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Connecticut DEEP seeks to Overhaul Remediation Standards: Background Concentration Edition

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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 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 to the definition of background concentration of a substance in soil or groundwater.

How the background concentration of a substance is defined and used in the RSRs has been a point of debate for some time. Earlier conceptual discussions of proposed revisions to the RSRs included the use of the term “anthropogenic origins” as part of the background concentration definition which some commentators thought opened the door to a wide variety to human-caused conditions to be inappropriately considered as background. That term is not found in the current proposed iteration. Rather, background concentration is proposed to be defined as follows under proposed RCSA § 22a-133k-1(a):

(5) “Background concentration” means the concentration of a substance in soil or groundwater that, based on a validated conceptual site model, is:

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(A) In the general geographic vicinity of a release;

and

(B) Either:

(i) Naturally occurring; or

(ii) Minimally affected by human influences at concentrations equal to or less than criteria specified in the RSRs.

This proposed definition of background concentration is materially different from the current definition which does not require a validated conceptual site model as its basis and is not dependent upon a showing of natural occurrence or minimal affect by human influences such that concentrations remain equal to or less than criteria specified. Rather, the current definition of background concentration looks at representative concentrations of a substance that are not within a release area and are otherwise representative of the area under consideration.

The effects of this revised definition need to be carefully considered in the context of how background concentrations are utilized in site remediation.

Firstly, how one demonstrates what is “naturally occurring” is not set forth in the proposed RSRs. Given the role of background concentration as an alternative remedial criteria and the import of the concept of naturally occurring in the revised definition, this is a critical component that deserves attention. The current RSRs at RCSA § 22a-133k-2(a)(2) provide a list of information relevant to the current definition that needs to be submitted to the Commissioner when background concentrations are sought to be utilized in lieu of RSR numerical criteria for polluted soil. This language has been eliminated in the proposed revised RSRs (it is obsolete given the new definition) without any new guidance or material provided.

Secondly, the concept of soil or groundwater that has been “minimally affected by human influences” is practically nullified by capping such affected media to concentrations equal to or less than criteria. In effect, this makes background concentration either what is naturally occurring or existing RSR criteria. Acknowledging human influence but capping it at existing criteria essentially neutralizes the concept. Given that background concentration is often used as an alternative cleanup criteria when there is no numerical criteria provided, this definition limits background concentration to naturally occurring. [1] This is a significant tightening of the standard from the current definition which looks for a geographically representative sample that is unaffected by a release.

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Note too that the proposed revisions to the RSRs include provisions that explicitly state that background concentrations shall be utilized if there are no specified criteria for surface water and volatilization[2]. Additional provisions provide that background concentrations can be utilized as an alternative to numeric criteria for direct exposure and pollutant mobility criteria and groundwater[3]. The ability to request a proposed risk-based criteria remains and may be utilized, if granted by the Commissioner.

The effect of this is to establish background concentration as established by naturally occurring conditions as a default criteria under many scenarios. This is a material change from the current RSRs and should be carefully considered by the regulated community.

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.

[1] This definition also codifies a controversial concept found in a recent DEEP Declaratory ruling which stated that "With respect to certain substances for which there are no criteria specified in the RSRs, clean-up to background is required, although clean-up to a different criteria approved by the Commissioner is permitted."

[2] E.g. proposed RCSA §§ 22a-133k-3(h)(2), 22a-133k-3(h)(3)

[3] E.g. proposed RCSA §§ 22a-133k-2(b)(7)(A), 22a-133k-2(c)(6)(A), 22a-133k-3(a)(1)

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