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HAZARDOUS WASTE

SITE REMEDIATION REFORM ACT

The authors of this article review New Jersey's newly enacted Site Remediation Reform Act, which they say marks yet another milestone in the evolution of the state's aggressive program requiring the remediation of contaminated sites. Due to the wide ranging scope of New Jersey's environmental remediation statutes and its history as one of the most heavily industrialized states in the country, the authors say it is not surprising there are tens of thousands of open site remediation cases in New Jersey. The primary objective of the new law is to streamline the state's oversight of environmental remediation projects and to eliminate the Department of Environmental Protection's enormous backlog by using private consultants to oversee the remediation of contaminated sites. The foundation of the Reform Act is the establishment of the licensed site remediation professional program. It is modeled on similar programs in Connecticut and Massachusetts.

New Jersey Enters a New Era in Its Contaminated Site Remediation Program

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On May 7, 2009, New Jersey Gov. Jon S. Corzine (D) signed into law the controversial Site Remediation Reform Act (Reform Act), which previously had been passed overwhelming by both the New

Jersey Senate and Assembly.¹ This legislation marks yet another milestone in the evolution of New Jersey's aggressive program requiring the remediation of con-

¹ "Governor Signs Legislation to Privatize Oversight of Cleanups in Bid to Ease Backlog," 40 ER 1144, 5/15/09.

taminated sites.² Currently, contaminated site cleanups in New Jersey generally are managed under the Site Remediation Program (SRP),³ under which DEP is responsible for reviewing and approving the investigatory and remedial activities proposed by the person responsible for the site cleanup.

Due to the wide ranging scope of New Jersey's environmental remediation statutes and its history as one of the most heavily industrialized states in the country, it is not surprising that there are tens of thousands of open site remediation cases in New Jersey, many of which involve complicated technical issues demanding significant input by DEP staff. Faced with an ever growing number of open cases that were an impediment to redevelopment and environmental improvement, in 2006, the regulated community began to engage in discussions with the DEP and state legislators seeking to identify ways in which the state cleanup program could be improved to benefit responsible parties by making the program more efficient while ensuring environmental protection would not be compromised.

According to its sponsors, the Reform Act's primary objective is to streamline the DEP's oversight of environmental remediation projects and to eliminate the DEP's enormous case load backlog by using private consultants to oversee the remediation of contaminated sites. Many observers fear this change will reduce the rigor of New Jersey's environmental program due to the decreased involvement of the governmental watchdog whose mission is to protect human health and the environment. The Reform Act does not eliminate meaningful DEP involvement in New Jersey's site remediation. DEP still has an important and critical role to play in future rulemaking and in various categories of cases.

Cognizant of the concerns voiced during the debate over the legislation, Corzine issued Executive Order No. 140 at the time he signed the Reform Act, which mandates that DEP take certain actions to ensure the protectiveness of the licensed site remediation professional program. As a result of these additional DEP responsibilities, and because the licensed site remediation professional must comply with all regulatory requirements applicable to a site's remediation, including but not limited to DEP's Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1, *et seq.* (the Tech Regs), it is unlikely that the fears of the opponents of the legislation will result, as discussed below. As is the case with many environmental programs, the collective experience of the regulated community over a long period of time will be the ultimate measure of the effectiveness of the Reform Act.

² New Jersey's landmark Environmental Cleanup Responsibility Act in 1983, N.J.S.A. 13:1K-6, *et seq.* (ECRA), pursuant to which the owner or operator of an industrial establishment is required to investigate and cleanup as necessary, its plant site upon the transfer of the plant assets or real property on which the plant is located or the cessation of plant operations, is one of the two cornerstones of the New Jersey Department of Environmental Protection's (DEP) authority to regulate the manner and degree to which contaminated sites are remediated. The other, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq.* (the Spill Act) enacted in 1976, is New Jersey's counterpart to the federal Comprehensive Environmental Response, Compensation, and Liability Act.

³ Cases involving contamination solely from underground storage tanks are overseen by DEP's Bureau of Underground Storage Tanks.

