

DWM Response to Petition

On or about May 15, 2014 Marvin E. Taylor (the Petitioner) requested rulemaking to amend 15A NCAC 2L .0400 et seq., Risk-Based Assessment and Corrective Action for Petroleum Underground Storage Tanks (USTs), to include other sources of petroleum such as aboveground storage tanks (ASTs). The Division of Waste Management (Division) does agree with the petitioner that there is need to establish a Risk-Based Assessment and Corrective Action approach for petroleum discharges or releases into the environment from sources other than Underground Storage Tank Systems. As of the making of the Division's response, Senate Bill 38 has been introduced in the General Assembly. Section 11(a) of Senate Bill 38, if signed into Law, would direct the Department of Environment and Natural Resources (the Department) to study, among other things, the expansion of risk-based remediation to all remediation programs in the Department. The (Division) does not believe the requested rulemaking is appropriate at this time, and thus respectfully recommends that the Environmental Management Commission (Commission) deny the petition. The Division believes the Petitioner's ultimate objectives have a high probability of being met through this directed study and ensuing rule development process. Relevant portions of SB38 are as follows:

STUDY USE OF CONTAMINATED PROPERTY

SECTION 11(a). The Department of Environment and Natural Resources shall study ways to improve the timeliness of actions necessary to address contaminated properties such that the property is safe for productive use, threats to the environment and public health are minimized to acceptable levels, and the risk of taxpayer funded remediation is reduced. The Department shall specifically consider all of the following:

- (1) The expansion of risk-based remediation of groundwater to all remediation programs under the Department.
- (2) The Resources needed within the Department to oversee remediation, including the potential to expand the use of Department approved private environmental consulting and engineering firms to implement and oversee remedial actions.
- (3) That rules adopted by the Environmental Management Commission for water quality standards applicable to groundwater be no more stringent than the lower of the federal or State maximum contaminant levels for drinking water in cases where the maximum contaminant levels have been adopted.
- (4) Liability protection for innocent purchasers of nonresidential property who take actions consistent with the federal Comprehensive Environmental Response, Compensation, and Liability Act for due diligence and due care regarding investigations and contaminants found.
- (5) Other matters the Department deems appropriate to further the goals of this study.

DWM Response to Petition

SECTION 11(b). The Department shall report the results of this study, including any recommendations, to the Environmental Review Commission no later than November 1, 2014.

The Division notes that historically the General Assembly has provided clear mandates to the Department as to which programs shall engage in risk-based assessment and remediation. All programs in the Division's jurisdiction that currently employ risk-based assessment and remediation have express statutory mandates from the General Assembly to do so. See, for example, G.S. § 143-215.104D(b)(3) of the Dry-Cleaning Solvent Cleanup Act, which requires that the Commission "shall adopt rules establishing a risk-based approach applicable to the assessment, prioritization, and remediation of dry-cleaning solvent contamination...." See also G.S. § 143-215.94V, which expressly requires, among other things, that "the Commission adopt rules that will provide for risk-based assessment and cleanup of discharges and releases from petroleum underground storage tanks...." The Division also respectfully submits that the current regulations addressing USTs and ASTs are constitutional, despite Petitioner's assertion to the contrary, as there is a rational basis for these regulations, including, among other things, federal mandates, regulatory and permit requirements unique to USTs.

The General Assembly has clearly directed the Department in the past as to which programs must adopt risk-based rules, and the General Assembly is again studying the possibility of expanding risk-based rules, this time to all Department programs. This study presumably will include, as it has in the past, express statutory authority to promulgate risk-based rules where the General Assembly so desires them to be implemented. Under these circumstances, the Division respectfully recommends that the Commission allow the legislatively proposed study, if mandated, to be completed in order to have both the benefit of its findings and also the clear directives of the General Assembly, prior to the promulgation of other risk-based rules.

Recommendation: The Division respectfully recommends, that instead of adopting the Petitioner's Petition at this time, that the Division, the Commission, and the Petitioner to the extent available to him, work with the General Assembly as it considers the adoption of risk-based rules for, among other things, remediation of petroleum releases other than from UST sources