JULY 2023

WILLIAMS MULLEN ENVIRONMENTAL NOTES

North Carolina Proposes New Guidance for Vapor Intrusion Assessment and Mitigation

BY: CARRICK C. BROOKE-DAVIDSON

The North Carolina Department of Environmental Quality (DEQ) has drafted new and revised guidance documents for the assessment and mitigation of vapor intrusion (VI) at properties undergoing reuse and redevelopment (Draft Guidance). Spearheaded by the Brownfields Redevelopment Section of DEQ's Division of Waste Management, the proposed new guidance was developed in February and presented to stakeholders for review and comment on March 10, 2023. At that time, DEQ solicited comments for 30 days on the new and revised guidance, and comments are now being reviewed by DEQ.

There are four draft documents included in the new vapor intrusion guidance:

- Revised Brownfields Vapor Intrusion Assessment Checklist
- New Minimum Mitigation Requirements for Reuse
- Revised Brownfields Vapor Intrusion Mitigation System Design Checklist
- New Minimum Sampling Guidelines Summary Table

In its rollout of the draft guidance, DEQ stated it was responding to stakeholder desires for consistency in decisions, predictability for project budgeting, and getting to an endpoint in assessing and mitigating vapor intrusion in site reuse projects. Technical issues which the new guidance seeks to address were identified as responding

to the overall changing technical landscape for vapor intrusion issues, as well as specific concerns over experience with discrepancies between exterior soil gas measurements and sub-slab soil vapor data, concerns about the presence of trichloroethene (TCE) as an immediate exposure threat, and addressing methane where a significant source exists. Ultimately, the guidance seeks to foster maximum consistency and predictability of sampling and achieving a sampling endpoint balanced against concerns about TCE because of immediate exposure threats, differentiation between residential and commercial sites (e.g., TCE Action Levels lower for residential), and reflection that sub-slab vapor is the best risk predictor compared to exterior soil gas.

Key components of the Draft Guidance include the following:

> **Baseline Assessment:** Recommendations on sampling protocol for exterior soil gas, sub-slab soil gas, and indoor air sampling, including for the following:

  - Spatial distribution/sample frequency
  - Minimum initial and final sample canister vacuum
  - Maximum purge rate during sampling
  - Sampling times following probe installation
  - Addition of analytes for vapor testing

> **VI Mitigation System Decision Making:** Incorporation of several decision matrices driven by the results of DEQ Risk Calculator, the presence of TCE, and whether the site end use is residential or nonresidential. Mitigation is recommended and/or additional pre- and post-occupancy testing requirements are now applied when TCE is identified in any media (soil, groundwater, soil gas, or indoor air) due to acute exposure concerns for this chemical.

> **Pre- and Post-Occupancy Sampling:** Requirement of both indoor and sub-slab pre- and post-occupancy vapor sampling based on the presence of TCE and Risk Calculator results. Post-occupancy sampling for sites generally defaults to at least one year of sampling, regardless of TCE concentrations or mitigation approaches.

The Draft Guidance seeks to establish minimum mitigation and sampling requirements for vapor intrusion for the entire Division of Waste Management – not just the Brownfields Redevelopment Section. In describing them as minimum requirements, the Draft Guidance could be read to establish binding standards of conduct for all contaminated sites in North Carolina. Consequently, this guidance could be relevant to other cleanups outside of the Brownfields Redevelopment Section, and therefore have invited scrutiny and comment from a wide range of stakeholders.

DEQ is still reviewing the comments, but it can be expected that final versions of the Draft Guidance will be issued in the near future.

Virginia's Ongoing Construction Stormwater Program Guidance Evolution: Part III - A Recap and a Look Ahead

BY: HENRY R. POLLARD, V

Virginia's construction stormwater discharge permit program continues to evolve on various fronts, including program implementation guidance. Indeed, stormwater regulatory stakeholders have much to digest from recent activity and to anticipate in the near term.

Part I of our stormwater article series last summer (found here), addressed DEQ's proposed new Guidance Memo No. 22-2011, designed to establish important new procedural guidance and streamlining for DEQ's review of erosion and sediment control plans (ESC Plans) and construction stormwater management plans (SWM Plans). Part II of that series last summer (found here), addressed DEQ's proposed Guidance Memo 22-

2012, "Stormwater Management and Erosion & Sediment Control Design Guide," focusing on more technical aspects of SWM Plan and ESC Plan review and approval. Last winter, following multiple public comment periods, the Virginia Department of Environmental Quality (VDEQ) completed a lengthy process of finalizing these guidance documents. This article serves as Part III of this series on stormwater program developments reviewing the final versions of these guidance documents, as well as discussing separate pending efforts by VDEQ to create a new master stormwater program handbook.

