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Overview of May 7, 2012 Comprehensive Revisions to the NJ Site Remediation Program Regulations*

On May 7, 2012, the NJDEP published final rules that comprehensively revise its Site Remediation Program Regulations to coincide with the date for full implementation of the licensed site remediation professional (LSRP) program. MGKF has prepared the following brief summary highlighting some of the principal *new* provisions of these regulations:

Who and Which Cases are Covered:

The regulations specify the criteria for determining which persons are obligated to remediate a site, when the obligation to remediate is triggered, and the requirements for retaining a LSRP and registering the case with the NJDEP. With limited exceptions (e.g., unregulated heating oil tanks), remediation of all sites is required to proceed under LSRP oversight and without prior NJDEP approval; special rules apply where remediation is occurring under the federal RCRA corrective action program or the site is listed on the National Priorities List under the federal Superfund law.

Guidance and Deviations:

NJDEP has issued many guidance documents since the enactment of SRRRA which LSRPs are required to follow unless a deviation can be justified under the criteria in the new regulations. The justification must be in writing in the next relevant submittal made to NJDEP. There is no requirement that the deviation be approved, however, all submittals may be reviewed by NJDEP and every response action outcome (RAO) is subject to audit, which could result lead to rejection of a RAO based on an inadequately unjustified deviation. Note that deviations differ from variances, which apply to departures from regulations (as opposed to guidance documents). Variances are addressed below.

Revisions to Public Notification Requirements:

The new regulations provide some additional flexibility to the public notification requirements. Now that the LSRP will be the primary point of contact for a remediation and expected to field public inquiries, the required submission to DEP of specific site information has been removed, and DEP contact information is no longer required on posted signs. Specifications for the required size, format and content of public notification signs, letters and fact sheets have also been removed to allow greater discretion to the LSRP to determine how best to convey site information to the public.

Mandatory and Regulatory Time Frames:

New mandatory and regulatory timeframes (deadlines) have been adopted for the completion of the remedial investigation (RI) and remedial action (RA) and are added to the time frames which already exist for completing a preliminary assessment (PA), site investigation (SI), and for addressing immediate environmental concerns. A table summarizing the applicable time frames for PAs, SIs, RIs, and RAs can be found [here](#).

New Fee Requirements:

The new regulations complete the transition from the traditional payment of NJDEP oversight costs to a framework where the person responsible for conducting the remediation will now pay one or more fixed fees. The primary fees are: (1) an annual remediation fee that varies for \$450 to \$13,700 depending on the number of areas of concern and types of contaminated media and will be adjusted annually based on budgeted program costs and (2) remedial action permit application and annual permit fees.

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* This is meant to be a brief overview of certain highlights of these regulations and is not intended to be a complete summary of all rule changes. The complete rule-making package should be consulted in all instances.

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**New Fee Requirements (cont'd):**

Traditional oversight fees will continue to apply to "direct oversight" cases (discussed below) and special circumstances requiring agency oversight, (e.g., vapor intrusion cases). The first annual remediation fee is due June 20, 2012 for all active sites that entered the LSRP program on or before May 7, 2012, with future payment dates varying based on the county where the site is located.

Remediation Funding Source and Financial Assurance Revisions:

The most significant changes to the financial assurance requirements affect ISRA matters – the remediation funding source which previously covered the cost of the remedial action, will now have to include the cost of monitoring and maintenance of engineering and institutional controls, NJDEP fees and oversight costs and not only the cost of the remedial action.

Rescission and Invalidation of Response Action Outcomes (RAOs):

In addition to the existing provisions identifying circumstances under which the NJDEP will invalidate a RAO issued by a LSRP (or a NJDEP-issued no further action letter), new requirements for the rescission of RAOs by LSRPs were added. Both actions are primarily grounded in a finding that the remedial action is not protective of public health, safety or the environment, which in turn is premised upon the occurrence of any of twelve conditions spelled out in the regulations (among those conditions are identification of a discharge that should have been but was not addressed, remediation standard changes greater than an order of magnitude, inconsistency between the scope of the remediation and the RAO, etc.)

Remedial Action Permits:

The provisions governing the remedial action permit, which is required for any engineering or institutional control remedy as an administrative mechanism to ensure compliance with periodic monitoring, maintenance and reporting requirements, were largely unchanged in the new revisions. An exception is that new provisions were added to require

that remedial action permits be obtained for engineering and institutional controls that were approved before the new permit program went into effect in November 2009. Those permits must be applied for by the earlier of May 7, 2014 or within 2 years of the submission of the most recent biennial certification submitted prior to that date.

Enforcement:

NJDEP has developed a new table of base penalties for the violation of over 250 separate regulatory provisions that will be applied in enforcing the revised SRP regulations. The agency's response to comments on the new enforcement provisions rejected claims that the penalty revisions were excessive and makes clear that these provisions apply to the party responsible for performing the remediation, not the LSRP, and that reliance on the judgment of the LSRP is not a defense.

Direct Oversight:

The direct oversight regulations, which address the criteria that will determine which of the limited universe of cases will fall under NJDEP's direct oversight were largely unchanged. Circumstances triggering mandatory DEP direct oversight include the failure by the person responsible for conducting the remediation to meet mandatory timeframes or a schedule in an administrative or court order, and where such person has a history of noncompliance, as spelled out in the regulations or has failed to complete by May 7, 2014 a remedial investigation for a site where the discharge was discovered prior to May 7, 1999. The Department can invoke discretionary direct oversight when certain other site characteristics described in the regulations are present.

