KEAN MILLER
FROM MAIN STREET TO WALL STREET
KEAN MILLER HAWTHORNE D'ARMOND McCOWAN & JARMAN LLP

ENVIRONMENTAL NOTES
MAY 2007

LOUISIANA ADOPTS PROCEDURE AND STANDARDS FOR "CONTAINED-OUT" DETERMINATIONS FOR CONTAMINATED ENVIRONMENTAL MEDIA

In final rules adopted on March 20, 2007, the Louisiana Department of Environmental Quality ("LDEQ") adopted amendments to the Louisiana Hazardous Waste Rules to create a procedure by which an applicant may obtain a determination that contaminated media (soil/sediment, groundwater, and/or surface water) do not contain a hazardous waste and may be managed as nonhazardous. This procedure does not establish clean-up standards; instead, it will be used to determine whether hazardous waste rules apply to the management of such media when removed from their location or otherwise managed.

The procedure is known as a Nonhazardous Environmental Medium ("NHEM") Determination. It is intended to apply when hazardous waste is the suspected source of the contamination. The rule does not address the question of any presumption as to the source of the contamination (for this, see EPA's 1998 Guidance on Management of Remediation Waste which is available at http://www.epa.gov/epaoswer/hazwaste/ca/resource/guidance/remwaste/pspd_mem.pdf. To obtain a NHEM Determination, an applicant must:

- Submit a letter of application to the LDEQ Office of Environmental Assessment.
- Define the Area of Investigation.
- If the application is for contaminated soil, demonstrate that the maximum soil concentration, or the upper bound estimate of the arithmetic mean concentration, of any of the hazardous waste constituents is below the soil standard set forth in Table 1 of the new rule (LAC 33:V.106)
- If the application is for contaminated groundwater, demonstrate that the maximum concentration of any of the hazardous waste constituents is below the groundwater standard set forth in Table 1 of the new rule.
- Demonstrate that the medium does not have any hazardous waste characteristic.
- Demonstrate that any applicable land disposal restriction standard of LAC 33:V.Ch. 22 is met.
- Submit a fee of $3,000 to LDEQ with the application.

The applicant need only address the hazardous waste constituents that are associated with the hazardous waste believed to be the source of the contamination. (The constituents that are associated with each hazardous waste, with the exception of creosote, are shown in LAC 33:V.4901, Table 6. LDEQ indicated it will make case-by-case determinations for what constituents should be tested when creosote is the potential source.)

Although it is not clear, the rule implies that sediment will be treated as though it is soil. (The only place in the rule where sediment is mentioned states "soil/sediment.") Further, although the rule indicates that it is applicable to contaminated surface water, there are no surface water standards provided.

Cont. from Front

The soil standards set forth in Table 1 are, for the most part, the same as the industrial soil screening standards under LDEQ's RECAP rule, LAC 33:I.Ch. 13; however, there are a few deviations from those standards, so care should be taken when making any generalized assumptions about the rule. The groundwater standards in Table 1 are generally equivalent to 100 times the drinking water MCL. In the case of both soil and groundwater, if a particular constituent does not appear in Table 1, LDEQ has provided equations in an Appendix to enable calculation of an appropriate standard.

To many, the existence of this procedure may be a welcome addition to the LDEQ program as there has been a great deal of uncertainty in the appropriate characterization of contaminated media. Unfortunately, LDEQ chose to require that all of these NHEM determinations must be made by LDEQ and did not allow any self-implementation procedures. Many other states take the approach that such "contained-out" determinations may be self-implementing if the concentrations of hazardous constituents are below certain "look-up table" values and the testing follows certain rules and is documented. A case-by-case review by these agencies is only required if, on a site-specific basis, an applicant believes that less restrictive levels are consistent with a determination that no hazardous waste is contained-in the contaminated media.

The new LDEQ rule also confirms the long-standing EPA guidance that even if contaminated soil is considered to still contain a hazardous waste (i.e., concentrations are above the Table 1 values), the contaminated soil may be managed within the Area of Contamination ("AOC") without triggering the Land Disposal Restriction standards or the Minimum Technological Requirements for landfills/surface impoundments under RCRA. (New LAC 33:V.105.P.) However, the LDEQ also refused to allow these activities without prior LDEQ review and approval of the AOC. Where contaminated media is considered to still contain a hazardous waste, it may be moved within the AOC or treated in-situ only where an application has been made to LDEQ and LDEQ has approved the AOC. No fee program was established for this approval process.

EPA's 1998 Guidance on the Management of Remediation Waste indicates contaminated media may be removed from the AOC, then treated to remove the hazardous waste constituent to below risk-based levels set by the applicable state. In such case, if the contaminated media still contains hazardous waste at the point of generation (i.e., when removed from the AOC), then applicable Land Disposal Restrictions still apply, but the contaminated media itself is no longer considered to be a hazardous waste. LDEQ *appears* to have adopted this guidance in its new rule (see section 106.A.2); however, this is not entirely clear and will need further explanation by the agency. Because the procedure only allows the maximum concentration as detected in the ground/groundwater (or in the case of soil, the upper bound estimate of the arithmetic mean concentration), the rule does not explicitly provide for any means to "exit" the hazardous waste classification at a later stage after treatment.

LDEQ's intended goal was to facilitate remediation projects by establishing a clear basis by which contaminated media could exit the universe of hazardous waste regulation while still being controlled by conservative risk based values. This is likely to be the case for large remediation projects; however, with smaller, day-to-day activities, such as installing a pipeline through a lightly contaminated area, the rules may be much more burdensome than it was under the existing EPA remediation policies. Under those policies, it was clear that incidental movement of contaminated soil during pipeline and road building activities and the like did not trigger any hazardous waste regulatory requirements. Now, an AOC concurrence determination may be required in such areas prior to any soil movement if hazardous waste was the potential source of contamination. Link to the rule: http://www.deq.louisiana.gov/portal/portals/0/planning/regs/pdf/HW092fin.pdf.

Maureen N. Harbourt
225.382.3412
maureen.harbourt@keanmiller.com