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Another Season of Change in North Carolina Environmental Law - Part II

By Stanford D. Baird, Hope N. Duckworth, David A. Franchina, and James L. Joyce

As discussed in Part I of our environmental legislative update published on November 12, 2015, the 2015 North Carolina legislative session resulted in a great deal of change for the state's environmental programs. In addition to the changes discussed in Part I, the 2015 North Carolina budget law (Session Law 2015-241) and the Regulatory Reform Act of 2015 (Session Law 215-286) (the "Act") together broadened the applicability of the North Carolina Brownfields Program ("Brownfields Program") and risk-based remediation, and altered the rules for cleanup of some petroleum releases from underground and aboveground petroleum storage tanks. These and other changes to environmental law in North Carolina are discussed below.

Definition of "Prospective Developer" Expanded Under the Brownfields Law

In a significant change for developers of brownfields projects in North Carolina, the Act amends and expands the definition of "prospective developer" under the state brownfields law.¹ In order for a project to be eligible for the Brownfields Program, the subject property must qualify as a "brownfields property" under the law and the developer must qualify as a "prospective developer." Previously, the brownfields law defined the term prospective developer as "any person with a bona fide, demonstrable desire **to either buy or sell** a brownfields property for the purpose of developing or redeveloping that brownfields property and who did not cause or contribute to the contamination at the brownfields property."² Thus, to be eligible for the Brownfields Program, there had to be an underlying transaction involving the brownfield property and the would-be prospective developer, such as a purchase, sale, or financing of some type. In many instances, this requirement made it difficult for existing owners, who did not cause or contribute to the contamination, to qualify for the Brownfields Program.

Under the expanded definition in the Act, however, the term "prospective developer" is now defined as "any person with a bona fide, demonstrable desire **to develop or redevelop** a brownfields property and who did not cause or contribute to the contamination at the brownfields property."³ Effectively, the definitional change removes the requirement that a prospective developer buy or sell property in connection with entry into the program. Instead, a prospective developer must only prove intent to develop or redevelop a property. The proposed change appears to substantially relax the requirement surrounding a prospective developer's eligibility for the Brownfields Program. What remains to be seen, however, is how the Brownfields Program will interpret the other eligibility requirements in light of the removal of the transaction requirement. For example, it is not entirely clear how the Brownfields Program might interpret the requirement to demonstrate a bona fide desire

¹ North Carolina Brownfields Property Reuse Act of 1997, N. C. Gen. Stat. 130A-310.30 et seq.

² *Id.* at § 130A-310.31(b)(9) (emphasis added).

³ Session Law 2015-286, § 4.9(a) (emphasis added).

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to develop or redevelop the property and the degree to which the Brownfields Program will continue to require current owners of a proposed brownfields property to show that they did not cause or contribute to the contamination. Even with these questions unanswered at this time, the expansion of the definition of “prospective developer” appears to be a positive change for the brownfields development market in North Carolina.

Risk-Based Remediation Amendments

Risk-based remediation has been a reality in North Carolina for nearly two decades. However, until 2011, risk-based remediation was only available in certain environmental programs, such as the leaking petroleum underground storage tank (“UST”) program and cleanups under the Dry-Cleaning Solvent Cleanup Act program. In 2011, the General Assembly enacted legislation known as House Bill 45,⁴ which put in place a statutory program for risk-based remediation of certain industrial sites. However, House Bill 45 had significant shortcomings and was very limited in scope. For example, risk-based remediation was only available under House Bill 45 for “industrial sites,” which was limited to sites primarily used for manufacturing or electrical generation. Additionally, House Bill 45 only applied to sites where contamination had been reported to DENR prior to March 1, 2011, and also expressly excluded any and all sites where contamination had migrated off-site or would migrate off-site. As a result of these limitations, House Bill 45 was sparingly used and failed to meet its legislative objectives of accelerating cleanup of contaminated sites.

