

Compliance vs. Protectiveness, Variances, Professional Judgment

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How Does DEP Evaluate Protectiveness

- ▶ Three parts to protectiveness:
 - ▶ Does not allow for exposure of the contaminants to the environment including human exposure
 - ▶ The area that was remediated/being restricted is clearly identified
 - ▶ Compliance with the Tech Regs and ARRCs

If the remedy does not demonstrate all three parts, it is not protective

Protectiveness is not Always Synonymous with Compliance

- ▶ There are times when it is acceptable to not be in compliance with rules and guidance:
 - ▶ When a variance is submitted in accordance with N.J.A.C. 7:26E-1.7(a)
 - ▶ When a deviation is submitted for a guidance document

Some things are not negotiable (N.J.A.C. 7:26E-1.7(b))

N.J.A.C. 7:26E-1.7(b)

1. A regulatory timeframe, site-specific expedited timeframe, or mandatory timeframe;
2. A requirement to obtain or comply with a permit;
3. A requirement to submit a document;
4. A requirement to comply with a remediation standard;
5. A requirement to comply with a quality assurance laboratory requirement;
6. A requirement to obtain the Department's prior written approval;
7. The requirements of N.J.A.C. 7:26E-5.2(b); or
8. The requirement to not import hazardous waste as fill material, pursuant to N.J.A.C. 7:26E-5.2(f).

Variations from the Tech Regs

- ▶ Every variance is a review trigger and will be evaluated
- ▶ Many are reviewed and accepted without contacting the LSRP
- ▶ It is necessary to provide sufficient information to explain why a variance is protective
- ▶ Don't skimp on the information

Deficiencies

- ▶ When the Department asks for more information, it is to ensure:
 - ▶ that the record is complete
 - ▶ that the LSRP's professional judgment is clear

The majority of the time the Department agrees with an LSRP's conclusion after their professional judgment is explained fully

Most Common Deficiencies

- ▶ Failure to provide multiple lines of evidence for professional judgment
- ▶ Administrative errors in the Deed Notice, FA, and RAO
- ▶ Failure to complete the RI for all receptors
- ▶ Failure to completely delineate to the standards in the RA, extrapolation is not acceptable in the RA

Documentation of Independent Professional Judgment

What it is:

- ▶ documentation of the factors considered during decision making
- ▶ how those factors influenced decisions or actions
- ▶ a written discussion including all information identified and evaluated

What it is not:

A written statement that professional judgment was utilized without any supporting documentation or any explanation that focuses solely on cost

Examples of Professional Judgment Documentation

- ▶ Multiple lines of evidence
- ▶ Technical justification
- ▶ Detailed analysis
- ▶ Data evaluation
- ▶ Evaluation of receptors
- ▶ Evaluation of health and safety
- ▶ Long term effectiveness

Reminders

- ▶ Permit writer, inspector and the reviewer have no previous knowledge of the site
- ▶ Permit writer, inspector and the reviewer do not have copies of previous submittals - unless submitted through the portal
- ▶ Permit writer, inspector and the reviewer do not know what is going on at neighboring properties

Insufficient Justification

- ▶ Comment from the NTD:
 - ▶ According to information contained within the RAR dated September 2020, the contaminant plume is not delineated North and West of MW-X, West of MW-Y, and North of MW-Z.
- ▶ Response from the LSRP:
 - ▶ Based on my independent review as the LSRP, it is my professional judgment that the plume is horizontally delineated by monitoring wells MW-A, MW-B, MW-C, MW-D, and MW-E.

No other information was provided

Insufficient Documentation

- ▶ Comment from the NTD:
 - ▶ Prior to issuance of the Ground Water Remedial Action Permit (RAP), sampling of the potable wells at...is required
- ▶ Response from the LSRP:
 - ▶ A building is marked on tax assessment record for this parcel. Access was requested to sample the potable well at this property. However, access was not granted. All surrounding wells were sampled, specifically all potable wells located between the site and this lot were sampled. The sampling has indicated no impact of the site to the potable wells in the area and therefore a MNA ground water permit is appropriate.
- ▶ The LSRP response did not include the construction details for the potable wells

Sufficient Documentation

- ▶ The planned sub-slab soil gas (SSSG) sample could not be collected since the hammer drill was not capable of penetrating through more than 20-inches of concrete slab. No penetrations, cracks or other potential preferential pathways that might promote VI were identified during the initial or subsequent annual building surveys. The slab extends approximately 10-inches above ground surface based on measurements recorded from the outside of the building.
- ▶ Because SSSG collection was not practical, one near-slab soil gas (NSSG) sample was collected from within 5-feet of the northeast side of the building in. Since the VIG did not require multiple NSSG locations and due to the following factors, one NSSG was collected at that time:
 - ▶ The maintenance garage is adjacent/connected to the office on its southeast side of the office (Figure 1)
 - ▶ The space between the offices to the southwest is inaccessible, as it is only about 10 feet wide and utilities are present
 - ▶ The NSSG sample was located toward the northern corner of the office such that an additional NSSG sample along the front of building (northwest side) would have been redundant. Also, multiple utilities are present along that street.

Supporting Independent Professional Judgement

- ▶ Submissions should include:
 - ▶ Clear table of contents
 - ▶ Detailed information
 - ▶ Multiple lines of evidence
 - ▶ Copies of previous submittals or sections of submittals if relevant to your conclusion

Questions?