

Environmental Law

License Site Professional Program Is Coming

Time delays and staff challenges require addressing

By James Stewart

On April 15, New Jersey Department of Environmental Protection (NJDEP) Commissioner Lisa Jackson and Assistant Commissioner Irene Kropp testified before a joint hearing of the Senate Environment and Assembly Environment and Solid Waste Committees regarding delays and challenges facing the NJDEP Site Remediation Program. As Commissioner Jackson testified, there are now more than 20,000 cases in the Site Remediation Program, which overwhelm the NJDEP's current staff and budget for addressing them. Without changes, either in staffing, funding or otherwise, sites subject to the Site Remediation Program will continue to languish.

To address this situation, Assistant Commissioner Kropp proposed a series of measures at the joint hearing of April 15. One of those measures was to establish a program for licensing environmental consultants — a Licensed Site Professional (LSP) Program.

On June 5, Senator Bob Smith introduced *S.1897*, which authorizes NJDEP's proposed changes to the Site Remediation Program, including its LSP program. *S.1897* identifies who may be LSP's, establishes their qualifications, provides their testing, licensing and code of con

Stewart is a Director in the Environmental Law Department of Lowenstein Sandler in Roseland.

duct, and defines their role in site remediations.

Provisions for Licensed Site Professionals

The Act delegates to NJDEP the establishment of standards for education, training and experience of LSPs. The Act requires that NJDEP conduct an examination to certify that an LSP possesses sufficient knowledge of state regulations, standards and requirements applicable to site remediation to be licensed.

The Act also provides that each license shall be valid for a term of three years.

Temporary LSPs

The Act recognizes that it will take time for NJDEP to develop and implement the LSP program. In the interim, *S.1897* has provisions for temporary licensing of LSPs. The Act anticipates the applications for temporary LSP licenses will be submitted to the NJDEP within three months after the effective date of *S.1897*.

Those seeking a temporary license as an LSP must have qualifications; the same qualifications for full LSPs plus one additional requirement. The temporary LSP applicant must have one of the following seven professional certifications: (a) a certified hazardous materials manager from the Institute of Hazardous Materials Management; (b) certified groundwater professional from

the National Groundwater Association; (c) licensed professional engineer from the National Council of Examiners for Engineers; (d) licensed professional geologist from any state's licensing board; (e) certified environmental professional from the Academy of Board of Certified Environmental Professionals; (f) qualified environmental professional from the Institute of Professional Environmental Practice; or (g) state licensed to performed remediation work from a licensing program that NJDEP determines is comparable to its LSP program.

In addition, an applicant for a temporary LSP license must show that she has sufficient site remediation experience, including providing a list of site remediation projects on which she has worked as the manager of the site within the last 10 years and a list of site remediation projects that she has conducted within New Jersey during the last five years under NJDEP oversight.

LSP Role in Site Remediation

S.1897 provides that within 90 days of its effective date, any submissions concerning the remediation of a contaminated site must be signed and certified by an LSP. The LSP certification required under the Act certifies that the work was performed, that the LSP managed, supervised or performed the work and that the work and the submission conform to the technical requirements for site remediation regulations.

How much an LSP must work with, or independently of, NJDEP depends on

the ranking of the site. *S.1897* establishes a four-tier ranking system for contaminated sites. Each tier allows for differing levels of NJDEP and LSP involvement.

Tier 1 and Tier 2 Sites

A site must be placed in Tier 1 in three situations. The first is if the responsible party has a history of non-compliance with environmental statutes and regulations as shown by their receipt of multiple formal enforcements actions issued by NJDEP over a four-year time period. The second is if the responsible party has repeatedly failed to meet the remediation time frames established by NJDEP's rules and regulations or an administrative or court order. The third is if the responsible party has failed to complete a remedial investigation of the entire site within 10 years after the discovery of the discharge and has failed to complete a remedial investigation for the entire site to NJDEP's satisfaction two years after the effective date of *S.1897*.

S.1897 establishes five types of sites to be designated as Tier 2 sites. Tier 2 sites are those sites that: (1) pose a significant detrimental impact on the public health, safety and the environment based on a receptor evaluation; (2) are within a brownfield development area or other economic development priority area; (3) affect a licensed childcare facility, school or other sensitive population; (4) are subject to federal oversight; or (5) are in an environmentally sensitive area or a high priority economic development.

For a Tier 1 or Tier 2 site, all remediation related documents must be submitted, signed and certified by an LSP. The LSP must submit a preliminary assessment, a site investigation report, a receptor evaluation, a remedial investigation workplan, a remedial investigation report and a remedial action workplan, a remedial action report and progress report to NJDEP. NJDEP must review and approve the documents submitted by the LSP. NJDEP selects the remedial action for Tier 1 sites. At Tier 1 sites the LSP provides all the required submissions to the Department and the responsible party simultaneously. And finally for Tier 1 sites, the responsible party must establish

a remediation funding source and NJDEP approves all disbursements of funds from that funding source.