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**Direct Oversight (cont'd):**

Being placed under direct oversight requires DEP review and approval of each document submitted by an LSRP, a trust fund for financial assurance, and the preparation and submission of a feasibility study to the Department for approval, with the Department (rather than the responsible party) selecting the remedial action.

Linear Construction Projects:

New requirements and fees are set out in the regulations for persons engaged in “linear construction projects” – typically projects involving the construction, maintenance or modification of roadways, railroads or utilities. Remediation triggered by these projects was traditionally handled in the same manner as any other remediation, but the new regulations provide a streamlined process using an LSRP for oversight. A technical guidance document specific to linear construction projects was also issued by DEP in January 2012.

Deed Notice Form Changes:

The regulations contain a revised model deed notice form reflecting the replacement of the case manager with the LSRP, the new remedial action permit requirements, and a number of other revisions.

Revisions to the Tech Regs:

The regulations governing the Technical Requirements for Site Remediation (Tech Regs) underwent a major overhaul intended to make them more performance-based and many of the technical details were removed and placed in guidance documents developed with stakeholder input (see Guidance and Deviations” above). Some of the more significant revision to the remaining Tech Regs are as follows:

- **Variance Requirements:** The criteria for when a variance from a Tech Reg requirement is appropriate have been clarified, including submission of certain information to NJDEP prior to varying from the technical requirement. Prior approval by NJDEP is still not required, although NJDEP cautions that it may question a variance as late as the auditing process after

a response action outcome (RAO) is issued.

- **Receptor Evaluation:** Unlike other Tech Reg requirements, NJDEP felt that the provisions governing receptor evaluations should remain largely prescriptive (versus performance based). New provisions for updating the receptor evaluation during the course of the remediation process were added.
- **Ecological Evaluation:** The baseline ecological evaluation was eliminated from the site investigation requirements, however, an ecological evaluation is still required to determine if a more in-depth ecological investigation/risk assessments is required in connection with the remedial investigation.
- **Preliminary Assessment (PA) and Site Investigation (SI):** Consistent with the overall approach, many of the area-specific investigation requirements are removed and will be addressed in guidance. A new section is added to address PA/SI requirements for diffuse anthropogenic pollutants in soil, and separate SI requirements are included for building interiors, off-site sources, landfills and historic fill.
- **Remedial Investigation (RI):** The much-criticized full horizontal and vertical delineation requirements for soil and groundwater remain, although many other prescriptive investigation requirements are removed and replaced with performance goals. In addition to RI requirements for soil, groundwater and surface water, separate requirements apply to landfills, historic fill (see below) and ecological receptors. A RI workplan is no longer required to be submitted to NJDEP (except in certain state-lead federal cases).

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- **Sites with historic fill:** NJDEP has modified the technical requirements related to historic fill, especially those related to area wide historic fill which transcends a site's boundary. For the latter, the remediator is exempt from the requirement to distribute a fact sheet notifying neighbors of contaminant migration beyond the site's boundary, soil delineation beyond the property boundary is not required and, if groundwater is found to be impacted by fill constituents, no further groundwater investigation is required, and a CEA which encompasses the site's boundary will be established. Additionally, a groundwater investigation is only required where historic fill is presumed or known to be contaminated above standards and is present within two feet of the seasonal high water table.
- **Remedial Actions:** Various changes are made. The Tech Regs have been revised to remove the remedial action selection report requirement. The remedial action workplan must generally be submitted to NJDEP at least sixty days before implementation and, except in state-lead federal cases, NJDEP approval is not needed. New requirements are included for the use of alternative and clean fill, remedial actions for diffuse anthropogenic pollutants in soil, and remedial actions for residential, school and day-care uses (including presumptive remedies).

Underground Storage Tank Rule Changes:

The regulations modify NJDEP's requirements pertaining to regulated underground storage tanks (USTs), primarily to address the involvement of LSRPs in the UST remediation context. New record-keeping requirements were adopted pertaining to release detection and closure of UST systems and the regulations introduce a new prohibition on the delivery of product to UST systems that are undergoing investigation related to suspected releases. New requirements were adopted pertaining to unknown source investigations and the in-place closure of UST systems where contamination is above applicable remediation standards.

**Industrial Site Recovery Act (ISRA)
Rule Changes:**

Several new requirements were incorporated into the ISRA regulations including the following:

- **Changes to Definitions:** The definition of "Industrial Establishment" has been modified in multi-tenant leasehold situations to expressly include areas where tenants have stored hazardous substances outside their leasehold and the definition of "Negative Declaration" has been eliminated because that process has been replaced by the Response Action Outcome issued by the LSRP.
- **ISRA Alternate Compliance Options (ACOs) Revised:** The process for satisfying ISRA through ACOs has been substantially reworked with the following ACOs eliminated as unnecessary in view of availability of a Remediation Certification issued by a LSRP: Expedited Review, Area of Concern Review, Limited Site Review, Remedial Action Workplan Deferral and Minimal Environmental Concern Review. The following ACOs are still available on application to and approval by NJDEP: Underground Storage Tank Waiver, Remediation in Progress Waiver, Certificate of Limited Conveyance and De Minimis Quantity Exemption.
- **Revisions to ISRA-Covered NAICS Codes:** Additions and deletions have been made to Appendix C of the ISRA regulations which lists the North American Industry Classification System ("NAICS") Codes which are covered by ISRA.

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- **ISRA Applicability Guidance:** Although not addressed in the regulations, the Department has also responded to concerns in the regulated community related to its prior decision to cease issuing ISRA Letters of Non-Applicability through the release of new guidance at www.nj.gov/dep/srp/isra/isra_applicability.htm.



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