



Risk-Based Corrective Action Creeping into State Regulatory Programs

The principles of Risk-Based Corrective Action ("RBCA") are not new, but it has taken some time for these concepts to be incorporated into New Jersey's regulatory programs. The EPA has encouraged states to apply RBCA in their cleanup programs with the goal of tailoring cleanups to address the actual risks instead of requiring application of numerical cleanup standards, which are somewhat arbitrary. EPA believes that the regulated community is more willing to cooperate in cleanups that are guided by actual risks posed by the contamination at a particular site. In addition, application of RBCA concepts results in more flexible and efficient cleanups. EPA applies RBCA concepts in various programs, including underground storage tank ("UST"), Superfund and RCRA cleanups, as well as guidance concerning state groundwater cleanup programs. A number of states, including New Jersey, also have developed and amended various remedial programs consistent with EPA's RBCA concepts.

Beginning with NJDEP's initiation of the Cooperative Venture, an RBCA-type program applicable to UST cleanups, New Jersey gradually has incorporated more RBCA principles into its remedial programs. The Cooperative Venture, announced in 1995, combines risk-based standards developed by the American Society for Testing Materials ("ASTM") with a cooperative program designed to allow responsible parties to take a greater role in designing a cleanup. Parties remediating non-priority sites are able to schedule and conduct remedial actions in coordination with their own business and economic needs, so long as the site does not present immediate risk to health or the environment. While parties still must comply with NJDEP's Technical Requirements for Site Remediation (the "Technical Regulations"), the Cooperative Venture allows cleanups to proceed based upon specific site conditions and with substantial input from the responsible parties.

In keeping with the Brownfield and Contaminated Site Remediation Act, P.L. 1997, c. 278 (effective January 6, 1998), NJDEP also has proposed changes to the state's Brownfields regulations that reflect RBCA principles by allowing for quicker and more efficient cleanups. These proposed changes would amend the Technical Regulations in order to allow additional flexibility in selecting remedial methods and technologies, and streamline the remedial process. The proposed rules also are more "user-friendly" in a number of ways. They would require the state to

issue a covenant not to sue for future remedial actions once a "No Further Action" letter has been issued, providing finality to responsible parties. They also would prohibit NJDEP from imposing its indirect oversight costs on parties performing cleanups. See 30 N.J.R. 2373 (July 6, 1998).

New Jersey has incorporated risk-based procedures into other programs as well. For example, the state's Voluntary Cleanup Program already utilizes RBCA-type concepts by allowing the responsible party to take the lead in proposing cleanup methods and standards applicable to a particular site. The Technical Regulations allow alternative cleanup levels in appropriate circumstances, based partially upon evaluation of risk to the environment. The use of Classification Exception Areas ("CEA") for groundwater contamination is another example of how NJDEP assesses risk in determining appropriate remedial actions.

NJDEP is continuing to integrate RBCA concepts throughout its remedial rules and policies, while EPA encourages states to tailor their corrective action programs to site-specific risks.

Attorney:

Dennis J. Krumholz

Practice:

Environmental Law

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984

50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578

500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628

399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361

1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361

www.riker.com