

DIMENSIONS

RECENT DEVELOPMENTS IN SITE REMEDIATION: REVISED SOIL REMEDIATION STANDARDS

By: **Melissa A. Clarke, Esq.**

On September 18, 2017, the New Jersey Department of Environmental Protection (DEP) updated the soil remediation standards for nineteen contaminants.¹ These changes are significant for persons responsible for remediating contaminated property, environmental professionals, and potential purchasers of contaminated sites as the new standards may impact remediation requirements. The impact of the new standards will depend primarily upon whether the site already has a Final Remediation Document and how much the revised standard(s) have changed.

DEP's September 2017 soil remediation standard updates are based upon revisions by the United States Environmental Protection Agency to toxicity information for these contaminants. Specifically, the soil remediation standards are now less stringent for eleven contaminants, including solvents tetrachloroethene (PCE) and 1,1,1-trichloroethane (1,1,1-TCA) and several polyaromatic hydrocarbons (PAHs) commonly found in historic fill, like benzo(a)pyrene. The soil remediation standards are more stringent for six contaminants, including the solvent trichloroethene (TCE). The standards for three of those six contaminants have significantly decreased,² by an order of magnitude or more: 1,1-biphenyl (for both residential and non-residential); cyanide (both residential and non-residential); and nitrobenzene (non-residential only). One contaminant remains unchanged (1,1,2,2 tetrachloroethane), while

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another will no longer be regulated under DEP's soil remediation standards (thallium).

Sites without a Final Remediation Document

If a site undergoing remediation does not have a Final Remediation Document (FRD), the person responsible for conducting remediation may continue to remediate using the pre-September 18, 2017 soil remediation standards so long as the updated standard has not decreased by an order or magnitude or more from the standard in effect prior to September 18, 2017, and one of the following conditions apply:

- DEP has approved a Remedial Action Workplan (RAW) or Remedial Action Report (RAR) for the site being remediated prior to the effective date of September 18, 2017; or

- A RAW or RAR certified by a licensed site remedial professional (LSRP) has been submitted to DEP prior to September 18, 2017 for the site being remediated; or
- The site being remediated will have a RAW or RAR approved by the DEP by March 18, 2018; or
- A LSRP-certified RAW or RAR for the site being remediated will be submitted to DEP by March 18, 2018.

In addition, the remedial action must be conducted within the applicable regulatory timeframe as set forth in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-5.8.

If the site being remediated has been impacted by any of the three contaminants for which the soil remediation standard decreased by an order of magnitude or more (1,1-biphenyl, cyanide, or nitrobenzene) then the new remediation standard applies regardless of whether a RAW or RAR has been approved by DEP or certified and submitted to DEP.

Sites with a Final Remediation Document

If a site undergoing remediation has a FRD, such as a Remedial Action Outcome (RAO), and the new soil remediation standard has not decreased by an order of magnitude or more, no further evaluation is required.

Where there is a FRD and the site

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1. <http://www.nj.gov/dep/rules/adminchg/20170918a.pdf>; http://www.nj.gov/dep/rules/rules/njac7_26d.pdf

2. If a standard becomes more stringent, it will decrease (i.e., the threshold for action will be lower). If it becomes less stringent, the standard will increase (i.e., threshold for action will be higher).

About the Author:

Melissa A. Clarke, Esq., is an Associate Attorney with Giordano, Halleran & Ciesla, P.C.. She can be contacted at mclarke@ghclaw.com or 732-741-3900. GH&C's Environmental and Land Use Department represents clients in environmental and land use matters, including State and federal environmental permitting and regulatory compliance involving wetlands, coastal areas, flood hazard areas, water and air quality, solid and hazardous waste remediation, brownfield redevelopment, and underground storage tank compliance. GH&C is also experienced in a broad variety of land use, development and environmental litigation involving municipal, State and federal agencies, such as planning and zoning boards, the Department of Environmental Protection (DEP), and the United States Environmental Protection Agency (EPA).

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being remediated has been impacted by any of the three contaminants for which the soil remediation standard decreased by an order of magnitude or more, additional inquiry and remedial action may be necessary. If the site is subject to a deed notice, the person responsible for maintaining the engineering and/or institutional control (deed notice) must perform an order of magnitude evaluation for any of those three contaminants during the biennial protectiveness certification as required by the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C-7.7. If the existing controls are deemed protective, no further remediation will be required. If the remedy is deemed insufficient to control exposure under the updated remediation standard, additional remediation will be necessary. In either case, the deed notice and/or remediation action permit (RAP) for soil, if applicable, must be modified to reflect the updated soil remediation standard. If DEP has not yet issued a soil RAP, the person responsible for maintenance of the engineering and/or institutional control must apply for a RAP, per N.J.A.C. 7:26C-7.5.

If the site has a FRD but no deed notice, an order of magnitude evaluation must be performed if the site returns to the Site Remediation and Waste Management Program, pursuant to the ARRCS (N.J.A.C. 7:26C-1.4). If, as a result of that evaluation, the remedy is found to be insufficient to control exposure under the new standards, additional remediation will be necessary, and a deed notice and soil RAP will be required if contamination remains above the applicable standard(s).

Conclusion

DEP's revised soil standards took effect on September 18, 2017. Persons remediating contaminated sites and their environmental professionals should familiarize themselves with the new

standards and understand the potential impact on remediation requirements, particularly if the site has been impacted by any of the contaminants subject to significantly more stringent standards (i.e., 1,1-biphenyl, cyanide, and nitrobenzene). In addition, prospective purchasers of contaminated property should carefully assess during due diligence whether there is a possibility of DEP re-opening a remediation case given the new standards, and environmental professionals should consider addressing same in a Phase I Environmental Site Assessment and/or a Preliminary Assessment.

INCENTIVIZING AFFORDABLE HOUSING

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fifty percent of the residential units are constructed and reserved for very low-, low-, and moderate-income housing. At least thirteen percent of these residential units must be reserved for very low-income housing-- defined as housing developed as part of a qualified residential project, affordable by Federal Housing and Urban Development or other recognized

standards for home ownership and rental costs and occupied, or reserved for occupancy, by households with a gross household income equal to thirty percent or less of the median gross household income for households of the same size within the housing region in which the qualified residential project is located.

Developers would apply for these tax credits in the same manner in which developers applied for grants under the State Economic Redevelopment and Growth Grant (ERG) program. The bill is currently with the Assembly Budget and Appropriations Committee.

Each of these bills, if signed into law, will provide valuable incentivizing tools to encourage the infusion of capital from private investors into affordable housing for those in the lowest income brackets who need it the most.

HIGHLIGHTS TAX CUTS AND JOBS ACT

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law deduction for domestic production activities has been repealed. Further, deductions for business entertainment expenses such as golf and sporting events are disallowed beginning in 2018.

Sunset Rules Apply to Individual Tax Reform

The individual tax law provisions discussed above such as the reform of individual tax rates, special pass-through deduction for individuals, repeal of individual tax deductions and personal exemptions, increases to the estate, gift and GST exemption amounts and individual AMT changes are subject to a sunset provision for tax years ending after December 31, 2025.

GETTING YOUR PROJECT APPROVED

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so there is support for your position in writing and on file. Although you may believe your project is innocuous at worst and beneficial at best, there's no telling (or control over) what the board or the public might bring up. If your project is bringing something new and different to a community, prepare for people who oppose change of any kind.

Whatever type of land use you are proposing or the scale of your project, you can create a smoother, less contentious approval process by following these guidelines. Showing that you have the community's interests in mind as part of your planning process can help lead to the outcome you desire.