

CLIENT ALERT

EPA Implements Obama-Era Subsurface Intrusion Regulation with National Priorities List Additions

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The U.S. Environmental Protection Agency (EPA) recently implemented an Obama-era regulation by listing two sites - the Rockwell International Wheel & Trim Site in Grenada, Mississippi and the Delfasco Forge Site in Grand Prairie, Texas - on the National Priorities List (NPL) solely based on subsurface intrusion risks. 83 Fed. Reg. 46408 (Sept. 13, 2018).

Subsurface Intrusion and NPL Listing

To evaluate whether a site warrants listing on the NPL, a distinction reserved for the sites most in need of EPA's attention, EPA employs the Hazard Ranking System (HRS). The HRS is a numerical assessment based on data gathered in the preliminary stages of an investigation at a site. It employs a scoring metric targeted toward evaluating the potential for a site to pose a danger to human health or the environment, across such categories as likelihood of exposure, waste characteristics, targets of exposure, and the pathways of exposure. Until 2017, groundwater, surface water, soil exposure, and air migration were the pathways EPA evaluated. In the waning days of the Obama Administration, EPA finalized a rule that added subsurface intrusion as a new component of the HRS, specifically adding it to the soil exposure pathway category. 82 Fed. Reg. 2760 (Jan. 9, 2017). Subsurface intrusion is the migration of hazardous substances, pollutants, or contaminants from the subsurface environment into overlying structures, such as factories or houses. Subsurface intrusion can occur either through contaminated groundwater intrusion or, more commonly, through vapor intrusion. ([More information on vapor intrusion can be found here.](#))

Given the timing of the rulemaking, its fate was uncertain as the Trump Administration ascended. With good reason: on the third day after the inauguration, the Acting Administrator of EPA signed a rule delaying the effective date of the subsurface intrusion rule (which had been set to take effect February 8, 2017), along with 29 other agency actions, until March 21, 2017, to allow for further review. 82 Fed. Reg. 8499 (Jan. 26, 2017). On March 14, 2017, EPA (by then under the leadership of Administrator Scott Pruitt) signed a rule further delaying the effective date until May 22, 2017, attributing the delay to the dearth of appointed officials available to evaluate the need for substantive review. 82 Fed. Reg. 14324 (Mar. 20, 2017). The rule took effect May 22, 2017, without further postponement or alteration.

The HRS and the Rockwell Site

With the subsurface intrusion update to the HRS in effect, still unknown was whether EPA would employ it to propose listing sites on the NPL. It took the better part of a year, but EPA proposed listing the first NPL site based on subsurface intrusion—the Rockwell Site—in January 2018. 83 Fed. Reg. 2576 (Jan. 18, 2018). The Rockwell Site formerly operated as a wheel cover manufacturing and chrome plating facility, and currently operates as a metal stamping plant. Past operations, spills, and waste handling practices resulted in groundwater, surface water, and soil contamination. Trichloroethene (TCE) and other solvents were detected at elevated levels in indoor air in the manufacturing plant. The HRS scoring document notes that EPA relied solely on subsurface intrusion because the score was so high it did not need to review the remaining categories (soil, groundwater, surface water, or air migration).

Public comments on the NPL listing proposal were accepted through March 26, 2018. The National Association of Manufacturers (NAM) commented, expressing concern that EPA did not take into account existing mitigation measures in place at the Site (specifically, a sub-slab depressurization system (SSDS)) when performing the HRS scoring. NAM stated that the SSDS had reduced vapor intrusion levels to below even the most stringent EPA-established thresholds. The current site operator raised similar concerns, stating that repeated testing had demonstrated the effectiveness of the SSDS.

The HRS and the Delfasco Forge Site

In May 2018, EPA proposed a second site – the Delfasco Forge Site – for NPL listing based on subsurface intrusion risk. 83 Fed. Reg. 22918 (May 17, 2018). The Delfasco Forge Site formerly operated as a munitions manufacturing and forge operation. Soil and groundwater is contaminated with chlorinated solvents. Subsurface contamination has resulted in indoor air contamination of residential properties adjacent to the former facility. Vapor mitigation systems have been installed in some of these homes. The HRS scoring was done strictly on the basis of subsurface intrusion, with EPA stating that the site score would not be changed by evaluating any other pathways. Unlike the Rockwell Site, no public comments were received on the proposed NPL listing of the Delfasco Forge Site.

Why Does It Matter?

Although the addition of another hazardous substance exposure pathway to the HRS and its use by EPA to add sites to the NPL might not seem like big news, this sends some important signals:

1. Superfund cleanups remain a priority for EPA under the Trump Administration. Notwithstanding the criticism EPA has received since January 20, 2017, EPA has continued to press forward with Superfund-related issues and Acting Administrator Andrew Wheeler has reiterated his commitment to the Agency emphasis on Superfund first championed by former Administrator Pruitt.
2. EPA's addition of subsurface intrusion as a migration pathway for purposes of the HRS, and EPA's application of this recent addition to ongoing site investigations, reflect the traction subsurface intrusion has gained at the Federal level. In adding this new criteria, EPA explained that when the HRS was last revised in 1990, the technology to detect and evaluate subsurface intrusion threats was not sufficiently developed. 82 Fed. Reg. at 2761. The change to the HRS reflects scientific advances.
3. Sites can now be listed where the only route of exposure is subsurface intrusion, if the HRS score is high enough.
4. The addition of the subsurface intrusion component could expand the number of sites that could be evaluated and proposed for listing on the NPL. EPA identified over 1,000 sites not currently on the NPL with a "potential or identified" subsurface intrusion threat when evaluating the HRS changes. 82 Fed. Reg. at 2771. However, in the Frequently Asked Questions that EPA issued with the rule change, EPA stated that it did not expect the HRS addition to result in the placement of more sites on the NPL per year, citing current Agency budget levels. EPA also emphasized that it did not plan to systematically re-evaluate sites that had not previously met the HRS score for NPL listing and instead would continue to follow its policy of typically re-scoring only those sites for which new information becomes available or additional sampling has been performed due to evidence of changed site circumstances. It remains to be seen how the addition of this HRS component actually will impact the number of NPL listings.
5. In assessing risk, EPA did not take mitigation measures into account or recognize that they had eliminated the subsurface intrusion exposure pathway.

At bottom, companies with sites already under investigation or that may be subject to investigation in the future should be aware of this development and seek appropriate guidance. In addition, companies that have been able to obtain site closure should be aware that there could be a risk of those sites being reevaluated, and possibly reopened, as a result of subsurface intrusion risks.

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