



Environmental UPDATE

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Vapor Intrusion Screening Levels Impact Virtually All Cleanups, Including Where Vapor Issues Were Closed

On January 16, 2013, the New Jersey Department of Environmental Protection ("NJDEP") published on its website a revised Vapor Intrusion Technical Guidance and updated vapor intrusion screening levels ("VISLs"). These

revisions have immediate and significant consequences for open site remediation cases, but also for many closed cases, since the changes in VISLs for some contaminants may result in reopening vapor issues that were previously closed.

Unless your site has already received an unrestricted use final remediation document (i.e., a no further action letter ("NFA") or a response action outcome ("RAO")) for groundwater, remediating parties must assess their sites using the new VISLs. The NJDEP is requiring all open site remediation cases to review existing sampling data for comparison to the new VISLs by **April 16, 2013**. If any of the results exceed the new VISLs, further investigation, and potentially mitigation, will be required, even if the vapor intrusion ("VI") issue had previously been closed out. For sites that have a restricted use final remediation document for groundwater, an order of magnitude analysis is required as part of the next biennial certification. There are three contaminants where the VISL has decreased by an order of magnitude or more: 1,1-dichloroethane, ethylbenzene and 1,2,4-trichlorobenzene. If a Remedial Action Workplan for groundwater was issued prior to January 16, 2013, a similar review must be conducted for those cases.

The screening levels for some VI contaminants have decreased. For example, the groundwater screening level for ethylbenzene, a common contaminant associated with gasoline releases, decreased from 61,000 ppb to 700 ppb. For other contaminants, the screening level has become less stringent. This is the case for one notable VI contaminant, the common dry cleaning solvent tetrachloroethene ("PCE") for which the groundwater screening level increased from 1 ppb to 31 ppb. In addition, new compounds have been added to the list of VI contaminants. These changes may result in situations where cases that are classified as an Immediate Environmental Concern ("IEC") or Vapor Concern ("VC") may no longer meet the criteria of an IEC or VC and can be reclassified based on the new VISLs. Alternatively, other cases may now meet the definition of an IEC or VC.

Another issue to consider is that conditions triggering a vapor investigation may be different based upon the revised groundwater VISLs. For example the 100-foot radius from the detection of VOCs in excess of the groundwater screening levels for contaminants where the VISLs decreased may now include additional buildings or may extend off-site.

In addition to the updated screening levels, the guidance document itself has been revised. One notable revision is the requirement that the remediating party file legal action in court to obtain access to private properties to conduct VI sampling, including residences, if access is not granted voluntarily.

These are all significant changes in the substance and practice to address VI which must be immediately taken into account in site remediation cases. Please feel free to contact Riker Danzig if you need assistance in the analysis of any of your matters in regard to these new standards or if you would like to discuss the revisions to the VISLs or

the Vapor Intrusion Technical Guidance document in greater detail.

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State Guidelines For Sandy-Related Rebuilding

As part of the State's efforts to respond to the need for communities to rebuild and adapt in the aftermath of Hurricane Sandy, on February 11, 2013 the New Jersey Department of Community Affairs ("DCA") published on its website a Guidance to Code Officials ("Guidance") addressing technical issues associated with elevating existing houses without increases in habitable space. This Guidance was designed to respond to specific inquiries to the DCA on this issue and the need to elevate houses to meet Federal Emergency Management Agency ("FEMA") and State requirements.

The Guidance provides three main clarifications. First, it emphasizes that raising the elevation of a home constitutes an "addition" under the rehabilitation subcode because it would result in an increase in the mean height of the highest roof of the building. Therefore, the requirements for new construction – in this instance a new foundation system including pilings – must be complied with.

