

DEC Proposes Vapor Intrusion Policy

DEC recently published a draft policy outlining a procedure for evaluating possible vapor intrusion at future remedial sites and at sites where remedial decisions already have been made. Vapor intrusion is the migration of volatile chemical vapors from the subsurface into overlying or adjacent buildings. In the past, DEC assumed that vapor intrusion was caused primarily by soil vapors emanating from a source of volatile chemicals located adjacent to or directly beneath the foundation of buildings. According to the policy, recent studies and experience indicate that the potential for vapor intrusion from contaminated soils and/or contaminated groundwater flowing deep beneath a home or business is greater than previously thought.

The draft policy sets forth a strategy for prioritizing sites, where remedial decisions were made prior to January 1, 2003, based on their potential for vapor intrusion. Sites where remedial decisions were made after that date have already addressed vapor intrusion in the remedial action plan. The policy contains screening criteria that focus on the presence and nature of volatile chemical contamination at the site, emphasizing sites where chlorinated volatile organic compounds (CVOCs) were disposed of or detected, on the theory that these substances do not readily biodegrade and have

high odor thresholds, allowing them to accumulate indoors without being noticed. Applying these and other screening criteria, DEC identified over 400 sites for initial evaluation.

Sites meeting the screening criteria will be ranked and prioritized using a pair of score sheets, one for soil and one for groundwater. The sheets evaluate soil and groundwater for the following four conditions: (1) total CVOC concentration; (2) depth to contamination; (3) soil characteristics; and (4) land use adjacent to the site above impacted soil or groundwater. Each condition will be assigned a weighting factor depending on the answer. Additional points may be added or subtracted based on other factors such as proximity to sensitive receptors, presence of non-aqueous phase liquid (NAPL), or current information pertaining to completion of remedial activities. The information from the score sheets will be combined with other information concerning possible vapor intrusion at particular sites. As a final step, DEC staff will review the prioritized list and confirm the information used to score and rank the sites. *(Cont'd on following page)*

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Once the initial list is developed, DEC staff will identify a manageable number of sites for further study, including sampling, to determine whether indoor air impacts associated with site contaminants actually exist. If sampling reveals soil gas contamination or contaminated groundwater within 100 feet of or beneath an occupied building, then sub-slab and indoor air sampling will be conducted. Once the first few investigations are complete, DEC may revise the procedures in the policy. DEC will then begin to investigate the remaining sites identified as having potential vapor intrusion impacts.

Each DEC region is expected to identify several previously-investigated sites for further vapor intrusion investigation each year until all sites requiring further study have been completed. Where it is determined that a vapor intrusion pathway does not exist (i.e., that humans will not be exposed to vapors that originate from contamination), the potential for vapor intrusion must be considered if future plans for the site include development that "could result in a complete exposure pathway."

For a copy of the policy, use the QUICK-REPLY form or visit DEC's web site at www.dec.state.ny.us/der.

FEDERAL NEWS

EPA Removes Various Substances from Regulatory Lists

EPA has adopted a series of rules deleting substances from various regulatory lists. These final rules include: (1) a rule deleting ethylene glycol monobutyl ether from the list of hazardous air pollutants (HAPs) regulated under section 112 of the Clean Air Act (CAA); (2) a rule excluding various compounds, including several refrigerants, from the definition of volatile organic compound; and (3) a rule deleting phosmet from the list of extremely hazardous substances (EHS) under the Emergency Planning and Community Right-to-Know Act (EPCRA).

EPA made the decision to delete ethylene glycol monobutyl ether (EGBE or 2-butoxyethanol) from the list of HAPs regulated under CAA § 112, after concluding that there is adequate data on the health and environmental effects of EGBE to determine that "emissions, ambient concentrations, bioaccumulation, or deposition of the substance may not reasonably be anticipated to cause adverse effects to human health or adverse environmental effects." Deletion from the list means that EGBE emissions need not be considered in assessing whether a source is major for purposes of determining the applicability of § 112 standards. However, EGBE must still be included on a facility's Toxic Release Inventory (TRI) form; it also will remain a VOC for purposes of various

ozone control programs. The rulemaking can be obtained from the November 29, 2004 Federal Register at: www.epa.gov/fedrgstr.

