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## Environmental Law

### Site Remediation Program Goes Public

NJDEP plans to codify its public outreach program in remediation cases

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Historically, the public has not been extensively involved in remediation cases overseen by the New Jersey Site Department of Environmental Protection (NJDEP). Recently, however, widespread press coverage following the discovery of unacceptably high levels of mercury at Kiddie Kollege, a Franklin Township daycare center built on the unremediated site of a thermometer manufacturer, and the use of PCB-contaminated construction debris from the former Ford Motor Company facility in Edison as fill at off-site redevelopment properties, has put the issue of public involvement in site remediation and redevelopment matters into a spotlight.

In an effort to address the concerns raised by the public in the Kiddie Kollege and Ford Motor cases, requirements for public notification and participation in site remediation cases have been developed both by NJDEP guidance and legislative action in the last

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few years. In 2005, after NJDEP's Site Remediation and Waste Management Program (SRWM) held a series of meetings of interested stakeholders to discuss improving public participation in site remediation cases, an internal SRWM task force issued draft recommendations to improve public access to site remediation information and public involvement in remediation cases. Thereafter, SRWM's Office of Community Relations issued guidance for the providing of public notice by responsible parties in remediation cases. In August 2006, amendments to the Brownfield and Contaminated Site Remediation Act were enacted. N.J.S.A. 58:10B-24.1-24.5. Included in the legislation was a directive to NJDEP to develop regulatory requirements applicable to the remediation cases.

In response, on Aug. 6, 2007, NJDEP proposed amendment of Section 1.4 of its Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1.1, et seq., (Tech Regs) to codify its public outreach program. 39 N.J.R. 2687(a). The key elements of NJDEP's proposal include the following.

*Initial identification of potentially affected populations and resources.* At least two weeks prior to initiation of a remedial investigation or implementation of a single-phase remediation, the responsible party must submit to

NJDEP, the clerk of the municipality wherein the subject site is located and the local health official a standard form "Sensitive Population and Resource Checklist" identifying "sensitive populations and resources" within 200 feet of the site boundaries, including residences, schools below the high school level, child care facilities, public parks and playgrounds, Tier 1 well-head protection areas and surface waters, and Environmental Justice Petition neighborhoods. See [www.nj.gov/dep/sro/community](http://www.nj.gov/dep/sro/community). The checklist must be accompanied by a scaled map showing the location of the site and the sensitive populations and resources.

*Provision of public notice.* Contemporaneously, individual notice must be given to the owners and occupants of all properties and the administrator of each school and child care facility within the 200-foot area. If by letter, the notice must provide identifying information about the site, including the address and NJDEP ID number, a brief description of the site condition, the remedial actions to be taken, contact information, and that environmental reports will be provided to the municipality upon request. Thereafter, follow-up letters must be sent every two years until a final No Further Action (NFA) letter is issued by NJDEP. Copies of the

letters must be submitted to the governmental officials who received the Sensitive Population and Resource Checklist.

If notice is provided by signage, clearly visible, legible signs must be erected at least two weeks prior to the commencement of field activities and must remain in place until an NFA Letter is issued. At a minimum, signs must be at least two feet by three feet, include the phrases "Environmental Investigation/Cleanup In Progress At This Site" and "For Further Information Contact [name and telephone numbers for the person conducting the remediation] and the NJDEP Office of Community Relations (1-800-253-5647)" and indicate the date the sign was posted. The responsible party also will be required to send a photograph of the sign as part of future environmental reports delivered to the NJDEP case manager, the NJDEP Office of Community Relations, the municipal clerk and the designated local health official.

*Contaminated fill notification.* To avoid a repeat of the Ford Motor Company situation, additional notice must be given to the mayor of the municipality in which the site is located and the county solid waste coordinator in cases where contaminated fill will be used for redevelopment, rather than remedial, purposes. The notice must include a description of the proposed use and quantity of the contaminated fill, contaminant concentrations, exposure reduction or elimination measures, and a schedule for the importation and use of the fill material.

*Sites where contamination migrates off site.* Because these sites pose additional concerns for the public due to the fact that potential impacts of contamination may be more widespread, NJDEP requires preparation of a fact sheet identifying the site's industrial history, the contaminants of concern and proposed response/remediation activities, contact information, and the date of the issuance of the fact sheet. The fact sheet must be published in a local paper, and distributed to owners and tenants of property within

200 feet of the site within four weeks of the discovery of the offsite condition. Within four weeks of the delineation of the full extent of the offsite condition, the fact sheet must be updated and recirculated.

*Substantial public interest sites.* In cases where a significantly high degree of public interest is evidenced by a petition signed by 25 persons residing or working within 200 feet of the site or by written request from a municipal official, the responsible party must develop additional public outreach by: 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.

NJDEP has revised the table at N.J.A.C. 7:26C-10.4(c)2 to incorporate its public notice and outreach requirements into its "Grace Period" program. Whereas failure to comply with specific requirements of the new program are generally classified as "minor" and are eligible for a 30-day cure period, a number of the new requirements are designated "non-minor" and carry penalty assessments of \$8,000. These requirements include: (1) failure to notify NJDEP of contamination associated with a previously unreported discharge or of "immediate environmental concern" conditions, (2) failure to provide initial notice of remediation activities, (3) failure to send additional notification of excess fill use, and (4) failure to implement additional public outreach as directed by NJDEP.

Persons currently implementing remedial actions must comply with the public notice and outreach requirements within one year of the effective date of the final rule. Because NJDEP has established a 60-day public comment period, these rules are not likely to be finalized until late 2007 or early 2008. Persons currently involved in ongoing cases would be well advised, however, to begin preparations for compliance.

While, in theory, public involvement in site remediation and redevelopment is beneficial, such involvement may, in fact, produce unwelcome and undesired

results, particularly in regard to the voluntary redevelopment, revitalization and environmental protection of contaminated sites in New Jersey. Public involvement may cause further delays in NJDEP's processing of remedial cases — delays that will only exacerbate an already too-lengthy regulatory process. In turn, these delays will, in most cases, increase the cost of site remediations. For ISRA and Spill Act cases not involving redevelopment, this result, while not welcomed by the responsible party, is not likely to cause the remediation of the property to be abandoned. However, in Brownfields cases, where the remediating party is not legally responsible for the remediation, increased public participation and the associated project delays may force developers to abandon or revise their projects to account for the increased costs associated with such delays. Moreover, the dissemination of increased information, which is likely to be highly technical and therefore difficult for most people to understand, may create unnecessarily negative public perceptions of these sites and the remedial actions to be implemented. In such cases, increased public participation may mean increased difficulty in getting community buy-in for redevelopment, again resulting in developers/investors abandoning these sites rather than face substantial delays or potential litigation. This unfortunately will be contrary to SRWM's goal of achieving effective remediation of sites to protect human health and the environment, and the state's goal of readapting its old industrial properties to modern, economically viable uses.

It is still too early to tell what the actual implications of SRWM's public participation initiatives will be. If properly implemented to balance the concerns of the general public with the technical and economic considerations associated with site remediations, New Jersey's citizens will benefit from this evolving program. If a proper balance is not struck however, neither an improvement in the state's environmental or economic condition is likely to be achieved ■