Second, the Guidance recognizes that requiring compliance with certain requirements applied to new construction – those limiting one- and two-family homes of unprotected wood-framed construction to two stories and 35 feet in height and requiring higher structures to be protected wood-frame construction or contain fire sprinkler systems – is punitive when applied to existing homes that need to be elevated. The Guidance therefore suggests a variance to these requirements, subject to certain conditions aimed at fire safety. This flexibility is consistent with the practical approach to rebuilding and enhancing affected communities endorsed by Governor Christie.

Third, the Guidance addresses the issue of increased wind load. Houses constructed in accordance with the International Residential Code ("IRC") and whose mean height of the highest roof surface does not exceed 42 feet do not require additional analysis. Non-IRC homes, however, must be retrofitted to ensure that the roof can resist specified uplift loads set forth in the Guidance. Elevated houses that will exceed the 42 foot mean height of the highest roof surface will require an engineering analysis to prove that all connections, not just roof connections, will withstand the predicted wind forces.

For additional information please [click here](#).

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Failure to Conduct Appropriate Environmental Due Diligence Renders Homebuyer Liable For Cleanup Under the New Jersey Spill Act

On September 28, 2012, the Appellate Division upheld a trial court's ruling that a residential property owner that failed to conduct appropriate pre-purchase environmental due diligence was not an innocent purchaser and, thus, was liable for cleanup costs under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (the "Spill Act"). *State Farm Fire and Cas. Co. v. Timothy Shea*, No. A-4124-10T1 (App. Div. Sept. 28, 2012).

In *State Farm*, defendant Timothy Shea ("Shea") purchased a home in Mays Landing in September 1999 that was located adjacent to a property owned by Kimberly Rossi ("Rossi"). Prior to purchasing his home, Shea did not conduct an environmental assessment of the property. He did, however, observe a vent pipe protruding from the soil in the backyard but did not inquire about the purpose of the pipe at any time prior to the purchase.

During an investigation of a leaking underground storage tank ("UST") on Rossi's property, the environmental consultant for State Farm Fire and Casualty Company ("State Farm"), Rossi's insurance carrier, discovered a leaking UST on Shea's property. State Farm, as subrogee of Rossi, sued Shea to recover its investigation and remediation costs. Shea's homeowner policy insurer, Cumberland Mutual Fire Insurance Company ("Cumberland"), filed a complaint as subrogee of Shea against Rossi, which was subsequently consolidated, seeking equitable allocation of Rossi's responsibility for the contamination on the neighboring properties and reimbursement of sums paid by Cumberland to address the contamination.

The trial court found that since Shea made no pre-purchase assessment of the property in spite of observing a vent pipe sticking out of the ground in his yard, he was not an innocent purchaser absolved of liability under the Spill Act, N.J.S.A. 58:10-23.11 g(d)(2). In affirming the trial court's ruling, the Appellate Division emphasized that it was not holding that every residential purchaser must conduct an environmental assessment prior to purchase. Rather, the court held that under the circumstances, where Shea observed a pipe protruding from the ground, he "had a duty, at a minimum, to inquire ... and take whatever measures are warranted by the response to those questions."

This ruling is significant because it demonstrates that residential purchasers – not just buyers of commercial and industrial property – need to be aware of possible liability for existing contamination, the potential need to conduct an appropriate environmental investigation prior to purchase and the consequences of failing to do so. The nature of the environmental inquiry, if any is necessary, will depend on the particular property characteristics and circumstances.

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The Federal Environmental Regulatory Agenda for 2013

President Obama's main environmental focus for his second term will be energy and air issues. But regulatory agencies and Congress will also be pushing a number of additional environmental regulatory reforms this year, including proposed stormwater rules, drilling regulation, possible revisions to the Toxic Substance Control Act ("TSCA"), and changes to the safe drinking water rules.

