

REMEDIATION PROGRAM GUIDE
PUBLIC COMMENTS RECEIVED
10/4/11 TO 11/18/11

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1. Barnes and Thornburg, Comments on IDEM's draft "Remediation Program Guide" NPD Number: WASTE-0060-NPD

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November 18, 2011

Via E-Mail (plikins@idem.IN.gov)

Ms. Patricia Likins
Indiana Department of Environmental Management
Office of Land Quality
100 N. Senate Avenue, Room 1101
MC 66-30 IGCN 1101
Indianapolis, IN 46204-2251

**RE: Comments on IDEM's draft "Remediation Program Guide"
NPD Number: WASTE-0060-NPD**

Dear Ms. Likins:

This letter provides comments on IDEM's Draft Remediation Program Guide (RPG) on behalf of the Indiana Remediation Coalition and a number of Barnes & Thornburg LLP clients. We appreciate the opportunity to submit these comments and look forward to working with IDEM to discuss these comments in more detail leading up to the eventual presentation of the RPG as a Non-rule Policy Document (NPD) to the Solid Waste Management Board, which we understand is targeted for February 2012.

A. Transition Policy

When IDEM released the RISC Technical and User's Guides in February of 2001, it provided a transition policy explaining how it intended to utilize the new RISC guidance. That policy has evolved over time and has become the source of controversy and confusion. It is important for IDEM and the public to address the issue of a "moving target" – it is not in anyone's interest to have uncertainty on this subject. Part of the problem is the continuous updating of the default closure level tables, which will be even more frequent under IDEM's new proposed approach announced in connection with changes to the companion Remediation Closure Guide (RCG). IDEM has the opportunity to clarify its transition policy – both the current policy and the proposed changes to this policy introduced in the RPG so the regulated community can make clear and informed decisions.

Based on recent discussions with senior IDEM management and senior IDEM technical staff, we understand that IDEM does not believe it is making any material changes to its 2001 transition policy. We hope that is in fact the case and do not suggest any changes are necessary to the existing transition policy. If IDEM is not intending to make any changes to its existing policy, we believe it is critically important that we confirm our mutual understanding of this policy.

Here is our understanding of the current Transition Policy as it has evolved since 2001:

1. IDEM created a one-year transition period starting with the effective date of the RISC guidance for the regulated community to choose either the prior guidance, like the VRP Guidance which was published in 1996, or the new RISC guidance. After that one year, the person was to use the RISC Guidance.
2. IDEM provided certain program-specific milestones that established the date to determine which guidance was applicable. For example, if you submitted a VRP Remediation Work Plan on March 1, 2005, you were grandfathered into being able to use the RISC default closure level tables that were in effect on that date, even if the approval and implementation of that RWP occurred after the next "update".
3. A key feature of IDEM's guidance includes not only the default closure level tables, but also the underlying physical and chemical parameters and toxicity values for each chemical (collectively referred to below as the "underlying science") which were used to calculate the default closure levels. Once you are grandfathered, you are allowed to (a) use the published default closure levels that were in effect on your "grandfathered date"; or (b) compute site-specific closure levels using the underlying science in the grandfathered default closure levels.
4. At some point about 5 years or so ago, IDEM began telling people that even if they were grandfathered, they could choose to use subsequent default closure level tables if they wanted to, and that they could selectively use the later default closure levels or the underlying science to calculate non-default, site-specific closure levels if they wanted to, and that this election would not require the person to use all of the subsequent levels – e.g., you could select the grandfathered default closure levels or certain "new" default closure levels if the new default level was higher than the old level.

Please confirm that this is consistent with your understanding and explain in detail, if applicable, any differences.

The vapor intrusion pathway has underscored the need for IDEM and the regulated community to clearly understand the transition policy. Even though a person was allowed to use the grandfathered underlying science to calculate, e.g., non-default soil levels, some at IDEM have taken the position that you can not use those same grandfathered underlying science values to calculate non-default indoor air levels, including soil gas and groundwater vapor intrusion screening levels, to assess the vapor intrusion (VI) pathway. Based on extensive discussions with well-respected risk assessors and toxicologists, we have been informed that this inconsistency does not have any technical merit – if the underlying science is technically appropriate to calculate non-default values for one medium, why is it suddenly inappropriate for another? For example, the default soil and groundwater levels, whether using "old" or current levels, all include an inhalation component. IDEM's argument that it did not have VI look-up values until recently and so we have to throw out the underlying science when we address VI has no technical basis, and could be viewed as arbitrary and capricious. Once you are grandfathered, you should be able to use the science to calculate any non-default, site-specific level for any

medium. Since we are still going to be addressing this issue for the vast majority of the hundreds of sites already pending before IDEM, we urge IDEM to make a clear statement that if you are grandfathered, you are grandfathered for all purposes. We all need certainty in the administration of the program and not to have different underlying science being used for different purposes.

