

Site Remediation Reform Act of 2009 Adopted Creates New Licensed Site Remediation Professional Program

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In February 2007, a group of stakeholders was convened to discuss ways to reform NJDEP's Site Remediation Program (SRP) that former DEP Commissioner (now EPA Administrator) Lisa Jackson described as "broken."

After two years of meetings, draft bills, committee hearings and language revisions the Site Remediation Reform Act of 2009 was adopted. The new legislation is expected to dramatically change the process of conducting remediation in New Jersey.

When the new program is implemented consultants will be licensed and authorized to conduct and complete remediation activities without the need for any approvals from DEP. As Licensed Site Remediation Professionals (LSRPs) take on new and existing cases, remediation should move forward without the massive delays caused by an overwhelmed DEP staff.

The basic premise of the LSRP program is that in the vast majority of cases remediation activities will continue to completion under the supervision of a LSRP without waiting for concurrence from DEP. Approval from DEP would only be required in a limited set of "direct oversight" cases or where the LSRP seeks to use a cleanup standard different from DEP's adopted standards. Other local, state and federal permit approvals will still be needed where applicable.

The new legislation also imposes new requirements for remediation at residential properties, schools and day care centers as well as a new permit program for capped sites and sites subject to deed notices.

LSRPs will issue Response Action Outcomes instead of NFAs

As the LSRP program is implemented DEP-issued No Further Action (NFA) determinations will be replaced by the LSRP-issued Response Action Outcome (RAO). On behalf of the New Jersey Builders Association I advocated for language that was incorporated into the legislation which will ensure that RAOs be afforded the same liability protections as NFAs including the Covenant Not To Sue (CNS). Once an RAO is issued by a LSRP, the RAO recipient will be deemed by law to automatically receive a CNS. Currently DEP includes a CNS when an NFA issued. To clarify the issue, the February 26, 2009 Committee Statement incorporates NJBA proposed language noting that:

“The bill would amend the liability provisions in the ‘Spill Compensation and Control Act’ to provide the same liability protection to recipients of a Response Action Outcome as is currently provided under the law to recipients of a No Further Action letter.”

Roles of DEP, LSRPs and the LSRP Board

In general, the division of responsibility can be summarized as follows:

DEP:

- establishes cleanup standards.
- establishes temporary licensing program and issues temporary licenses.
- adopts regulations and publishes guidance as to how remediation is conducted.
- screens submissions from LSRPs.
- audits RAOs issued by LSRPs.
- conducts direct oversight for “recalcitrant” cases.
- provides staff for LSRP Board.

LSRPs:

- oversee, supervise and implement remediation.
- continue with remediation without waiting for DEP approval, except for “direct oversight” cases.
- issue RAOs on completion of remediation.
- adhere to Code of Conduct.
- use best judgment where DEP rules and guidance are not directly applicable.

LSRP Board:

- establishes permanent licensing program.
- establishes and administers testing and continuing education programs.
- issues permanent licenses and renewals.
- audits LSRPs.
- investigates complaints against LSRPs.
- imposes penalties and license suspensions and revocations.

Screening By DEP

DEP will adopt regulations identifying what type of submissions will be required for screening by SRP staff. DEP’s intent is to provide form cover-sheets that would be prepared by the LSRP for each required submission. In some instances, based on review of the cover-sheet forms, DEP would focus on certain aspects of a submission that are of particular interest. In a few cases, DEP will assign case managers to assist LSRPs. Examples provided by DEP are Brownfield Development Areas (BDAs) and sites posing specific threats to resources.

RAO Audits -- Narrow grounds for overturning RAOs

DEP is required to audit at least 10% of RAOs issued by LSRPs. DEP’s authority to overturn an RAO is focused to only those situations where *“the department determines that the remedial action is not protective of public health, safety, or the environment”* or if there was a failure to

implement a required “presumptive remedy” and DEP could not determine that the remedy that had been implemented was nonetheless protective of public health, safety and the environment.

Expanded Guidance for LSRPs

In determining how to implement a remediation effort, LSRPs will be required to follow a series of Remedial Action Performance Standards (RAPS). The RAPS set forth a four tier hierarchy of what LSRPs should look to in determining whether a remedial approach is acceptable.

- First, the LSRP is to apply the soils and groundwater cleanup standards adopted by DEP and any building interior standards adopted by Department of Health and Senior Services.
- Second, the LSRP is to look to DEP’s Technical Regulations on Site Remediation, NJAC 7:26E (the Tech Regs) and regulations to be adopted establishing “presumptive remedies” and “mandatory timeframes”.
- Third, the LSRP is to apply DEP guidance published periodically. DEP has indicated that an effort will be made to work with LSRPs to identify additional guidance in the future.
- Finally, LSRPs are authorized to apply other relevant guidance where “there is no specific requirement” under DEP’s Tech Regs and where DEP’s guidance is “not appropriate or necessary” in the LSRP’s professional judgment. LSRPs must set forth justification for using such other relevant guidance.

