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ENVIRONMENTAL NOTES

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VDEQ CHANGES APPROACH TO NO FURTHER ACTION LETTERS AND OFFICIALLY LAUNCHES VURAM

BY: HENRY R. "SPEAKER" POLLARD, V

The Virginia Department of Environmental Quality ("DEQ") has clarified its approach to issuing "no further action" letters ("NFAs") for sites with both petroleum and non-petroleum contamination. This clarified approach will ensure that non-petroleum contaminated sites are reviewed only through the Virginia Voluntary Remediation Program ("VRP") screening process. In addition, DEQ has launched its updated technical approach to risk assessments, the Virginia Unified Risk Assessment Model ("VURAM"). The combined effect of these developments is a more universal and definitive process for determining whether cleanup obligations exist for non-petroleum contaminated sites and, if so, the applicable risk-based cleanup levels.

Parties that discover non-petroleum contamination on properties are often faced with a conundrum: even though reporting such contamination is actually not required in many cases, there can be uncertainty as to whether the nature or level of contamination triggers the need for remediation based on the current or potential land use or lender requirements. DEQ often has encouraged property owners or prospective property owners to use the VRP for review of non-petroleum contamination. However, when presented with sampling results indicating both petroleum and non-petroleum contamination, some DEQ regional offices have issued petroleum program "no further action" ("NFA") form letters that, on their face, arguably covered both kinds of contamination. While reading too much into any NFA

letter is ill-advised, DEQ's new NFA policy forecloses this argument altogether, requiring that determinations of remediation duties for non-petroleum contamination must occur through the VRP review process. The first step will be to see if the site is eligible for the VRP. If remediation is clearly mandated by law or agency or court decision, the site is ineligible and must be remediated pursuant to the applicable regulatory program. If the site is VRP-eligible, then evaluation of risk-based cleanup measures or controls follows. Consistent with this new approach, DEQ has revised petroleum program form letters used when it is presented with evidence of both types of contamination. By example, the new NFA letter states that non-petroleum contamination must undergo VRP review separately from the normal petroleum program review. Note that the VRP involves tiered fees that progress from initial registration and eligibility determination to ultimate completion.

This change in how sites are reviewed comes amid implementation of VURAM. As we reported in our August 2016 newsletter, VURAM is designed to streamline the risk assessment process across several non-petroleum risk-based cleanup programs, doing so in part by removing many of the negotiable risk assessment exposure assumptions and replacing them with default assumptions. This effectively consolidates and formally unifies risk assessment approaches for the VRP, other DEQ brownfields programs, the Resource Conservation and Recovery Act Corrective Action program, and solid waste facilities under the Virginia Solid Waste Management Regulations. While VURAM may streamline the risk assessment process, the loss of negotiable risk assessment exposure assumptions may eliminate site-specific arguments for appropriate alternative risk scenarios for some sites.

Related People

- Jessica J.O. King – 803.567.4602 – jking@williamsmullen.com
- Henry R. "Speaker" Pollard, V – 804.420.6537 – hpollard@williamsmullen.com
- Ryan W. Trail – 803.567.4605 – Rtrail@williamsmullen.com
- Ethan R. Ware – 803.567.4610 – eware@williamsmullen.com

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