NYSBA Brownfield/Superfund Update

Linda R. Shaw

lshaw@nyenvlaw.com

December 5, 2018

Knauf Shaw LLP

Emerging Contaminants Sampling Program

Hoosick Falls PFOA drinking water crisis linked to the landfill where PFOA wastes were buried commenced State-wide quest for PFAS data from all remedial and landfill sites even though the new Clean Water Infrastructure Law focuses on drinking water.

Knauf Shaw LLP

EPA Health Advisory Levels Intended for Drinking Water Sources are being treated as Cleanup Standards Now

With PFAS compounds are being found everywhere, NYSDEC is asking parties in remedial programs (EXCEPT ACTIVE LANDFILLS) with exceedances of more than 70 ppt of PFAS compounds to "cleanup" this contamination even though the Drinking Water Quality Council has not adopted standards, which were due this Fall 2018.

70 ppt is an EPA Health Advisory Level for Drinking Water sources, not a federal Standard and PFAS compounds are not yet hazardous substances under federal law.

Knauf Shaw LLP

New Proposed Part 375 Regulations

Why do we need any changes?

- DEC explains that new Soil Cleanup Objectives (SCOs) are needed as a result of a required five-year review. DEC's only hint about SCO changes is that "Some may increase; most changes will be lower."
- Friendly Reminder about timeframes in ECL 27-1415(6)(b) for public input of SCO changes - The initial tables shall be published in draft form for public comment with a public comment period of one hundred twenty days, and be the subject of at least three public hearings throughout the state. Subsequent tables shall be the subject of at least one public hearing and a public comment period of at least ninety days.

DEC's True Motivation for Regulatory Changes Continues to be the Agency's Obsession over the Tax Credits

While the following text was eliminated from DEC's PP this year, last year a similar presentation revealed on slide 7: "Cover system - the definition addresses the potential for abuse. DEC is setting parameters to help NYS Division of Taxation and Finance issue appropriate credits in line with the intent of the legislation."

In DEC's own opinion, the legislature did not go far enough to diminish the tax credits in June 2015 amendments and now they want to independently cut the credits by legislating amendments through new regulations.

Knauf Shaw LLP

DEC Continues to Fail to Heed Judge Cherlundo's Advice in the *Destiny* case

DEC was admonished by Judge Cherlundo in his Supreme Court *Destiny v. NYSDEC* decision, 63 A.D.3d 1568, 879 N.Y.S.2d 865 (4th Dep't 2009), lv. den'd 2009 WL 3161769, 2009 N.Y. Slip Op. 07124 (4th Dep't 2009), when he warned DEC not to legislate changes to existing law:

"Clearly, in deciding to adopt the 'guidance factors', the DEC has opted to make itself a fiscal watchdog without legislative authority. Moreover, by adopting the so called 'guidance factors' the DEC has chosen to rewrite the statute that was clearly written by the legislature, the effect of which is to not only dull, but to emasculate the clear intent of the statute, by administrative agency fiat. Such activities cannot - and should not - be condoned."

Knauf Shaw LLP

A Regulation that States a Party will only recover the "equivalent cost of a soil cover" when asphalt or concrete is used is Legislation by Regulation

Last Year's DEC PP Essentially Stated a Cover System for a Track 4 cleanup site:

- for a restricted residential use that used a building foundation to "meet the 2 feet of soil cover requirement" will only be entitled to site preparation costs equivalent to the value of 2 feet of soil cover.
- for a commercial or industrial use, only the equivalent value of 1 foot of soil cover will be permitted for tax credit purposes.

This is legislating by regulation because the legislature CLEARLY intended for some of the costs of FOUNDATION SYSTEMS to count:

- Tax Law §21(b)(2) "Site preparation cost shall not include the costs of foundation systems that exceed the cover system requirements in the regulations applicable to the qualified site."
- Tax Law §21(a)(3)(iv) "Eligible costs for the tangible property credit component are limited to costs for tangible property that has a depreciable life for federal income tax purposes of fifteen years or more, costs associated with demolition and excavation on the site and the foundation of any buildings constructed as part of the site cover that are not properly included in the site preparation component and costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, whether or not such property has a depreciable life for federal income tax purposes of fifteen years or more.

Knauf Shaw LLP

Tax Law Clearly Contemplated A Portion of Foundation Costs to Count

- DEC was supposed to draft regulations that would defined what portion of a foundation would count toward the tax credits in terms of thickness for different qualified sites (e.gs. a PCB site, or a landfill site might need a thicker concrete cover system than a standard BCP site);
- There is no legislative history and no possible plain language interpretation that the language in these Tax Law provisions were intended to mean, for tax credit purposes, that only the equivalent dollar amount of a 2 foot soil cover for a residential site or a 1 foot soil cover on a commercial/industrial site would count;
- DEC knows the intent of this language was to adopt a minimum thickness for a "foundation system" that qualifies as a cover system. Moreover, this will hurt upstate BCP Sites more than downstate where Track 4 is used more frequently.

