

What's New in Risk Based Corrective Action in Florida?

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Over the last several years, under the direction of Governor Rick Scott, the Florida Department of Environmental Protection (FDEP) has embarked on an aggressive program to streamline regulatory processes across program areas, while maintaining protection of human health and the environment. Some of the most exciting developments relate to the process of site assessment and remediation under Florida's risk based corrective action program, now consolidated in a single rule, Chapter 62-780, FAC (Rule). **Rulemaking to Facilitate Development of Alternative Soil Cleanup Target Levels**

In response to a petition filed by the Associated Industries of Florida in December 2013, FDEP implemented changes to the Rule that facilitate the derivation of Alternative Cleanup Target Levels (CTLs) for soils by responsible parties under the "actual circumstances of exposure" as originally contemplated by the Legislature when Chapter 376.30701, Florida Statutes, was adopted in 2003. In practice, the changes allow the use of probabilistic risk assessment, as well as use alternative toxicity values and scientifically valid ranges of exposure to derive ACTLs for a site (approved by the Department), although the responsible party must use the FDEP's equations to derive the ACTL. The anticipated practical effect is that direct exposure alternative soil CTLs could increase approximately twofold in the residential context and 50 percent in the industrial/commercial context for carcinogens (for example, arsenic, pesticides, dioxin, PCBs, chlorinated solvents), which often drive cleanup costs. The expected benefit is not as great for non-carcinogens (TRPH, lead, copper) because the calculation is driven by daily exposure (soil ingestion). Once a responsible party has had an ACTL derived for a particular contaminant of concern approved by the Department that will likely be more broadly used by the regulated community, in essence as an alternative number to the direct exposure SCTL now set forth in Chapter 62-777, FAC. Some of the most exciting developments, however, have taken place in the form of policy and guidance changes. These have been significant and are ongoing. **Use of Non-Recorded Institutional Controls as Basis for Closure with Conditions**

On November 1, 2013, the Department issued a memorandum (Memo) with the somewhat understated title, "Site Closure with Conditions." It confirmed the Department's newly found willingness to rely on non-recorded institutional controls (ICs) in certain circumstances as an alternative to requiring a recorded restrictive covenant as a condition of closure. This change was embraced by the Department following many years of urging by the regulated community, including,

notably, the Florida Brownfields Association (FBA). Although the Memo discusses a variety of non-recorded ICs that might be appropriate for the Department's reliance, to date, the Memo has been used in only a handful of situations, all involving sites where the only remaining impacts above unrestricted use standards are to groundwater, and a local ordinance is in place that either restricts well installation or requires connection to municipal water. The Department is in the process of developing additional guidance to flesh out the policy's implementation. Other concerns being considered, which are expected to be addressed in subsequent guidance, include how the policy will address concerns related to potential exposure in the case of future dewatering or construction activities, as well as the effect of existing or potential irrigation wells on the property. The approval process may ultimately involve a "weight of evidence" approach, where a variety of factors are considered, such as:

- Size and location of the plume relative to existing improvements
- Nature and concentration of contaminants of concern (COCs) in the plume
- Scope and coverage of the local ordinance
 - requirement for connection for both potable and irrigation
 - prohibition on installation of new wells
- Status of site development and existing infrastructure for provision of water/irrigation
- Potential for additional construction and impact of construction activities such as dewatering on impacted area, potential for exposure, discharge, etc.

Facilitating Change to Policy and Rule

To facilitate consideration of possible policy changes, after a 10-year hiatus, the Department has reconvened the Contaminated Media Forum (CMF), a group of industry, consulting, legal, and Department professionals tasked by the Department to identify areas for potential rule and policy change, starting with the "low hanging fruit" — changes that can be implemented relatively simply through policy in Spring 2014 — to be followed by those that will require rulemaking. This process is expected to address a wide variety of longstanding issues under existing guidance and the Rule including updates to: fundamental approaches, inputs, and derivation of Cleanup Target Levels under Chapter 62-777, FAC, site assessment requirements and alternatives (e.g., incremental soil sampling and delineation requirements), alternative methods of background determination, considering human-influenced background conditions and establishing regional background for some naturally occurring contaminants, ecological risk assessment, vapor intrusion, the institutional controls procedures guidance, and reliance on non-recorded institutional controls. The CMF has been broken into four working groups that are tackling the following general areas for potential policy change or rulemaking:

- Direct Exposure/Leachability and Institutional and Engineering Controls

- Eco-Risk
- Background Determination
- Chapter 62-777, FAC, Cleanup Target Levels

A brief summary of the concepts and alternative approaches under consideration by the Direct Exposure/Leachability/Institutional and Engineering Controls Working Group of the CMF follows. NOTE: the concepts discussed on the following pages are just that — concepts. They have not been embraced as the final recommendation of the CMF, nor have they been endorsed or accepted by the Department. They do provide a sense of the options on the table, and the willingness of the Department to “think outside the box” to further refine the cleanup program in a manner that is both protective of human health and the environment and more cost-effective and efficient for the regulated community. *Delineation “Requirements”*

Much of the time and expense connected with site rehabilitation is associated with the often protracted assessment process. There are several areas where guidance might result in a more efficient, streamlined, and cost-effective process.