The Licensed Site Professional Program

The foundation of the Reform Act is the establishment of the licensed site remediation professional program. The act requires any person responsible for remediation of a property pursuant to the New Jersey Industrial Site Recovery Act the successor to ECRA, or the Spill Act, or a tank regulated under the New Jersey Underground Storage of Hazardous Substances Act⁴ shall utilize a licensed site remediation professional for the matter.⁵

For all cases that commence on or after Nov. 3, 2009, the licensed site remediation professional (LSRP) must be used. For cases that exist prior to this date, an LSRP is not required. However, all New Jersey Industrial Site Recovery Act, Spill Act, and underground storage tank cases that remain open after May 7, 2012 must transition to the LSRP program.

The requirement to engage an LSRP applies only to site remediation projects. An LSRP is not required to conduct or oversee preliminary assessments or site investigations performed during pre-acquisition environmental due diligence.⁶

An LSRP must have legislatively-mandated educational and professional experience, including at least a bachelor's degree in science or an engineering degree in a site remediation-related field; at least eight years of full-time environmental remediation experience, with at least five of those years in New Jersey (three being immediately prior to his/her licensing as an LSRP); and a minimum of 5,000 hours of experience immediately prior to his/her licensing.⁷ Licenses will be issued by a newly created licensing board to (1) certify all site remediation submissions to DEP and (2) certify that the remediation complies with all laws and regulations, and protects public health, safety, and the environment.⁸

LSRPs will be licensed and subject to oversight by a newly-established 13-member licensing board comprised of the DEP Commissioner, the State Geologist, six LSRPs, three environmentalists, (one of whom must be an LSRP), a representative of the business community familiar with site remediation issues, and an academic community member who also is knowledgeable of site remediation issues.⁹ The board will be required to develop rules related to the issuance, suspension and revocation of licenses, the training of LSRPs, and the issuance of sanctions against LSRPs.¹⁰ These rules are to be finalized within 18 months of the May 7, 2009, effective date of the Reform Act.¹¹ To allow the LSRP to begin in the short term, DEP is required to establish an interim licensing program for LSRPs.¹²

DEP has been gearing up for the LSRP program for months and has set an aggressive schedule for itself to accomplish the transition to the LSRP program.¹³ It currently plans to issue license applications, establish li-

⁴ N.J.S.A. 58:10A-21 *et seq.*

⁵ P.L. 2009, ch. 60; section 30.a.

⁶ *Id.* at § 2.

⁷ *Id.* at § 7.d.

⁸ *Id.* at § 14(a), (d).

⁹ *Id.* at § 3(b).

¹⁰ *Id.* at § 6.

¹¹ *Id.* at § 7.

¹² *Id.* at § 13(a).

¹³ The time line for DEP's actions to fully implement the Reform Act is posted on the department's website at http://www.nj.gov/dep/srp/stakeholders/lsp_timeline.pdf. The reader

censing fees, and establish criteria for the approval and denial of license applications within three months of the effective date of the legislation. Within six months, DEP intends to publish interim rules for the LSRP program and to propose for public comment rules for the establishment and operation of the board. DEP anticipates it will take a full year to evaluate public comment on these rules and to finalize them so that the board may begin its operation within the mandated 18 months.

Modeled on Similar State Programs. Modeled on similar programs in Connecticut and Massachusetts, the Reform Act requires a LSRP to certify to DEP that all remedial actions and submissions in connection with a given remediation project comply with the technical regulations and are “consistent with all applicable remediation requirements adopted by the department.”¹⁴ Included in these requirements are the DEP site remediation standards¹⁵, building interior maximum contaminant levels established by the Department of Human Health and Senior Services for licensed child care centers or other educational purposes,¹⁶ and presumptive remedies adopted by DEP pursuant to the Reform Act. The requirement to meet established interior criteria may impose obligations on a responsible party heretofore not required under the currently existing Site Remediation Program.¹⁷ Moreover, the assessment, investigation, and other remedial action necessary to complete a case must meet mandatory time frames to be adopted by DEP.¹⁸

Upon completion of the site remediation, the LSRP will issue to the responsible party a Response Action Outcome (RAO) and file the document with DEP, certifying that the remedial action was conducted in accordance with state standards and that the site does not pose a threat to human health and safety and the environment.¹⁹ The issuance of a Response Action Outcome by an LSRP replaces the issuance of a no further action letter by DEP, and is intended to constitute administrative closure.²⁰

The act further provides that a Response Action Outcome constitutes, by operation of law, a covenant not to sue from the state.²¹ This covenant shall remain in effect for as long as the condition(s) certified in the Response Action Outcome remain in effect. In instances where DEP determines such conditions no longer exist, the responsible party will be given a reasonable period of time to correct the deficiencies. Failure to do so will result in revocation of the covenant not to sue.²²

is encouraged to check this website frequently for updates to DEP’s schedule of activities.

