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Connecticut DEEP seeks to Overhaul Remediation Standards—Pesticide Remediation

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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 pesticide remediation.

Connecticut’s rich agricultural history, particularly in eastern and north central Connecticut, has left it with a legacy of soils containing residual traces of pesticides. While this pesticide residue is not an issue for active farming operations, issues arise when farms are sold and converted to other commercial/ industrial uses or to residential developments. Under the current regulatory scheme, such sites often are forced to remediate residual pesticides to background levels as part of the transfer of the property to a developer.

The proposed revisions to the RSRs would provide opportunities to avoid remediating pesticide-contaminated soil, subject to conditions designed to control risks to human health or the environment. Thus, if the revised RSRs are approved and implemented, pesticide-contaminated soils will face fewer regulatory hurdles. For example, for residual pesticides located on properties that have commercial or industrial uses, the pesticide-contaminated soil need

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not be remediated if:

1. “Protective measures” are developed for instances where such soils exceed applicable levels (i.e., the direct exposure criteria);
2. A soil management plan is put in place whenever soil is being excavated or otherwise used on the site; and
3. An environmental use restriction is put on the site which places the previous two requirements on the land records and also prohibits residential activity at the site.

Similarly, if an entity wishes to undertake residential development (rather than commercial or industrial development) at a site that is contaminated with pesticides, that entity must place an environmental use restriction on the property and must implement protective measures for the site. Such protective measures will include:

1. Adding clean soil to the site so that the concentration of pesticides in the top foot of soil meets applicable standards;^[1]
2. Covering the soil with pavement, buildings, or permanent structures; or
3. Growing “dense or vexatious vegetation” where steep slopes are involved.^[2]

In addition, the proposed amendments to the RSRs eliminate the long-standing prohibition against the re-use of contaminated soils if those soils contain pesticides. Pesticide-contaminated soil may be re-used at another agricultural site provided that DEEP approves the request in advance and the soil meets the following requirements:

1. The soil meets applicable criteria for all contaminants other than pesticides;
2. Such soil is only excavated from the “A Soil Horizon;”
3. Such soil will be re-used for agricultural purposes;
4. The pesticides found in the soil were placed there as a result of proper pesticide application (i.e., no dumping); and
5. The re-use is determined to be protective of human health and the environment.

The RSR revisions also allow sites to escape remediation requirements for groundwater contaminated with pesticides. To qualify for this exemption, the site must go through an extensive well receptor survey to ensure that no pesticides could possibly be contaminating potable wells. The nature and extent of pesticide contamination in the groundwater must also be ascertained, and measures must be taken to limit the likelihood that pesticides will contaminate drinking water supplies in the future.

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As proposed, this particular set of changes appears to be a pragmatic solution to a problem that has dogged the Connecticut real estate industry for some time. We will continue to follow this portion of the revised regulations, as well as other aspects of the RSR revisions, in the weeks and months to come.

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] Thus, it appears, at least for the limited circumstance of pesticide contamination, that the DEEP is willing to consider that dilution may be the solution to pollution.

[2] It should be noted that "vexatious vegetation" is not a defined term in the RSRs, but we presume that all manner of poison ivy, prickly bushes and the like will be considered vexatious.

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