

# EPA PROPOSES TO FURTHER COMPLICATE CERCLA AND RCRA REMEDIATION BY REQUIRING COMPLIANCE WITH THE SITE REMEDIATION NESHAPS

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**Environmental, Land and Natural Resources Alert**

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Thirteen years after issuing limits on emissions of hazardous air pollutants from site remediation activities (National Emissions Standards for Hazardous Air Pollutants: Site Remediation ("Site Remediation NESHAPs"), 40 CFR 63, Subpart GGGG), the U.S. Environmental Protection Agency ("EPA") recently proposed (81 Fed. Reg. 29821, May 13, 2016) to significantly expand the scope of the NESHAPs to include sites being remediated pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). While EPA estimates that this will only affect 67 sites, if adopted, the rule will add to the difficulty of identifying and funding a cost effective remedy at sites with significant quantities of volatile contamination.

EPA published the Site Remediation NESHAPs on October 8, 2003 (58 Fed. Reg. 58172) to fulfill its responsibilities after it identified site remediation as potential sources of Hazardous Air Pollutants ("HAPs"). Yet, EPA significantly limited the scope of the NESHAPs in several ways. First it did not apply to sites being addressed pursuant to the remediation requirements of CERCLA or the corrective action requirements of RCRA, including underground storage tanks at gasoline service stations. Second, it only applied to sites that were co-located with stationary sources that emitted HAPs listed in the rule and where the HAP emissions from the site and the stationary source together exceeded the limits for major HAP sources. Third, it only required controls for three types of units associated with site remediation activities: process vents for treatment systems, remediation materials management units and equipment leaks from pumps, valves, and associated piping.

Environmental organizations challenged these exemptions first by seeking EPA reconsideration and then by filing suit. The litigation languished until 2014, when the appellate court threatened to dismiss the case. In response, EPA agreed to reconsider the exemptions for RCRA and CERCLA sites and issued the proposed rule as a result. The proposal not only includes RCRA and CERCLA sites but it also deletes the requirement that the site be co-located with a major HAP source.

In the absence of these exemptions, responsible parties will be required to evaluate whether their sites fall under the NESHAPs and whether they need to establish controls or apply work practices to their sources. The rule applies if "remediation material" on site (i.e. contaminated soil or groundwater or tanks drums or other containers) contains one or more of the Volatile Organic Compounds ("VOCs") listed in the rule. This remediation material must be subject to "site remediation" which is designed to excavate, manage and/or treat remediation material.

The definition specifically excludes sampling or monitoring. As a result, the rule would not apply unless there was some type of ongoing remediation, removal action, or an approved remedy involving VOC contamination.

The rule also applies only if the site is a major source of HAPs listed in the rule by emitting or having the potential to emit 10 tons per year of an individual HAP or 25 tons per year of the aggregate of all HAPs. The rule does not specify how these emissions would be measured in the absence of a discrete source and is not specifically limited to emissions from the three regulated sources described above: process vents, remediation material management units and equipment leaks from piping or valves.

The proposal requires only recordkeeping unless the amount of remediation material being excavated pumped or treated on site exceeds one megagram (essentially 2,200 pounds) per year. If the amount of remediation material exceeds that threshold then the owner or operator must use controls or implement best management practices to limit emissions from the three types of regulated emission units.

Other than settling its case with the environmental organizations, it is not clear what the EPA hopes to accomplish with this proposal. It identifies no specific issues and provides only minimal justification or reason for the change. It states that few additional sites will actually need to establish air emission controls so the actual reduction of HAPs is likely to be small. In addition, significant VOC emissions from approved remedies at CERCLA and RCRA sites are likely to be controlled already to comply with federal and state air emission requirements.

Despite this lack of benefit, the proposal will introduce another element of confusion in what is the already difficult and cumbersome remedy selection process, whether subject to the National Contingency Plan under CERCLA or the corrective action requirements under RCRA. The proposal will also require potential emissions issues to be evaluated at mature VOC contamination sites with continuous treatment, such as groundwater pump and treat or soil vapor removal systems. The paper work and control requirements will be in addition to those already in place and will simply add to the cost and complexity of operating an ongoing and long-standing approved remedy.

The public comment period on the proposal ends on June 27. Comments may be submitted at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OAR-2002-0021. K&L Gates is available to assist in drafting or filing any comments.

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