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DEEP Updates Engineered Control Financial Assurance Guidance

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On January 31, 2013, the Connecticut Department of Energy and Environmental Protection (DEEP) unveiled revisions to guidance on financial assurance for engineered control variances under the Remediation Standard Regulations (RSRs).

In remediating contaminated property, engineered controls serve to “physically isolate” contaminated soil. Under the RSRs, an approved engineered control renders direct exposure and pollutant mobility criteria inapplicable to the “isolated” soil. Contaminated soil can then be left in place, so the engineered control can be a valuable part of a strategy to achieve RSR compliance on relatively cost-effective terms.

Despite their potential to streamline and simplify remediation projects, engineered controls have proven challenging to implement. Even for sites delegated for supervision by a Licensed Environmental Professional, every control requires DEEP staff review of risks, costs and benefits. Proponents must provide for ongoing inspection and maintenance of controls and supply financial assurance for performance over an operational lifetime that may extend for decades. Because each proposal is unique, DEEP review and approval have been ad hoc, time-consuming and unpredictable.

Continuing an ongoing process of improving the utility of the engineered control mechanism, the revisions just announced address financial assurance requirements.

Significantly, DEEP has reordered its preferences among financial assurance options, giving first priority to irrevocable standby letters of credit and performance bonds. Trust funds, formerly the first preference, drop to third place. Insurance remains the fourth option.

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On-line resources now include a “financial assurance calculator” spreadsheet, as well as templates for letters of credit and performance bonds, and a separate document detailing DEEP’s conditions for approval of letters of credit.

DEEP also provides a database of thirty-three sites where it has approved engineered controls. For administrative staff and the regulated community alike, the database is an invaluable resource to share information about the spectrum of controls that DEEP has approved and that may therefore be available in comparable situations.

The new refinements on financial assurance continue an incremental process of realizing the full potential of the engineered control variance mechanism. Even as DEEP continues its ambitious initiative to “transform” Connecticut’s remediation programs, these changes reflect the value of efforts to enhance the effectiveness of existing programs.

Pullman & Comley’s environmental attorneys have played major roles in negotiating and implementing five of the thirty-three engineered controls listed on the DEEP database; of those, Chris McCormack has had lead counsel responsibility for three.

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