Tier 3 and Tier 4 Sites

S.1897 defines Tier 4 sites as those involving the remediation of an unregulated heating oil tank if the remediation does not pose an immediate environmental concern, groundwater does not threaten a potable well, groundwater contamination has not migrated off of the UST site boundary, or there is no vapor intrusion concern in a building. All sites that are not Tier 1, Tier or Tier 4 are classified as Tier 3 sites under the Act. One may anticipate that the majority of contaminated sites will fall within Tier 3.

For Tier 3 sites, the LSP must submit all documents concerning the remediation. The Act provides that for Tier 3 sites NJDEP will develop requirements for screening documents and certifications. For each Tier 3 site, NJDEP will review the screening documents and certifications submitted by the LSP, and on the basis of that review it shall issue a no further action letter.

For Tier 4 sites, documents must be submitted by an LSP or a certified subsurface evaluator. The Act anticipates that NJDEP will identify check lists and certifications required in addition to the remedial action report for Tier 4 sites. NJDEP will review the check lists and certifications submitted, and on the basis of that review will issue no further action letters.

Audits of Tier 3 or Tier 4 Sites

For Tier 3 or Tier 4 sites, NJDEP will review the screening documents or check lists and certifications submitted for each site. If, based on that review, NJDEP determines that the LSP or certified subsurface evaluator did not comply with technical requirements for site remediation; NJDEP may conduct a more detailed field audit of the site, and a more comprehensive review of the documents submitted and of the site conditions. If NJDEP's field audit does not satisfy it that the site has been addressed properly, NJDEP may require additional

remediation activities and impose deadlines for this additional work. In addition, if the Department has previously issued a no further action letter, the Department may revoke the no further action letter based on the results of the field audit.

In additional, *S.1897* provides that an LSP may be audited by NJDEP at least once during the three-year licensing period. LSPs are required to cooperate with NJDEP in any audit, and to preserve all data, documents and information concerning site remediation activities for at least 10 years after receipt a no further action letter.

Code of Conduct and Discipline

The code of conduct contains several new obligations for LSPs. One of these new obligations is the reporting obligations that the Act imposes on LSPs directly. If the LSP forms the independent judgment that a discharge meets the definition in the Act of an immediate environmental concern, the LSP must verbally advise the client of the need to notify NJDEP of the discharge and must itself immediately notify the Department of the discharge. That Act also provides that if the LSP makes the independent judgment that data or circumstances require notification to NJDEP, then the LSP must notify the client of the existence of that condition and notify NJDEP. It is not clear whether this provision expands any existing obligation to report to NJDEP to now include LSPs.

In addition, *S.1897* contains at least three circumstances in which an LSP has a duty to notify the client in writing. The first is if the LSP learns that the client has taken action that significantly deviates from any scope of workplan or report that the LSP has prepared. The second is if, subsequent to the completion of a report, LSP learns material facts that are either contrary to or significantly different from those in the complete report. The third is if the LSP learns of facts or circumstance significantly different from those contained in a report completed by prior LSP.

The Act also identifies conflict of interest situations that LSPs must avoid. *S.1897* provides that an LSP may not

accept compensation for professional services pertaining to a site from more than one person having significantly conflicting or adverse interests, unless there is full disclosure and waiver by all clients.

The Act sets out generalized standards of care for LSPs with regard to their performance. For example, *S.1897* provides that LSPs must act with reasonable care and diligence and use knowledge and skill ordinarily exercised by LSPs in good standing practicing in the state. The Act also prohibits LSPs from providing services outside their areas of professional competency. LSPs

are required to exercise independent judgment, and to hold paramount the protection of public health safety and the environment in the performance of their services.

In addition to NJDEP's authority to license LSPs, the Act also gives it the authority to discipline LSPs. NJDEP may revoke or suspend the license of an LSP and may enforce its authority over LSPs through civil actions, administrative orders and actions for civil or administrative penalties.

This Act broadens NJDEP's authority over those performing site reme-

diations. For the first time, NJDEP has authority to license and discipline LSPs. In addition, this Act will impose additional reporting obligations and a new code of conduct on LSPs. This increased regulatory authority is the price for getting more speedy resolution of site remediations. If these changes conclude a site remediation within a reasonable time, the additional regulation may be worth it. If sites continue to languish in the Site Remediation Program, then the Act will only have increased the regulatory burden on parties trying to address contaminated sites in New Jersey. ■