Final Construction Stormwater Implementation Procedural and Technical Guidance Memoranda.

1. **Guidance Memo No. 22-2011 – Streamlined Plan Review for Construction Stormwater Plans and Erosion and Sediment Control Plans submitted by a Licensed Design Professional and reviewed by a Dual Combined Administrator for Erosion and Sediment Control and Stormwater Management (2022 Procedural Guidance Memo).**

As discussed in Part I of the stormwater article series, the intent of the 2022 Procedural Guidance Memo is to facilitate quicker reviews and approvals of SWM Plans and ESC Plans (either, a Plan) by creating a framework for development and submission of such Plans by certain qualified professionals meeting minimum standards set forth in Virginia Stormwater Management Program (VSMP) regulations at 9VAC25-870 and Virginia Erosion and Sediment Control Program (VESCP) regulations at 9VAC25-840, as well as the companion Guidance Memo 22-2012 ("2022 Technical Guidance Memo"). In this respect, the final 2022 Procedural Guidance Memo retains the proposed version's five key requirements for allowing expedited review and approval of a Plan:

- DEQ must be the administrator of VESCP or VSMP in the locality where the construction activity is taking place;

- A Virginia-licensed professional engineer must have prepared, signed and placed his or her seal on the Plan;
- The Plan is prepared in accordance with DEQ's proposed Guidance Memo, 22-2012, Stormwater Management and Erosion & Sediment Control Design Guide;
- A complete and accurate Plan Submission Checklist is submitted with the Plan package; and
- A person certified as a Dual Combined Administrator for erosion and sediment control and stormwater management must pre-review, sign, date, and include his or her certificate number on, the Plan Submission Checklist.

In most respects related to DEQ review and approval processes and timetables for presumptive approval based in DEQ inaction, the final version was unchanged from the proposed version issued for public comment on August 1, 2022. The final version of the 2022 Procedural Guidance Memo, dated November 30, 2022, became effective as of January 19, 2023.

2. **Guidance Memo No. 22-2012 - Stormwater Management and Erosion & Sediment Control Design Guide (2022 Stormwater Technical Guidance Memo).**

As described in Part II of our stormwater article series, the intent of the 2022 Technical Guidance Memo was to centralize in one program implementation guidance cross-references to and summaries of various design standards and practices for ESC Plan and SWM Plan preparation. The final 2022 Technical Guidance Memo, dated November 30, 2022, and effective as of February 18, 2023, carried forward in material respects the proposed version's approach to implementation of these criteria and standards at construction sites and for post-development stormwater management. DEQ expects it to serve as a quick and primary reference resource for DEQ staff as they review of Plans for technical sufficiency, though it also provides guidance for Plan preparers to ensure that the Plans will pass muster during DEQ review and be eligible for the expedited Plan review and approval set forth in the 2022 Procedural Guidance Memo. The key elements of the final 2022 Technical Guidance Memo include the following, largely surviving from the proposed version (as discussed in our Part II stormwater series article):

- A consolidation of then-current technical guidance and technical standard references, particularly as to assessing erosion and sediment control and stormwater management needs and controls;
- Aggregation of key factors to be considered for determining water quantity and water quality impacts associated with regulated construction projects subject to ESC Plan and SWM Plan obligations and appropriate use of control measures, with cross-references to specific design standards;
- Clarification of certain aspects of DEQ's technical review process for submitted Plans;
- Revision of and, in some respects, increased stringency of certain existing technical methods and practices used to demonstrate compliance with or otherwise meet applicable water quantity and water quality criteria, such as the following: applicable run-off coefficients and assumed groundcover conditions, analyses of channel protection and receiving stream adequacy, post-construction confirmation of soil composition use for run-off curve values, and greater accounting for flood-prone areas; and
- Further iteration and clarification of DEQ's solar energy project stormwater policy set forth in its controversial March 29, and April 14, 2022, solar project guidance memoranda, though with lingering concerns about whether or to what degree solar panels should be considered impervious surface area for purposes of stormwater runoff calculations (as described in our Part II article).

As with the proposed version of the 2022 Technical Guidance Memo, some of the changes in the final version seem to reflect increasing urgency to ensure Virginia's compliance with the 2025 deadline of the EPA Chesapeake Bay Total Maximum Daily Load Rule (Bay TMDL Rule) addressing control of nutrients (nitrogen and phosphorous) and sedimentation loads in runoff and discharges into the Chesapeake Bay watershed.