We offer the following suggested changes to the transition policy introduced in the RPG that would make it consistent with the old policy and eliminate some of the confusion that exists.

IDEM provides Nonrule Policy Documents (NPDs) such as the *Risk Integrated System of Closure (RISC) Technical Guide (Waste-0046)* (www.IN.gov/idem/4694.htm) as guidance to be used along with applicable rules or laws for risk-based assessment of contaminated sites. Rules or laws may be amended and NPDs revised during the course of a remediation project.

IDEM developed a transition policy to identify the applicable guidance and associated procedures and screening level tables for each project. IDEM will evaluate proposed remediation work plans and remediation objectives (*including substantive additions or amendments to previously approved remediation work plans or remediation objectives*) based on the laws, rules, guidance, and prior agreements [footnote omitted] in effect at the time the site achieves the program-specific milestones set forth below. To the extent that NPDs may become outdated due to amendments to statutes or rules, IDEM must follow state law, unless the site is governed by an agreement, such as a voluntary remediation agreement or order.

For substantive changes to guidance (*which includes screening level tables*), IDEM will provide advance notice of the revisions or updates and when appropriate, define a transition period of 6 months to 1 [footnote omitted] year that will begin on the effective date of the new guidance. IDEM will consider both the guidance that is being replaced and the new guidance to be in effect during the transition period. A party(s) may choose to use either previously applicable guidance or portions of the new guidance, specifically including in both options, the underlying physical and chemical parameters and toxicity values for a particular chemical (collectively referred to below as the "underlying science") used to compute closure levels for soil, groundwater, and indoor air, if the following program-specific milestones are met before or during a transition period:

- **Brownfields** – a Remediation Work Plan has been submitted or a complete request for a Comfort/Site Status/No Further Action letter has been logged by the program
- **Resource Conservation and Recovery Act (RCRA) permitting** - a closure plan has been submitted

- **RCRA Corrective Action** - a facility investigation work plan has been submitted
- **Leaking Underground Storage Tank Program and Excess Liability Trust Fund Program** - a Corrective Action Plan (CAP) has been submitted
- **State Cleanup Program** – a Remediation Work Plan has been submitted
- **Voluntary Remediation Program** – a Voluntary Remediation Agreement (VRA) has been approved by IDEM and executed by the program participant before the transition period ends

If the above actions have not occurred before the applicable milestone, then IDEM will refer to current guidance and applicable rules and laws when evaluating proposed remediation work plans and remediation objectives.

Party(s) that are utilizing an older guidance document may propose site-specific approaches or choose to change to the most current guidance, or any portion of the new guidance, at any time. ~~The scientific methodology and any inputs used to evaluate risk or to establish remediation objectives need to be current at the time they are presented to IDEM for approval. Whether using an older guidance document or the most current guidance, site specific approaches, including the calculation of site specific remediation objectives, will be evaluated using currently accepted methodology and best available science.~~

For example, if the party(s) has an approved remediation plan that references an old default closure level (*or even an entire table of old default values*) or a calculated nondefault value which was based on the underlying science that was current at the time it was approved, they are “grandfathered” under that approval, and may proceed with the project under the terms of that approved remediation plan even as policy and science changes after that (*except if a hazardous substance or petroleum becomes an imminent and substantial threat to human health or the environment*). Note that the terms “default closure levels” and “nondefault closure levels” are no longer used. These levels from the *RISC Technical Guide* have been updated and are provided in the *Remediation Closure Guide* as “screening levels.” The *Remediation Closure Guide (Waste-0046-R1)* (www.IN.gov/idem/4694.htm) provides detailed guidance on the use of screening levels.

~~If, however, the party(s) decides at some later date to change or recalculate a remediation objective and present a new remediation objective for IDEM to approve, the party(s) will need to base their proposal and calculations on science information and toxicity data that is current at the time that they request that approval.~~

Approved remediation work plans and site remediation objectives will not be re-opened merely because they utilize "outdated" guidance, underlying science, or closure tables. If a party(s) does not complete a remediation project consistent with the terms and conditions of the Remediation Work Plan (*or agreement*), or if a hazardous substance or petroleum contaminant becomes an imminent and substantial threat to human health or the environment, then IDEM may withdraw its prior approval of the work plan.