LSRP Code of Conduct

In addition to such requirements later adopted by the LSRP Board, the legislation provides a code of professional conduct in 26 parts, to which each LSRP must adhere. Included in the Code of Conduct is the requirement that the LSRP immediately inform DEP if they become aware of any Immediate Environmental Concern (IEC) – generally conditions which have an immediate impact on human health or the environment such as contamination in a potable water well. Only LSRP’s who are responsible for conducting remediation, as compared to LSRPs conducting due diligence for prospective purchasers, must take steps to have DEP informed of any evidence of a discharge of which DEP is not aware.

LSRP Board

The implementation of the permanent licensing program and any enforcement actions directly against LSRPs under that program will be by a Board comprised of 13 members to be appointed by the Governor with consent of the State Senate. The membership includes six LSRPs, as well as representatives of the environmental community, business community, state geologist, DEP and an academic. The general requirement for the public, non-LSRP members is that they be “knowledgeable with respect to issues involving responding to discharges of hazardous substances.” DEP will provide staff for the Board, however, the Board will make final decisions on any adjudicatory proceedings regarding licensing. Timely appointment of the Board is critical to starting the permanent licensing program within 18 months.

LSRPs subject to enforcement actions by the LSRP Board.

LSRPs can be held responsible not only through suspension or revocation of the license, but also through civil and criminal penalties. The criminal penalties are imposed for violations which are “purposely, knowingly or recklessly”. A criminal penalty is a crime of the third degree and can include imprisonment and a fine of no less than \$5,000, nor more than \$75,000 per day. Civil penalties can increase from \$10,000 for the first violation to not more than \$20,000 for any subsequent violation.

Direct Oversight Cases

For a limited number of cases DEP will retain “direct oversight” and approve the remediation on a step-by-step basis including selection of the remedy. The general premise is that only certain “recalcitrant” parties will have their site subject to “direct oversight”. DEP estimates the number of “direct oversight” cases will gradually reach about 100 cases.

Sites which would become subject to “direct oversight” include those where the party responsible for undertaking the remediation has a “history of non compliance” including “at least two enforcement actions” during any five year period going forward. Enforcement actions prior to the legislation are not considered. “Enforcement actions” include only administrative orders, notice of civil administrative penalty and court orders, not notices of violation or notices of deficiency.

Failure to meet a mandatory timeframe or specific timeframe in a Department ACO or failure to complete a remedial investigation within the later of 10 years after the discharge was discovered and five years after the date of enactment of this legislation would also subject the site to “direct oversight”.

DEP also has discretion to conduct “direct oversight” for certain high priority sites. Sites with chromate chemical production waste, injury to one or more environmentally sensitive natural resources, sites where sediment containing PCBs, mercury, arsenic or dioxin is in a surface water or sites which are categorized as the highest priority under the ranking system to be developed by DEP.

Under “direct oversight” DEP approves each phase of remediation and DEP selects the remedy. The responsible party is required to conduct a feasibility study, and must have a remediation trust fund established to cover the estimated cost of remediation with disbursements from the fund preapproved by DEP. In “direct oversight” cases submissions will be made simultaneously to DEP and the responsible party and DEP may solicit public comments.

Implementation of LSRP Program.

The LSRP program is to be implemented in two phases. The first phase is a temporary program generally under DEP jurisdiction. The second phase will be the permanent program under the jurisdiction of the Board once it is fully constituted.

Both the temporary and permanent LSRP license will be issued to individuals, not to companies. Temporary licenses and permanent licenses can be as long as three years unless a shorter period is identified by DEP or the Board, respectively.

Temporary License Program

DEP has 90 days to establish guidelines to be published in the New Jersey Register for the submission of applications for temporary licenses. The legislation includes details as to who can qualify for the temporary license program. DEP may issue temporary licenses by publishing the list of names of the individuals approved.

Permanent License Program

The legislation requires that the Board adopt regulations for the permanent program within 18 months. Given that rule adoption can take as long as a year, the Board would need to be constituted early within the next six months to allow for rules to be proposed in a timely manner. The adoption of rules for the permanent program will include a provision defining when temporary licenses expire. The legislation includes detailed provisions for who can qualify to apply for a permanent license. In addition to those requirements the permanent licensee will need to pass a test to be developed by the Board.

Interim Rules

Interim Rules Proposed by DEP will be effective on filing with the Office of Administrative Law and will not be subject to a comment period. DEP has indicated its willingness to work with the regulated community prior to publishing the temporary rules.

Phase In for LSRPs

Once temporary licenses are issued by DEP all new cases will require a LSRP. The legislation requires that a LSRP be employed for all remediation cases within three years of the legislation's adoption.

As to current cases, DEP has indicated that its intent is to require approval for transferring cases from current oversight to the LSRP program. In the context of the voluntary cleanup program, since a memorandum of agreement (MOA) can be terminated at any point, DEP would be hard pressed to deny transfer to the LSRP program. For ISRA cases, UST cases and cases under a DEP ACO, permission from DEP would be required. Assistant Commissioner Irene Kropp has indicated that staff has been encouraged to approve such transfers.

