

Environmental law

The Grandparent Effect

DEP adopts new site clean-up standards

By Steve Barnett

On June 2, the New Jersey Department of Environmental protection (“DEP”) adopted new site clean-up standards, which will become effective December 2, 40 N.J.R. 3187. All remediation standards for soil, ground water and surface water are now in one new chapter of the New Jersey Administrative Code, N.J.A.C. 7:26D. Existing remediation standards for ground water and surface water are recodified to the new chapter, and the new residential and nonresidential soils remediation standards are also codified in the new chapter. In order to be “grandparented” and not be subject to the new standards, a compliant Remedial Action Workplan must be submitted before December 2.

The new clean-up standards will change how and to what degree site investigations and clean-ups are conducted initially and also when DEP may re-open cases which have approved clean-up plans and even those with a No Further Action approval (“NFA”). Some of those changes are known now based on existing DEP guidance and rules

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and state statutes. Other details regarding compliance with, and enforcement of, the new clean-up standards will await future rulemaking re-promulgating DEP’s “Technical Requirements for Site Remediation,” N.J.A.C. 7:26E, for which the rule expiration date was recently extended from December 17, 2007, to December 17, 2009.

Generic, Numeric Soil Remediation Standards

The new chapter specifies generic (nonsite specific), numeric values for (1) soil remediation standards, (2) ground water remediation standards, and (3) surface water remediation standards. The new rule specifies soil remediation values for about 140 substances for residential and nonresidential clean-ups. Clean-up to a residential standard allows for DEP to issue an unrestricted use NFA, while clean-up to a nonresidential standard requires a restricted use NFA. The residential and nonresidential values are further categorized into values for the ingestion-dermal exposure pathways and the inhalation exposure pathway — the applicable soil clean-up standard is the more stringent of these two and the site-specific impact to ground water soil remediation standard (see below), or the Practical Quantification Limit (“PQL” a/k/a detection limit) if that is less stringent

(DEP won’t require clean-up to levels less than sampling and lab detection limits).

Approximately 75 of the 140 substances with numeric standards listed in the new rule have more stringent applicable soil clean-up standards under the new rule than are in DEP’s existing 1999 Soil Clean-up Criteria (“SCC”). Approximately 50 of the 140 substances have less stringent standards under the new rule than under the SCC.

Site-Specific Soil Remediation Standards

Although the rule proposal included impact to groundwater soil standards, those were not adopted. The purpose of impact to ground water soil remediation standards is to prevent unacceptable risk to human health from ingestion of contaminated ground water caused by movement of contaminants from soil to ground water. The new rule provides that, after December 2, impact to ground water soil remediation standards must be developed on a site-specific basis by the person conducting the remediation subject to DEP approval. DEP has identified several methods to develop site-specific impact to ground water clean-up standards after December 2. Before December 2, use the generic, numeric impact to ground water standards from DEP’s Soil Clean-up Criteria (“IGWSCC”). In many cases, the site-specific values will be more stringent than the 1999 IGWSCC and that, together with the cost of developing the site-specific

value, should motivate submission of a compliant RAWP before December 2.

Interim Remediation Standards, Updating Of Remediation Standards, and Alternative Remediation Standards

The new rule provides regulatory authority and procedures for DEP to establish an interim standard when a numeric standard for a contaminant is not identified in the rule (interim remediation standard), for updating remediation standards when US EPA revises its reference data and for persons conducting remediation to seek DEP approval of an alternative soil remediation standard other than that listed in the rule.

Phase In of New Standards

If not “grandparented,” the person responsible for conducting the remediation must remediate a site to the new standards at N.J.A.C. 7:26D including site-specific impact to ground water soil remediation standards. A person responsible for conducting remediation can qualify for “grandparenting” when both (1) the remediating party has submitted a compliant RAWP or RAR before December 2, 2008, and (2) the SCC’s for substances at the site are not greater by an order of magnitude or more than the soil remediation standards at N.J.A.C. 7:26D.

With respect to the approximately 50 substances, for which the new rule provides less stringent soil clean-up standards than are in the SCC, a person may request that DEP apply the less stringent standard at any time before or after a NFA. With respect to the approximately 75 substances for which the new rule provides more stringent soil standards than the SCC, the SCC apply if included in a compliant RAWP submitted to DEP until December 2. After DEP approves such a RAWP (which is timely implemented) or after DEP issues a NFA, DEP may only compel use of a new soil remediation standard if the new standard is more stringent by an order of magnitude

(i.e., 10 times more stringent).

