

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2015

PHILADELPHIA, FRIDAY, MARCH 13, 2015

VOL 251 • NO. 48

An **ALM** Publication

## ENVIRONMENTAL LAW

### Successes, Anticipated Challenges for Pa.'s Land Recycling Program

BY **RODD W. BENDER**

*Special to the Legal*

Twenty years ago this coming May, the cleanup and redevelopment of contaminated properties in Pennsylvania became considerably more manageable when then-Gov. Tom Ridge signed into law the Land Recycling and Environmental Remediation Standards Act of 1995, 35 P.S. Sections 6026.101-908 (Act 2). Act 2 established the principles under which the Pennsylvania Department of Environmental Protection (DEP) promulgates remediation standards and procedures for remediating contaminants (referred to as “regulated substances”) in soil and groundwater, enabling persons to obtain legal liability protection and encouraging the reuse of “brownfields” and other contaminated sites.

With this legal underpinning, Pennsylvania’s Land Recycling Program provides developers, facility owners and others with several advantages in performing site cleanups. Some of these include:

- Allowing use of one or a combination of cleanup standards, including (1) demonstrating that contaminant concentrations do not exceed regulatory numeric criteria for soil and groundwater, taking into account residential or nonresidential land use and underlying aquifer use, (2) showing that contamination is solely due to background conditions, and (3) utilizing “site-specific” risk-based approaches including developing numeric standards unique to the site or implementing institutional controls (such as prohibitions on groundwater ingestion) and/or engineering controls (such as caps preventing contaminant exposure).
- Providing procedures for performing site investigations, preparing reports,



**RODD W. BENDER** is an attorney with the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd. He can be reached at 484-430-2317 or rbender@mankogold.com.

demonstrating attainment of cleanup standards, documenting controls, and other tasks.

- Requiring the DEP to respond to submissions within mandatory timeframes.
- Conferring liability protection (subject to limited reopeners) against further cleanup obligations under Pennsylvania environmental laws upon completing remediation, which protection extends to the remediator and current and future site owners, developers and occupiers.

As a result, the Land Recycling Program has helped Pennsylvania cleanups proceed in a more flexible and cost-effective manner, and provide better certainty on timing and liability protections, while protecting human health and the environment. These benefits have spurred remediation of over 5,400 sites across the state, according to the DEP’s website. At many sites, remediation has led to redevelopment of vacant or underutilized properties, fostering economic growth and community amenities while reducing development pressures on green space.

There is much to celebrate as the Land Recycling Program enters its third decade. However, several challenges to the program’s momentum have arisen, which should be understood by parties that buy, sell, remediate, redevelop, or finance contaminated property in Pennsylvania. The remainder of this article outlines some of the more pressing recent concerns, along with prospects for solutions.

#### **BUDGETARY CONSTRAINTS AND PERSONNEL TURNOVER**

The DEP has experienced significant budget cuts over the past 10 years, making it more difficult for the agency to devote sufficient personnel to many of its programs. Concurrently, a large number of recent retirements, some driven by budgetary cutbacks, is reducing cumulative experience and institutional knowledge among both administrators and project staff. As a result, remediators may find it more difficult to fast-track projects, and newer regulators may lack experience to think “outside the box” or look to prior projects as precedents for complex issues.

The incoming administration of Gov. Tom Wolf has recognized the DEP’s budgetary and personnel challenges, and is evaluating approaches to identify critical funding needs, make technology investments to improve efficiency and effectiveness, attract and retain quality staff, and transfer institutional knowledge. Notably, Wolf’s 2015-16 budget proposal would restore nearly \$8 million to the DEP, although the fate of the budget is uncertain at this point.

#### **REMEDICATION AND STORMWATER MANAGEMENT OBJECTIVES**

Management of stormwater from development projects has become an increasingly important regulatory program. Traditionally, this program focused on best management practices (BMPs) controlling erosion and sedimentation during construction. For the last decade, however, developers in Pennsylvania have also been required to design and implement BMPs aimed at reducing potential water quality and flooding impacts of stormwater from projects after construction is complete. The DEP has mandated these “post-construction stormwater

management” obligations through regulation and integration into stormwater construction permits.