¹⁴ The responsible party also must certify all document submissions. P.L. 2009, ch. 60; § 14.a.

¹⁵ N.J.A.C. 7:26D, *et seq.*

¹⁶ N.J.A.C. 10:122-5.2(i).

¹⁷ Building interior remediation, other than with respect to vapor intrusion of organic compounds, generally has not been required by the Site Remediation Program.

¹⁸ P.L. 2009, ch 60; § 14.c(2)(b). DEP currently plans to adopt both its presumptive remedies and mandatory time frames by May 2010.

¹⁹ The responsible party also must certify all documents submitted to DEP. *Id.* at § 14.

²⁰ Except in very limited circumstances, such as remediation projects completed before the full phase-in of the Reform Act, DEP no longer will issue NFA letters.

²¹ P.L. 2009, ch 60; § 31.

²² *Id.*

Protectiveness of Environment, Human Health. Despite opponents’ fears that legislation will result in a reduction of environmental protectiveness, especially in cases involving sensitive populations and environmental receptors, the Reform Act contains a number of significant safeguards.²³

One of the most significant changes to the state’s remedial program is in Section 47 of the Reform Act, which amends the Brownfield and Contaminated Sites Remediation Act’s provisions establishing remediation standards.²⁴ For any case initiated on or after May 7, 2010, the responsible party *must* achieve either DEP’s unrestricted use remedial use standard or a presumptive remedy to be established by DEP at an area of concern or site where its post-remediation use will be for residential use; the operation of a licensed child care facility, a private, public or charter school; or for other utilization by sensitive populations. For any case initiated between May 7, 2009, and May 7, 2010, DEP *may* require these types of end uses to meet unrestricted use remedial standards or the presumptive remedies to be adopted by DEP.

Presumptive remedies are to be based on the historic and future use of the site, the nature and extent of the contamination to be addressed, and other factors determined by DEP to be relevant. Presumptive remedies may include engineering and/or institutional controls. Finally, the responsible party may submit for DEP approval an alternative to the applicable presumptive remedy if the party deems the designated remedy “impractical due to site conditions” or the alternative would be “equally protective over time” as the presumptive remedy. However, the legislation does not appear to require that DEP approve the alternative proposal.

DEP plans to adopt its final presumptive remedies within a year of the Reform Act’s enactment.

DEP has the authority to invalidate a Response Action Outcome if it determines the remedial action performed by the LSRP is not protective of human health, safety, or the environment, or the LSRP did not implement the prescribed presumptive remedy at the site unless the remedy in fact utilized is determined by the DEP to be as protective as the otherwise applicable standard required at the site.

DEP must establish a permit program to regulate the use of engineering and institutional controls at sites not remediated to its most stringent remediation standards.²⁵ This likely will impose more rigorous requirements upon the use of these controls than currently exist. DEP is given the authority to require the posting of financial assurance to ensure the future effectiveness of such controls.²⁶ Whether this will incentivize responsible parties to remediate sites to DEP’s most stringent remediation standards, thus maximizing environmental protection, remains to be seen.

While DEP’s current remedial program has sought to require responsible parties to perform specified remedial actions within specified time frames via oversight

²³ Moreover, to address the remaining concerns of opponents following the final modification and adoption of the legislation, Corzine’s Executive Order No. 140 imposes additional obligations upon DEP to ensure that environmental protectiveness is not compromised by the new program.

²⁴ N.J.S.A. 58:10B-12.

²⁵ P.L. 2009, ch. 60; § 19.a.

²⁶ *Id.* at § 19.b.

documents or specific letters, the enormous case load burdening DEP staff has effectively prevented these time frames from being enforced.

