

Update on the Law

GOVERNOR SIGNS LAW ADDRESSING REMEDIATION OF CONTAMINATED PROPERTIES

The New Jersey Site Remediation Reform Act

On May 7, 2009 Governor Corzine signed the Site Remediation Reform Act (SRRA) into law. The SRRA is the most significant piece of environmental legislation since the 1997 Brownfield and Contaminated Site Remediation Act. One of the apparent purposes of the SRRA is to expedite the remediation of sites throughout the state while serving as a measure to clear the current backlog of cases in the NJDEP Site Remediation Program. The SRRA essentially privatizes certain aspects of the clean-up process by placing the responsibility for most remediation in the hands of consultants who will be licensed under the SRRA.

The Licensed Site Remediation Professional

The SRRA creates a program that licenses environmental consultants and contractors as a Licensed Site Remediation Professional (LSRP). In most circumstances, an LSRP will be permitted to sign and certify reports during the investigation and remediation of a site. In all but a limited type of case, the LSRP will be responsible for investigating and selecting the remedy for a site and conducting the remediation in accordance with NJDEP regulations without the need for prior approval from the NJDEP. In lieu of the No Further Action letter (NFA), which the NJDEP presently issues to signify that site remediation is complete, the LSRP will issue a Response Action Outcome (RAO). Like the NFA, the RAO will, by operation of law, also constitute a covenant not to sue, protecting the site owner from further enforcement actions by the NJDEP for the contamination being remediated. During the course of the investigation and remediation, the LSRP will submit investigative documents and reports to the NJDEP, which the NJDEP will inspect with the option to conduct a more detailed review. The NJDEP will also audit the LSRP's work for a period of three years. The NJDEP is required to audit at least 10% of all documents submitted by an LSRP annually. Entities presently under NJDEP oversight will have up to three years to transfer to the LSRP program.

Under the SRRA the NJDEP is to establish a temporary licensing program for the LSRPs within three months and issue interim regulations within six months. The interim regulations will be in effect for a period of 18 months.

After the LSRP program becomes operational, parties subject to the Industrial Site Remediation Act (ISRA), which governs the transfer of certain commercial and industrial properties, will come under the LSRP program. This will allow a transaction to close with an LSRP Remediation Certification. This includes the LSRP's evaluation of the appropriate financial assurance as well as certification that the assurance has been established. As with other remedial actions, the LSRP certified Remedial Action Workplan will be sufficient and the RAO will replace the NFA.

NJDEP Retained Sites

The NJDEP will retain primary oversight responsibility where the person responsible for the remediation: 1) has a history of noncompliance with remediation laws and regulations, 2) has failed to meet a mandated or expedited deadline as established by the NJDEP or court order, or 3) has failed to complete the remedial investigation of an entire site within 10 years after discovery of the discharge and has failed to complete the investigation within 5 years of the enactment of the SRRA. The NJDEP may elect to maintain oversight where the site contamination includes chromate waste; where the NJDEP determines that more than one environmentally sensitive natural resource has been injured by contamination from the site; where the site has contributed to PCB, mercury, arsenic or dioxin contamination to the sediments of a body of surface water, or where the site is in the highest priority of the NJDEP's new site ranking system.

Other Aspects of the SRRA

In addition to the LSRP program, the SRRA also requires the NJDEP to establish a new site ranking system to prioritize remediation sites within a year of the law's enactment. DEP may choose to retain oversight responsibilities of some of the highest ranked sites instead of relying on LSRPs.

The NJDEP is also to establish "presumptive remedies" for the remediation of schools, day care facilities and residential properties. Certain exceptions will be available on a case-by-case basis.

The Spill Act is modified in terms of what constitutes an innocent purchaser, so that LSRP-certified work is considered equivalent to that overseen and approved by the NJDEP.

The NJDEP is to establish a program for providing permits for institutional and engineering controls. The program will provide for specific financial assurance requirements. In addition, financial assurances for site remediation can include a letter of credit.

Executive Order # 140

Simultaneous with the signing of the SRRA, Governor Corzine signed Executive Order #140 (EO). This order requires the NJDEP to file annual reports on the progress of the LSRP program, and to post all documents submitted by an LSRP on the internet. These actions are geared towards increased transparency of the program. In addition, the EO requires the NJDEP to increase its level of oversight where sites have groundwater that is contaminated above groundwater standards or where the site is to be used for educational or residential purposes. The

EO also requires that the NJDEP's review of 10% of all documents submitted by the LSRPs shall include at least one review of case documents submitted by every LSRP.

Conclusion

The SRRA is intended to expedite the remediation of contaminated sites throughout the state and to improve a process that has often been fraught with delays due to an overburdened NJDEP. Similar programs have been successfully implemented in other states and it is the expectation that the ultimate result will be an improved process to remediate sites in New Jersey. If it is implemented in the manner intended, it will surely benefit the business community as well as the health and welfare of the people of the state.

DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, PC (www.dbnjlaw.com) is a full service law firm in New Jersey which provides a broad range of legal services, including the representation of clients in environmental matters. For additional information about the matters in this bulletin or in the firm's environmental practice, please contact Steven A. Kunzman, Esq. who heads our Environmental Department. skunzman@newjerseylaw.net

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