

Significant Changes to Washington State's Voluntary Cleanup Program

08.31.2016 | UPDATES

The Washington State Department of Ecology (Ecology) recently rolled out significant changes to its Voluntary Cleanup Program (VCP). The VCP covers the largest number of cleanup sites in Washington and is a key part of many redevelopment projects. In the VCP, program participants clean up sites with minimal Ecology oversight and ultimately seek to obtain a No Further Action (NFA) determination by Ecology. The NFA provides the agency's non-binding opinion that the site has been successfully cleaned up consistent with state standards. These new VCP changes will reduce the number of sites eligible for the VCP, slow down entry into the VCP and will push those sites already in the VCP to move more rapidly towards NFA status.

Background: Ecology's Funding Crisis

Ecology's VCP is funded through accounts associated with Washington's state cleanup law, the Model Toxics Control Act, RCW 70.105D (MTCA). These MTCA funds have been used during the Great Recession by the state legislature to plug funding gaps in other areas of the state budget. In addition, since the funds come from taxes that are tied to the price of petroleum, the fund amounts have plummeted in recent years as the price of oil declined. These factors have led to a crisis in adequate funding for Ecology to hire and retain adequate staff for the VCP. An additional factor is the robust economy and development surge in the Seattle area, which has led to an unprecedented level of new VCP applications to Ecology. Because Ecology has a high volume of VCP sites and pending applications and insufficient staff to timely review requests for opinions, it recently announced several significant changes to the VCP.

Ecology's VCP Changes

The changes that Ecology announced are the following:

- No more "complex" sites will be accepted into the VCP. Complex sites are those with surface water or sediment contamination, significant or immediate threats to human health, multiple contaminants or other complex factors.
- All new VCP applicants and current VCP participants must use new Ecology-developed reporting checklists and templates. This is to increase the quality of the submittals so that Ecology's review of opinion requests and reports is streamlined. Ecology's threshold for accepting a new application is now higher—an applicant must already have sufficient data and analysis about their site for Ecology to review.
- Ecology will no longer immediately accept a site into the VCP. New VCP applications will go on a waitlist for entry into the program, and applicants will be informed by Ecology whether and when they are accepted into the program.
- Sites already in the VCP that lose their Ecology site manager (when, for example, the site manager leaves Ecology) will go on a separate wait list to be re-assigned to a new site manager. A new site manager will not be assigned until there is an opinion request and that site's turn on the wait list occurs.
- Sites must move through the VCP more quickly. To drive this, for new sites, the applicant must request an opinion with the application *at the time of the application*. This does not necessarily mean a request for an NFA, but there must be a request, for example, for an opinion regarding the sufficiency of a proposed remedial investigation.
- To further drive sites to completion more quickly, sites in the VCP must seek an opinion from Ecology every year. As with new sites, this does not necessarily mean a request for an NFA, but the opinion request should seek Ecology's opinion on, for example, the sufficiency of an investigation or a proposed remedy. When a site has not sought an opinion in a year, the site will be terminated from the program.

Ecology's position is that these changes do not require formal rulemaking. These changes have been announced in workshops to stakeholders, environmental consultants and attorneys, and they are in effect now.

Implications for Liable Parties, Developers and Other VCP Users

These changes will slow down contaminated property redevelopment, decrease the number of contaminated sites cleaned up and adversely affect development project financing and scheduling. Because lenders often insist on entry

into the VCP and obtaining an NFA as conditions for financing, these changes will affect sellers and buyers of contaminated properties. Sites in VCP that are proceeding at a moderate pace due to insurance coverage or other factors must pick up the pace and move to NFA status.

How Project Developers Can Manage VCP Changes

Ecology understands the implications of these changes and their effects on contaminated property development but nevertheless implemented them to manage a program it believes is operating in “crisis” mode. Ultimately, one solution is the addition of sufficient Ecology staff for the VCP to process applications, review opinion requests and issue opinions in a timely and thorough manner. This will require a stable, secure source of funds less susceptible to being swept away by the legislature. Perkins Coie is working with Ecology, the development community, environmental consultants and others to develop solutions to address these issues. We are also working with clients on strategies to enter and move through the VCP as successfully as possible in the current environment.

In the meantime, new VCP applicants must manage their projects to account for a delay in entering the VCP. To ensure new applications are not rejected, VCP applicants would do well to retain experienced consultants and environmental counsel with strong relations and reputations with the agency to facilitate VCP entry and progress. Developers and other entities with complex sites that will no longer be accepted into the VCP should consult with consultants and environmental counsel for other options to achieve regulatory closure, such as formal oversight by Ecology or fully independent cleanup actions.

© 2016 Perkins Coie LLP

CONTACTS



Michael Dunning
Partner
Seattle
D +1.206.359.3464



Mark W. Schneider
Partner
Seattle
D +1.206.359.8627

Related Services

- [Environment and Natural Resources](#)
- [Real Estate & Land Use](#)
- [Construction](#)

© 2016 Perkins Coie LLP