



AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

Questions and Answers on NJDEP's Proposed Legislative Changes to the Site Remediation Program

November 24, 2008

This question and answer document is designed to present the highlights of the New Jersey Department of Environmental Protection's (NJDEP's) proposed legislation to create a licensed site professional (LSP) program and otherwise reform the site remediation program (SRP).

1. **What is an LSP?** - An LSP is an individual who, based on education, training and experience requirements set out in the bill, is qualified, upon passing an exam, to be licensed by a newly created licensing board to certify all site remediation submissions to NJDEP and that the remediation complies with all laws and regulations, and protects public health, safety and environment.
2. **How would the LSP certify that the remediation meets NJDEP standards?** – The LSP would make this determination through the issuance of a “response action outcome” (RAO) upon completion of the remediation activities. RAOs, except in cases where no contamination is detected, must be submitted to NJDEP and may be audited, a determination which NJDEP has six months to make, with no limitation on the time period of the audit.
3. **Who must use an LSP?** - Any person responsible for conducting a remediation, other than for a discharge from an unregulated underground storage tank (UST), must hire an LSP. Unregulated tanks may use either a certified subsurface evaluator or an LSP. Regulated USTs must use an LSP to perform subsurface evaluation for corrective action.
4. **Would NJDEP still issue no further action (NFA) letters and covenants not to sue?** – Although it is not entirely clear, it appears that RAOs, for most cases, will replace NFA letters and covenants not to sue would no longer be issued by NJDEP.

5. **What information must LSPs share with NJDEP?** - In addition to the usual report submissions, an LSP would have an obligation to report certain discharges it discovers (see question 7 below) and a client's significant deviation from a workplan or scope developed by the LSP. The LSP would also be subject to document retention requirements.
6. **Who would license LSPs?** - An eleven member licensing board would be created to issue LSP licenses and to enforce a newly created extensive code of conduct applicable to LSPs (including the authority to revoke and suspend licenses and assess civil penalties up to \$50,000 per violation of the code and other requirements applicable to the LSP). Pending the establishment of the licensing system, NJDEP will issue temporary licenses to qualified individuals.
7. **Would LSPs have independent release reporting obligations to NJDEP?** If a LSP identifies a discharge that the LSP believes constitutes an "immediate environmental concern," the LSP must immediately notify NJDEP. If the LSP identifies any other discharge except historic fill, the LSP must notify NJDEP within 24 hours.
8. **How would NJDEP case oversight change?** - SRP cases would be divided into two tiers. For most cases, an LSP would make the usual submittals to NJDEP per the Technical Requirements for Site Remediation and NJDEP would "screen" the submittals, with a right to audit any submission based on any one of seventeen criteria. Given the scope of these criteria, most submittals could be audited. In addition, NJDEP is required to audit at least 10 percent of all LSPs annually. For select cases (see below), NJDEP would provide direct oversight of LSP submittals, much the same as it does now.
9. **What cases would be subject to direct oversight by NJDEP?** – Direct oversight would apply to certain cases with a history of noncompliance or delay, and sites with chromate contamination, multiple impacted sensitive ecological receptors, or where PCBs, mercury, arsenic or dioxin are impacting surface waters. For these cases (1) NJDEP will select the remedy based on a feasibility study and (2) a remediation trust fund to cover remediation costs will be mandatory.
10. **Would the available range of remedial actions change?** – Unrestricted use remedial actions or presumptive remedies established by NJDEP must be used in all cases where there is (1) new residential construction, (2) construction including a sensitive population (e.g., education, childcare) or (3) a change of use to any of these uses. These uses are also prohibited on landfills in certain cases. NJDEP may require removal or treatment if contaminated material poses an acute hazard upon engineering control failure.
11. **How would remediation timeframes be affected?** - NJDEP will establish mandatory timeframes for each phase of the remediation (e.g., preliminary assessment, site investigation, completion of remediation, etc.), certain interim measures and "all other activities deemed necessary by the Department". There are no similar timeframes applicable to decisions or actions of NJDEP.
12. **How would monitoring and maintenance of non-permanent remedies be affected?** - NJDEP is granted authority to establish a permitting system for operation, maintenance and biennial certifications of remedial actions (e.g., engineering controls).

13. **How would the remediation funding source (RFS) mechanism be affected?** – All remediations performed by Spill Act liable parties, with certain exceptions, and regulated UST owners or operators must establish a RFS for the cost of constructing a remedial action (but not for the investigatory phase). Exemptions include government entities, new innocent (non-labile) purchasers, small businesses, homeowners, childcare and educational (K-12) facilities.
14. **Would the self-guarantee RFS mechanism still be available?** – The use of a self-guarantee for the RFS, which can now cover the entire cleanup, would be limited to 50 percent of the cleanup cost. This means that the existing 1 percent annual RFS surcharge (which does not apply to self-guaranteed cleanups) would now apply to 50 percent of the remedial action cost.
15. **What is the new surcharge for non-permanent remedies?** – As an incentive for permanent remedies, all persons, with the same exceptions applicable to the RFS requirement noted above, who implement a non-permanent remedy (e.g., engineering controls), will have to pay a surcharge of 5 percent of the cost of constructing the remedy to the state’s Remediation Guarantee Fund. Exemptions are provided for the same parties exempt from the RFS requirement.
16. **What is the Remediation Guarantee Fund (RGF)?** - The RGF is a fund that may be used by NJDEP to perform cleanups at properties where an RFS is required and the private party does not perform the cleanup. It may also be used for grants to certain innocent parties at a site for which an NFA or an RAO was issued where (1) there is a remedy failure for a non-permanent remedy or (2) cleanup standards change by more than an order of magnitude and additional remediation is necessary.
17. **Would the Hazardous Discharge Site Remediation Fund (HDSRF) grant program be affected?** Yes. The proposed legislation would prohibit an applicant receiving HDSRF grant funds from contracting away its subrogation rights in connection with any remedial work performed with the grant funds. Also, any funds otherwise destined for the RGF would go into the HDSRF once the former is funded to \$100 million.
18. **Would the statute of limitations (SOL) for natural resource damage claims change?** Claims for natural resource damages would have to be brought by the state within three years following the completion of the remedial action for all media at the entire site. Under current law, these claims must be brought within five and a half years of the completion of the remedial investigation. The change would not affect claims for which the SOL had already run.