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A Sea Change in Proposed Site Remediation Rules, But Is the Tide Coming in or Going Out?

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On Aug. 15, the Department of Environmental Protection (DEP) proposed rules intended to implement the new Licensed Site Remediation Professional (LSRP) program. 43 N.J.R. 1935-2087. The LSRP was touted as a "sea change" for the management of the remediation of contaminated sites in New Jersey when it was created by the Site Remediation Reform Act (the SRRA) in May 2009. Borrowing from aspects of programs in other states — particularly the Massachusetts Licensed Site Professional program — the goal was to emulate the progress made in those other states in moving remediation forward with greater efficiency in both time and cost without compromising the protection of the environment.

The SRRA established a three-year phase-in period to allow time for the existing program to transition to the new LSRP program. By May 2012, virtually all remediation sites will need to be under the supervision of an LSRP working under regulations to be adopted by that deadline. A critical concern for all involved was whether the implementation of the program would capture the sea-change spirit envisioned when the SRRA was adopted.

The bulk of the proposed rules are comprised of a revised Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) (N.J.A.C. 7:26C) and a revamped Technical Rules for the Remediation of Contaminated Sites (Tech Rules) (N.J.A.C. 7:26E).Changes were proposed for the rules governing the remediation of underground storage tanks (USTs) (N.J.A.C. 7:24B), Discharges of Petroleum and other Hazardous Substances (DPHS) rules (N.J.A.C. 7:1E) and Industrial Site Recovery Act (ISRA) rules (N.J.A.C. 7:26B).

Consistent with the concept of a sea change, most of the proposed regulations move the New Jersey site remediation process from a cookie-cutter, prescriptive set of requirements to a performance-based program focused upon whether the remedy implemented is "protective of human health and the environment." Rule changes are proposed that eliminate much of the hyper-technical detail in the current Tech Rules that engendered delays and wasteful spending.

However, the proposed rules have a number of aspects that may cripple the ability of the new program to succeed in spawning faster, more cost-effective clean-up of contaminated sites. Two critical issues are discussed below: a change in the standard to when a Response Action Outcome (RAO) can be invalidated; and proposed new mandatory time frames. Practitioners and their clients involved in contaminated sites should carefully monitor whether the DEP's adopted rules address these critical concerns.

Invalidation Standard

Perhaps the most significant flaw in the proposed rules is the change in the standard under an RAO which can be invalidated. RAOs (issued by LSRPs) replace the No Further Action (NFA) determination (issued by DEP) as the main deliverable signifying the successful completion of a remediation project. A critical aspect of the SRRA is the ability to rely on an LSRP's RAO. The legislature specifically highlighted that recipients of RAO's are entitled to the same statutory protections as recipients of NFAs. See Committee Statement, Feb. 26, 2009. The legislature also made clear that the RAO would remain valid unless "the department determines that the remedial action is not protective of public health, safety, or the environment." N.J.S.A. 58:10C-22.The interim

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ARRCS rule, adopted in November 2009, tracked the legislative language in mandating that DEP must have specific information showing that the remedy was not, in fact, protective in order to invalidate an RAO. N.J.A.C. 7:26C-6.4a.

The proposed rule lowers the bar for invalidation of an RAO by establishing a series of 12 circumstances that will be deemed as "not protective." *See* proposed N.J.A.C. 7:26C-6.4, 43 N.J.R. 2019. Conspicuously absent is the current mandate that DEP must first determine that a remedy is not protective. Further, a number of the 12 circumstances that would be deemed a basis for invalidation are not readily discernible. For example, proposed N.J.A.C. 7:26-6.4(a)9 establishes "mistakes or errors in the final remediation document [that] may result in detrimental reliance on the final remediation document by a third party" as a basis for invalidation. 43 N.J.R. 2020. The proposed rule would shift the focus from a performance-based issue of whether the remedy is protective to a process-based focus of whether an LSRP's written submissions conform to the department's interpretation of its own rules. As a result, many parties will desire DEP's concurrence that the process was acceptable. The program, however, is based on parties moving forward without input from DEP in most instances.