This year, however, the General Assembly sought to correct many of the shortcomings of House Bill 45 with amendments that were included in the Act. The amendments open the door for risk-based remediation at many more contaminated sites across North Carolina. The amendments remove the requirements that contamination must have been reported prior to March of 2011 and that the property had to be an industrial site. Additionally, sites where contamination has migrated off-site are no longer excluded. It should be noted, however, that sites with petroleum contamination undergoing cleanup pursuant to risk-based regulations and sites subject to the Coal Ash Management Act of 2014 are excluded. For sites where contamination has migrated off-site, a cleanup using site-specific remediation standards that exceed unrestricted use standards will require notice to and the written consent of the off-site property owner. While the consent requirement may make it more burdensome or expensive for responsible parties to pursue cleanups based on risk-based remedial standards, incident closure may now be a possibility at many sites that had little hope previously.

Risk-Based Corrective Action for Petroleum Releases From ASTs and Other Sources

Continuing the expansion of the use of risk-based corrective action, the Act added a new section to the North Carolina Oil Pollution and Hazardous Substances Control Act, N.C. Gen. Stat. 143-215.75 et seq., to allow for risk-based remediation of petroleum releases from aboveground storage tanks (“ASTs”) and other sources. Risk-based cleanup had previously been available for petroleum releases from USTs, but not from ASTs. Although not identical to the provisions for risk-based remediation of UST releases, the contours of the non-UST program would be similar. Section 4.7(b) of the Act tasks the North Carolina Environmental Management Commission (“EMC”) with developing regulations “for risk-based cleanup of

⁴ Session Law 2011-186.

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discharges and releases from ASTs and other sources.” The regulations must include the following elements:

1. The set of circumstances where site-specific information should be considered;
2. Criteria for determining acceptable cleanup levels;
3. The acceptable level or range of levels of risk to human health and the environment;
4. Remediation standards and processes;
5. Requirements for financial assurance, if deemed necessary; and
6. Appropriate fees for undertaking remediation under site-specific risk-based remediation, in order to pay for administrative and operating expenses necessary to implement this non-UST risk-based remediation program.⁵

In order to obtain a risk-based closure, a property owner or operator may be required to provide information to assess the degree of risk posed by a given petroleum release.⁶ In addition to providing the required information, a responsible party will be required to perform initial abatement actions, including determining the source of the release, monitoring for potentially hazardous vapors or free product, and submitting a report summarizing these initial abatement actions within 20 days of the release. If petroleum contamination has migrated off-site, the responsible party will either have to (a) remediate the off-site property to unrestricted use standards or (b) obtain the off-site property owner’s written consent to use risk-based standards after providing the off-site owner with a copy of the risk-based remediation statute and a government publication regarding risk-based cleanups.⁷ A petroleum release incident will be able to achieve closure if the release does not pose an unacceptable degree of risk to human health and the environment.

Phaseout of the Noncommercial UST Trust Fund

In another important legislative development, provisions in the budget law began the phaseout of the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund (the “Noncommercial Trust Fund”). The Noncommercial Trust Fund was created in 1988 to defray cleanup costs and third-party damages related to leaking noncommercial USTs. Noncommercial USTs primarily include home heating oil tanks and small (less than 1,100 gallons) farm or residential motor fuel tanks. Commercial USTs, by contrast, are generally larger tanks and include USTs at gasoline stations. A separate fund (the “Commercial Trust Fund”) is available for releases from commercial USTs. Prior to the new budget taking effect, the Noncommercial Trust Fund provided the potential for reimbursement for cleanup costs up to one million dollars for certain releases and also for payment of certain third-party damages. The Noncommercial Trust Fund now will apply to releases that were reported to the North Carolina Department of Environmental Quality (“DEQ”) prior to October 1, 2015, provided that all claims are submitted to DEQ prior to July 1, 2016. As a result of the legislation, the primary financial resource for remediation of residential USTs has been eliminated in North Carolina.

⁵ N.C. Gen. Stat. 143-215.104AA(b).

⁶ N.C. Gen. Stat. 143-215.104AA(c).

⁷ N.C. Gen. Stat. 143-215.104AA(e).

