

ENVIRONMENTAL PROTECTION

Site Remediation Program

Notice of Action on Petition for Rulemaking

Remediation Standards, N.J.A.C. 7:26D

Non-residential soil remediation standard for hexavalent chromium

Petitioners: Interfaith Community Organization, GRACO Community Organization and Natural Resources Defense Council

Take notice that the Department of Environmental Protection (Department) has determined to deny a petition for rulemaking received on May 4, 2009, from Interfaith Community Organization, GRACO Community Organization and Natural Resources Defense Council (Petitioners). Petitioner Interfaith Community Organization is based in Hudson County and comprises religious congregations in Jersey City and Hoboken and individual residents of the county. Petitioner GRACO is a community organization made up of residents of several streets in Jersey City. Petitioner Natural Resources Defense Council is a national, not-for-profit environmental advocacy organization. The Petitioners request that the Department amend the Remediation Standards at N.J.A.C. 7:26D to include a non-residential soil remediation standard for hexavalent chromium protective of human health. Concurrently with this petition, Petitioners submitted a separate petition requesting that the Department amend the soil remediation standards to include a residential soil remediation standard for hexavalent chromium, which petition is the subject of a notice of action published elsewhere in this issue of the New Jersey Register.

The Department agrees that a residential and non-residential soil remediation standard for hexavalent chromium needs to be developed. As noted in its response to comments in the June 2, 2008, adoption of the Remediation Standards (see 40 N.J.R. 3187(a)), the Department committed to proceed with a hexavalent chromium standard once the National Toxicity Program's final report was issued and evaluated by the Department.

In accordance with the Brownfield and Contaminated Site Remediation Act at N.J.S.A 58:10B-12, the process for remediation standard development involves evaluating three components: the toxicity of a contaminant, analytical limitations (Practical Quantitation Limits, PQLs), and regional background levels. The Department's development of a risk assessment based on the National Toxicology Program's report serves to address one of these components, namely, evaluating the toxicology of a contaminant. The Department intends to proceed with proposing residential and nonresidential hexavalent chromium standards once additional work associated with an assessment of hexavalent chromium in background soils and an assessment of the capabilities of current analytical methods for measuring hexavalent chromium have been completed. The Department has begun these assessments already and is committed to completing them as quickly as possible. However, as these assessments will not be completed within the required 60-day timeframe for the Department's response to this

petition for rulemaking, the petition must be denied. The Department anticipates beginning the standard development process in early 2010.

Under N.J.S.A. 58:10B-12d, the Department is required to develop minimum remediation standards for soil, groundwater, and surface water intended to be protective of public health and safety taking into account the provisions of this section. In developing these standards, the Department is required to identify the hazards posed by a contaminant to determine whether exposure to that contaminant can cause an increase in the incidence of an adverse health effect and whether the adverse health effect may occur in humans. The Department is required to set minimum soil remediation health risk standards for both residential and nonresidential uses. In the case of hexavalent chromium, as the National Toxicology Program has recently confirmed, the contaminant is a carcinogen via ingestion and, as such, the Department is required to set the remediation standard, as categorized by the United States Environmental Protection Agency, at an additional cancer risk of one in one million.

Pursuant to N.J.S.A. 58:10B-12g(4), in deciding on the development of a remediation standard or remedial action, the Department is required to base these decisions on a variety of factors including:

“(4) Remediation shall not be required beyond the regional natural background levels for any particular contaminant. The department shall develop regulations that set forth a process to identify background levels of contaminants for a particular region. For the purpose of this paragraph "regional natural background levels" means the concentration of a contaminant consistently present in the environment of the region of the site and which has not been influenced by localized human activities.”

Consistent with the Safe Drinking Water Act requirement at N.J.S.A. 58:12A-13b to “adopt rules and regulations which develop, within the limits of medical, scientific, and technological feasibility,” the Department must develop and require the use of appropriate testing techniques to ensure that all parties can accurately measure health-based standards. The Department’s scientific and technical experts are undertaking this process at this time for hexavalent chromium.

It is important to note that under the New Jersey Supreme Court's decision in Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), the Department cannot require a person conducting a cleanup to comply with a standard established via a policy or guideline. If the Department intends to compel a person to meet a specified cleanup standard, that standard must be set via formal rulemaking under the Administrative Procedure Act. The parties responsible for the remediation of chromium contamination have, so far, been agreeable to voluntarily comply with former Commissioner Lisa P. Jackson’s February 8, 2007 chromium policy which embodies the most protective policy for remediation of hexavalent chromium nationally. In order to enforce a new remediation standard, however, the Department must do so pursuant to a formally adopted regulation.

The Department is committed to enforcing timely and protective remediation of all sites that exhibit hexavalent chromium contamination throughout New Jersey. Proceeding with the remedial investigation phase of a cleanup today is key to ensuring these sites move forward to a full cleanup quickly. The Department commits to include a provision in all enforcement documents or settlement agreements involving hexavalent chromium contamination that ensures that any new standards in place at the time a remedial action decision is made are the standards that must be used for the cleanup. In addition, persons responsible for submitting biennial certifications for remediation sites are required by law to re-evaluate the conditions at their site whenever there is a change in a remediation standard by an order of magnitude and they must undertake additional remedial action, if necessary, to ensure the existing remedy is still protective. Therefore, all sites must be re-evaluated for protectiveness over time.

In accordance with N.J.A.C. 1:30-4.2, the Department has mailed to the Petitioners a copy of this Notice of Action.

DATE

Mark N. Mauriello
Acting Commissioner