

New NJDEP Regulations Require Public Outreach at Remediation Sites

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Introduction

Effective September 2, 2008, the New Jersey Department of Environmental Protection (NJDEP) adopted amendments to its Technical Requirements for Site Remediation (the Tech Regs)¹ compelling public notification of ongoing remedial action at sites subject to NJDEP oversight. Effective immediately for new cases, the Tech Regs create public notice obligations for parties responsible for conducting site investigation and/or cleanup.² Major provisions of the new rules include mandatory guidelines for identification of “sensitive populations,” notice requirements to owners and residents of property within 200 feet of cleanup sites, as well as opportunities for direct community involvement in remediation matters. Each requirement mandates compliance by specified deadlines and establishes civil penalties for non-compliance.

Though somewhat lengthy, the new rules offer few surprises to persons who have followed the NJDEP rulemaking process. Section 1.4 of the Tech Regs is nearly identical to the proposed amendments published by NJDEP in August 2007 despite extensive comments from various segments of interested parties. While the mandate to provide public notice of remediation activities may pose an additional burden on the regulated community, the adoption of these regulations is far from unexpected. Rather, the new rules are the natural result of events and policy decisions that, over the years, have gradually re-shaped the way NJDEP oversees the site remediation process.³ By formally adopting its public notice and outreach amendments - rather than relying on the regulated community’s voluntary action - NJDEP demonstrates its intent to lead on the issue of providing an opportunity for public involvement in environmental issues that can potentially impact the community.

The New Rules: N.J.A.C. 7:26E-1.4

The primary goal of the new public notification and outreach amendments is to foster early communication among all parties affected by the site remediation process. By requiring dissemination of information and creating a mechanism by which the public can raise questions and concerns about a site, the new rules are intended to help responsible parties anticipate and address issues in a proactive and cost effective manner, while at the same time building community trust and support for their cleanup efforts. To achieve this goal, the amendments implement the following requirements.

Early Identification of Affected Individuals and Resources

Prior to beginning the remedial investigation phase of a multi-phase or a single phase remedial action at a site,⁴ the party responsible for conducting the remedial action must make several determinations regarding the environs of the subject site. First, any and all affected sensitive receptors and resources located within 200 feet of the site boundaries must be identified. These populations and resources include residences, potable wells, schools (teaching grades K-12), child care facilities, public parks and playgrounds, surface waters, and Tier 1 well-head protection areas.⁵ A responsible party can comply with this requirement by completing NJDEP’s standard form “Sensitive Population and Resource Checklist.”⁶ In addition, the responsible party must determine whether the site is located in an Environmental Justice Petition neighborhood,⁷ and/or an area where the majority of property owners and residents primarily speak a language other than English. Finally, the responsible party must generate a scaled map, in both hard copy and electronic form, identifying the site location as well as the specific location of each identified sensitive population and resource.⁸

The required information must be submitted, at least two weeks prior to commencing the remedial investigation or single-phase remediation, in both paper and electronic form (CD or disk) to the NJDEP case manager, NJDEP's Office of Community Relations ("OCR"),⁹ the clerk of each municipality in which the contaminated site is located, and the designated local health official.¹⁰ The information submitted will assist both the responsible party and NJDEP in ensuring that the design and implementation of any remedial actions taken at the site will take into consideration the unique characteristics of these receptors and resources.

Providing Notice to the Public

Once the initial determinations mentioned above are completed, parties responsible for remediation must undertake a program of providing notice of remedial activities to the surrounding community members. Any such notice must be provided at least two weeks prior to initiating remedial investigation field activities or a single phase remediation by either: (1) posting a sign; or (2) sending individual letters to potentially affected persons in the vicinity of the subject site.

1) Notification by Signage

The regulations specify that any sign must be at least two feet by three feet in size, be printed in a large enough font to be legible from the sidewalk or street, and must include the following wording:

"Environmental Investigation/Cleanup In Progress at this Site"	
"For Further Information Contact"	[Remediator Name and Number] and
	[NJDEP OCR Number]
	[NJDEP/EPA site ID number] or
	[NJDEP hotline 877-WARNDEP if ID not available]
"Posted On"	[Posted Date]

If English is not the predominant language spoken in the area within 200 feet of the subject site, the sign must be printed in the language commonly spoken in the area. NJDEP does not direct where the sign is to be placed as long as it is legible to the public. However, local building codes may impose additional restrictions on the size and location of the sign. Thus, a responsible party should consult the local code (or other municipal official) to determine whether there are additional local requirements for public signage.