Mandatory Time Frames. A significant modification to the current state remedial program will be the adoption by DEP of mandatory time frames for the LSRP to accomplish various components of a site remediation or where specific conditions exist. In addition to establishing mandatory time frames for the basic components of remedial action (preliminary assessment, site and remedial investigations and remedial action), the legislation requires time frames be set for receptor evaluations, ongoing contamination source control, performance of interim remedial measures or actions to address conditions of immediate environmental concern, and the completion of the site remediation.²⁷ While DEP is authorized to grant extensions to mandatory time frames, the circumstances in which extensions may be granted are specified, thereby limiting the DEP's discretion.²⁸

Whereas the new legislation substitutes the LSRP's decisionmaking for DEP's traditional oversight function, the Reform Act does not eliminate its oversight role in the cleanup of the properties. DEP is to "inspect all documents and information" submitted by the LSRP "upon receipt," and may "provide additional review" if the LSRP:²⁹ (1) has not exercised due care and independent judgment in performing his/her duties; (2) acts outside his/her professional competency; (3) has not corrected deficiencies in submittals previously identified by DEP; or (4) generally has not acted to protect public health, safety or the environment; or where the remedial case:³⁰ (1) involves a brownfield development, chromate contamination, PCB, mercury, arsenic or dioxin sediment impact, or any other natural resource impact, (2) has the highest priority ranking under a ranking system to be developed,³¹ (3) is of substantial public interest, (4) requires issuance of an DEP permit, or (5) involves a proposal for an alternative or site-specific cleanup standard.

DEP has a legislatively mandated obligation to perform additional review of all documents submitted under the LSRP program for sites that: (1) pose a "significant detrimental impact" on public health, safety, or the environment; (2) are located in a "low-income community of color" that has a disproportionately higher percentage of contaminated sites and permitted discharges than exist in other communities; (3) potentially impact a school, licensed child care facility or other sensitive population; or (4) use state monies.³²

Moreover, Executive Order No. 140 requires the licensing board to review at least one submission of ev-

ery LSRP in its legislatively mandated obligation to annually audit 10 percent of LSRPs, and further requires that DEP, in carrying out its review functions, pay particular attention to sites involving groundwater contamination or where future uses may be residential or educationally related, including recreation areas.

In addition to this "review" function, DEP has audit authority. With limited exceptions, the act requires that any such audit be conducted by DEP within three years of the date the Response Action Outcome was filed.³³ DEP has the authority to invalidate an RAO if it determines the remedial action performed by the LSRP is not protective of human health, safety, or the environment, or the LSRP did not implement the prescribed presumptive remedy at the site unless DEP determines the remedy utilized is as protective as the otherwise applicable remedy required at the site.³⁴

Finally, the act requires DEP to directly oversee specific types of cases, including those where the responsible party has a history of noncompliance or failing to meet mandatory or otherwise imposed remedial time frames, or where a pre-existing remedial case has not been concluded within 10 years of the enactment of the Reform Act or the remedial investigation has not been completed within the five years of enactment.³⁵ For "direct oversight cases," DEP must review and approve or deny all LSRP submissions, and will select the remedial action based on a feasibility study prepared by the LSRP.³⁶ The responsible party will be required to establish a remediation trust fund to cover remediation costs for all sites subject to direct DEP oversight and must also prepare a public participation plan subject to DEP approval.³⁷

Miscellaneous Provisions

The Reform Act abolishes the New Jersey Industrial Site Recovery Act remediation agreements issued by DEP, which allow a transaction to transfer an industrial establishment or real property prior to DEP's approval of a remedial action work plan approval. In place of these agreements, the Reform Act provides that remediation certifications may be submitted by the LSRP to DEP. This new submittal must contain the estimated cost of the site remediation, a certification by the responsible party that it is responsible for the site remediation under the Industrial Site Recovery Act and that such remediation will be performed in accord with the Industrial Site Recovery Act and other DEP requirements, documentation of the establishment of a remediation funding source equal to the estimated remediation cost, and documentation that all DEP fees have been paid.³⁸ This amendment to the New Jersey Industrial Site Recovery Act becomes effective Nov. 3, 2009.

²⁷ *Id.* at § 28.

²⁸ *Id.*

²⁹ P.L. 2009, ch. 60; § 21.a.

³⁰ *Id.* at § 21.c.

³¹ DEP plans to finalize its ranking system procedure by May 2010. All contaminated sites in the state will be given a rank, and a database containing this information will be established and maintained by DEP. Sites are to be ranked based on factors chosen by DEP, including the level of risk posed to human health, safety, or the environment; the duration of the ongoing site remediation; and the site's economic impact upon the community and surrounding properties. DEP is to establish a database of this information. *Id.* at § 39.