- Rely on the Conceptual Site Model (CSM) — the site history, timing and location of discharge, timing of installation of any existing “cap”, the vertical depth of samples relative to depth of the water table — to shape the scope of delineation during the assessment process.
- Relax the requirements for delineation to unrestricted use concentrations (as well as leachability), when the responsible party is willing to restrict future use of the property, or to memorialize reliance on de facto existing engineering controls, such as paving or building foundation.
- Clarify off-site delineation obligations (particularly for soil) for sites where the current owner of the “source” property did not cause or contribute to offsite soil impacts.
- Clarify soil intervals required for delineation — what flexibility can be afforded between two feet and the top of the water table?

Soil Leachability Issues

Leachability CTLs (LCTLs) are generally interpreted as point not-to-exceed values and may result in overly restrictive cleanup requirements. In reality, LCTLs are only a “surrogate” for anticipated exceedances in groundwater under appropriate circumstances. A revised approach would allow reliance on other equally reliable models or methods of predicting impacts.

- There must be some spatial consideration or averaging allowed when looking at soil concentrations greater than leachability CTLs (horizontally or vertically).
- Look at max flux or other criteria to help define acceptable parameters for delineation?

- Clarify requirements for delineation based on soil leachability exceedances when no groundwater impacts have been detected:
 - options when the area has (or has not) been capped for some period of time;
 - options to the “requirement” for one year of supporting groundwater data—if the concern is obtaining data from high versus low water table conditions, or the site has been in “steady state” for a significant period of time.
- Identify certain COCs (such as PAHs) that may be amenable for more “relaxed” treatment based on historical information over a broad number of sites that suggests that notwithstanding LCTL exceedances, leaching is unlikely.
- Acknowledge that use of alternative models for leachability evaluation (to the SPLP or soil concentration) is permitted and provide examples and references
- Acknowledge that alternative fate and transport models may be used for leachability calculation as alternatives to SPLP (Vleach, csoil, vs2dt, DAF)

Direct Exposure-Related Issues

- Should ACTLs be developed for other “common” alternative exposure scenarios (such as trespasser, recreator, utility worker, landscape contractor, construction work) or is that likely to gravitate to numbers based on the most restrictive set of assumptions and conditions?
- As an alternative, could a variety of resources for alternative exposure assumptions be made available for use/consideration by the regulated community?
- FDEP currently uses the NAICS codes (successor to the SIC codes) to define “non-residential uses” in its model Declaration of Restrictive Covenant, even though the actual conditions of exposure for most sectors are much less than what is considered residential/unrestricted use (30 years, 350 days/year, ages 1-31). Can an alternative approach be developed that would allow the responsible party to propose alternative descriptions for uses permitted or prohibited on the property that would be consistent with the degree and nature of the cleanup conducted and actual conditions of exposure?
- Current policy has been to require either two feet of clean fill or an impermeable surface to limit direct exposure. Guidance should be developed for acceptable alternatives such as use of materials other than soil, the use of visual cues and barriers, and vegetative cover.
- An asphalt or paved cap is the most common engineering control. Could FDEP develop a template Engineering Control Maintenance Plan for paved engineering controls that could be used by the regulated community?

Institutional Controls Procedure Guidance (ICPG)

There are likely to be several areas where the current ICPG requires revision in response to the

ongoing changes. These are expected to be in the following areas:

- Implementation of the November 1, 2013, Memorandum, “Site Closure with Conditions” (described above):
 - Where existing ICs do not prohibit well installation, could a weight of evidence approach be used to determine suitability of reliance for closure (factors such as: size/location of plume, location of existing improvements, nature and concentration of COCs, status of site development and existing infrastructure, potential for additional construction and impact of construction activities, location of existing irrigation wells (if any) relative to plume)?
 - Should the Memo’s applicability (at this time) be limited to closure for groundwater impacts only based on local ordinances, or should reliance on other non-recorded governmental controls alluded to in the Memo be implemented at this time (such as Water Management District delineated areas under Chapter 62-524, FAC, prohibition of installation of wells under Chapter 62-521, FAC)?
- Implement changes to capture potential for alternative descriptions of permitted/prohibited uses that are not so broadly defined and that dovetail with the risk based closure that has been implemented

The Department and the Contaminated Media Forum have established an ambitious schedule and agenda for the next eight months. Practitioners should expect significant streamlining and clarification to FDEP’s cleanup rules to be made through policy changes and directives. To the extent any of the contemplated changes require rulemaking to implement, the final result may well depend on November 2014 election results. If Governor Scott is not reelected, the future of any pending initiatives will be uncertain.

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