EPA recently revised the definition of VOC in two separate rulemakings to exclude certain compounds. In the first rulemaking, EPA excluded four compounds from the definition of VOC after concluding that these compounds make only a negligible contribution to the formation of ground level ozone (i.e., smog). The four compounds are: 1,1,1,2,2,3,3-heptafluoro-3-methoxy-propane (HFE-7000), 3-ethoxy-1,1,1,2,3,4,4,5,5,6,6,6-dodecafluoro-2-(trifluoromethyl) hexane (HFE-7500), 1,1,1,2,3,3,3-heptafluoropropane (HFC 227ea), and methyl formate. All four compounds have the potential for use as refrigerants, fire suppressants, aerosol propellants or blowing agents (used in the manufacture of foamed plastics).

Excluding these substances from the definition of VOC means that states need not consider these substances for purposes of preparing State Implementation Plans (SIPs) to attain the National Ambient Air Quality Standard (NAAQS) for ozone; it also means that facilities need not count emissions of these compounds as VOCs in determining their compliance obligations under various federal regulations. Note, however, that the rule applies for state regulatory purposes only

if the state relies on the federal definition of VOC. In states such as New York that have adopted their own definition of VOC, the state must amend its definition to exclude these substances before the new definition applies under state law.

In a related rulemaking, EPA modified the definition of VOC to state that t-butyl acetate (also known as tertiary butyl acetate or TBAC) will not be a VOC for purposes of VOC emissions limitations or VOC content requirements; however, TBAC will continue to be a VOC for purposes of recordkeeping, emissions reporting and inventory requirements. In adopting this approach, EPA concluded that even “negligibly reactive” compounds such as TBAC may contribute to ozone formation if present in sufficient quantities, making it necessary to track emissions for reporting and inventory purposes. As with the rule discussed above, this revision to the definition of VOC will take effect in New York only if DEC revises its own definition of VOC.

In both rulemakings, EPA noted that it plans to assess its VOC policy in general and its VOC exemption policy, in particular. Among other

things, EPA is reconsidering the scientific basis of its VOC exemption policy. During that review, EPA will address the issue of whether recordkeeping and reporting requirements should apply to other exempt compounds. The two VOC rulemakings can be found in the November 29, 2004 Federal Register at: www.epa.gov/fedrgstr.

In another recent rulemaking, EPA deleted phosmet from the list of extremely hazardous substances (EHS) under EPCRA. As a result of the rulemaking, facilities with phosmet on-site will no longer be required to comply with emergency planning and emergency release notification requirements. In addition, facilities handling phosmet will no longer have to file an emergency and hazardous chemical inventory form and material safety data sheet (MSDS) for phosmet with state and local emergency planning agencies for amounts less than 10,000 pounds. EPA issued the rule after reviewing data which purportedly showed that phosmet does not meet the acute oral toxicity listing criterion. The rule can be obtained from the November 26, 2004 Federal Register at: www.epa.gov/fedrgstr.

OSHA to Update Consensus Standards

OSHA recently announced that it was undertaking an initiative to update rules that reference or incorporate outdated consensus standards. Many consensus standards referenced in OSHA regulations were issued 30 or more years ago and have since been superseded or eliminated altogether. The continued inclusion of outdated standards in the OSHA rules imposes considerable burdens on employers. OSHA has already received input from various standards development organizations (SDOs) such as the American National Standards Institute (ANSI) and the National Fire Protection Association (NFPA) to assist in identifying which referenced standards had been updated by the SDOs since their adoption by OSHA. This information, together with OSHA's own research, will form the basis for a series of rulemakings to update OSHA's regulations to eliminate outdated references or language. OSHA plans to implement the changes through one of three mechanisms: (1) notice and comment rulemaking (where action would impose compliance costs or raise significant issues); (2) direct final rulemaking (for changes that are non-

controversial, equally protective and do not impose significant new compliance costs); and (3) technical amendments (for updating references that are currently incorporated into OSHA standards and that only provide information to the regulated community).

OSHA has also published a direct final rule proposing to update references found in the following five standards: temporary labor camps, guarding of portable power tools, sawmills, flammable and combustible liquids, and arc welding and cutting. Of particular interest to the environmental community is the withdrawal of the reference to American Petroleum Institute (API) standards for oil storage tanks with riveted shells. The referenced standard was withdrawn by API and so is no longer available to the public. According to OSHA, its withdrawal of the standard will not change an employer's responsibility for constructing properly designed atmospheric tanks. The direct final rule will become final on February 22, 2005 if no adverse comment is received prior to December 27, 2004.