B. General Comments

This section provides general comments on other portions of the RPG.

1. As with the Remediation Closure Guide (RCG), IDEM does not appear to have followed some of the statutory requirements applicable to NPDs, particularly the mandate that IDEM evaluate the potential economic impact of its policy. IDEM's statutory directive provides:

(a) If the department proposes to utilize a policy or statement that:

- (1) interprets, supplements, or implements a statute or rule;
- (2) has not been adopted in compliance with IC 4-22-2;
- (3) is not intended by the department to have the effect of law; and
- (4) is not related solely to internal department organization;

the proposed policy or statement may not be put into effect until the requirements of subsection (b) have been met.

(b) The department shall present the proposed policy or statement under subsection (a) to the appropriate board. At least forty-five (45) days before the presentation, the department shall make available to the public, including posting on the department's web site:

- (1) the proposed policy or statement;
- (2) information on the availability for public inspection of all materials relied upon by the department in the development of the proposed policy or statement, including, if applicable:

- (A) Health criteria;
- (B) analytical methods;
- (C) treatment technology;
- (D) economic impact data;

- (E) environmental assessment data; and
- (F) other background data.

IND. CODE § 13-14-1-11.5(a) and (b) (emphasis added). If these evaluations have not, in fact, been performed, this could be a serious shortcoming that could threaten to compromise the entire NPD process. IDEM cannot just ignore these statutory requirements. If it has in fact performed this evaluation, it needs to show that work in connection with the issuance of the NPD.

2. As we explained in our comments to the RCG, it would have been helpful to have released the RPG contemporaneously with the draft RCG so both documents could be reviewed concurrently. IDEM received significant comments to the RCG and we understand is making numerous significant changes based on those comments. It is not clear how those changes could affect the RPG. Not having both documents available at the same time has meant we have been unable to integrate comments on both documents, and we reserve the right to provide additional comments on the RPG, as well as on the RCG, that may be made necessary by a future review of the RCG. We note that the RPG continues to reference TPH as a potential petroleum constituent of concern even though the RCG eliminates TPH as a regulated substance. We recommend that IDEM undertake efforts to try to expedite release of the RCG so that we can determine if any of the proposed changes affect our comments to the RPG, and that both documents be presented to the Solid Waste Management Board at the same time as related NPDs.

3. We understand that IDEM is proposing to eliminate certain default screening levels (previously called closure levels) for commercial/industrial land use. We and many others involved in remediation projects believe this is a mistake and will be submitting independent comments to IDEM on this proposed change. Has IDEM considered how those changes affect the RPG, and in particular, the Independent Closure Program (ICP)? Please explain in detail your evaluation and conclusions on the impact and implications to the RPG in general and the ICP specifically.

4. We understand that IDEM is planning a major structural overhaul to its remediation programs. Specifically, IDEM has recently announced a new program that will consist of the Underground Storage Tank compliance section, LUST, and ELTF. Please explain in detail how this proposed change will affect the RPG.

5. Disclaimer

Please insert the following disclaimer at the front of the RPG similar to that used in RISC:

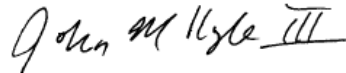
Disclaimer: This Nonrule Policy Document (NPD) is being established by the Indiana Department of Environmental Management (IDEM) consistent with its authority under IC 13-14-1-11.5. It is intended solely as guidance and shall be used in conjunction with applicable rules or laws. It does not replace applicable rules and laws, and if it conflicts with these rules or laws, the rules or laws shall control. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least forty-

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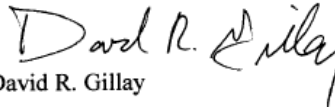
five (45) days prior to presentation to the appropriate State Environmental Board, and may be put into effect by IDEM thirty (30) days afterward. If the nonrule policy is presented to more than one board, it will be effective thirty (30) days after presentation to the last State Environmental Board. IDEM also will submit the policy to the Indiana Register for publication.

Thank you again for the opportunity to provide these comments. As stated above, we hope that you will consider our suggested comments. We would be happy to further discuss any of the information presented above or in the attachments at your earliest opportunity.

Sincerely,



John M. Kyle III



David R. Gillay

cc: Bruce Palin *(Via Email)*
Peggy Dorsey *(Via Email)*
Bruce Oertel *(Via Email)*
Laura Steadham *(Via Email)*
Mike Habeck *(Via Email)*

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