Within two weeks of erecting the sign, the responsible party must photograph the sign and submit it along with specified site information notice to: (i) the NJDEP case manager;¹¹ (ii) NJDEP's Office of Community Relations (OCR); (iii) the clerk of each municipality in which the contaminated site is located; and (iv) local health official(s). The site information notice includes: (i) the name and address of the site; (ii) the site tax blocks and lots; (iii) the NJDEP preferred ID number or EPA site ID number or, if neither of those are available, the NJDEP hotline number [877-WARNDEP (877-927-6330)];¹² (iv) a statement that contamination has been identified; (v) a brief, common language description of the type of contamination, the affected media and the actions being taken; (vi) contact information for the responsible party and the NJDEP OCR; and (vii) a statement warranting that the responsible party will provide copies of environmental reports to the municipality upon request.

Signs must be maintained in legible condition at all times, and must remain posted until the NJDEP issues a No Further Action and Covenant Not to Sue letter to the responsible party. The

responsible party may remove the sign prior to this time, but must, prior to doing so, substitute letter notices.

2) Notification by Letter¹³

Letters must be sent, by registered mail or using the certificate of mailing service to: (i) owners of all properties within 200 feet of the subject site's boundaries; (ii) tenants of these properties; and (iii) the administrator of each school and child day care center identified on the Sensitive Population and Resource Checklist previously prepared and submitted to NJDEP.¹⁴ Letters must include: (i) the name and address of the site; (ii) the tax blocks and lots; (iii) the NJDEP preferred ID number or the EPA site ID number or, if neither are available, the NJDEP hotline number [877-WARNDEP (877-927-6330)]; (iv) a statement that contamination has been identified; (v) a brief, common language description of the type of contamination, the affected media and the actions being taken; (vi) contact information for the responsible party and the NJDEP OCR; and (vii) a statement that the responsible party will provide copies of environmental reports to the municipality upon request, to all owners and residents of property located within 200 feet of the cleanup site boundary.

Property owners may be identified by contacting municipal authorities. Tenants of properties, however, may not be as easily identified. Property owners can provide this information, but may be hesitant to do so. If multi-tenanted properties have individual mailing addresses, the U.S. Postal Service may be of assistance in assuring that notices are delivered to property occupants.

A copy of the notice letter and a list of the notice recipients must be sent, both in paper and electronic form, to: (i) the NJDEP case manager; (ii) NJDEP's OCR; (iii) the clerk of each municipality in which the contaminated site is located; and (iv) the local health official(s).

Letters providing a status update on case must be resent every two years until the case is closed by issuance of a No Further Action letter.

3) Alternative Notification

If a responsible party determines that an alternative form of notification would better to achieve the objectives of NJDEP's public outreach program, an alternative plan can be submitted to the OCR for review and approval.

Special Situations

NJDEP has established additional requirements for those cases that potentially pose unique concerns to the public. As a result of a number of recent cases receiving considerable notoriety regarding the use of contaminated fill for site redevelopment,¹⁵ NJDEP now imposes additional notice obligations upon a person proposing to import contaminated fill in quantities in excess of that needed for site remediation. Notices of the use of contaminated fill must be sent by letter to: (i) all owners and tenants of property within 200 feet of the site boundary; (ii) the assigned case manager; (iii) the mayor of each municipality where the site is located; (iv) the county solid waste coordinator; and (v) local health official(s). These notices must be sent via certified mail, and must include a description of the proposed use, the amount of fill material and its level of contamination, as well as a plan for mitigating the risks associated with the fill material.

Additional requirements also are imposed in cases involving offsite migration of contamination. In such cases, notice must be distributed by fact sheet to all owners and tenants of properties located within 200 feet of the subject properties boundaries. The fact sheet must include the site name and address, the site tax block(s) and lot(s), the NJDEP Preferred ID number or EPA site identification number, or the NJDEP hotline phone number. In addition, the fact sheet must describe, *inter alia*, the commercial or industrial history of the site, the type and extent of contamination, its sources, a list of online resources offering information about the contaminants,

and the proposed mitigation plan. Initial fact sheets must be prepared and mailed within two weeks of the discovery of the offsite migration. Thereafter, within four weeks of discovery, the fact sheet must be published as display advertisements in local newspapers, and copies must be submitted to: (i) the NJDEP case manager; (ii) NJDEP's OCR; (iii) the clerk of each municipality in which the contaminated site is located; and (iv) local health official(s).