In fact, the United States Environmental Protection Agency ("EPA") has already been busy in 2013. In February, the EPA issued a rule setting limits for E. Coli. bacteria in drinking water. It is also working on a national drinking water regulation for perchlorate that it anticipates will be released later this year. The EPA submitted to the Office of Management and Budget ("OMB") its draft plan on how the Agency will address effluent limits over the next two years. It also submitted a guidance document to the OMB regarding what waters the EPA believes are protected by the Clean Water Act. The Agency is working on proposed rules that will impose limits on effluent discharges from power plants. It also anticipates that a post-construction stormwater rule will be released this year. The stormwater rule will have an impact on newly developed and redeveloped sites. The EPA is working to finalize its vapor intrusion guidance and anticipates it will be released this year. It is also important to note that the EPA released guidance at the end of last year regarding a tenant's ability to obtain *bona fide* purchaser protection under the Comprehensive Environmental Response, Compensation and Liability Act.

In January 2013, the Department of Interior, Bureau of Land Management, pulled back proposed requirements for drilling on federal lands that focused on hydraulic fracking due to extensive comments. A new draft was scheduled to be issued in March of this year.

2013 may bring long awaited revisions to TSCA, which regulates the manufacture, use, cleanup and disposal of certain chemicals. The Senate Environment and Public Works Committee in 2012 approved a bill that would have revised TSCA by providing, among other things, that industries would have to submit data to the EPA regarding the safety of their chemicals. At present, the EPA has the burden to prove that a chemical is unsafe prior to regulation. The proposed revision to TSCA would have shifted some of this burden to the chemical manufacturers. Chemical manufacturers would have also been required to disclose to the public information on the health and environmental impacts of their chemicals. It is anticipated that similar bills may be introduced in 2013.

As demonstrated, the federal government will be attempting to tackle a number of environmental issues this year. We anticipate more information will be forthcoming as these initiatives move forward and these may be the subject of future newsletter articles.

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The New Jersey Appellate Division Holds That Responsible Parties Cannot Shift Blame for Non-Compliance to Environmental Consultants

The New Jersey Appellate Division has held that a party responsible for compliance with requirements imposed by the NJDEP may not avoid enforcement of penalties by arguing that the non-compliance was due to the fault of the environmental consultant, calling such an argument “utterly unpersuasive.” See *New Jersey Dept. of Env'tl. Prot. v. Nanak Auto Fuel, Inc.*, 2012 WL 6600304 (App. Div. Dec. 19, 2012).

In 2000, Ross Fogg Enterprises (“Ross Fogg”) reported to the NJDEP a discharge from the underground storage tanks located at its gas station property. In 2002, Nanak Auto Fuel, Inc. (“Nanak”) purchased the property from Ross Fogg. In 2005, sampling at a nearby residential drinking well revealed the presence of hazardous substances in concentrations exceeding safe drinking water standards. The NJDEP issued a directive to Ross Fogg and Nanak requiring them to conduct monthly monitoring and sampling of a “point of entry” treatment (“POET”) unit at the residence adjacent to the gas station. The NJDEP also required sampling of three other nearby potable wells. Neither Ross Fogg nor Nanak completed the sampling and reporting required by the NJDEP directive. As a result, the NJDEP issued the parties two warning letters and a notice of violation. In 2007, the NJDEP assessed a \$20,000 civil penalty against Ross Fogg and Nanak for failing to sample the POET unit at the adjacent residential property and another \$20,000 penalty for failing to sample the other nearby potable wells. The administrative law judge sustained the penalty assessments.

On appeal, Ross Fogg and Nanak argued, among other things, that the failure to report the sampling results was due to the error of their environmental consultant. The Appellate Division rejected this defense outright, holding that responsible parties cannot absolve themselves of the responsibility to comply with NJDEP requirements by pointing the finger at their environmental consultant.

This decision teaches that, ultimately, government agencies and the courts turn to responsible parties, not their consultants, for compliance or redress. As such, parties responsible for environmental compliance should be active participants in ensuring their obligations are met. Counsel can play a key role in securing such compliance.

