



THE NATIONAL
LAW JOURNAL
& LegalTimes
Present

The 2012
NLJ Regulatory Summit
WHAT EVERY IN-HOUSE COUNSEL SHOULD KNOW

SAVE THE DATE
Thursday, December 6
Washington, DC

ALM

Connecticut **LawTribune**

An ALM Website

ALM Properties, Inc.

Page printed from: [Connecticut Law Tribune](#)

[Back to Article](#)

After 16 Years, Regulations Get DEEP Thought

SARAH KOWALCZYK

The Connecticut Law Tribune

09-28-2012

Adopted on Jan. 1, 1996, the Connecticut Remediation Standard Regulations (RSRs), Sections 22a-133k-1 through 22a-133k-3 of the Regulations of Connecticut State Agencies, provide standards and guidance for determining "how clean is clean" at sites requiring remediation. The RSRs assist parties in determining whether clean-up is necessary to protect human health and the environment, and provide clean-up targets for the remediation of sites where hazardous wastes have been disposed of or other pollutants have been released to the environment.

Recently, the Connecticut Department of Energy and Environmental Protection (DEEP) gave notice of its intent to amend the RSRs, as well as the related environmental land use restriction regulations, for the first time since their original adoption. Despite a requirement in the RSRs for a review of the regulations every five years (with the first review to have been made within 18 months of the regulation's effective date), this is the first time since their adoption that RSR amendments have been publicly noticed.

Prior to the development of the RSRs, the DEEP made remedial decisions on a case-by-case basis, often resulting in inconsistent decisions. The RSRs were developed to define minimum remediation performance standards, to specify numeric clean-up criteria and to clearly specify a process for establishing alternative site-specific standards.

The RSRs apply to actions taken to remediate polluted soil, surface water or a ground water plume at or emanating from a release area, to the extent that such actions are triggered by a Transfer Act filing required by Chapter 445 (Hazardous Waste) or 446k (Water Pollution Control) of the Connecticut General Statutes, or voluntary remediation pursuant to C.G.S. § 22a-133x or 22a-133y. (See DEEP's "Remediation Standards Regulations: An Environmental Program Fact Sheet," which can be found at www.ct.gov/dep.)

According to the fact sheet, while the RSRs do not create a requirement that remediation be performed at a site or a time frame in which remediation must be conducted, as noted above, the RSRs contain guidance and standards used to determine whether remediation of polluted soil, surface water or a groundwater plume is necessary to protect human health and the environment, as well as technical criteria for any resulting remediation. The degree of remediation at a site will depend, in part, on the ground water classification of the site, use of the land and the proximity to "sensitive receptors of the contamination."

The current proposed amendments began their evolution in 2006. Proposed amendments were issued in 2008 and subsequently withdrawn by then-DEEP Commissioner Gina McCarthy in May 2009 when the environmental, business, legal, and licensed environmental professional communities, as well as the Environmental Professionals' Organization of Connecticut, were unable to come to a consensus on certain issues. Pressured to move forward with amendments to the RSRs, DEEP's long-awaited proposal embodies those portions of the previously proposed amendments where the various stakeholders were able to reach an agreement. Notwithstanding these amendments, DEEP has communicated its intention to move forward with legislation to transform the clean-up process in Connecticut in 2013, which will require a comprehensive overhaul of the RSRs, if the General Assembly adopts DEEP's proposals.

During a recent presentation, Jan Czczotka, assistant director of DEEP's Remediation Division, summed up the goals of the proposed amendments by noting that in recognition of the fact that there are fewer polluters currently operating in the state than there are developers seeking to correct prior pollution, the proposed amendments seek to remove unintended barriers to remediation and "aid site cleanup and redevelopment without compromising the protection of public health and environmental quality."

Mr. Czeczotka noted that DEEP seeks to continue its efforts to protect human health and environment, while, at the same time, assisting in and encouraging the redevelopment of polluted sites by identifying additional, and less costly, remedial alternatives, decreasing and clarifying regulatory requirements, increasing self-implementation alternatives and flexibility, streamlining remediation processes and increasing predictability and certainty for potentially responsible parties.

Proposed Amendments to the Applicability of the RSRs: The amendments attempt to clarify various definitions, as well as the applicability of the RSRs and to standardize the process by providing for the use of forms for persons requesting a variance or other approval by the DEEP commissioner, or submitting any required notice to the commissioner.

Proposed Amendments to Water Remediation Guidelines: The goals of the RSRs as they relate to groundwater remediation are to preserve high quality groundwater, protect existing uses of groundwater, prevent further degradation of groundwater and surface water quality, and protect human health. In light of these goals, the proposed amendments seek to provide an exemption from the remediation criteria for trihalomethanes in ground water resulting from releases of drinking water from a public water supply system; revise the ground water monitoring and compliance provisions to allow LEP self-implementation of these sections; and revise the formula for calculating the ground water protection concentration for additional polluting substances.

