

Will the NJDEP Listen to and Cooperate with Industry?

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BY STEPHEN W. SMITHSON, ESQ.
LOWENSTEIN SANDLER, P.C.

FOR THE BETTER PART OF THE LAST 20 YEARS, relations have been strained between industry and the State of New Jersey with regard to environmental issues. Legislative enactment in 1984 of the Environmental Conservation Recovery Act (ECRA) and in 1990 of the Clean Water Enforcement Act (CWEA) was seen by industry as particularly onerous and troubling. With the regulators and the regulated community taking adversarial positions, those were the bad old days.

Lately, however, there has been a real thawing of relations, with the New Jersey Legislature and the New Jersey Department of Environmental Protection (DEP) evidencing a willingness to listen, at least with regard to some environmental issues. Indeed, some have suggested that there is a return to cooperation between industry and the government. In many ways, the state has been more willing to listen to outside views. In other important ways, however, the state has been exceptionally resistant to changing its views.

For instance, the DEP has been working on a vapor intrusion guidance document for the past few years. Considering that the final guidance may call for rather direct, intrusive impacts on offsite neighbors, this will be a critically important document. COMMERCE magazine led the way in reporting on the DEP's preliminary thoughts, publishing "Vapor Intrusion: NJDEP Approach May Have Dire Consequences" in June 2004. Partly in reaction to that article, the DEP has since clarified, and scaled back, some of its more alarming proposals for addressing vapor intrusion. Nevertheless, the DEP is apparently still considering whether it should, and whether it has the legal authority to, require the imposition of deed notice restrictions on neighboring properties.

If the DEP pursues their course, it could be the "worst of times" all over again. Industry, however, remains of the view that the DEP does not have that authority, and that such a scheme likely would cause confused homeowners to initiate widespread litigation. For now, the DEP has continued to listen to these concerns. Perhaps, the DEP will address these concerns and the final guidance will turn out to be part of the "best of times" of productive



interaction between the DEP and industry.

This potential for good/bad developments extends beyond the vapor intrusion issue; indeed, it is evident throughout the entire Site Remediation Program. As an example, the DEP is justifiably proud that it has increased the number of No Further Action letters issued to roughly 3,000 last year. At the same time, however, the DEP opened roughly 3,600 new site remediation cases. Therefore, even with the increased productivity, the DEP still fell further behind. Thus, as of September 2004, the DEP had over 15,000 open site remediation cases, and little reasonable prospect of catching up under the status quo.

This is not to say, though, that the DEP has ignored the problem. Rather, it has responded to industry recommendations by implementing the Cleanup Star program, which is designed to decrease the DEP's overwhelming caseload by allowing recognized environmental firms to manage certain types of remediation. The Cleanup Star program is currently limited to minor sites with soils-only contamination, and the program should be expanded to involve more complex sites. In addition, the DEP's enforcement provisions in that program should be re-evaluated so that they do not serve as a disincentive to consultants using the program.

Similarly, the DEP should evaluate all of its current proposals with a view toward enacting regulatory schemes that it can actually manage. As it is, natural resource damages (NRD), vapor intrusion and the lowering of soils remediation standards all have had, or will have, the effect of increasing the DEP's regulatory burden and may further delay remediation of sites in the Site Remediation Program. ■

Stephen W. Smithson is counsel in the Environmental Law and Litigation Department of Lowenstein Sandler in Roseland. For more information, visit www.lowenstein.com.