

The NJDEP is killing the Licensed Site Remediation Professional Program (SRRA)

Legal Alert

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Other than fully remediated sites or sites close to full remediation that have languished in the NJDEP's queue awaiting issuance of a "No Further Action" approval, Flaster Greenberg continues to recommend keeping existing contaminated sites under the "old" No Further Action Program ^[1] instead of transferring the site to a Licensed Site Remediation Professional (LSRP) under the "new" system established by the Site Remediation Reform Act (SRRA).^[2] Two recent developments further support this recommendation.

First, the recent draft and interim guidance documents and forms issued by the NJDEP to instruct LSRP's on groundwater and free product contamination are seriously flawed. They provide only general guidance, do not establish a procedure for an LSRP to seek feedback from the NJDEP to be relied upon as "technical assistance" for site specific determinations, and do not provide objective criteria (unlike the Massachusetts Contingency Plan) on end points.

Second, despite court rulings over the past 25 years striking down guidance and guidance type documents issued by the NJDEP without following the public notice and comment requirements of the Administrative Procedures Act, the NJDEP, nonetheless, decided to implement many technical and procedural aspects of the SRRA by unilaterally issuing draft, interim or final guidance documents. In so doing, the NJDEP has also taken prior guidance documents such as the "Vapor Intrusion Guidance" issued in October 2005 and "finalized" that guidance document as part of the ever growing number of such documents issued by the NJDEP without following the Administrative Procedures Act since the November 4, 2009 effective date of the SRRA.

As in the past, a number of persons have become concerned that the guidance document process currently being followed by the NJDEP is not consistent with the Administrative Procedures Act, does not provide adequate opportunity for the public to comment on any proposed regulations, does not require the Agency to consider the comments provided by the public, and does not require the Agency to respond to the comments at the time of ruling adoption and explain the Agency's reasoning in accepting, modifying, or rejecting public comments. Many are also of the opinion that the guidance document process currently being followed by the NJDEP has been nothing more than an "end run" around the Administrative Procedures Act, and if continued, may find broader applications within the approximate 125 State agencies with rule making authority in New Jersey. The NJDEP would disagree, claiming that the SRRA expressly or impliedly authorized the NJDEP to issue technical guidance without following the Administrative Procedures Act. However, the NJDEP's argument has not been tested before the courts.

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Assembly Bill No. 2464 sponsored by John Burzichelli and Annette Quijano was introduced on March 4, 2010, and would specifically prohibit State agencies, except in emergencies, from using regulatory guidance documents unless the documents have been adopted as rule-making in accordance with the Administrative Procedures Act. On Monday, March 22, 2010, A-2464 was passed in the Assembly by a vote of 73 to 2 with 1 abstention. The Senate's Committee on State Government, Wagering, Tourism, Historic Preservation has recently received a companion Bill, S-1783, which was introduced in the Senate by Senator Oroho on March 15, 2010. When the committee next meets, it is not known at this time whether S-1783 will be on its agenda. If this bill should eventually become law, a currently unanswered question is whether it would invalidate all guidance documents previously issued by the NJDEP, including the more recent guidance documents ostensibly issued under authority of the SRRA, until such time as rule making takes place under the Administrative Procedures Act. This and other issues may eventually have to be resolved by the courts.

Until all of this uncertainty gets "sorted out", we are recommending that anyone considering transfer of an existing site case from the "old" No Further Action Program to a Licensed Site Remediation Professional should consider delaying that decision. Obviously, new sites need to comply with SRRA, and all sites with the mandatory deadlines and IEC requirements. However, change is needed in the approach taken by the NJDEP in the technical and procedural implementation of the LSRP program. It is hoped that a solution to these issues reflecting a better understanding of how to accomplish a far more effective system for site remediation and adequately protecting the environment will take place under the leadership of Commissioner Bob Martin

[1] However, a cost benefit analysis may result in a different recommendation for an existing site. It may make sense to hire an LSRP should there be a reason to proceed in a more timely or immediate fashion than being unattended to in the "NFA pipeline".

[2] Under the SRRA, sites newly entering the remediation program are required to use an LSRP. Obviously, the recommendation in this alert would not apply to that situation.

ATTORNEYS MENTIONED

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