

Holland & Knight

# Environmental Screening Levels Ratchet Down: Implications for Regional Land Development

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The San Francisco Bay Regional Water Quality Control Board Released New Environmental Screening Levels (ESLs) on Jan. 24, 2019.

- » ESLs for soil gas (i.e., indoor air/vapor intrusion trigger) are pegged at significantly lower concentrations (e.g., up to 30 times lower). *Note: Corresponding changes have been made to groundwater and soil ESLs.*
- » Examples: Cleaning solvents ubiquitous in the Bay Area Trichloroethene (TCE) and Tetrachloroethene (PCE)

New and Old ESLs for Soil Gas	TCE		PCE	
	Jan. 24, 2019	Feb. 2016 (prior update)	Jan. 24, 2019	Feb. 2016 (prior update)
Residential	16 $\mu\text{g}/\text{m}^3$	240	15 $\mu\text{g}/\text{m}^3$	240 $\mu\text{g}/\text{m}^3$
Commercial	100 $\mu\text{g}/\text{m}^3$	3,000	67 $\mu\text{g}/\text{m}^3$	2,100 $\mu\text{g}/\text{m}^3$

## What Are the Environmental Screening Levels (ESLs)?

- » Non-regulatory (i.e., guidance) screening level for evaluating cleanup requirements on Brownfields properties.
- » Established to allow the San Francisco Bay Regional Water Quality Control Board (Water Board) “to quickly focus on the most significant problems at contaminated sites.”
- » “The presence of a chemical at concentrations in excess of an ESL does not necessarily indicate adverse effects on human health or the environment, rather that additional evaluation is warranted.”

Source: *San Francisco Bay Regional Water Quality Control Board User Guide (2016)*

# What Caused the Water Board's More Conservative Approach?

- » Consistency with the U.S. EPA's generic "attenuation factor"
  - "Attenuation" refers to how subsurface soil vapors are reduced by a combination of movement through soil (e.g., from groundwater contamination upward), through eventual dilution in indoor air.
  - The U.S. Environmental Protection Agency (U.S. EPA) found that at the 95th percentile (conservative), soil vapor attenuates by a smaller factor than what the Water Board previously assumed (U.S. EPA generic attenuation factor: 0.03).
  - At the 50th percentile (median), soil vapor attenuated 10 times more (i.e., 0.003).
  - For sites with fine grain soil sediments (e.g., "tight soils" or clay), U.S. EPA found an attenuation factor of nearly 100 times lower (i.e., 0.0005).
- » The Water Board adopted U.S. EPA's generic attenuation factor of 0.03. This value is approximately 30 times more conservative than the prior attenuation factor and is largely responsible for the more conservative ESLs. Note: Toxicity factors also changed for certain chemicals (e.g., TCE).

## Development Impact of More Conservative ESLs

- » Sites considered “clean” yesterday may need a second look today.

*Practice Tip: Double check vapor, groundwater and soil concentrations, if available, during due diligence, even if the Phase I report does not identify a Recognized Environmental Condition.*

- » Impacted sites may require testing and evaluation, as well as mitigation, remediation during development, and long-term maintenance and monitoring post-development.

*Practice Tip: Retain environmental professionals known for excellence. ESLs are based on generic, conservative assumptions. Your site and project is not generic, and you may need help to prove it up.*

- » Creditors are more likely to ask for sampling as part of underwriting.

*Practice Tip: Budget time for sampling or conduct sampling as part of diligence.*

## Development Impact of More Conservative ESLs

- » Increased attention will be placed on environmental conditions by municipalities and other lead agencies in environmental review.

*Practice Tip: Develop a robust set of measures in the project's California Environmental Quality Act (CEQA) document.*

- » Pay greater attention to: environmental due diligence, environmental deal terms (e.g., reps and warranties, length of escrow period) and strategic site planning around environmental constraints.

*Practice Tip No. 1: Bring your environmental team into the deal during negotiations.*

*Practice Tip No. 2: Consider purchasing an environmental pollution legal liability insurance policy to manage environmental risk associated with potential "unknowns," re-openers and toxic tort claims.*

# Vapor Intrusion and ESL Issues on the Horizon

## What's Next:

- » Corresponding Update to Statewide Vapor Intrusion Guidance for Investigation, Cleanup and Management of Vapor-Impacted Properties
  - Early Spring 2019 (public comment)
  - Attention to cross-agency consistency
  - The guidance will establish a preference for soil gas sampling, rather than modeled attenuation
  
- » Pending Issues
  - Will Water Board or other agencies reopen closed cases?
  - Will the ESLs be adopted by other regions, agencies or states?
  - Will the ESLs be used as regulatory standards rather than guidance?
  - Will a California-specific attenuation factor be developed and used?
  - Is cleanup to new ESLs or requiring mitigation too expensive in terms of housing and community revitalization?

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