

Impact of New Vapor Intrusion Screening Levels and Policies on Open and Closed Environmental Compliance Cases

On January 16, 2013, the New Jersey Department of Environmental Protection ("NJDEP") released updated vapor intrusion screening levels ("VISLs") and a revised Vapor Intrusion Technical Guidance (Version 3). These changes have immediate and significant consequences - not only on all open environmental cases, but also, in some instances, on certain closed cases - and impose requirements for 90-day reviews. Vapor intrusion issues that have previously been closed could now be reopened.

A time deadline has been imposed for all open environmental matters. Existing sampling data must be compared to the new VISLs by April 16, 2013, even if the vapor intrusion issue had previously been closed out. If any of the results exceed the new VISLs, then further investigation and remediation will be required. In instances in which a restricted use final remediation document (No Further Action Letter ("NFA") or Remediation Action Outcome ("RAO")) was issued for groundwater before January 16, 2013, the existing sampling data for the three contaminants whose concentrations decreased in the revised VISLs by an order of magnitude (see below) must be compared to the new VISL for those contaminants as part of the biennial certification. If they exceed the new concentration levels, additional action will be required. If a Remedial Action Workplan for groundwater was issued prior to January 16, 2013, a similar review for those same three contaminants must be conducted and appropriate action taken.

VISLs are concentrations of contaminants above which various investigation and remediation obligations become applicable. The VISLs include Groundwater Screening Levels, Soil Gas Screening Levels (both residential and nonresidential), and Indoor Air Screening Levels (both residential and nonresidential). Revision to the VISL tables has resulted in decreases in VISLs for some compounds. The VISLs for only three contaminants decreased by an order of magnitude - 1,1-dichloroethane, ethylbenzene and 1,2,4-trichlorobenzene. In the circumstances set forth below, previously obtained sampling data for these three contaminants must be compared to these new, lower concentrations. Additional investigation and remediation may be required based on this analysis.

At the same time, the screening levels for some compounds (such as tetrachloroethene or PCE) have increased. To the relief of many responsible parties, this may result in situations in which cases currently classified as an Immediate Environmental Concern ("IEC") or Vapor Concern ("VC") may no longer meet the criteria of an IEC or VC and can be reclassified based on the new VISLs.

The following rules and timing for the implementation of the new VISLs have been established by the NJDEP:

UPDATE

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- All new cases initiated after January 16, 2013 shall follow the applicable Technical Rules and regulatory and mandatory timeframes using the new VISLs;
- Sites issued unrestricted use final remediation documents for groundwater prior to January 16, 2013 require no further investigation for the VI pathway;
- Sites issued restricted use final remediation documents for groundwater prior to January 16, 2013 require an evaluation of the VI pathway as part of the biennial certification. At that time, any existing data for 1,1-Dichloroethane, Ethylbenzene and 1,2,4-Trichlorobenzene must be compared to the new, lower standard and additional investigation and remediation undertaken if required;
- Sites with Remedial Action Workplans for groundwater issued prior to January 16, 2013 require the same analysis for 1,1-Dichloroethane, Ethylbenzene and 1,2,4-Trichlorobenzene and additional investigation and remediation undertaken if required;
- For all other sites (that would include all presently open environmental matters) all existing site conditions and data must be evaluated by April 16, 2013 using the new VISLs.

NJDEP requires a VI investigation of any building located within a 100-foot radius of the detection of VOCs at concentrations in excess of the Ground Water Screening Levels. There is a 30-foot "trigger distance" for petroleum hydrocarbon-related contamination. Accordingly, revision to the groundwater screening levels may have an impact on the need to conduct not only on-site, but also off-site vapor intrusion assessments.

For many sites, the VI investigation requirements have led to difficult access issues. The administrative requirements for the remediation of contaminated sites identifies the minimum requirements for the person responsible for conducting the remediation of real property not owned by that person to obtain access to that property. The formal process to obtain access, requires a written request via certified mail for access to the property where investigative or remedial work is required. This letter must specify that the property owner respond, in writing, within 30 days of receipt of the written request. If the owner of the property does not respond, a second request, also via certified mail, is required. Ultimately, if the off-site property owner does not grant access or imposes unreasonable requirements in granting access, the person responsible for conducting the remediation is required to initiate and "rigorously pursue" an action in Superior Court, including an appeal to the Appellate Division, if appropriate. The Superior Court action requires an order to show cause, verified complaint, application for summary action and certification, brief in support of order to show cause, and certification of the person seeking access to substantiate "good faith efforts." If the request for access is granted, the parties will be directed to prepare an access order to be issued by the Judge.

Please feel free to contact us if you would like us to assist in the analysis of any of your matters in regard to these new standards and related access issues or if you would like to discuss these revisions in greater detail.