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CHANGES COMING TO FLORIDA CLEANUP RULES

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Commercial property transactions often involve much haggling between seller and purchaser over potential contamination liabilities, with known contamination problems sometimes ruining marketability. The ownership and redevelopment of contaminated property has historically been a risky business in Florida because of prescriptive and potentially costly state and local cleanup requirements and nervous lenders. Further complicating matters is the fact that the persons responsible for cleanup ("responsible parties") can include current and former property owners, lessees, or "operators" on the property.

As the Florida Department of Environmental Protection has gained more experience in overseeing the cleanup of contaminated property and a greater understanding of risk and practicality, coupled with the development of more flexible state laws, rules, and policies, these risks are gradually being lowered. As the result of a newly enacted law and FDEP's most recent policy and rulemaking initiatives, we can anticipate significant new opportunities for risk reduction and more flexibility.

State implementation of Risk Based Corrective Actions ("RBCA," commonly called "Rebecca") was an important early development in this trend. Florida first enacted RBCA legislation to sites covered under the cleanup requirements of Florida's Petroleum Restoration, Brownfields Redevelopment, and Dry Cleaning Facility Programs. Application of RBCA to all kinds of contaminated sites ("Global RBCA") came in 2003 with the enactment of Section 376.30701, Florida Statutes, implemented in 2005 through FDEP's Contaminated Site Cleanup Criteria Rule, Chapter 62-680, Florida Administrative Code, in conjunction with Chapter 62-777, which established Cleanup Target Levels ("CTLs") for the cleanup of contaminants in groundwater, surface water, and soils. FDEP established CTLs both for contaminants for which the FDEP has adopted water quality standards by rule, which made them legally binding, and for contaminants without adopted standards or bound up in soils, for which the CTLs simply act as "guidance," though in practice they can be treated by FDEP as equally binding.

This year the Florida legislature enacted Chapter 2016-184, Laws of Florida, effective July 1, which among other things amended the Global RBCA statute, Section 376.30701, and comparable Brownfield requirements at Section 376.81, to provide for some additional flexibility in determining when site cleanup can be considered complete—i.e., the point at which FDEP can issue a Site Rehabilitation Completion Order ("SRCO") to the responsible party. (The new law has additional provisions specifically related to funding and cleanup priorities for the Petroleum Restoration Program that will not be discussed here.) Coincident with this new law, FDEP had already commenced rule and related policy development activities also seeking more flexibility.

One key consideration has been the development of less stringent criteria for determining contamination levels at which a site cleanup can meet SRCO requirements. Another involves the development and expansion of mechanisms by which the FDEP can issue a SRCO when even these relaxed cleanup criteria are not met, provided certain steps are taken to protect the public health and safety.

Current rules generally limit FDEP's ability to issue a SRCO for property with groundwater contamination levels higher than the CTLs only where the higher levels do not exceed 10 times the CTLs, except under very proscribed circumstances when the responsible party can establish Alternative Cleanup Target Levels ("ACTLs") on the property. In either case certain conditions must be imposed upon use of the property. One

condition is called “Institutional Controls.” This generally involves the use of restrictive covenants (deed restrictions) that limit certain uses of the property (for example, prohibiting withdrawal of groundwater), and can also involve some active management of the property to prevent further migration of the contaminants through the use of engineering controls such as maintenance of a paved cap over contaminated soils. Another condition can be applied when the exceedances can be reduced to the CTLs by “natural attenuation” that occurs with the passage of time, the condition being that the CTLs must be achieved within five years.

The new law authorizes the FDEP to modify its rules to:

- Require that FDEP rules allow for cleanup by natural attenuation even though the standards will take longer to be achieved than the current limit of five years;
- Loosen the definition of “background concentration,” which now refers to the natural conditions of a water body, to allow for contamination caused by “anthropogenic impacts” unrelated to pollutant discharges at the site. This allows the responsible party to address only the contamination that was generated by pollution caused by activities within the property boundaries;
- Expand the ability to use ACTLs to include “results from probabilistic risk assessment modeling,” a term that is not defined but that FDEP has used to allow for statistical variability in determining when water quality monitoring results can demonstrate compliance. In addition, ACTLs can be implemented without Institutional Controls under certain circumstances, including that the contamination does not spread beyond the property boundary.

In addition, without the new statutory authorization the FDEP has engaged in the following rulemaking activities:

- Opened up the Chapter 62-780 rulemaking, not only to implement Chapter 2016-184, but also to refine some existing provisions, with a purpose as stated on its website to “foster improved regulatory practices that provide responsible environmental protection while facilitating compliance and minimizing regulatory burden.”
- Approved for adoption, on July 26, 2016, a modification of the state water quality standards rules, which includes the addition of new contaminants, the raising of allowable maximum contamination levels for certain existing contaminants, and the lowering of others. This would change the CTLs for a number of constituents accordingly. The proposed rule is very likely to be challenged, with the result being that the effective date, even assuming the challenges fail, is uncertain.

One area of particular interest in the Chapter 62-780 rulemaking is that FDEP is considering modifying the Institutional Control program to eliminate the requirement that a restrictive covenant must always be used to ensure compliance with property usage restrictions. There are a number of situations where such a requirement is problematic—for example, where the property is sold and the new owner refuses to place a restrictive covenant on the property, which can thereby prevent the responsible party from being able to obtain a SRCO. An alternative to a deed restriction on groundwater usage, for example, could be a SRCO that relies upon a local government ordinance prohibiting private wells.

As explained by FDEP officials at a recent environmental conference, FDEP believes that its 30 or so years of experience overseeing contamination cleanups has taught it that it can develop more sophisticated, less expensive, and less burdensome approaches towards the cleanup and redevelopment of contaminated properties that will benefit both the environment and the economy. It is interesting to see where the current rulemaking will go and how successful FDEP will be in reaching that goal.

For more information on this topic, please contact Dan Thompson on the firm’s Government and Regulatory Team.

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