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Connecticut DEEP Seeks to Overhaul Remediation Standards – Expansion of LEP Approval Authority, Part II: Groundwater Contamination

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On July 8, 2019 the Connecticut Department of Energy and Environmental Protection (“DEEP”) proposed an overhaul to its Remediation Standard Regulations (“RSRs”). These proposed amendments, often referred to as “Wave 2,” will significantly alter Connecticut’s remediation programs if they are approved. DEEP is seeking public comments on these proposed regulatory changes through October 7, 2019, and will be hosting public information sessions in July, August and September.

Because DEEP’s regulatory changes are so sweeping, their scope cannot be captured in a single Alert. Therefore, for the next several weeks, Pullman & Comley’s Environmental Practice Group will be issuing a series of Alerts, each one focusing on one aspect of the changes to the RSRs. Today’s Alert focuses on the regulatory changes associated with groundwater contamination.

Connecticut Licensed Environmental Professionals (LEPs) perform crucial functions, most importantly issuing the verifications that bring sites to closure under the Transfer Act and voluntary remediation programs. As the RSRs stand, however, DEEP must approve many decisions preliminary to verification, resulting in delay and expense. So one of the most significant themes of the “Wave 2” amendments is the expansion of LEP approval authority. The expansions are limited: for each decision LEPs would be authorized to make, “Wave 2” bifurcates approval authority into circumstances where they can do so and circumstances where DEEP approval will still be necessary. In general, LEPs can act where criteria can be reduced to a list of quantifiable, objective factors, whereas DEEP approval is required where outcomes turn on more complex facts, more diverse factors, and the exercise of judgment or discretion. Overall, while

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the proposed changes would put LEPs on a short leash, the expanded decision-making capabilities provided by “Wave 2” could meaningfully streamline the remediation process.

Following the structure of the RSRs, and using the section designations in the “Wave 2” proposal, the proposed new LEP authorities concerning groundwater contamination are as follows.

The “Wave 2” proposal provides for an expanded LEP role in developing alternative surface water and ground water protection criteria. Both exhibit the bifurcated structure characteristic of the new LEP provisions, although the primary process for developing alternate surface-water protection criteria is the same for the LEP and DEEP paths.

Alternative Surface Water Protection Criteria

Proposed §22a-133k-3(b) provides that alternative surface-water protection criteria (SWPC) may be calculated by an LEP or approved in writing by DEEP. For groundwater discharging to surface water, the viability of this approach no doubt rests on the detail with which the proposed regulation prescribes not only the calculation, but also the derived, substance-specific and property-specific inputs to it, including distinct calculations for inland and coastal receiving waters. The calculated values are also subject to a sliding cap based on proximity to the nearest downgradient surface water. In addition, the “Wave 2” proposal includes an alternative methodology based on aquifer dilution, available to LEPs for groundwater plumes at least five hundred feet from the nearest downgradient surface water. When the alternative value is calculated by an LEP, written notice showing the calculation must be submitted to DEEP.

While these approaches are equally available to LEPs or DEEP, the “Wave 2” proposal also expands on DEEP’s existing authority to approve alternate criteria on a case-by-case, site-specific basis. Specifically, the proposal would allow DEEP to approve release-specific alternative surface water protection criteria or an alternative method of demonstrating compliance. In this approach, the only limit on DEEP’s discretion is that the alternative must be protective of existing and proposed surface water uses, human health, and the environment. A request under this provision may also take into account the receiving water body’s stream flow, other discharges within a half mile upstream of the plume, the quality of the receiving water body, and the flow rate of the groundwater discharge.

Alternative Groundwater Protection Criteria

The “Wave 2” approach to alternative groundwater protection criteria shares certain features with both the alternative PMC provision and the alternative SWPC provision. For LEPs, proposed § 22a-133k-3(d)(2)(A) first defines eight threshold criteria, including:

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- Alternative value cannot be more than 100 times the applicable GWPC or 50% of the residential volatilization criteria;
- There can be no drinking water wells in or adjacent to the part of the plume exceeding background;
- There must be a public water supply distribution system within 500 feet downgradient or 200 feet in any direction of the plume;
- Soil source areas must have been remediated so there is no ongoing source;
- Alternative GWPC cannot be employed where alternative PMC are in use;
- Alternative criteria cannot be used for any portion of the plume in bedrock.

The provision prescribes equations for calculating alternative GWPC for VOCs and SVOCs.

LEP authority to calculate alternative GWPC is also constrained in another very significant way: it is only available for groundwater in geographical areas designated on the “Potential Alternative Groundwater Protection Criteria Map” included in the “Wave 2” proposal as Appendix I.

Following the familiar pattern, DEEP authority to approve alternative GWPC employs the same calculation framework, but is more expansive in multiple respects. First, it is available outside the “Appendix I” areas. Second, it is subject to the same threshold criteria, with the crucial exception of the bedrock prohibition – meaning that DEEP may approve alternative criteria for a plume in bedrock. Third, it provides considerably more flexibility to demonstrate that drinking water exposure is not a concern, either because public water supplies are available in the area of the plume, or because the aquifer is not suitable for development of water supply wells.

Deletion of an LEP Option: Alternative Site-Specific Volatilization Criteria

Despite the overall expansion of LEP authorities, “Wave 2” would cut back on LEP authority in one respect: it would eliminate the implicit authority of LEPs to approve site-specific residential volatilization criteria under § 22a-133k-3(c)(4), which currently provides that such values “may be calculated” using current Appendix G. Under the equivalent provision in “Wave 2,” such criteria would be available only with DEEP approval.

For more information on DEEP’s changes to the Remediation Standard Regulations, please contact any member of our Environmental Practice Group, your responsible Pullman Attorney or send a message to brownfields@pullcom.com. If you prefer, you may investigate this initiative further on DEEP’s website.

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