

Environmental Law

Watershed Date for N.J. Site Remediation: May 7, 2012

By Susan C. Karp

In just over two months, nearly every existing site remediation case pending before the New Jersey Department of Environmental Protection (NJDEP) will become subject to the 2009 Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq. The regulated community and NJDEP have been gearing up for this pivotal date since the 2009 reform legislation, which was the culmination of years of political and agency strategy, stakeholder meetings and white papers. All of these efforts have paved the way for the development of New Jersey's version of a semi-privatized site remediation program, relying on private consultants to oversee the cleanups languishing in a massive NJDEP administrative backlog. The reform act also establishes strict remediation timeframes and solidifies affirmative obligations for cleanups in response to a growing political concern

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that NJDEP was failing to adequately protect the environment.

In the three years since the reform act was passed, private consultants temporarily licensed under the law as "licensed site remediation professionals" (LSRP) have been both performing and signing off on new cleanups initiated after the reform act was enacted and older cleanups where the remediating party opted in to the LSRP program. During this interim period, NJDEP has been in so-called compliance assistance mode and, for the lion's share of cases, has been allowing responsible parties to move forward at a much slower pace without threats of penalty.

But the watershed date of May 7, 2012, which once seemed so far away, is nearing — the date when so many of the over 20,000 backlogged cases currently under NJDEP oversight must transition to the LSRP program. The effectiveness of the reform legislation will take years to evaluate, particularly given the dearth of new, well-financed brownfield transactions that should be able to take advantage of the new paradigm which, despite its demands, will allow cleanups to proceed without the delays of waiting for the state to review and dispute each phase of cleanup.

In the near term, parties involved in cleanups are focused on the immediate

implications of May 7, 2012, and what they need to do to avoid a regulatory misstep that exposes them to NJDEP's newly enhanced enforcement capabilities.

Retain an LSRP by May 7, 2012

By May 7, 2012, nearly all cleanups currently under NJDEP oversight must hire an LSRP, who will then assume the primary oversight role of the cleanup. LSRP retention occurs by submission of an LSRP "notice of retention or dismissal" form, identifying the LSRP. The form requires the applicant to state whether the LSRP is being retained to remediate and ultimately certify that the entire site is clean or just a particular area of contamination. This is an important distinction to be considered.

The shift in power from NJDEP case manager to LSRP creates a new dynamic between the environmental consultant and its customer, moving from a partnership based on trust and advocacy to one which has the potential to become adversarial. Under the reform act, the LSRP has new whistle-blower type obligations supported by significant financial penalties, loss of license and even imprisonment. But not all environmental consultants in the state are currently or will ever become licensed, and there are numerous consulting firms that do not have an LSRP on staff, leaving customers to make the business decision of whether to start over with a new consultant or pay a second firm that has an LSRP to oversee their already competent consultant.

Shopping for the right environmental consultant is now, perhaps more than ever,

critical to a cleanup, because the degree to which an LSRP is willing to use its professional judgment (as permitted under the reform act), in the face of confusing technical rules and NJDEP guidance documents may make the difference between an efficiently run case or a protracted, overly conservative and expensive cleanup. Careful consideration should also be given to using an LSRP in a transactional due-diligence setting; one of the few instances of invasive environmental investigation where an LSRP is not required. In general, buyers will want to use an LSRP who can investigate the site with the gravitas of the state and then see the matter through to closing, while sellers fear the reporting obligations of the LSRP, which could trigger cleanup obligations before a deal goes to closing.

Address Outdated Agreements

As customers around the state retain their LSRP, they should be re-evaluating the consultant's or their own template services agreements. The review should focus on making the terms consistent with the reform act and contractually creating protections for the client that the law may have taken away. For example, the LSRP assigned to a case must report discharges and other conditions, as well as deviations from remediation work plans, to NJDEP. Many LSRPs are expecting revisions to the standard confidentiality clause to allow for this self-reporting while customers want to secure the right to object to the obligations to report before a report is made. Customers also want LSRPs to notify them of any investigations of the LSRP being undertaken by NJDEP or the LSRP licensing board, since that can also trigger an audit of the LSRP's entire body of work under the reform act. Customers need to ensure that the consulting company has notified its insurance carriers where it is employing LSRPs to ensure that standard coverages afforded to employees of the firm apply to the new risks inherent to the LSRP role.