Mandatory Timeframes

DEP is authorized to establish a series of timeframes by regulation for the completion of the various site remediation process steps, such as completion of a remediation investigation. Failure to meet mandatory timeframes will subject the responsible party to enforcement, increase the likelihood of the matter being transferred to "direct oversight" or may trigger DEP to increase scrutiny for each submission. The legislation provides mandatory extensions, such as for delay in obtaining a necessary permit from DEP, and permissive extensions, such as for delay in obtaining access to off-site property.

Presumptive Remedies

In response to concerns from various environmental groups and out of professed concern over the long term safety of the use of capping and other engineering controls at sites containing schools, daycare centers, or residential development, the legislation authorizes DEP to adopt

“presumptive remedies”. The “presumptive remedies” will be required above and beyond those remedies which are deemed necessary to “protect human health and the environment” for all schools, daycare centers and residential developments.

Initially, the presumptive remedies will be set forth in guidance, but DEP is required to adopt specific regulations. In concept, “presumptive remedies” would detail what type of engineering controls will be required based on a specific use. It is anticipated that specific, acceptable engineering controls will be set forth for each type of use.

If a LSRP can show that the “presumptive remedy” for a specific use is “impractical due to conditions at the site” or “that an alternative remedy may be equally protective over time as a presumption remedy” then an alternative presumptive remedy can be proposed and approved by DEP. The approval of an alternative presumptive remedy would be one of the exceptions to the general provision that LSRPs are not required to obtain DEP approval before moving forward.

Phase-in for Presumptive Remedies

The requirement for “Presumptive Remedies” will be phased in. Projects for which “remediation” has been initiated prior to the adoption of the law will not need to have “presumptive remedies.” Projects for which “remediation” is initiated within one year of the adoption of the act will need to comply with DEP guidelines for presumptive remedies. Thereafter, all uses involving daycare centers, schools and residential development will be required to implement the “presumptive remedies” to be established in regulations by DEP.

Acute Cleanup Standards

The legislation also authorizes DEP to prepare standards to deal with an “acute health and safety hazard” in the event of the failure of an engineering control. It is expected that these “acute” standards would be used to require a “hot spot” removal even when a capping plan that conforms with the “presumptive remedy” is employed.

Permit System for Capping.

DEP is authorized to adopt a permit program for use of “engineering controls” and “institutional controls” such as capping programs and deed notices. The permit program will include general permits and permits by rule. It is expected that the currently required biennial certification will be converted into a permit renewal application. DEP may require funding sources for certain types of managing and maintenance requirements. DEP has indicated that they would not require funding sources for most common capping programs.

Remedial Priority System

The legislation requires DEP to adopt a remedial priority system to rate sites by potential risk to human health and the environment. Such a ranking system has been under development by DEP for some time and is currently undergoing internal review within DEP. At this point it does not appear that such a ranking system would be ready for release to the public until next year.

Modification of the Statue of Limitations for cost recovery actions by the State

For some sites, the period of time within which the State can bring an action for cost recovery, including natural resource damages claims, was extended. Under the legislation, such claims

must be brought within three years of completion of the remedial action unless a longer period is allowed under a different statute. Previously, the three year period commenced when the remedial investigation was completed, again unless a longer period is allowed under a different statute.

Changed Dynamics

No doubt, the biggest change contemplated with the adoption of the LSRP program is the ability for cases to move forward without DEP approval on a step by step basis and for LSRPs to issue the final approval – Response Action Outcome (RAO). However, given that the LSRPs will be making decisions that would be subject to review by DEP and potential enforcement, it is reasonable to expect that LSRPs will take a conservative approach in developing and implementing remediation. Hence, there will be increased tension between the party paying for the remediation and the party's consultant when that consultant is the LSRP.

Some parties conducting remediation will choose to use a consultant who then works with a LSRP. In Massachusetts, where a similar program has been in place for many years, a market has developed for LSRPs who predominantly work with consultants who perform the remediation with the LSRP supervising their work. Such a market would allow smaller consulting firms or consultants who otherwise chose not to participate in the LSRP program to continue working in New Jersey.

In lending situations, some time may be required for confidence to be built into the system and reliance on an RAO, rather the current NFA. While the legislature has made clear that LSRP-issued RAOs have the equivalent impact on liability as current DEP-issued NFAs, some lenders may chose to seek a second opinion from another LSRP. Means of resolving potential conflicts between LSRPs will also need to be developed by the regulated community.

Finally, although DEP's regulations and guidance help provide direction for remediation efforts, there are many unique situations which require a certain amount of subjective interpretation and judgment. Individuals familiar with DEP's program and personnel will be increasingly important members of any compliance team.

Overall, the new legislation modifies many of the ways that site remediations will be handled by DEP. No doubt in many instances the new LSRP program will allow cases to move forward much more efficiently and in a timely manner. However, reform is still needed in the technical requirements DEP has adopted by regulation and in the manner by which compliance with the cleanup standards is assessed. Substantive reforms will likely be needed in these areas if the LSRP program is truly to be successful in moving cases through the process. Finally, many issues are to be addressed and regulations to be adopted by DEP and later by the Board. Ultimately, a major factor in whether the LSRP program will be successful will depend on whether those regulations allow for a system that meets the needs of the regulated community.