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Phase I Environmental Site Assessment Standard, ASTM E1527, To Be Revised And Expanded To Include Vapor Intrusion in Early 2013

Significant revisions to the Phase I Environmental Site Assessment Standard, ASTM E1527 (“the Standard”), used to assess environmental conditions at a property prior to sale, are expected in early 2013. The Standard is the touchstone for and first step in environmental due diligence in the United States.

The Standard was developed by the American Society of Testing and Materials (“ASTM”) to meet the requirements of the federal All Appropriate Inquiries Rule (“Federal AAI Rule”). The Federal AAI Rule sets forth the environmental due diligence a prospective purchaser must perform in order to qualify for the innocent purchaser defense under federal law. (The New Jersey All Appropriate Inquiries Rule, which sets forth the environmental due diligence required for a prospective purchaser to qualify for the innocent purchaser defense under the state Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., differs from the Federal AAI Rule.) Prospective purchasers and their environmental professionals are not required to use the Standard to satisfy the Federal AAI Rule. Nevertheless, most do rely upon the Standard to ensure compliance. Given the widespread use of the Standard and its relationship to the Federal AAI Rule, the EPA is reviewing the proposed revisions.

The current version of the Standard, published in 2005 and known as ASTM E1527-05, is scheduled to expire this year in accordance with ASTM’s eight-year lifespan policy for all of its standards. The new version will be published as ASTM E1527-13 and will contain several revisions, including the following:

- The requirement to conduct assessments of vapor intrusion pathways;
- Clarification and specification of regulatory file review requirements;
- Clarification and specification of judicial records review

requirements;

- Revision of the definition of the term “Recognized Environmental Condition” (“REC”) to exclude a release inside a building from a source inside that building;
- Revision of the definition of the term “Historic Recognized Environmental Condition” (“HREC”) to limit it to closed RECs that are not subject to engineering and/or institutional controls (“EC/ICs”); and
- Addition of the defined term “Controlled Recognized Environmental Condition” to describe closed RECs that are subject to EC/ICs, and to distinguish them from HRECs.

While most of the changes are clarifications that will have limited effect on how Phase I assessments are performed, the addition of the requirement to assess vapor intrusion pathways is a significant substantive change that will require additional analysis beyond current practice. The addition of the vapor intrusion assessment is in line with the greater focus on vapor intrusion by federal and state environmental regulators in recent years. As a result of the new requirement, environmental professionals may recommend follow-up vapor intrusion sampling more frequently. This will increase transactions costs, but will also provide prospective purchasers with a better understanding of the condition of the property.

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Regulatory Update

New Jersey Department of Environmental Protection

NJDEP to Receive \$1.1 Million for Storm Preparation and Response Efforts

On December 27, 2012, Senators Frank Lautenberg and Robert Menendez announced the federal government's initial plan to reimburse the NJDEP approximately \$1.1 million for its efforts in preparing for and responding to Hurricane Sandy.

The NJDEP staff worked to put measures in place that would protect communities in advance of Hurricane Sandy from likely dangers by removing unsecured debris, communicating safety concerns to members of the community

and mounting sandbags at state facility doors. The NJDEP officials aided residents by assisting with home repairs, removal of downed power lines and the restoration of electricity to those who had lost power following the storm.

Senators are supporting a \$60.4 billion emergency supplemental appropriations bill, which will provide resources to rebuild beaches and infrastructure damaged by Hurricane Sandy.

Editor's Note: Since the funding approval for reimbursement of initial NJDEP costs associated with Hurricane Sandy, Congress has approved over \$50 billion in additional emergency disaster aid. This aid package will assist homeowners and businesses affected by Hurricane Sandy in several states, as well as fund infrastructure repairs and reimburse local governments for response costs.

New Jersey to Join Reuse Marketplace

On February 14, 2013, the NJDEP announced New Jersey's participation in a new website which aspires to reduce waste by facilitating the exchange of unused or unwanted items.

Administered by Northeast Recycling Council, Reuse Marketplace (the "Marketplace") facilitates the exchange of reusable items from more than 30 categories. While only members may post items to the site, the general public is permitted access to shop, in many instances for free.