The manner by which DEP addresses the invalidation standard issue upon rule adoption will have a significant impact on how the program will (or will not) function. If the rule remains as proposed, we should expect a higher degree of hesitancy in the willingness to rely on RAOs. If, however, DEP returns to the existing standard, the program should move forward as intended with parties able to rely on RAOs issued by LSRPs.

Mandatory Timeframes

The SRRA authorized DEP to establish timeframes for the completion of remediation phases known as "mandatory timeframes." N.J.S.A. 58:10C-28a. The initial interim rule established timeframes for the early remediation phases, the identification of impacts to receptors (such as nearby water supplies) and situations that could cause a more immediate threat to human health and the environment. N.J.A.C. 7:26C-3.4(a) 1-4.

The proposed rules expand the set of timeframes to include deadlines for the completion of Remediation Investigations (RI's) (the scope and extent of contamination) and Remedial Actions (RAs) (cleanups). Proposed N.J.A.C. 7:26C-3.3(a) 5 and 6, 43 N.J.R. 2007-8; Proposed N.J.A.C. 7:26E-4.10 and 5.9, 43 N.J.R. 2075 and 2083. As proposed, all remediation projects must meet the same set of timeframes regardless of the complexity or cost of the remediation.

In general, for sites with only soil contamination, three-year time limits are placed on the RI phase and on the RA phase. A five-year timeframe for the RI phase and for the RA phase applies when groundwater or sediment is also contaminated. An additional one-year extension can be obtained. Accordingly, under the proposed rules most sites must be remediated within seven to 11 years of when investigation is triggered. Exceptions are provided for nonprofit entities and government entities that are not liable under the Spill Act. Proposed N.J.A.C. 7:26E 4.10(e) and 5.9(c), 43 N.J.R. 2075 and 2083. No other exceptions are provided. However, the SRRA does require that DEP provide extensions for delays resulting from a limited set of required governmental actions, such as the processing of DEP permits. N.J.S.A. 58:10C-28c.

For many sites, the timeframes should be achievable. DEP maintains that the proposed timeframes are based on its "twenty-plus years of experience in overseeing remediation investigations and remediation actions of sites." 43 N.J.R. 1950. However, the department has not provided details on any analysis used to select the specific proposed timeframes. Clearly, many remediation projects have been ongoing for longer periods of time, as evidenced by the fact that certain early ECRA cases from the late 1980s remain "open."

Under the SRRA, DEP was required to take a series of factors into consideration in establishing mandatory timeframes including: impacts to receptors, ongoing industrial and commercial operations, and the complexity of the contaminated site. N.J.S.A. 58:10C-28b.The rule proposal, however, establishes a "one size fits all" approach. It is not clear that the proposed timeframes selected conform to the SRRA. Perhaps more critically, it is questionable whether that approach is workable for many of the more complex sites, particularly where there are multiple sources of contamination.

Failure to comply with a mandatory timeframe has at least two serious implications. First, the department can impose penalties for noncompliance. Of greater concern is that the department can invoke its power to place the site into "direct oversight" pursuant to N.J.S.A. 58:10C-27. Direct oversight triggers a number of onerous conditions, including DEP control over the selection of a remedy and the requirement to post a remediation funding source. The department has proposed to give itself broad discretion as to when to decrease or eliminate the direct oversight requirements for a specific site. N.J.A.C. 7:26C-14.4. Hence, if the rule is adopted as proposed, the department would have significant leeway to reduce the severity of a penalty for failure to comply with a mandatory timeframe.

It is clear that the timeframes will be problematic for many sites. If the number of those sites is significant, DEP will be faced with a much higher number of "direct oversight" cases than it anticipates. Based on the fact that many cases have been pending for decades, it is likely the department will be overwhelmed with many cases eligible for direct oversight, if the rule is adopted as proposed. If DEP refuses to alter the current proposal, the regulated community must be prepared to address the fact that many decisions regarding the remediation of contaminated sites will be driven by timing alone and not by relative health risk or sound planning.

Given the importance of these and other key issues, DEP needs to focus on making improvements to the proposed rule as it wades through the hundreds of comments submitted. The regulated community needs to carefully monitor whether DEP makes the changes needed to allow the new program to succeed. ■