

## Environmental Law

### Remedial Action Permits: One Size No Longer Fits All

By Norman W. Spindel

Remediation of contaminated sites in New Jersey has evolved over the past three decades through the implementation, by the New Jersey Department of Environmental Protection (NJDEP), of comprehensive regulations and guidance specifying how a site is to be investigated. The responsible party's objective in a site remediation case is the issuance of a "no further action" (NFA) letter by NJDEP, or a "response action outcome" (RAO) by a licensed site remediation professional under the recently enacted Site Remediation Reform Act (SRRA). Both of these outcomes signify that the condition of the property is deemed to be protective of the environment and human health and safety.

Over the past two decades, NJDEP has moved away from "one size fits all" cleanups, and now recognizes that the appropriate remedial response and other activities for a specific site are dependent, to some extent, upon the current and future anticipated use of the site. Accordingly, NJDEP has allowed "persons responsible for conducting the

remediation" (see N.J.A.C. 7:26C-1.3 for the broad definition of such person) of contaminated properties in New Jersey to utilize a "multi-tiered" cleanup scheme to address environmental contamination on a property.

So-called "unrestricted use" remediations, which would permit any type of current or future use of the property, would require that soil and groundwater contamination be addressed to achieve NJDEP's most stringent environmental cleanup criteria. The issuance of an "unrestricted" NFA letter or RAO signifies that, barring the later discovery of previously undetected contamination at the site, the responsible or remediating party has satisfied its remedial obligations under New Jersey law by meeting the most stringent applicable cleanup standards, and thus may "walk away" from the site.

In contrast, current and future uses of sites that do not meet the most stringent cleanup criteria would be restricted with regard to access to impacted soils or the use of contaminated groundwater. For soils that do not pose a threat to groundwater, the restrictions and controls fall into two categories. First, residual contamination at the property that exceeds NJDEP's most restrictive soil cleanup criteria (the "residential direct contact soil remediation standard," also known as

the RDCSRS) need only be identified on a deed notice filed with the appropriate county clerk or registrar. A deed notice is a form of "institutional control" defined in the SRRA as "a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time."

The second category of restrictions and controls applies to soils that exceed *both* the RDCSRS and the less restrictive nonresidential direct contact soil remediation standard. Here, additional engineering controls designed to "contain or stabilize contamination or ensure the effectiveness of a remedial action" by generally limiting human contact, are required. These engineering controls most commonly consist of covering ("capping") the more severely impacted soils with asphalt, concrete or clean soil, or fencing off the area of contamination to prevent contact with the contamination and to limit groundwater infiltration through the contaminated area.

For groundwater, NJDEP will permit less than complete remediation of contamination to applicable groundwater quality standards or site-specific standards established by the party conducting the remediation if, similar to deed restricted soils, the area of the impacted groundwater is publicly identified. Unlike a deed notice, however, which is prepared and recorded by the remediating party, NJDEP establishes this institutional control known as a "classification exception area" or CEA.

A person whose remediation of a site does not meet NJDEP's most restrictive cleanup criteria would receive a conditional NFA letter or a restricted-use or limited-restricted-use RAO. In this

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case, future environmental actions will be required and responsibility for the environmental condition of the site continues. The SRRA statutorily provides for a permitting program to establish and enforce the restrictions that must be imposed on properties that are not cleaned up to NJDEP's most restrictive standards.

### **Statutory Basis for Remedial Action Permits**

SRRA Section 19 requires NJDEP to establish a "permit program to regulate the operation, maintenance and inspection of engineering and institutional controls and related systems installed as part of a remedial action of a contaminated site" (N.J.S.A. 58:10C-19). The statute further requires that monitoring, operation and maintenance, and financial assurance obligations be imposed by a permit allowing the use of engineering and institutional controls. The obligation to establish financial assurance (commonly called the "remediation funding source") is waived, however, for: municipalities that undertake site remediations, persons who remediate their residential property, persons remediating day care centers or educational facilities, or the owner of a small business on his or her property. A "small business" owner is further defined by SRRA as a person who (i) did not acquire the property for development or redevelopment, (ii) for the last three tax years has not employed more than 50 full-time employees, and (iii) fits within the definition of "small business concern" under the Federal Small Business Act, 15 U.S.C. §631, et seq.

### **Current NJDEP Permitting Program**

NJDEP administers its remedial action permit program pursuant to its Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, Subchapter 7, and various forms found on the department's web-

site at: [www.nj.gov/dep/srp/srra/forms](http://www.nj.gov/dep/srp/srra/forms). Corresponding to the two major types of contamination NJDEP remedial program is concerned with, NJDEP has established separate remedial action permits for soils and groundwater. Application is made by submittal of the appropriate NJDEP form.

*Timing of the permit application and issuance.* Remedial action permits are to be issued prior to the issuance of the RAO or the NFA letter. NJDEP's practice is to issue the permit upon review of the application, not necessarily after its review of the comprehensive documentation detailing the full scope of the site investigation and remedial action. This raises the possibility that NJDEP's substantive review of the entire case file may result in a request for additional remedial action and the subsequent modification of the remedial action permit. The timing of this review and modification is uncertain; it could occur as much as three years after the issuance of an RAO, if that RAO undergoes a full audit as permitted by SRRA.

*Potential permittees.* In addition to providing that any person legally responsible for remediating a site pursuant to the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21, et seq., the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq., or the Industrial Site Recovery Act, N.J.S.A. 13:1K-6, et seq., a person who voluntarily or otherwise remediates a site can be a permittee subject to complying with the conditions of a permit. Moreover, NJDEP permits the transfer of a permit to a purchaser of property that is subject to a permit, or a tenant at such property, provided that the current permittee notifies NJDEP in advance of the transfer and documents that the transferee of the permit accepts responsibility for the permit conditions and is in compliance with the financial assurance requirements of the permit. See N.J.A.C. 7:26C-7.8.

*Contents of the application.* The form application prepared by NJDEP requires

the submittal of information regarding the identification of the site, the permittee, the remedial actions taken at site and the presence of any sensitive receptors in the area of the site. The type of permit requested and the proposed permit monitoring, maintenance and evaluation terms also must be specified. Finally, establishment of the appropriate financial assurance must be documented and the applicable permit fee must accompany the application. For remedial action permits for soils associated with a site remediation for which a deed notice is required, the deed notice must be prepared using NJDEP's standard form (see N.J.A.C. 7:26E, Appendix E) and recorded prior to submittal of the application. For groundwater remedial action permits, details of the CEA to be established for the site must be provided.

*The permit terms.* The precise permit terms are established either by NJDEP prior to issuing its NFA letter, or as approved by the licensed site remediation professional prior to issuing its RAO. Generally, the permit will require that all controls implemented at the site be maintained and that the effectiveness of such controls be monitored and evaluated on a regular basis. The permittee is required to submit biennial reports to NJDEP regarding the continued effectiveness of the controls and is further required to maintain financial assurance in an amount consistent with the projected costs of complying with the permit requirements to operate, maintain and inspect engineering controls specified by the permit.

In light of the fact that a substantial percentage of remediation cases are anticipated to be concluded without achieving NJDEP's most restrictive cleanup criteria, a person who is legally responsible for remediating, or otherwise has remediated a site, can expect to have a long-tail involvement with the site. As such, continued monetary expenditures and responsibility for a site can continue for decades after the actual site cleanup has concluded. ■