The Marketplace currently has members in six additional states, namely Connecticut, Delaware, Massachusetts, New York, Rhode Island and Vermont.

Further information can be found at www.nj.gov/dep.

Annual Recognition of Environmental Leaders by the Christie Administration

On January 28, 2013, the thirteenth annual Governor's Environmental Excellence Awards took place at the New Jersey State Museum, in recognition of New Jersey's environmental leaders.

Honorees included Princeton University for its 27 acre megawatt solar collector field, Drew University of Madison for restoration of 18 acres of the Drew Forest Reserve, RPM Development Group of Montclair for building the state's first multi-family Climate Choice building in Orange, and Alder Avenue Middle School of Egg Harbor Township for its energy conservation campaign which accomplished more than \$1 million in cost savings for the school district.

NJDEP Commissioner Bob Martin lauded the leadership achievements of those recognized, highlighting their dedication to protection of our environment.

Further information can be found at www.nj.gov/dep.

United States Environmental Protection Agency

Lisa Jackson Resigns as Head of the EPA

After four years as Administrator of the EPA, Lisa Jackson has resigned. (John M. Broder, *EPA Chief Set to Leave; Term Fell Shy of Early Hope*, NY Times, December 27, 2012). The timing of Jackson's departure was negotiated with the White House, who confirmed that Jackson was leaving the role of her own accord.

Jackson is noted for her accomplishment in identifying the dangers of greenhouse gases to human health and the subsequent creation of the carbon-cutting rules.

Jackson has not ruled out seeking political office in New Jersey or Louisiana. A native of New Orleans, Jackson holds degrees in chemical engineering from Tulane and Princeton. She led the NJDEP from 2006 to 2008 and was Chief of Staff to former Governor Corzine before being appointed Head of the EPA by President Obama.

Acting Administrator Appointed at EPA

Following the resignation of Lisa Jackson, Bob Perciasepe has been appointed as Acting Administrator of the EPA. Perciasepe will perform this role in addition to holding his post as Deputy Administrator. Possessing extensive experience in the public and private sector, Perciasepe previously served as a top EPA executive during the Clinton administration. His previous positions include Secretary of the Environment for the State of Maryland and a senior official for the City of Baltimore.

Perciasepe holds a Bachelor degree in Natural Resources and a Master's Degree in Planning and Public Administration.

Further information can be found at www.epa.gov/aboutepa/administrator.

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Legislative Update

Recently Introduced Environmental Bills

A3578 Establishes *de minimis* levels for regulation of air contaminants and hazardous air pollutants and directs the NJDEP to establish *de minimis* levels for regulation of hazardous substances. Status: Pending in Assembly Environment and Solid Waste Committee.

A3639 Removes certain requirements for professional engineers to take the examination to operate water supply and wastewater treatment systems. Status: Pending in Assembly Regulatory Oversight and Gaming Committee.

A3709 Deletes CAFRA permit exemption for reconstruction activities in coastal area. Status: Pending in Assembly Environment and Solid Waste Committee.

S2322 Prohibits contribution action against first responders for cleanup and removal costs or any other damages associated with discharge of hazardous substance. Status: Pending in Senate Environment and Energy Committee.

SR17 Urges Congress to modernize Toxic Substances Control Act. Status: Pending in Senate Environment and Energy Committee.

Updated Environmental Bills

A3367 / S2332 Requires owner or operator of industrial establishment applying for *de minimis* exemption from the Industrial Site Recovery Act ("ISRA") to certify as to no actual knowledge of contamination exceeding remediation standards. Status: Out of Assembly Environment and Solid Waste Committee; second reading in the Assembly; pending in Senate Environmental and Energy Committee.

S989 / A2800 Establishes special environmental prosecutor. Status: Pending in Senate Environmental and Energy Committee; identical to A2800 pending in Assembly Environment and Solid Waste Committee.

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