3. Remaining Uncertainty Tied to New Guidance Memos.

DEQ's final versions of their 2022 Procedural Guidance Memo and 2022 Technical Guidance Memo offer helpful guidance to all stakeholders and provide a clearer roadmap for DEQ staff for review and approval of ESC Plans and SWM Plans while allowing for more expedited approvals along the way. However, there are still significant concerns among regulated community stakeholders, in particular, that the 2022 Technical Guidance Memo raised the bar or changed acceptable control measures in important respects for certain erosion and sediment control and stormwater management standards. How VDEQ will navigate these concerns as these guidance memos are being implemented remains unclear.

In addition, as discussed above, most localities in Virginia run their own VESCP, and most urban and suburban localities administer their own VSMP (all subject to DEQ program oversight). Therefore, ESC Plan and SWM Plan submissions to a locality serving as the VESCP Authority or

VSMP Authority, respectively, are not subject to either the 2022 Procedural Guidance Memo or the 2022 Technical Guidance Memo. That said, such a locality, depending on its VESCP or VSMP status, could choose to follow either or both of these DEQ guidance documents, so long as their own programs remain at least as stringent as the program requirements set by state VESCP and VSMP regulations. Therefore, the degree to which many construction projects will actually fall under either of these new guidance documents is unclear and may remain so until localities that administer their own VESCP and/or VSMP determine whether and to what degree they will follow these guidance documents.

New DEQ Construction Stormwater Program Handbook.

DEQ has embarked on a mission to consolidate and update the very outdated construction stormwater management program and erosion and sediment control handbooks which currently consist of three separate documents with dates ranging from 1992 through 2013. Using a large and varied stakeholder group to provide input, DEQ hopes to create a master stormwater program guidance handbook that would reflect the current state of related law, regulation, and guidance, though not to create new standards. Underway since last year, this effort is painstaking given the breadth of the issues, the degree of technical and engineering information necessary to be brought current, and the integration of erosion and sediment control and stormwater management practices and current statutory and regulatory cross-references. Essentially, the new handbook will aggregate all applicable legal/regulatory and technical criteria, or at least include links or cross-references to them, for erosion and sediment control and post-development stormwater management. The hope is that this will allow DEQ staff, local VESCP and VSMP authorities, and regulated parties to have a central repository for finding and using applicable standards and practices and related program guidance. Another goal is to ensure that the new handbook can be promptly and reliably updated as a living document to reflect changes in law and regulations, updates in best practices, and evolving engineering standards. To this end, it also seems likely that the new handbook would incorporate the substance of the recently issued 2022 Procedural Guidance Memo and 2022 Technical Guidance Memo.

Such a resource could certainly make life easier for all involved in erosion and sediment control and stormwater management planning and program administration. The process still has quite a way to go, though to date much progress has already been made.

Virginia Department of Environmental Quality, Guidance Memo No. 22-2011, "Streamlined Plan Review for Construction Stormwater Plans and Erosion and Sediment Control Plans submitted by a Professional Engineer and reviewed by a Dual Combined Administrator for Erosion and Sediment Control and Stormwater Management," 39:9 VA.R. 1285 (December 19, 2022). *See also* Virginia Regulatory Town Hall and DEQ Stormwater Guidance Webpage.

Virginia Department of Environmental Quality, Guidance Memo No. 22-2012, "Stormwater Management and Erosion and Sediment Control Guide," 39:9 VA.R. 1285 (December 19, 2022). *See also* Virginia Regulatory Town Hall and DEQ Stormwater Guidance Webpage.

General Notice - Notice of Intent to Establish a Stakeholder Advisory Group to Assist with Development of the 2023 Virginia Stormwater Handbook. *See also* Meeting Details.

PFAS and Your Wastewater Discharge Permit: What to Know and How PFAS Affects Permit Requirements

BY: RYAN W. TRAIL

Beginning with the PFAS Action Plan of 2019, it became clear to industry observers and environmental professionals that EPA intends to regulate PFAS compounds in industrial wastewater permits. The Action Plan identified an agency goal

of identifying "industry sources that may warrant further study for potential regulation [of PFAS] through national Effluent Limitation Guidelines and Standards (ELG)." However, the Action Plan also noted several barriers to regulation, including a lack of validated sampling methodologies, a need for additional toxicity and exposure information for establishing defensible cleanup levels, and a need to develop new, and enhance existing, treatment methods. Since publication of the Action Plan, EPA has published several guidance documents and issued rulemakings in furtherance of its goal to regulate PFAS in wastewater permits.

