



Soil and groundwater contamination: What governmental agency has authority?

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Imagine this scenario: You purchase or already own property and find out that it's contaminated. Reports show that there are chemicals, with odd names, present in the soil or groundwater. Your lender, consultant or attorney advises that you must report this matter to a government agency, and proceed with an investigation of the problem and a cleanup under the oversight of the agency. But what agency? And within the agency, what program? What can you do?

You must ask yourself some important questions. Where is the contamination? Is it in a leaching structure, which is a concrete ring buried in the soil that accepts wastewater and migrates into the underlying and surrounding soil. Or, is it in soil or groundwater? And, what type of contamination is it -- petroleum-related chemicals or non-petroleum chemicals such as metals or solvents that contain chlorine?

Leaching Structures

If the contamination is present in the soil underlying or immediately surrounding a leaching structure, it is likely that the relevant government agency would be a local body, such as the county Department of Health, working in conjunction with the U.S. Environmental Protection Agency (EPA). Under the federal Safe Water Drinking Act, these leaching structures are subject to the authority of the EPA. In most cases, the EPA will work with a local governmental body such as the county Department of Health.

Under this program, both petroleum and non-petroleum contamination is addressed. Usually the process is straightforward. A work plan must be prepared for the possible investigation and cleanup of the leaching structure. The process entails removal of the contaminated soil at the base of the leaching structure until clean soil is observed. Then, the collected end points are analyzed chemically to confirm that the contamination has been removed. Sometimes, the contamination is deep enough or present outside of the ring, requiring the removal of the ring to complete the remediation. Infrequently, the contamination from the leaching structure has migrated deep enough so that the groundwater is impacted which could lead to an expensive, long-term cleanup under one of the programs described below.

Petroleum in

Soil or Groundwater

If petroleum chemicals are present in soil or the groundwater, usually the Spill program at the New York State Department of Environmental Conservation (DEC) will be applicable. Upon reporting the matter to the DEC, a spill number will be assigned that will stay with the property until it is closed after the cleanup is completed. The Department will require the submission of work plans for the investigation and the cleanup of the problem. If all goes as expected, the agency will accept letter reports (as opposed to voluminous documentation). DEC will likely request that the responsible

private party execute a one-page stipulation, a legally-binding document where the private party agrees to perform the investigation and cleanup required by DEC. The stipulation is regarded as the equivalent of an order under the New York State Environmental Conservation Law potentially subjecting the private party to potential fines and penalties for non-compliance. This is the routine followed for an investigation and remediation of a gasoline station.

State Brownfield Program

This program has received significant attention regarding the revitalization of contaminated properties. It applies to both petroleum and non-petroleum contamination, although petroleum sites typically proceed under the Spill program described above. To enter the program, it is necessary to apply to the DEC and be accepted. As a general matter, the program applies to properties where development is impaired by the presence of contamination. An application form must be completed, and upon acceptance, DEC will require the execution of an agreement and the preparation of voluminous investigation and remediation work plans. After the investigation or remediation is completed, substantial reports describing the work must be submitted to the agency for comment, review and approval. Under this program, a number of public notices are required during the process from application through the completion of remediation. The public notices are sent to local residents, tenants, politicians and the media. Significant tax advantages that must be carefully evaluated are also associated with this program. In substantial projects, the tax credits can be extremely valuable.

Inactive Hazardous Waste Site Program

Under this program, the DEC will list a property as an inactive hazardous waste site, generally, an undesirable result. The program only applies to non-petroleum chemicals and will involve a lengthy and detailed process involving the investigation and remediation of the property. Groundwater contamination is usually involved at most sites. The investigation and cleanup process under this program will take several years, and for the investigation and remediation the cost will be more than \$1 million. Also, listing of the property casts a negative light on the property, causing concern for buyers and lenders.

Finally, it must be emphasized that a site with only soil contamination and no groundwater contamination will proceed more expeditiously through remediation. If only the soil is contaminated, and not the groundwater, the remediation could be performed in a matter of months, and the entire process with the agency through a sign-off could possibly be completed within one or two years (probably longer under the Inactive Hazardous Waste Site program). If groundwater contamination is involved, however, the cost will increase substantially, and the process to investigate and remediate will be measured over the course of several years.

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