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However, in an apparent compromise, the legislation also substantially relaxes cleanup requirements for certain petroleum releases from noncommercial USTs. Section 14.16(B) of the budget law, Session Law 215-241, requires DEQ to adopt permanent rules that would remove the requirement for initial abatement actions related to releases from noncommercial USTs until the level of risk associated with the release has been determined. Additionally, upon a determination of low risk for a given release, the release incident can be closed without any soil remediation. Risk level is generally determined based on the proximity of the release to receptors (such as drinking water wells and surface waters) and the level of groundwater contamination. For petroleum releases from noncommercial USTs in urban settings, the regulatory path to closure may now be smoother.

The phaseout provisions also extended coverage by the Commercial Trust Fund to certain releases now no longer covered by the Noncommercial Trust Fund, such as releases from commercial USTs when: (a) the tank's owner or operator cannot be found or fails to proceed with cleanup, (b) the tank was taken out of operation prior to 1974 and at the time of discovery neither the owner nor operator owned or leased the property, or (c) the tank's owner only owns the tank based on ownership of the property where it is located, and the owner did not know or have reason to know the tank was there.

Changes in Permissible Soil Assessment Methodology

A subtle but important change to soil assessment protocol was included in the budget law. This provision requires DEQ to allow Ultra Violet Fluorescence ("UVF") technology in lieu of U.S. EPA Method 8015 for soil assessment and petroleum contamination delineation provided that the use of UVF does not violate federal requirements, gives results with equivalent accuracy and quality, and results in appreciable cost savings. Laboratory testing using EPA Method 8015 is a multi-step method of evaluating organic compounds (including petroleum hydrocarbons) in soil that requires sample preparation, sending samples to a laboratory, and waiting several days for results. UVF, on the other hand, is simpler and less expensive than EPA Method 8015 and can be conducted on-site with immediate results. In turn, this allows more samples to be taken and evaluated at a given site. UVF will likely be a valuable and cost-effective alternative for many sites.

Narrowed Jurisdiction Over Isolated Wetlands and Intermittent Streams

The Act also trims back substantially DEQ's jurisdiction over wetlands that are not regulated under federal law and, to a lesser extent, streams that are not regulated by federal law. DEQ began asserting authority over isolated wetlands in the early 2000s, as federal courts limited the jurisdiction of the U.S. Army Corps of Engineers over these wetlands. DEQ then put into place a permitting regime that, generally speaking, regulated North Carolina isolated wetlands in a manner that mirrored wetlands regulation at the federal level. The new legislation undoes many of the parallels between federal and state law. First, the Act limits the types of wetlands that can be considered isolated wetlands under North Carolina law. Where North Carolina previously recognized 16 different types of isolated wetlands, DEQ now can only regulate two of them (basin wetlands and bogs) as isolated wetlands. Second, the Act rewrites the manner in which mitigation for impacts to isolated wetlands must be provided. Instead of closely following mitigation requirements for federally regulated wetlands and requiring cumulative consideration of isolated and jurisdictional wetlands, mitigation for isolated wetlands impacts now must be considered separately from mitigation for jurisdictional wetlands, and the legislation puts a cap of 1:1 on the ratio of mitigation that

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must be offered for isolated wetlands impacts — as opposed to up to 10:1 in the current rule. Third, the Act requires that DEQ authorize increased impacts to isolated wetlands, raising the limits from 0.3 acre in Eastern North Carolina to one acre and 0.1 acre to one-third acre in the central and western parts of the state. With respect to projects with impacts to intermittent streams, mitigation will no longer be required by DEQ unless such streams are regulated by federal law.

Each session of the General Assembly seems to produce significant changes in the landscape of environmental regulation in North Carolina, and the environmental team at K&L Gates will continue to monitor these changes.

Authors:

Stanford D. Baird

stanford.baird@klgates.com

+1.919.743.7334

Hope N. Duckworth

hope.duckworth@klgates.com

+1.704.331.7452

David A. Franchina

dave.franchina@klgates.com

+1.704.331.7543

James L. Joyce

jim.joyce@klgates.com

+1.919.743.7336

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