In 2020, EPA published interim guidance geared specifically toward NPDES permit writers, suggesting ways to begin incorporating PFAS requirements into NPDES permits. The stated goal of the interim guidance was to "address" PFAS "while the CWA framework for potentially regulating PFAS discharges pursuant to the NPDES program is under development." Although it is clear the end goal is to regulate PFAS by way of numeric effluent limitations, EPA has been creative in figuring out ways to regulate without numeric discharge limits. First, permit writers were told to begin incorporating monitoring requirements at facilities where "PFAS are expected" in the discharge. However, without a validated laboratory methodology for analyzing PFAS in wastewater, gathering defensible monitoring data is difficult.

The next year, in 2021, EPA issued an Advanced Notice of Proposed Rulemaking to collect data and facility information concerning discharges of PFAS from facilities in the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) point source category. EPA's intent was to use the data to amend the OCPSF effluent limitation guidelines to include PFAS compounds. EPA requested information from "manufacturers" and "formulators" of PFAS. A manufacturer is any facility producing PFAS compounds. Formulators are the primary customers of PFAS manufacturers and use PFAS in either the production of commercial or consumer goods (e.g., weather-proof caulking) or as an intermediary in the production of consumer goods (e.g., grease-proof coating for a pizza box). Facilities in these categories were asked to provide EPA with information regarding the identity and location of other facilities believed to be PFAS manufacturers or formulators. They were also asked to describe their manufacturing processes (i.e. process flow diagrams), provide data on specific compounds produced or used, and to provide *customer information* related to PFAS products, including "the customers or industries that are purchasing these materials, and the quantities of materials sold to various customers." This final category of requested information is particularly concerning. Even if your facility is not a manufacturer or formulator of PFAS compounds, if you purchased PFAS containing products, EPA may already be aware and may be poised to share this information with state or local permit writers.

By April of 2022, EPA had identified industry categories with known PFAS containing wastewater discharges and published updated NPDES specific guidance for permit writers. The updated NPDES guidance suggested not only required monitoring and reporting of PFAS in discharges, but also suggested including best management practices (BMPs) for PFAS reduction as permit conditions. Suggested BMPs include product substitution (where reasonable alternatives to PFAS containing products are available), accidental discharge minimization (good housekeeping provisions), and equipment decontamination or replacement requirements. EPA further suggests permit writers require facilities to conduct a PFAS pollution prevention/source reduction evaluation within 6

months of the effective date of the permit. This required review would evaluate whether the facility uses or has historically used any products containing PFAS, whether use of those products or legacy contamination reasonably can be reduced or eliminated, and a plan to implement those steps. The facility would be required to implement the plan within 12 months of the effective date of the permit. Finally, the facility would submit an annual status report to the permitting authority including a list of potential PFAS sources, summary of actions taken to reduce or eliminate PFAS, PFAS source reduction implementation steps, source monitoring results, effluent results for the previous year, and adjustments to the plan, based on the findings.

Some initial steps toward numeric PFAS effluent limitations have also been taken. In April 2022, EPA issued draft aquatic life criteria for two PFAS compounds (PFOA and PFOS). In April 2023, EPA issued a proposed rulemaking to establish Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act for PFOA and PFOS. The finalization of aquatic life criteria and MCLs are precursors for state water quality standards, which in turn allow permitting authorities to establish numeric effluent limits. Although EPA has not yet built out the regulatory framework needed for PFAS permit limits, facilities should begin thinking about the potential for non-numeric permit conditions related to PFAS. If your permit is up for renewal soon, you should expect your permit writer to propose some or all of the conditions discussed here. To make ready, begin reviewing facility records for current or historic use of PFAS containing products, begin reviewing potential product replacement options, evaluate decontamination or replacement of PFAS contaminated equipment, and begin researching available treatment technologies. Like it or not, PFAS regulation in wastewater permits is here to stay, and to be prepared in advance of its inclusion in your permit will position your facility for a competitive advantage and for a clean compliance history.

MDLs: The Black Holes of the U.S. Judicial System

BY: RUTH LEVY

> "Of all the conceptions of the human mind from unicorns to gargoyles to the hydrogen bomb perhaps the most fantastic is the black hole: a hole in space with a definite edge over which anything can fall and nothing can escape; a hole with a gravitational field so strong that even light is caught in its grip; a hole that curves space and warps time."

Kip Stephen Thorne, *Cosmology +1: Readings from Scientific American* (1977)

Many attorneys (including this author) have been known to mutter in dismay, "this MDL is like a black hole." The description fits. Still others have never heard of an "MDL."