Knauf Shaw LLP

Track 1 Sites Cannot be Treated as Track 2 Sites – DEC is Trying to Eliminate Tax Credit $$$ Without Considering Negative Policy Implications

Newly Proposed Regulation as described in DEC's PP:

375-3.8(e)(1)(ii-iii) – Track 1: Conditional Track 1 would no longer be issued; instead Track 2 will be issued and Applicant can request modified Certificate of Completion (COC) for Track 1 upon meeting requirements.

Existing Regulations should be amended to be CONSISTENT WITH THE BCP STATUTORY LAW in ECL 27-1415(4), which allows for the achievement of a Track 1 cleanup through the implementation of LONG term institutional controls and engineering controls (IC/ECs) for groundwater (and vapor) contamination provided asymptotic levels are demonstrated. DEC previously, and randomly, inserted a 5 year timeframe and stated that only short term ICs and ECs can be employed.

Knauf Shaw LLP

New Proposed Regulations Will Discourage Track 1 Cleanups, Which Violates Statutory Intent

- Goal in the Statute is to encourage Track 1 "permanent" cleanups, therefore, DEC cannot propose a regulation that takes away achievement of a Track 1 SOIL cleanup if Track 1 SOIL SCOs are achieved because the Track 1 statutory definition does not require achievement of drinking water standards or DOH vapor guidance values.
- ECL §27-1415(4) Track 1: The remedial program shall achieve a cleanup level that will allow the site to be used for any purpose without restriction and without reliance on the long-term employment of institutional or engineering controls, and shall achieve contaminant-specific remedial action objectives for soil which conform with those contained in the generic table of contaminant-specific remedial action objectives for unrestricted use developed pursuant to subdivision six of this section. Provided, however, that volunteers whose proposed remedial program for the remediation of groundwater may require the long-term employment of institutional or engineering controls after the bulk reduction of groundwater contamination to asymptotic levels has been achieved but whose program would otherwise conform with the requirements necessary to qualify for Track 1, shall qualify for Track 1.

Knauf Shaw LLP

DEC Cannot Legitimately Discourage Track 1 and 2 Cleanups Without Violating the Statutory Intent

- **DEC is redefining Track 1 to mean achievement of BOTH soil & drinking water standards and no vapor exceedances within 5 years. This is diametrically opposed to the Law's intent and plain language. The Law seeks to encourage Track 1 SOIL cleanups even if GW Standards are not achieved because eventually the groundwater will be remediated after a complete source removal, and in many brownfield neighborhoods, pristine GW is simply not achievable.**
- **The concept of only needing to achieve asymptotic levels was intended to mean background conditions, NOT the drinking water based GW standards.**
- **Moreover, the Law allows for the LONG term use of ECs and ICs not just use of ECs and ICs for 5 years.**
- **What should be addressed in the new regulations is that a party should not lose Track 1 if an off-site groundwater or vapor plume is migrating onto to a Track 1 or 2 BCP Site or else no one will try to achieve these cleanup levels since they will merely be punished for doing so.**

Knauf Shaw LLP

Unclear What DEC is Planning for Track 2 Sites

- **Last year's PP included a Third Legislation by Regulation Issue:**
- **Proposed Change to 375-3.8(e)(2)(iv) read as follows - Track 2. Site cover cannot be used as a long-term EC to achieve applicable SCOs, but may be used to address contamination below 15 feet. The remedial program may use long term IC/EC to address groundwater or soil vapor contamination.**
- **Here DEC's prior 15 foot regulatory rule AND possible new proposed regulation prohibiting cover systems as ECs is not what the statute says:**

ECL §27-1415(4) Track 2: The remedial program may include restrictions on the use of the site or reliance on the long-term employment of engineering and/or institutional controls, but shall achieve contaminant-specific remedial action objectives for soil which conform with those contained in one of the generic tables developed pursuant to subdivision six of this section without the use of institutional or engineering controls to reach such objectives.

Knauf Shaw LLP

What does Track 2 Statutory Language Mean & Why Regulations should be amended to Comply with Law

- The Law meant that in order to achieve a Track 2 cleanup, the soil on your site, and in the bottom of the hole, MUST meet the numbers without use of any controls but it did not mean that a cover system would not still be needed to address groundwater and vapor contamination since such a system may be required for a sub slab mitigation system and to block exposure from contaminated groundwater that may be left even after the Track 2 soil cleanup down to whatever depth is required.
- DEC randomly adopted a 15 foot rule, which is inconsistent with the Law, makes no sense on petroleum tank sites where the cleanup typically starts at 15 feet, disregards any contamination left under that 15 foot depth above the Track 2 SCOs, and is now saying that a cover system cannot serve to cover the bad dirt above the Track 2 standards that may be left at the bottom of the excavation.

Knauf Shaw LLP

We will be participating in the upcoming mandatory Public Hearings on this regulations and hope you will as well - Thank you! Questions?

Linda R. Shaw
lshaw@nyenvlaw.com