Order of Magnitude Change

After DEP approves a RAWP which is timely implemented, or after DEP issues a NFA, or after remediation in compliance with a standard at the time, DEP may compel remediation to a more stringent standard, only if the new standard is more stringent by an order of magnitude (i.e., at least 10 times more stringent). N.J.S.A. 58:10B-12j and N.J.S.A. 58:10B-13e. Therefore, persons performing clean-ups should conduct an order-of-magnitude analysis, and DEP requires such an analysis under certain circumstances.

The new rule provides for order-of-magnitude changes in the non-residential soil standards for 13 substances Bis (2-chloroisopropyl) ether, Bromodichloromethane, Bromomethane, Chloroform, Chloromethane, Dibromochloromethane, 1,4-Dichloro-benzene, 1,1-Dichloroethane, Hexachlorocyclopentadiene, 4-Methylphenol, Naphthalene, 1,1,2,2-Tetrachloroethane, 1,1,2-Trichloroethane and in the residential soil standards for 11 substances (the same 13 minus Bromomethane and Hexachlorocyclopentadiene). Most of these are chlorinated compounds. Often when there is one chlorinated compound at a site, there are others because they are decay products of each other — therefore any site with chlorinated compounds may be candidates for order of magnitude changes under the new rule.

At sites with RAWP approval but not a NFA, the DEP case manager will require an order-of-magnitude evaluation and also any additional remediation. For sites with a NFA and engineering and/or institutional controls (e.g., cap and/or deed notice), the person responsible for maintaining the control must perform the order-of-magnitude evaluation as part of the biennial certification. For sites with a NFA and without engineering and/or institutional controls, DEP will require the order-of-magnitude evalua-

tion whenever a site re-enters DEP’s Site Remediation Program.

Order-of-magnitude evaluations are required with respect to nonsite-specific soil, ground water and surface water standards, but they are not required with respect to site-specific impact to ground water soil remediation standards.

Chromium, Petroleum Hydrocarbons and PCB’s

Interestingly, DEP did not adopt soil remediation standards for chromium or petroleum hydrocarbons in the new rule. DEP is reviewing recent data regarding chromium and advises that the existing SCC values for chromium will continue to apply until further notice. With regard to petroleum hydrocarbons, DEP issued guidance that it will apply a standard of 10,000 mg/kg Total Petroleum Hydrocarbons (TPH) in its review of RAWP’s which are submitted before March 17, 2009, and after that it will apply 4,800 mg/kg Diesel Range Organics (DRO). With respect to PCBs, the new rule lowers the residential and nonresidential soil clean-up standard from 0.49 to 0.2 mg/kg and 2 mg/kg to 1 mg/kg respectively for RAWP’s submitted after December 2.

Effects on Spill Act Innocent Purchaser protection

The new clean-up standards will change what is needed to qualify as an innocent purchaser not liable for clean-up costs under the New Jersey Spill Act. N.J.S.A. 58:10-23.11.g.d(2)(e) provides that an owner of property acquired after September 14, 1993 can qualify as such if either i) the person remediated the site, ii) relied on a prior valid NFA, or iii) obtained DEP approval of a RAWP and continued to comply with the RAWP. Often an approved RAWP is the gold standard for a prospective purchaser today seeking to qualify as an innocent purchaser because time and other constraints make the first two options infeasible. For RAWP’s submit-

ted before December 2, DEP will not apply the new rule (except for the 11 or 13 new standards which are more stringent by an order of magnitude), and DEP will not require development of a site specific impact to ground water soil clean-up standard. For an innocent purchaser who has received a NFA before December 2, DEP can not apply the new standards, except DEP may compel a responsible party (not the innocent purchaser) to remediate the property (which may now be owned by the innocent pur-

chaser) to the new standards if the new standards applicable to the property are more stringent by an order of magnitude.

Conclusion

RAWPs submitted before December 2 are "grandparented." Therefore, they do not need to reference the more stringent soil remediation standards which are in the new rule and they do not need to provide a site-specific impact

to ground water soil clean-up standard under the new rule. Responsible persons should be aware that the new rule includes order of magnitude changes which may trigger re-opening of clean-ups which have an approved RAWP or NFA. For sites with engineering controls or institutional controls, an order of magnitude analysis will be required during the biennial certifications to help ensure that the controls remain protective of public health and safety and the environment. ■