Thoughtful post-construction stormwater management planning provides environmental benefits. This framework also presents challenges, however, at brownfields where the stormwater program’s goal of maximizing on-site stormwater infiltration can conflict with concerns about mobilizing contamination, and impose significant additional project costs.

Stormwater construction permitting is typically managed by the DEP’s regional waterways and wetlands program in conjunction with the county soil conservation district, while site remediations are overseen by the regional environmental cleanup and brownfields program. Successful brownfields projects require complex evaluations of remediation options, including potentially leaving contamination in place where safe to do so, which may not always allow for use of infiltration-oriented BMPs. Although this suggests that stormwater and cleanup program staff should coordinate early and closely for brownfields projects, this degree of coordination does not always occur. Moreover, redevelopers have found that some stormwater program staff can lack experience addressing the unique challenges of brownfields sites. This problem can be exacerbated by the DEP’s Stormwater Best Management Practices Manual, which does not provide much practical guidance for brownfields.

The Wolf administration is evaluating these challenges to harmonizing brownfields cleanup and stormwater management objectives. It is hoped that the DEP will strive to improve communication between the cleanup and stormwater programs, and partner with private-sector professionals to develop additional brownfields guidance for the stormwater BMP manual.

## **ADAPTING TO CHANGING VAPOR INTRUSION REQUIREMENTS**

The potential for certain contaminants—such as gasoline and dry-cleaning solvents—to volatilize and enter indoor air of overlying

or nearby buildings can present a difficult remediation issue. The past decade has seen a rapid development in science and law focusing on this vapor intrusion (VI) exposure pathway.

---

*Wolf’s 2015-16 budget proposal would restore nearly \$8 million to the DEP, although the fate of the budget is uncertain at this point.*

---

The DEP issued guidance on VI issues at Act 2 sites in 2004. The agency is currently preparing a long-awaited revision to this guidance, which will include several changes. Based on the current draft, improvements will likely include clarifying how to address VI under the site-specific standard, and allowing use of mitigation methods (e.g., vapor barriers or depressurization systems) in lieu of investigation. The current draft would also present new challenges, including more stringent screening values that could trigger additional VI testing and possibly mitigation; these tighter levels could also raise questions for sites where screening was previously performed. Also, the draft guidance would require recording of an environmental covenant imposing ongoing VI obligations, including maintaining mitigation systems for existing inhabited buildings and performing additional evaluation or mitigation for future construction.

The DEP’s proposed VI guidance should be available for public review and comment sometime in 2015. Parties involved in site cleanups should carefully review this important proposal and consider providing feedback to the agency.

## **ANTICIPATING CHANGES TO THE MANAGEMENT OF FILL POLICY**

On Dec. 20, 2014, the DEP published proposed revisions to its management of fill

policy, which governs the process for identifying fill material that must be regulated as a waste, and material that qualifies as “clean fill” that may be used without such regulation. This policy, originally issued in 2004, has played a key role at Pennsylvania brownfields and other construction sites.

The management of fill policy is closely related to the Act 2 program, as the clean fill numeric limits were derived from Act 2 medium-specific concentrations (MSCs) for regulated substances in soil at residential properties. The current revision would update the clean fill limits to reflect recent changes in the Act 2 MSCs. In doing so, the clean fill limits for dozens of substances will decrease, which will restrict the volume of material that can qualify as clean fill. One important example involves benzo(a)pyrene, a compound ubiquitously found in urban soils from fossil fuel combustion, whose clean fill limit would drop by nearly 80 percent.

Besides reducing clean fill limits for several important substances, the proposal raises other concerns. Among others, these include not allowing use of other Act 2 methods to calculate clean fill limits, and failing to address the impact of revised limits on existing and completed projects. Thus, the proposal would not only impact availability of fill material for future construction, but may also raise concerns for transactions involving properties where fill was previously placed.

Various parties have submitted comments on the proposal. It is hoped that the DEP will thoroughly consider these comments and consider making improvements before promulgating the revisions in final form. •

---

Reprinted with permission from the March 13, 2015 edition of THE LEGAL INTELLIGENCER © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit [www.almreprints.com](http://www.almreprints.com). # 201-03-15-03