessary to maintain the safety, sanitation and essential operations of businesses,” which some parties have been reading in concert with restrictions limiting construction activities to those that have been deemed essential.

Today, the New York State Department of Environmental Conservation (NYSDEC) issued its own guidance to help the regulated community. NYSDEC indicated that the following are deemed “essential” activities:

- Remedial construction activities, including new construction starts, at sites that NYSDEC has determined pose a significant threat to public health and/or the environment, including Class 2 sites on the Registry of Inactive Hazardous Waste Disposal Sites (State Superfund) and significant threat sites in the Brownfield Cleanup Program (BCP);
- Completion of remedial construction already under way at non-significant threat sites, as necessary to ensure site safety and prevent exposure to site contaminants, including completion of site cover systems;
- Operation and maintenance activities for active remedial systems that are necessary for the continued protection of human health and the environment;
- Interim remedial measures to address imminent human exposures and/or threat of significant contaminant migration;
- Spill response actions; and
- Investigation, including pre-design investigations, of petroleum and hazardous waste releases as determined by NYSDEC on a case-by-case basis to be necessary to address potential human exposures and/or threat of significant contaminant migration.

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NYSDEC confirmed that a site participating in the BCP and currently engaging in remedial measures that also serve to advance project development would be deemed “essential” because the work would be “unsafe to allow to remain undone,” per ESD guidance. Regardless of the BCP designation, we think it is likely that many BCP projects will be delayed. General limitations on access to personnel and equipment play a factor, as does the long-term project planning scoping.

In short, if your business has a site that has active site remedial work in progress, or experiences an inadvertent release requiring prompt action, it appears that the NYSDEC will most likely allow the work be undertaken. We still recommend engaging the assigned Project Manager directly in light of this guidance to independently confirm the designation, especially given the distinctions that can exist on a case-by-case basis. And while the project may be deemed essential for purposes of moving forward, bear in mind that there may be other factors that remedial parties need to consider and convey to the NYSDEC in regard to the pandemic, such as the limitation on available personnel and resources, and general risk to worker health and safety, that may limit short-term action.

If you wish to discuss NYSDEC’s guidance, or brownfields or environmental issues generally, please contact Michael Hecker (716.848.1599) or Jeff Stravino (716.848.1394).

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