Public Outreach for Substantial Public Interest Sites

Under the new rules, NJDEP reserves the right to require parties to perform additional public outreach if a community demonstrates substantial interest in cleanup activities (as evidenced by a petition signed by twenty-five persons residing or working within 200 feet of the site or by written request from a municipal official). Demonstrated community interest triggers additional responsibilities for the remediating party, including publicizing and hosting public information sessions or public meetings, publishing notice of basic site information in the local paper, or establishing a local information repository.

Conclusion

NJDEP's objective in establishing mandatory public notice requirements is to increase transparency in site remediation cases, and, through increased early public participation, promote efficiencies in these cases to reduce the ultimate cost of remediation. While this is a laudable objective, it is too early to comment on how best to comply with the regulations or evaluate whether the desired results will be achieved. The new regulations raise a number of issues to be considered in developing a public notice program. At sites where the responsible party is not the current owner or tenant with unfettered discretion to utilize the site, signage may not be a viable option. Even where signs may be used, the responsible party must decide where to locate the sign. When using letters, the responsible party must carefully consider how to describe the site conditions and activities. As for the benefits, undoubtedly, in a certain number of cases where the type and scope of issues would have attracted public awareness and potential involvement regardless of mandatory early notification, efficiencies in both the implementation and cost of remediation will be enhanced via the NJDEP's new rules. However, in many cases where the nature of the issues would not have otherwise prompted public involvement, these new requirements will impose additional costs on responsible parties and place greater demands on limited public resources.

It is too early to evaluate whether the benefits to the public resulting from notice will outweigh the added private and public burdens. Providing notice in all cases may unnecessarily alarm the public where none is warranted. Given the technical nature of remediation cases and NJDEP's technically complex requirements for investigation and remediation, involvement of the public may confuse, rather than enlighten, the intended beneficiaries of the new regulations. If in fact the intended public benefit of the regulations is not attained, the increased cost to responsible parties will ultimately be viewed by the regulated community as being unwarranted.

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¹ N.J.A.C. 7:26E-1.4

² The new rules provide a one year grace period for sites where a remedial investigation was initiated prior to September 2, 2008.

³ The presence of thousands of sites in New Jersey subject to remedial action, the evolution of public participation in federal cleanup programs, the emergence of social justice concerns, and the notoriety of a number of cases where contaminated sites were deemed not to have been appropriately addressed have all contributed to a general trend toward increased public participation in the remediation process.

⁴ The vast majority of remedial actions consist of phased activities consisting of a site investigation, one or more remedial investigation phases, and ultimately the remedial action addressing the contamination previously identified at the site. Thus, the public outreach requirements typically will not be required at the onset of the activities at the subject site.

⁵ A list of well site protection areas is *available at* <http://www.state.nj.us/dep/njgs/geodata/dgs02-2md.htm>.

⁶ The Sensitive Population and Resource Checklist is *available at* http://www.nj.gov/dep/srp/guidance/public_notification/checklist.pdf.

⁷ Environmental Justice Petition neighborhoods are identified and *available at* <http://www.nj.gov/dep/ej>.

⁸ To assist in the creation of sensitive population and resource maps, the NJDEP provides guidance and links to internet mapping programs on its website, *available at* <http://www.state.nj.us/dep/GIS/newmapping.htm>.

⁹ OCR's address is as follows: Division of Remediation Support, New Jersey Department of Environmental Protection, 401 East State Street, 6th Floor, P.O. Box 413, Trenton, NJ 08625-0413, ATTN: Office of Community Relations.

¹⁰ The regulations do not specify a deadline for submittal of information for cases that had already entered the remedial investigation phase prior to September 2, 2008. The NJDEP's Office of Community Relations has advised that submittal of this information for this class of existing cases is not required due to the belief that existing cases under NJDEP oversight would have already identified sensitive receptors and resources.

¹¹ If a case manager has not been assigned to the case, documentation of compliance with this requirement must be included in the Site Investigation or Remedial Action Report submitted to NJDEP.

¹² The NJDEP Preferred ID number is *available at* <http://www.nj.gov/dep/srp/kcs-nj/>.

¹³ As in the instance of signs, if English is not the predominant language of the persons receiving letters, the letters must be written in the predominant language.

¹⁴ For existing cases which do not prepare the checklist, sensitive populations and resources must be identified if the public notice is made by letter.

¹⁵ See NJDEP, *DEP Orders Immediate Removal of PCB-Contaminated Concrete from Redevelopment Sites*, Press Release March 8, 2006, *available at* http://www.state.nj.us/dep/newsrel/2006/06_0013.htm.