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Changes to Pennsylvania Cleanup Standards

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Special to the Legal

From the latest diet or exercise fad to New York City's recent court defeat in its efforts to limit the size of sugary drinks sold in restaurants, the news is full of stories about America's struggle against ever-increasing waistlines. However, a lesser-known impact of this challenging public health issue has been one of the forces behind recent proposed changes to cleanup standards utilized by real estate developers, business owners and others involved in remediating contaminated property in Pennsylvania.

On May 17, the Pennsylvania Department of Environmental Protection published a proposed rule that would modify the medium-specific concentrations, or MSCs, used to determine the statewide health standard for many regulated



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substances pursuant to the Land Recycling and Environmental Remediation Standards Act, known as Act 2. The Land Recycling Program regulations, 25 Pa. Code Ch. 250, require the state DEP at least every

three years to review new scientific information used to calculate Act 2 MSCs and propose appropriate changes reflecting this information.

Among the new scientific information cited by the DEP in this latest review, the agency noted that the average body weight utilized by the U.S. Environmental Protection Agency as a default exposure factor in risk calculations has increased from 70 kilograms (154 pounds) to 80 kg (176 lbs), an increase of 10 kg or 22 lbs. The DEP also reviewed current scientific knowledge regarding the physical and toxicological properties of regulated substances.

As a result of this review, some MSCs would increase, while others would fall to significantly more stringent levels. For example, the MSCs for several organic compounds found at contaminated sites would be reduced by one-half an order of magnitude or more, including 1,1-biphenyl (used heat-transfer fluid

production and textile dyeing), cis-1,2-dichloroethylene (a solvent and refrigerant), 1,2,4-trichlorobenzene (an intermediate in herbicide production, solvent and lubricant), and trichloroethylene (or TCE, a commonly used industrial degreaser). In the case of TCE, the MSC for direct contact in soil at residential sites would decrease from 260 mg/kg to 38 mg/kg, in surface soil at nonresidential properties from 1,300 mg/kg to 160 mg/kg, and in nonresidential subsurface soil from 1,500 mg/kg to 180 mg/kg. The MSCs for inorganic compounds free of cyanide (a measurement of cyanide compounds, which are used in plastic production, mining and electroplating) and vanadium (an element used to produce specialty steel alloys and sulfuric acid) would also be significantly reduced.

Changes to the Act 2 MSCs will likely have important implications at brownfield and other contaminated sites that have either been previously remediated under Pennsylvania's Land Recycling Program or that are slated for future cleanup and redevelopment. Some of the more significant potential impacts are discussed below.

POTENTIAL 'REOPENER' TRIGGER?

Successfully demonstrating attainment of Act 2 standards at contaminated sites in Pennsylvania confers protection from liability for further cleanup under state environmental laws for contamination identified in the approved reports. This release of liability, which applies to current and future property owners, the remediator and other cleanup participants, site developers and occu-

pants and their successors or assigns, has provided much-needed finality for parties required to remediate property in enforcement actions, and has facilitated hundreds of real estate transactions involving redevelopment of brownfield sites.

Despite this broad liability protection, the Act 2 statute contains limited "reopener" provisions under which the DEP could require additional remediation at a site where a cleanup was previously completed. One such scenario involves when "new information is obtained about a regulated substance associated with the site which revises exposure assumptions beyond the acceptable range." In theory, tightening of the relevant MSC due to new scientific information about a contaminant for which a remediator had previously demonstrated attainment could provide a basis for the DEP to reopen the cleanup if the previously achieved standard now fell outside of Act 2's target risk levels.

In practice, however, the DEP is unlikely to exercise this reopener authority in any systematic way. Troy Conrad, program manager for the Land Recycling Program in the DEP's central office, noted that the agency does not have a database system designed to screen prior cleanups against newly revised MSCs, and that individually reviewing previously approved reports would be an overly time-intensive process for DEP staff. Therefore, he indicated that reopeners due to MSC changes will not be a program priority, and would probably arise only in case-specific circumstances such as when a party approaches the agency to address other contamination at a site, or the DEP receives a specific complaint.

