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Regulated Community Faces Stricter Controls

If proposed Soil Remediation Standards are adopted, the cost of doing business in the state will increase

By Dave Mairo

With all of the discussion about the recently issued draft Vapor Intrusion Guidance, the draft Soil Remediation Standards (SRSs) released by the New Jersey Department of Environmental Protection in July 2004 may seem like yesterday's news. However, the DEP is planning on issuing the formal proposal to adopt the SRSs this fall. Depending upon whether, and to what extent, the DEP has revised the SRSs to take into consideration the concerns raised by the regulated community, a formal proposal will put them back into the spotlight.

In anticipation of the DEP's proposal, it's helpful to review a few of the primary concerns associated with the SRSs. Compared to the existing Soil Cleanup Criteria (SCC), the draft SRS standards include 39 additional compounds. The current SCC list is broken into three cate-

gories; residential direct contact criteria, nonresidential direct contact and impact to ground water criteria. Presently, 89 compounds are listed under the impact to ground water criteria. In the draft SRSs, 73 of those 89 compounds would decrease, with 47 decreasing by at least an order of magnitude.

The significance of the order of magnitude decrease cannot be overlooked as it potentially has far reaching implications. Indeed, N.J.S.A. 58:10B-13e states in pertinent part that:

[N]o person, except otherwise provided in this section, shall be liable for the cost of any additional remediation that may be required by a subsequent adoption by the department of a more stringent remediation standard for a particular contaminant...unless the difference between the new remediation standard and the level or concentration of a contaminant at the property differs by an order of magnitude. The department may compel a person who is liable for the additional remediation costs to perform additional remediation activities to meet the new remediation standard...

While the proverbial brass ring for any party conducting remedial activities overseen by the DEP is the No Further

Action/Covenant Not to Sue letter, even setting aside the issue of natural resource damages, 'done' is a relative term as the language of those letters always contains the following:

Pursuant to N.J.S.A. 58:10B-13.1d, this Covenant does not relieve any person from the obligation to comply in the future with laws and regulations. The [DEP] reserves its right to take all appropriate enforcement for any failure to do so.

Regardless of such limiting language, a party could be reasonably confident that the likelihood of re-opening its case was minimal. However, that modicum of comfort is significantly decreased by the draft SRSs and how the DEP will apply the order of magnitude qualifier is unknown. Given the DEP's current staffing and workload, it is difficult to imagine that it would have the desire or ability to re-examine closed cases. But what about sites that re-enter the environmental compliance arena through the Industrial Site Recovery Act (N.J.S.A. 13:1K-6 et seq.) or Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.)? Similarly, what about property transactions going through routine due diligence? It would seem that reliance on a No Further Action letter may be ill-advised without independently analyzing the underlying analytical results of samples on which that letter

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was based. Moreover, there remains a question of whether the DEP will require a party to certify that all past results comply with the order of magnitude test when compared to the SRSs, should they be adopted.

In either case, the result will be increased time and cost to both the public and private sectors. Arguments can be made that the SRSs address some of these questions and concerns through the use of Alternative Remediation Standards (ARSs) and the DEP relies heavily on them in the draft. ARSs would allow variances from the SRSs to be developed on a site-specific basis. However, given the DEP's historic reluctance to grant any waivers from existing regulations, as well as the inevitability that the DEP will be inundated with costly, time-consuming ARS petitions, it is difficult to imagine that parties can expect timely reviews.

The Brownfield and Contaminated Site Remediation Act (N.J.S.A. 58:10B et seq.), approves the use of engineering and institutional controls as acceptable remedial alternatives. An engineering control is essentially a physical restriction such as an asphalt cap or slurry wall. An institutional control is a paper restriction, such as a deed notice or a Classification Exception Area. Both types of controls have been utilized extensively and successfully at countless sites throughout the state. Without these integral tools, many a deal would have been scuttled and development plans quashed. However, in direct contradiction of the Brownfield Act's mandate, the draft SRSs do not allow the use of either engineering or institutional controls in many situations. Specifically, they gener-

ally will not be acceptable where concentrations exceed the impact to ground water SRS. This is made all the more problematic because the proposed impact to ground water SRS is the most stringent standard for 111 of the 142 compounds listed. Further compounding the issue is the fact that for 72 of the compounds, the draft SRS is set at the practical quantitation limit (PQL).

The PQL is the lowest concentration of a constituent that a laboratory can reliably achieve within specified limits of precision and accuracy under routine operating conditions. Therefore, any detectable concentration of that compound will require some form of remediation, unless an ARS is approved by the DEP. Given the potential problems associated with developing site-specific ARSs, one wonders whether the regulated community will be forced to revert back to excavation as the principle means of remediating soil. Moreover, as technology has advanced, techniques and instruments have been developed to detect compounds at lower and lower concentrations. In several cases the draft SRSs are set several orders of magnitude below the PQL. So as progress marches forward, the list of compounds that could potentially cause a site to be re-opened will just continue to grow.

Equally disconcerting and conspicuous in its absence is any discussion of historic fill in the draft SRSs. The reality of the presence of contaminated historic fill material has been recognized by the DEP since the early 1980s and the promulgation of the Environmental Cleanup Responsibility Act. Presently a party must only delineate the extent of historic

fill on its site and implement either institutional or engineering controls to prevent exposure to the fill. The draft SRSs, however, contain no such recognition or discussion about historic fill or, at the very least, confirmation that the DEP will not require it to be removed or treated. To the contrary, given the draft proposal's virtual elimination of the use of engineering and institutional controls, this would suggest that the DEP will require historic fill material to be addressed far more than what is currently required.

The explicit purpose and legislative intent of the Brownfield Act is to encourage cost effective cleanup, ensure finality in the process, provide liability protection and timely and efficient regulatory action (N.J.S.A. 58:10B-1.2). This article touches upon only a few aspects of draft SRSs that appear contrary to these statutory mandates. While the regulated community hopes that its concerns will be alleviated in the formally proposed SRSs, it is unrealistic to think that they will be abated. As such, the legal community will need to take a hard look at the ramifications and increased exposure to liability should the proposed SRSs be adopted. In addition to increasing the cost of 'doing business' in this state, the draft SRSs have the potential to become a significant impediment to re-development, as well as raising the issue of a party's status as an Innocent Purchaser and the attendant liabilities pursuant to the Spill Act. Regardless of the form in which the SRSs are proposed, there is little doubt that the regulated community and those that represent it will have its work cut out for them. ■