

## New York's Department of Environmental Conservation Provides Guidance on "Essential" Environmental Cleanup and Brownfield Activities

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### Client Advisory

April 3, 2020 by Nicholas W. Tapert and Michael H. Bauscher

The New York State Department of Environmental Conservation (DEC) recently issued guidance on what qualifies as "essential" construction in the field of environmental cleanup and Brownfield activities, under two Executive Orders (EO) issued by Governor Cuomo in response to COVID-19 (EO [202.6](#), dated March 18, which was modified by EO [202.13](#), dated March 29).

The Governor has charged Empire State Development ("ESD") with publishing interpretive guidance on what construction is essential versus non-essential. (We summarized ESD's guidance in a previous advisory, available [here](#).) Under ESD's guidance, non-essential construction must be shutdown, except for emergency construction, which ESD defines as "a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site." Essential construction "includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters." Separately, ESD's guidance provides that "[e]ssential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses including . . . emergency management and response" are considered essential and may continue.

Recently, DEC's Division of Environment Remediation [issued](#) its own guidance on how ESD's guidance bears on environmental cleanup and Brownfield activities. DEC considers the following activities to be essential and therefore permitted to continue under the Governor's EOs:

- Remedial construction activities, including new construction starts, at sites that DEC 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 and significant threat sites in the Brownfield Cleanup Program,
  - 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,
  - Investigation, including pre-design investigations, of petroleum and hazardous waste releases as determined by DEC 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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DEC goes on to appropriately remind the public that “[e]ssential work must continue to comply with the guidance and directives for maintaining a clean and safe work environment issued by the Department of Health and every business, even if essential, must maintain social distance to the extent possible.”

It is no surprise that DEC’s spill response program or other efforts to prevent imminent threats to human health and the environment will continue under current conditions. However, DEC’s guidance should provide the regulated community with needed clarity on how sites participating in the Brownfield Cleanup Program ought to proceed, with respect to both new and ongoing construction. Although Class 1 sites are not specifically referenced, to the extent immediate action is required at a Class 1 site to protect the public health and/or the environment, it would be permitted by DEC’s guidance.

Importantly, the rules governing business operations during the COVID-19 emergency continue changing on a daily and sometimes hourly basis. The Carter Ledyard COVID-19 Response Group is monitoring developments in this area and will continue providing updates as the situation evolves.

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*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, [boxer@clm.com](mailto:boxer@clm.com)), **Judith A. Lockhart** (212-238-8603, [lockhart@clm.com](mailto:lockhart@clm.com)), **Bryan J. Hall** (212-238-8894, [hall@clm.com](mailto:hall@clm.com)), **Alexander G. Malyshev** (212-238-8618, [malyshev@clm.com](mailto:malyshev@clm.com)), **Melissa J. Erwin** (212-238-8622, [erwin@clm.com](mailto:erwin@clm.com)), and **Leonardo Trivigno** (212-238-8724, [trivigno@clm.com](mailto:trivigno@clm.com)). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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