



NJDEP Revises Soil Remediation Standards Applicable to Historic Fill and Other Common Contaminants

Publication:

Riker Danzig Environmental Update December 2017

On September 18th, the New Jersey Department of Environmental Protection ("NJDEP") revised its soil remediation standards for eighteen contaminants in response to new toxicology studies by the U.S. Environmental Protection Agency. The revised standards became effective immediately; however, completed or nearly completed cleanups may be exempt from complying with certain of the new, more stringent standards in particular situations. Numeric standards for eleven constituents have increased and now are more lenient, and the standard for one constituent, thallium, was deleted entirely. Conversely, six other constituents now have more stringent standards. Parties responsible for ongoing cleanups should consider whether these new standards change the scope of their investigation or remediation. Parties responsible for completed cleanups also should consider whether a more stringent standard requires further action or whether a more lenient standard permits early termination of ongoing obligations associated with their cleanup. Properties containing historic fill material or that have been the site of operations utilizing solvents, such as dry cleaners, metal manufacturers and parts degreasers, are among the most likely to be affected by the new standards.

NJDEP established more lenient standards for seven different polycyclic aromatic hydrocarbons ("PAHs"), which are common contaminants and often are found in contaminated historic fill material throughout the state. The strict soil remediation standards for PAHs triggered significant remediation obligations at many of these historic fill sites, even though those sites themselves had not been subject to intensive industrial use. The typical remediation approach is placing a cap of clean soil, asphalt, or some other barrier on top of the historic fill and recording a deed notice notifying potential buyers that the site is contaminated. Notably, a party responsible for maintaining a historic fill cap that is no longer necessary under the new standards can obtain relief from the long-term remedial action

permit compliance obligations and associated costs, including the requirement to post financial assurance, pay annual fees, conduct biennial certifications and monitor and maintain the cap itself. Similarly, owners of property with a deed notice for historic fill can remove the deed notice, after obtaining NJDEP's permission, if their property complies with the new, more lenient standards for PAHs.

The soil remediation standards for tetrachloroethene ("PCE"), historically used by dry cleaners, metal manufacturers, and parts degreasers, increased substantially. However, in practice, this change may have a less significant impact on responsible parties' remediation costs than the change in the PAH standards, as the extent of remediation of PCE-contaminated soil often is driven by the impact to groundwater standard developed for each particular site, which can be stricter than both the old and new soil remediation standards for PCE. Nevertheless, the new standard for PCE will reduce the burden of soil remediation in situations where the impact to groundwater standard does not apply or where site-specific factors cause the impact to groundwater standard to exceed the new PCE soil remediation standard.

Parties responsible for property impacted by the six constituents subject to more stringent soil remediation standards have the less enviable task of determining the increased cost of these new obligations. The six constituents with more stringent standards are 1,1'-biphenyl; cyanide; hexachloroethane; nitrobenzene; pentachlorophenol; and trichloroethene ("TCE"). TCE, formerly a commonly used solvent, is the most prevalent of these constituents. As with PCE, however, the extent of remediation of TCE often depends on the still unchanged and generally more stringent impact to groundwater standard, so the practical impact of the more restrictive soil remediation standards for TCE may not be significant.

For sites undergoing investigation or remediation where one of these six constituents is present, the scope of the investigation or remediation may expand. However, sites where hexachloroethane, nitrobenzene (residential sites only), pentachlorophenol, and TCE are present may take advantage of a "phase-in period" which excuses the responsible party from the new, stricter requirements. Where the remediation standard decreased by less than an order of magnitude, *i.e.*, a factor of ten, which is the case for the contaminants listed above, the party responsible can avail itself of the old, more lenient remediation standard if it submits its remedial action report or remedial action workplan to NJDEP before March 18, 2018.

Remediated sites that are subject to either a no further action letter ("NFA") from NJDEP or a response action outcome ("RAO") from a Licensed Site Remediation Professional can be reopened and subject to further clean up, but only where the new remediation standard differs from the previous standard by more than an order of magnitude. The soil remediation standards for 1,1'-biphenyl, cyanide, and nitrobenzene (non-residential sites only) decreased by more than an order of magnitude. Property owners or parties otherwise responsible for sites with an NFA or RAO for these constituents should seek advice regarding the need for further remediation, as the

failure to do so could lead to penalties from NJDEP or difficult questions from prospective purchasers performing due diligence if the property is offered for sale.

Whether an environmental investigation recently has begun or a remediation has been completed for many years, parties responsible for property with historic fill or property impacted by the other constituents mentioned in this article should consider the impact of the new soil remediation standards on their obligations under New Jersey law.

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