Likewise, parties to real estate transactions need to be aware that contractual provisions and milestones drafted prior to the enactment of the reform legislation may no longer be applicable. A buyer will no longer be obtaining a No Further Action

letter from NJDEP, rather the LSRP will be issuing the buyer a Response Action Outcome. Many contracts and insurance policies were not drafted in contemplation of an affirmative audit process by NJDEP. The reform legislation gives NJDEP the right to conduct such an audit up to three years after the issuance of this formal LSRP signoff.

Mandatory Deadlines; March 1, 2012

The reform legislation established four mandatory timeframes covering submissions to NJDEP of a Preliminary Assessment and Site Investigation report for matters subject to the Industrial Site Recovery Act or NJDEP's underground storage tank law; an initial Receptor Evaluation identifying the effects of contamination on nearby residential properties and schools, groundwater, potable water and indoor air; an Immediate Environmental Contaminant Source Control Report; and a Free Product Interim Remedial Measures Report. The mandatory timeframe for each of these submissions is March 1, 2012, for all cases initiated as of March 1, 2010, except for cleanups triggered after that date by any of the events set forth in N.J.A.C. 7:26C-2.2(b), in which case the submissions are due two years from the date of that event.

Failure to meet a mandatory timeframe requires NJDEP to take direct oversight from the responsible party, a result that NJDEP wants to ensure remediating parties do not strive for. Perhaps the most draconian consequence of direct oversight is the mandatory relinquishment of the right to make decisions about remedial strategy to the state, and the obligation of the remediating party to post a financial assurance in the full amount of the cleanup which the state can then use itself to perform the cleanup.

NJDEP is now issuing Compliance Assistance Alerts warning of the March 1, 2012, mandatory deadline and advising of NJDEP's right to assume direct oversight. There had been some indication from NJDEP that it would seek a method to defer taking direct oversight, but no such mechanism has yet been identified, at least not to the public.

DEP Staff Reassignments

The role of the NJDEP site remediation case manager has been phasing out over the last year and as of May 7, 2012, will become largely obsolete. While the regulated community has been enjoying NJDEP's compliance assistance mode, with case managers actually un-assigning themselves from the cases they once managed, most case managers have now been quietly reassigned to NJDEP's Bureau of Enforcement or to its document review and inspection teams. NJDEP has historically been lax on enforcement on all but the most egregious of site remediation violations. However, with hundreds of personnel moved to these new posts, and with LSRPs now performing what was once NJDEP's job, it is well within the realm of possibility that NJDEP will use its resources to effectuate much more aggressive enforcement initiatives.

DEP Ranking of Contaminated Sites

The reform legislation also compelled NJDEP to rank all of the sites on its Known Contaminated Site List within a year of passage of the law. NJDEP did not meet this deadline but the ranking is in progress, as NJDEP has confirmed in new boilerplate language that now appears in NJDEP correspondence. Under the reform legislation, cases that have high priority ranking permit NJDEP to conduct a more detailed review of documents submitted by the LSRP than would be otherwise conducted.

As with any major modification to a regulatory process, the final transition to LSRPs required by the Site Remediation Reform Act is being greeted with more trepidation than optimism. A long-awaited rule proposal issued last August, to make NJDEP's various environmental regulations consistent with the law, went well beyond the intent of the reform legislation and drew wide concern from industry groups, which was expressed during the rule's public comment period. If history repeats itself, the rules will pass with little change. While NJDEP positions itself in its new role, the regulated community is best advised to prepare itself by coming into compliance during these early stages of the state's full transition into the LSRP program. ■