

New "Site Remediation Reform Act" to revolutionize environmental remediation process in New Jersey

Legal Alert

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Legislation recently passed by the New Jersey Legislature and signed into law on May 7, 2009 known as the Site Remediation Reform Act ("SRRRA") promises to dramatically alter the cleanup process for contaminated sites in New Jersey while also holding out the potential of causing financial harm to those who cannot or choose not to comply with its requirements. The law, which imposes new procedures for new and newly discovered discharges commencing on November 7, 2009 and for existing open cases no later than May 7, 2012, is fashioned after laws in effect in Massachusetts and Connecticut. It is intended to remove an overwhelmed New Jersey Department of Environmental Protection from routine oversight of New Jersey's thousands of contaminated sites by delegating key portions of the supervision of the remediation process to private licensed environmental professionals called Licensed Site Remediation Professionals ("LSRP's").

In order to understand how the new law will affect the remediation process, it is useful to summarize how the existing system for remediation operates. Currently, parties responsible for the remediation of a contaminated site employ private environmental consultants to develop an investigation and cleanup strategy which the consultant advocates to the NJDEP. Except in matters involving regulated underground storage tanks, the environmental consultant does not need to have any particular experience or educational background and receives no license or certification from the NJDEP. The consultant may seek prior approval from the NJDEP case manager to perform the scope of work set forth or may do the work at the client's peril with the hope that the NJDEP will accept it as satisfactory after a report describing the work in question has been submitted to the case manager for review. Presently, most open cases which are being remediated have a case manager and it is the case manager and case supervisor who decide if the remediation has been completed and whether a Letter of No Further Action closing the case can be issued by the NJDEP.

With NJDEP resources being inadequate to oversee all of the Department's open cases, the new law seeks to reduce, but not eliminate the involvement of the NJDEP in the remediation process. Remediation consultants will now be required to possess substantial minimum education and levels of experience and by November 7, 2010 will need to take an exam formulated by a new Site Remediation Professional Licensing Board. On November 7, 2009, the use of LSRPs will begin and for one year there will be temporary licensing of LSRPs based upon education and experience alone. An LSRP may not be a salaried employee of the person for whom the remediation is being performed. Furthermore, the work completed by the LSRP will be randomly audited by the NJDEP and if found to be deficient, the LSRP will be subject to sanctions, including loss of licensure.

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As opposed to the current system where the consultant's primary function is often to serve as an advocate of the client seeking to convince the NJDEP to accept a low cost, at times inadequate cleanup, the new law establishes a role for the LSRP whereby his or her chief loyalty will no longer be to the client who is providing payment for the services rendered. The Act provides that, "A licensed site remediation professional's highest priority in the performance of professional services shall be the protection of public health and safety and the environment." Furthermore, when a LSRP identifies a condition which he or she identifies as constituting an immediate environmental concern, the LSRP must advise the party responsible for the remediation to notify the NJDEP and must also personally call in the condition to the NJDEP hotline.

It is the LSRP who is responsible for determining to what extent the contamination should be investigated and what form of remediation is appropriate. In doing so, the LSRP is required to follow the requirements of regulations and standards governing site assessment and remediation, is expected to adhere to timelines established by the statute and by the NJDEP, and must certify to the NJDEP that the work performed meets NJDEP requirements. At the conclusion of the process, the LSRP is to issue a "response action outcome" ("RAO") a new regulatory document designed to signify that a site has been remediated sufficiently that it is in compliance with all applicable statutes, rules, and regulations concerning the environment. The RAO, as well as the complete file of the LSRP, is required to be filed with the NJDEP at the same time that the RAO is issued to the party responsible for having conducted the remediation. The NJDEP will then have three years to review the contents of the LSRP's file and determine whether the remedial action is protective of public health or safety. If it determines that it is not sufficiently protective, the RAO will be invalidated.

There are, however, certain categories of sites that will continue under direct oversight by the NJDEP. They include sites when the site investigation has not been completed within ten years of the discovery of the discharge and the remediation has not been completed within five years of passage of the SRRA. The NJDEP must also assume direct oversight when there has been a failure to meet deadlines two or more times following passage of the Act. In certain other instances, the NJDEP has the discretion to assume direct oversight. When the NJDEP is in charge of a site, it is empowered to select the remedy and can mandate in many instances that the responsible party post a remediation funding source. If a site is under NJDEP direct oversight, all submissions by the LSRP must be sent to the NJDEP and the responsible party simultaneously meaning that the responsible party will have no opportunity to comment on the submission prior to it being sent to the NJDEP

At this point, the NJDEP is preparing regulations to implement the new law and the details as to how it will operate remain somewhat unsettled. Various issues can be expected to arise a party seeks to comply with the law. For example, a question e that will be faced by parties performing a cleanup is whether and when it will be advisable to engage a second consultant to seek to persuade the LSRP to engage in a particular course of action with respect to a site assessment or remediation. Another is whether parties, especially prospective buyers of formerly contaminated property, can treat the RAO as having finality when it remains subject to invalidation by the NJDEP within 3 years of issuance by an LSRP.

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A third issue that can arise is whether a prospective buyer should engage someone other than an LSRP to conduct a due diligence environmental assessment where the existing property owner is resistant to an inspection by an LSRP because the LSRP is duty-bound to report a condition which is discovered to the NJDEP. A fourth is which responsible party will hire and pay for the LSRP when there are multiple responsible parties at one site.

In many instances, it appears that the law will probably increase costs and cause uncertainty about whether closure by an LSRP is really closure. It will also cause financial hardship to those without the means to comply with its deadlines who are not eligible for governmental funding and who must seek payment from their insurance carriers or other responsible parties before starting the cleanup. However, for those with the financial means and willingness to comply, a more rapid closure of contaminated sites seems likely.

ATTORNEYS MENTIONED

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