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Client Advisory

NEW JERSEY SITE REMEDIATION REFORM ACT MAKES MAJOR CHANGES TO CLEAN-UP PROCESS

On May 7, 2009, the Governor signed into law the New Jersey Site Remediation Reform Act (“the SRRA” or “the ACT”). This legislation dramatically changes the way New Jersey will remediate over 20,000 contaminated sites in the state. Although concerns have been voiced over the privatization of environmental cleanups, the New Jersey Department of Environmental Protection (“NJDEP” or “Department”) will gain more control over the cleanups of sites where homes, schools and daycares are situated, where that control was lacking in previous legislation. The ACT -- modeled after a Massachusetts state-sponsored program -- is also designed to expedite the remediation process through the creation of a licensed corps of professionals who will “step into the shoes” of the Department to oversee the remediation efforts at those sites.

Key Provisions

Some of the highlights of the ACT are:

- The SRRA establishes a new licensed site remediation professional (“LSRP”) who, on behalf of the NJDEP, will have authority to issue regulatory closures. There will no longer be “No Further Action (‘NFA’)” directives. Rather, the LSRP will now issue Remedial Action Outcomes or “RAOs”.
- A licensed site remediation professional Board will be established. The ACT sets forth licensing standards for the LSRP, including educational and experience requirements. The Board will oversee the licensure process for LSRPs, including discipline, suspension and revocation.
- The licensed site remediation professional program will be phased in over three years. By May 2012, all sites, except those involving unregulated heating oil tanks, will need to have an LSRP, even those sites under direct NJDEP oversight.
- Section 30 of the ACT requires, for the first time, an affirmative obligation to remediate the site. The SRRA mandates that an owner or operator of an industrial establishment subject to the Industrial Site Recovery Act (“ISRA”), a discharger or person in any way responsible for a hazardous substance pursuant to the Spill Act, or the owner or operator of an underground storage tank regulated by the Underground Storage Tank Act, “shall remediate the discharge of a hazardous substance.”
- The SRRA provides for direct oversight by the NJDEP for remediation of a contaminated site where the person responsible for conducting the remediation has a history of noncompliance. The site will go into direct NJDEP oversight if a party has: 1) been issued at least two enforcement actions after enactment of the SRRA during any five-year period; 2) failed to meet a mandatory remediation timeframe; or 3) failed to complete the remedial investigation of the entire contaminated site within ten years after the discovery of the discharge and has failed to complete the remedial investigation of the entire contaminated site within five years after enactment of the SRRA. The NJDEP, not the responsible party, will select the remedy.
- The NJDEP may, but is not required to, undertake direct oversight of remediation for other sites, including those with: 1) chromate chemical production waste; 2) more than one environmentally sensitive natural resource injured; 3) sediments contaminated by PCBs, mercury, arsenic or dioxin in a surface water body; or 4) the highest priority ranking developed pursuant to a 1982 amendment to the Spill Act.
- Section 28 of the SRRA requires the Department to establish mandatory remediation timeframes and expedited site specific timeframes, when necessary, to protect the public health and safety and the environment for matters involving, for example: a receptor evaluation; control of ongoing sources of contamination; addressing immediate environmental concern conditions; completion of remediation; and other activities deemed necessary by the Department to effectuate timely remediation. Violation of any mandatory timeframe will place a party into the direct oversight category.

Implementation of the ACT

The SRRA became effective on May 7, 2009. The NJDEP will soon issue temporary licenses for LSRPs. All new cases after November 3, 2009, will be required to use an LSRP.

Within three months, the Department will issue guidelines specifying what cleanup is required for sensitive sites including schools, single-family homes and daycare centers. Within six months, interim rules and regulations will be completed and, pursuant to the terms of the ACT, those interim rules will become effective when published. The rules do not have to go through the Administrative Procedures Act, so, as of November 3, 2009, whatever rules and regulations the NJDEP files and provides notice of in the New Jersey Register will become effective for the following 18 months.

The NJDEP will also be offering guidance on the mandatory timeframes. Specifically, the Department initially plans to establish mandatory timeframes for the following tasks: 1) receptor evaluation (vapor intrusion or potable well issues); 2) immediate environmental concerns; 3) Preliminary Assessment and Site Investigation ("PA/SI"); and 4) product recovery for LNAPL (light non-aqueous phase liquids). Other mandatory timeframes will be developed at a later date.

What the SRRA Means to You

If you are the owner of contaminated property and subject to liability under the Spill Act or any other environmental statute in New Jersey, you will be required under the ACT to remediate that site. The Department will no longer be issuing a Memorandum of Agreement ("MOA"). There will be limited use of Administrative Consent Orders ("ACOs").

Within 180 days after May 7, 2009, anyone initiating a new remediation needs to hire an LSRP. A "new remediation" includes: a) a new discharge or a new ISRA-triggering event after November 3, 2009; b) a site which is not already in the Environmental Management System ("EMS"); c) a site where an NFA is reopened after November 3, 2009; or d) a site which is in the system, but a report has not been submitted in the previous two years.

The NJDEP is looking for volunteers to enter the LSRP program immediately. Although there are no temporary LSRPs presently licensed, the NJDEP has committed to reviewing the work submitted based on the new "audit" paradigm instead of the review and approval process under the current system. Within the next month, the Department will be issuing letters to many responsible parties for lower priority groundwater and soil only sites -- especially those involving underground storage tanks -- asking whether they will volunteer to enter the LSRP program now.

By the end of September, the NJDEP intends to have a list of LSRPs who are temporarily licensed. While sites currently being remediated have three years to transition to the LSRP program, if a party chooses to, it can immediately switch to an LSRP once they are available.

The Department is currently deciding how it will handle its "oversight costs." It appears the Department is leaning towards charging an annual fee to be in the LSRP program, which is how Massachusetts handles its program.

Because implementation of the SRRA appears to be changing almost on a daily basis, anyone involved in environmental remediation in New Jersey needs to continue to keep abreast of the ACT's evolution and effectuation. Should you have questions concerning the SRRA, please contact Robert W. Bucknam Jr., Chair of Archer & Greiner's Land Use, Environmental Permitting & Compliance Group, at (856) 354-3025 or rbucknam@archerlaw.com, or Debra S. Rosen, Partner/Shareholder in the firm's Environmental Litigation Group, at (856) 354-3084 or drosen@archerlaw.com.

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