Proposed Amendments to Soil Remediation Guidelines: With respect to soil remediation, the RSRs seek to protect human health from exposure to contaminants in soil via the Direct Exposure Criteria and to prevent migration of contamination into groundwater via the Pollutant Mobility Criteria. The proposed amendments call for various changes to the soil remediation standards, including but not limited to the following:

- Providing a test methodology and criteria for petroleum hydrocarbons, and providing exemptions for incidental releases to soil, such as releases from "normal" operation of motor vehicles and normal paving or maintenance of bituminous concrete surfaces, while seeking to focus resources on more important remedial concerns.
- Revising the definition of "inaccessible soil" to render inaccessible certain substances found in polluted fill that are normally found in asphalt.
- Revising the criteria for remediation of soils polluted with lead to bring the RSRs in line with federal standards.
- Revising certain formulae for calculating the residential direct exposure concentration for additional polluting substances.
- Modifying standards applicable to polluted soils in GA areas.
- Clarifying requirements concerning the treatment of polluted fill which contains any combination of coal ash, wood ash, coal fragments, or asphalt paving fragments.
- Providing a Pollutant Mobility Criteria exception for petroleum hydrocarbons or semi-volatile substances in soil under specified circumstances.
- Providing an alternative for application of the Direct Exposure Criteria and Pollutant Mobility Criteria under specified circumstances.
- Deletion of the prohibition against requesting a widespread polluted fill variance if the person requesting the variance was authorized to legally dispose of such fill.
- Increasing the flexibility of engineered controls by tailoring such controls to the applicable Direct Exposure Criteria and Pollutant Mobility Criteria demonstration.

Environmental Land Use Restrictions

An ELUR agreement permits certain remedial goals to be met by recording a use restriction on the land records that minimizes the risk of human exposure to pollutants and hazards to the environment by preventing specific uses or activities at the property. (See DEEP's "Environmental Land Use Restrictions: An Environmental Program Fact Sheet.")

For example, an ELUR may prohibit the destruction of a building located above contaminated soil to prevent the contamination from being exposed or it may prevent construction over contaminated groundwater. An ELUR must be recorded on the municipal land records. The option of using an ELUR is at the discretion of the property owner. The proposed amendments to the ELUR regulations attempt "to clarify requirements and incorporate procedural changes that streamline the process of utilizing an ELUR on polluted real property" by streamlining the application process for an ELUR. The proposed amendments to these regulations include, but are not limited to, the following:

- Clarification of the forms that must be submitted to DEEP for review and approval.
- Consolidation of the Application Form for an ELUR so that the same form may be used whether the ELUR is to be approved by the commissioner of DEEP or a licensed environmental professional.

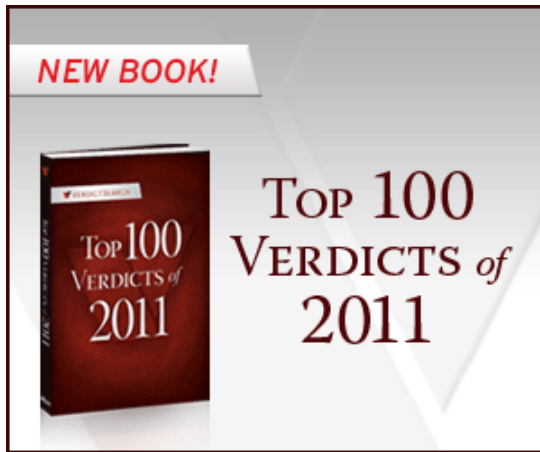
Public Participation

Has DEEP properly characterized those portions of the previously proposed amendments on which the various participating stakeholders reached a consensus in 2009? Has DEEP met its goals of removing unintended barriers to remediation and aiding site clean-up and redevelopment without sacrificing public health and environmental quality?

The public is invited to answer these questions by taking part in a public hearing scheduled for Oct. 25, 2012 at 1 p.m. in DEEP's Phoenix Auditorium, at 79 Elm Street in Hartford. The DEEP requests that any person speaking at this public hearing also submit a written copy of their comments.

Comments on the proposed amendments may also be submitted to the DEEP, attention of Robert E. Bell, Bureau of Water Protection and Land Reuse, 79 Elm Street, Hartford, Conn., 06106-5127. All comments must be received by the close of the public hearing. •

Sarah Kowalczyk is a Hartford-based associate in Murtha Cullina's Environmental and Law Use practice groups. Her practice focuses on counseling clients on air, water and waste permitting and compliance issues.



Copyright 2012. ALM Media Properties, LLC. All rights reserved.