EPA Releases Notice of Data Availability for Mercury Rule

EPA recently released a Notice of Data Availability (NADA) relating to the Clean Air Mercury Rule proposed in January 2004. The January proposal contained two alternatives for controlling mercury emissions from power plants. One approach would require power plants to install controls that satisfy maximum achievable control technology (MACT) under the hazardous air pollutant provisions of the CAA; the second approach, preferred by EPA, would establish a cap-and-trade program for mercury. EPA received extensive comments on the proposed rule which included various modeling analyses, many of which

relied on similar models but obtained different results due to differences in the assumptions employed. The NADA shares these analyses and seeks additional comment on the models and assumptions. The NADA also seeks comments on the methodology used by EPA to assess the benefits of reducing mercury emissions from power plants. Comments on the NADA must be submitted to EPA by **January 3, 2005**. The NADA can be obtained from the December 1, 2004 Federal Register at: www.epa.gov/fedrgstr.

EPA Proposes Cooling Water Intake Regulations

On November 24, EPA proposed regulations that would establish standards for certain existing facilities that use a cooling water intake structure and are designed to withdraw water above certain thresholds. EPA previously issued regulations addressing new facilities and certain larger existing power plants (Phase I and Phase II). The proposed Phase III regulations would address existing industrial facilities that withdraw water for cooling and other purposes. The recent notice proposes three options for defining which facilities would be subject to the new requirements: (1) facilities with

a total design intake flow of 50 million gallons per day (MGD) or more that withdraw from any waterbody; (2) facilities with a total design intake flow of 200 MGD or more that withdraw from any waterbody; or (3) facilities with a total design intake flow of 100 MGD or more that withdraw water specifically from an ocean, estuary, tidal river or one of the Great Lakes. The rule would establish standards for reducing both the number of fish trapped in the intake and the extent of mortality. EPA is accepting comments on the proposal until March 24, 2005.

CALENDAR OF EVENTS

- December 15:** Capital District Environmental Breakfast Club Joint Meeting with Eastern NY Chapter Air & Waste Management Association Topic: DEC's Focus and Initiatives for 2005. Speaker: Erin Crotty, Commissioner, NYSDEC. 12:00 noon, Holiday Inn Turf, Wolf Rd. \$20.00 Advance reservations and payment required.. Spaces may be available; check with Dan Reilly C.T. Male Associates, P.C. P.O. Box 727 Latham, NY 12110. 518-786-7625
- January 7, 2005:** Capital District Environmental Breakfast Club 7:30 am, Holiday Inn Turf, Wolf Rd. Colonie. Topic: Legislative Update Speakers: Richard Morss, NYS Assembly Executive Director of Committee on Solid Waste Management, and Darren Suarez, Program Associate, NYS Senate. \$12 pre-registered, \$14 day of event. 518/438-9907 ext. 240 or e-mail bpopolizio@youngsommer.com

QUIK-REPLY FORM

For more information on the topics in this issue, fax or mail this form to: Vicki Schlierer, Regulatory Affairs Paralegal, Young, Sommer...LLC, Five Palisades Drive, Albany, NY 12205. Fax: (518) 438-9914.

Name: _____

Title: _____

Company: _____

Address: _____

City, ST, Zip: _____

Phone: (____) ____ - _____ Fax: (____) ____ - _____

Please send the following:

Draft DEC Soil Vapor Intrusion Policy

Reservations for the Capital District Environmental Breakfast Club, Holiday Inn Turf, Wolf Road, Colonie, NY **January 7, 2005**

_____	Registration (includes full breakfast buffet)	\$12.00
_____	Binder update	\$5.00

Please make your reservation no later than **January 3, 2005**. Fax your reservation to 518/438-9914; call Betsy Popolizio at 518/438-9907 ext. 240; or email bpopolizio@youngsommer.com. Cancellations will be accepted until Jan. 3, 2005. No refunds or credits given after that time. To help us plan, please make a reservation. **The registration fee will be \$14.00 for walk-ins.**

**Best Wishes for a Blessed Holiday Season and a Safe and Joyous New Year
from all of us at Young, Sommer...LLC**