IMPACT ON DUE DILIGENCE FOR TRANSACTIONS AND FINANCING

Despite the unlikely prospect of widespread DEP re-evaluation of closed Act 2 sites, more stringent Act 2 MSCs could raise questions for purchasers and lenders engaged in due diligence evaluations for real estate transactions and financing. The recently revised protocol for Phase I investigations of commercial real estate—ASTM International, Standard E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (Nov. 2013)—contains a revised definition of the term "historical recognized environmental condition," or HREC. Importantly, the HREC definition now requires the environmental professional to evaluate whether a past release, which had previously been addressed (without the use of controls like land use limitations or caps) to the satisfaction of the applicable regulatory authority or met unrestricted use criteria, would continue to be an HREC today despite any changes in regulatory cleanup criteria. If a historical cleanup no longer satisfies current remediation criteria, the environmental professional must categorize the past release as a recognized environmental condition, or REC.

Under the current ASTM standard, environmental professionals performing Phase I investigations of previously remediated Pennsylvania sites will now need to review information (if available) about prior releases for comparison to current Act 2 standards. If a past cleanup no longer satisfies current MSCs, the environmental professional may need

to identify the historical release as a REC. In the transactional or refinancing context, reclassifying a formerly closed-out condition in this way would likely complicate the deal. This added complexity may cause significant delays in reaching the closing table while the parties and their counsel and consultants evaluate whether and how to address the issue from a technical perspective, potentially re-engage the DEP at the site or allocate reopener risk through contractual, insurance or other means.

ADDRESSING INCONSISTENCIES

For development projects, parties seeking to use soil or other excavated material as fill within Pennsylvania typically follow the DEP's policy on management of fill, Document No. 258-2182-773 (Aug. 7, 2010). In the absence of due diligence information indicating that proposed fill material has not been impacted by a release of a regulated substance, the party must perform analytical testing to determine if the material qualifies to be used as "clean fill" or "regulated fill" at a receiving site, or must be disposed as a waste if excavated. Clean fill may be used in an unrestricted manner, while regulated fill may be beneficially used under DEP General

Permit WMGR096 at nongreenfield sites used for nonresidential purposes.

The fill policy and General Permit WMGR096 contain tables of concentration limits for clean fill and regulated fill derived directly from Act 2 MSCs for soils at residential and nonresidential sites, respectively. However, these fill concentration limits have not been updated to remain in sync with previously revised Act 2 MSCs, and do not reflect the MSC changes in the current proposed rulemaking. These inconsistencies can raise difficulties where a developer or property owner seeking to import fill material for use at a site undergoing an Act 2 cleanup finds that the proposed fill satisfies the clean fill or regulated fill concentration limits but not the current Act 2 MSCs.

One regulated substance for which this scenario has recently arisen is the compound benzo(a)pyrene, which tends to be found ubiquitously in urban historic fill at low concentrations. The clean fill limit for benzo(a)pyrene is 2.5 mg/kg, whereas the Act 2 residential direct contact MSC is 0.57 mg/kg (proposed for revision to 0.58 mg/kg). Given this inconsistency, parties seeking to import soil with low levels of benzo(a)pyrene for use as fill at residential sites as part of an Act 2

remediation may have a difficult time obtaining DEP approval even though the proposed fill material would otherwise qualify as clean fill.

The DEP's Bureau of Waste Management has recognized these inconsistencies and is developing a process to align the fill limits with the current MSCs. In the near future, the bureau plans to propose a revision to the fill policy with clean fill limits derived from the current residential MSCs, along with a mechanism to keep the two sets of standards more closely in sync. Subsequently, the bureau expects to update the regulated fill limits in General Permit WMGR096. Depending on the contaminants involved, these upcoming changes may disqualify material from use as clean fill or regulated fill, but will eliminate the confusion currently caused by inconsistencies between the numeric limits used in fill projects and Act 2 cleanups. •

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