"MDL" is the acronym for "Multidistrict Litigation," a process created by Congress in 1968. *See* 28 U.S.C. § 1407. Its stated purpose is "to centralize

civil actions pending in different federal districts to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel, and the judiciary." **United States Judicial Panel on Multidistrict Litigation, "About the Panel."**

Think of large product liability cases, for example. An individual is harmed by an allegedly defective product in Newburg, New York, and that same product harms individuals in Columbia, South Carolina, Abilene, Texas, and West Palm Beach, Florida. Each individual files a case against the manufacturer of the product. Now multiply the number of individual plaintiffs by ten. There are now 40 cases pending against the manufacturer (and perhaps other manufacturers in the supply chain), each in different jurisdiction across the United States. Instead of having to defend itself in 40 jurisdictions at once, the defendants move for the cases to be consolidated into an MDL and adjudicated before one federal judge in one district court.

Since the inception of the MDL, there have been over 1,800 litigation dockets created, involving over 1.1 million cases. These dockets encompass litigation categories as diverse as airplane crashes, train wrecks, mass torts, marketing and sales practices, patent validity and infringement, securities fraud, and antirust price fixing. *Id.* As of May 2023, there are 174 MDLs in federal courts across the United States. *Id.*

Although created for its supposed pretrial efficiencies, MDLs do present a "black hole" problem. They may encourage litigation against already-named defendants, and in the interest of "robust discovery," judges are disinclined to allow defendants an early escape (whether justified or not). As a result, defendants can find themselves sucked into literally thousands of cases without the ability to file a motion to dismiss or motion for summary judgment until the discovery process against every defendant is complete. In the meantime, defendants are left to incur hundreds of thousands of dollars in defense costs while waiting for their turn to present their case to be dismissed.

Take, for example, the following statics on just a few of the 174 current MDLs:

- MDL 2740 (Louisiana) – *Taxotere Products Liability Litigation* – 10,607 pending actions
- MDL 2846 (Ohio) – *Polypropylene Hernia Mesh Products Liability Litigation* – 19,476 pending actions.
- MDL 2323 (Pennsylvania) – *NFL Players' Concussion Injury Litigation* – 329 pending actions.
- MDL 2783 (South Carolina) – *Aqueous Film-Forming Foams Products Liability Litigation* – 4,494 pending actions.

So, what is a manufacturer to do? First, do not get sucked in. Be sure any agreements with other manufacturers or others in the supply chain contain strong indemnification clauses, including a "duty to defend and hold harmless" provision based on the *allegations* made by any potential plaintiff.

If you find yourself stuck in the gravitational pull, having been named in a few lawsuits *before* they are consolidated into an MDL, immediately file a motion to dismiss these cases with the hope that you will be let out. You can also oppose any transfer into the MDL, though this is likely to be denied by the transferring district court.

If you find yourself in the black hole as the case against you is filed directly in the MDL or transferred into the MDL, work with your co-defendants to share discovery costs (experts, deposition coverage, etc.) and form coalitions based on common allegations. To the extent possible, press the judge to manage the MDL in such a way to allow defendants to file motions throughout the discovery process when the evidence is clear that a defendant is wrongfully named.

Finally, rest assured that one day you will have the opportunity to escape, either when discovery closes, the cases settle, or the trial(s) conclude. But this could be many years away, because remember, black holes "curve space and warp time."

CONTACT US

Ethan R. Ware
Partner & Chair
Columbia, SC
803.567.4610

Carrick C. Brooke-Davidson
Partner
Raleigh, NC
919.981.4027

Jessica J.O. King
Partner
Columbia, SC
803.567.4602

Channing J. Martin
Partner
Richmond, VA
804.420.6422

Ramona C. "Mona" O'Bryant
Partner
Raleigh, NC
919.981.4091

Henry R. "Speaker" Pollard, V
Partner
Richmond, VA
804.420.6537

Ryan W. Trail
Partner
Columbia, SC
803.567.4605

Liz C. Williamson
Partner
Richmond, VA
804.420.6050

Richard H. "Dick" Willis
Partner
Columbia, SC
803.567.4611

Amos C. Dawson, III
Of Counsel
Raleigh, NC
919.981.4010

Ruth Levy
Senior Associate
Columbia, SC
803.567.4613

John G. Tamasitis
Senior Associate
Columbia, SC
803.567.4617

Derek D. Tarver
Associate
Columbia, SC
803.567.4615

STAY IN TOUCH linkedin.com/company/williams-mullen twitter.com/williamsmullen