³² *Id.* at § 21.b.

³³ Exceptions are for previously undisclosed contamination not addressed by the Response Action Outcome or cases in which the licensing board has investigated the LSRP or suspended or revoked the professional's license. *Id.* at § 25.

³⁴ P.L. 2009, ch 60; §§ 21.f, 22.

³⁵ Ironically, as DEP increasingly exercises the reach of this mandatory claw back of its direct oversight, the less likely it will be that the Legislature's objective to expedite site cleanups will be achieved. Nonetheless, Executive Order No. 140 directs DEP to develop guidelines by July 7 for the exercise of this power.

³⁶ *Id.* at § 27(c).

³⁷ *Id.* at § 27.c(4).

³⁸ *Id.* at § 34.e.

The Brownfield and Contaminated Sites Remediation Act's requirement to maintain a remediation funding source during the pendency of a remediation case also has been amended. This provision, which also becomes effective Nov. 3, 2009, adds letters of credit as a fifth permissible form of satisfying a responsible party's obligation to maintain financial assurance.³⁹

Observations/Conclusions

It is likely that the result of the legislation will be a "mixed-bag" for the regulated community responsible for site remediations, environmentalists, and community organizations that fear that the new LSRP program will result in less environmental remediation and development interest in the state. As is the case with all new regulatory programs, it is unlikely that supporters ultimately will be completely satisfied with the "new world order" ushered in by the legislation. Similarly, the dire consequences predicted by the opponents of the legislation are unlikely to be realized.

Despite the shifting of the roles of DEP and environmental consultants, DEP still will play a significant role in shaping the future of the environmental cleanup of New Jersey. DEP's development and deployment of a myriad of new procedural and substantive regulatory requirements governing future site remedial actions will have a profound impact on how the LSRP program works and its consequences.

The development of a system to rank all remediation sites and the placement of this information of a publicly available website will increase the transparency of site remediations, potentially leading to increased community involvement.⁴⁰

Finally, the adoption of presumptive remedies for sites whose future use will involve sensitive populations, including residential and educational uses, could preclude the cost-effective development of many urban brownfield and other contaminated sites if the use of engineering and institutional controls is limited or prohibited.

Undoubtedly, site remediations will be expedited due to the elimination, in many cases, of the need to await DEP review of technical information and approval of remedial activities. However, while the shortening of a case should create cost-savings for the responsible party, the manner in which LSRPs may approach cases

may have the opposite result. Because all cases are subject to audit, and such audits could lead to the revocation of an LSRP's license if the licensing authority finds that the LSRP has not complied with all applicable requirements, an LSRP's decisionmaking likely will be affected by this risk of losing its professional license.

Therefore, LSRPs may be inclined to be conservative in their actions by undertaking a scope of work that will involve as much or more work than would be required under historic state oversight. This could lead to greater costs to the regulated community than might otherwise have been incurred under traditional DEP oversight. Given this likelihood, the new legislation may foster, at least initially, a change in the traditional consultant-client relationship where the environmental consultant was the advocate for the responsible party with the DEP being the judge of the case performance. In the future, LSRPs will have both of these roles in most cases and may be viewed by the client in a more adversarial light.

How other stakeholders in a site's remediation will view and react to the new paradigm also is unclear.

In cases where the responsible party is no longer the site owner, a current site owner may feel compelled to be more directly and actively involved in the contemporaneous monitoring and commenting on the remediation of its site now that DEP will not play this role. Similarly, the demise of a governmentally issued no further action letter may pose concerns for lenders who oftentimes have relied on this governmental "seal of approval." Lenders also may feel compelled in the future to more actively audit the remediation of a site, which is the collateral for a loan. Finally, the "privatizing" of the state site remediation program may compel the federal government to become more actively involved in more sites in New Jersey than under the former paradigm of DEP oversight.

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The opinions expressed here do not represent those of BNA, which welcomes other points of view.

³⁹ *Id.* at § 43.b. Other alternatives include self-guarantees demonstrable by a documentation of certain financial conditions specified by the DEP, a line of credit, a fully-funded trust or a line of credit.

⁴⁰ This database will complement the public outreach requirements set forth in Section 1.4 of the Tech Regs, N.J.A.C. 7:26E-1.4, now in effect.