

ENVIRONMENTAL ALERT

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SUBSTANTIAL CHANGES ON THE HORIZON REGARDING NEW JERSEY SITE REMEDIATION LAW

On March 16, 2009, the New Jersey Legislature passed the "Site Remediation Reform Act" (S. 1897/A.2962) (the "Act"), which is expected to be signed into law shortly. The Act represents a significant departure from current law by substantially overhauling the procedure by which environmental remediations will be conducted in New Jersey. The Act creates a licensing program for environmental consultants who will be known as "Licensed Site Professionals" ("LSPs"). The license is issued to individuals and not companies. A LSP will be responsible for the conduct of an environmental remediation from start to finish with limited oversight by the Department of Environmental Protection (the "DEP").

A. PURPOSE

The Act creates a program that is similar to a program in place in Massachusetts for the past 16 years. Currently, site cleanups in New Jersey are overseen by the DEP in most instances and the DEP requires that each aspect of the environmental work be reviewed and approved by a DEP case manager. With the substantial increase in site cleanups and concomitant decrease in DEP personnel, the ultimate issuance of a no further action ("NFA") letter by DEP, indicating the completion of a site cleanup, has been increasingly delayed. It is anticipated that the passage of the Act will expedite site remediation in New Jersey.

B. IMPLEMENTATION PROCESS

The Act provides for a licensing program for environmental consultants and creates a "Site Remediation Professional Licensing Board" (the "Board"). The LSP must meet specific educational and experience qualifications. The Board will be responsible for education and examination requirements of the LSP, and will have the power to audit and discipline LSPs for violations of the Act. The Board must audit 10% of all of the total submissions by LSPs to DEP. Within three months of the enactment of the Act, DEP must establish a temporary license program and issue temporary licenses to site professionals which will be valid for up to three years. DEP is required to establish interim regulations within three months of the Act and, within eighteen months, the Board must promulgate permanent rules and regulations for licensees.

Within six months after the enactment of the Act, any person initiating a remediation must utilize a LSP. Ongoing remediations may be completed under DEP oversight with existing consultants. However, within three years, all site remediations must be conducted by an LSP¹, which will include current, ongoing remediations that have not been completed within the three years.

C. THE LSP'S ROLE

Except in certain limited circumstances, the LSP will have the primary responsibility for overseeing and approving remediation of a site. The LSP must apply the New Jersey Technical Regulations for Site Remediation, NJSA 7:26 E-1 et seq., the timeframes provided in the Act and the "presumptive remedies" to be adopted by DEP. The Act requires DEP to develop "presumptive remedies" which must be used with respect to certain properties (such as certain residential, child care and school locations) if they are not remediated to unrestricted standards. While the person remediating a site must certify all documents submitted to DEP, the LSP must certify that the remediation work was performed, was overseen by the LSP, and that the work is consistent with all of DEP's remediation requirements. The DEP will screen all documents submitted to it by the LSP but will not substantially review each document as it does now. However, DEP is required, at a minimum, to substantially review at least 10% of all documents submitted by an LSP, and may conduct additional review.

Generally, under current law, reporting obligations as to discharges of hazardous substances have been the obligation of the owner/operator of a facility, the discharger or anyone responsible for the discharge. Under the Act, the LSP has mandatory reporting requirements to the DEP of the discovery of a discharge. By complying with these requirements, a safe harbor is created and retaliatory actions may not be taken against the LSP. The LSP is also required to notify the DEP of (i) facts and/or data that do not support the conclusions expressed in documents submitted to DEP, (ii) an "immediate environmental concern" uncovered during a remediation, and (iii) conduct by a client or employee that deviates from the remediation plan. In addition, the LSP must notify DEP of the discovery of

new material facts after completing a report and must correct any deficiencies in any document.

Except in those situations where the DEP continues to be the review agency of a site cleanup (discussed below), the DEP will no longer issue a NFA upon completion of a remediation. Upon completion, the LSP will issue a document entitled a "Response Action Outcome" ("RAO"). A RAO is filed with DEP and will be the equivalent of an NFA. The NFA issued by the DEP currently contains a "Covenant Not To Sue". The Covenant Not To Sue provides (with exceptions) for a release of civil liability by the State to the party conducting the remediation. Pursuant to the Act, the RAO will, by statute, contain the Covenant Not To Sue.

The DEP must invalidate a RAO if it determines the outcome is not protective of public health, safety or the environment, or if a presumptive remedy was not implemented. However, the DEP may not audit an RAO more than three (3) years after the RAO is filed unless either new contamination is discovered on the site, or the Board is investigating or suspending the LSP who issued that RAO.

In some instances, DEP will exercise oversight. In certain limited circumstances, including recalcitrant responsible parties and/or high priority sites, the DEP is required to, or may choose to continue to be the oversight agency for a remediation or provide a heightened review of a remediation. In situations where (i) there is a history of noncompliance or the failure to meet mandatory time frames by a remediating party, or (ii) the remediation has taken an excessive amount of time, the DEP is required to institute direct oversight. Direct oversight means that all site documents will have to be approved by the DEP. Direct oversight will require additional obligations and restrictions including (i) a feasibility study, (ii) DEP will have the right to select the remedial action, (iii) posting of a remediation fund with all disbursements requiring DEP approval, and (iv) a public participation plan.

Similarly, the DEP has discretion to engage in increased oversight based upon the severity of site conditions.² DEP will continue to issue NFAs as to those sites that remain under direct oversight.

The Act requires the DEP to create mandatory remediation and expedited site specific timeframes

by regulation. Site remediations must be completed within these time frames, although extensions will be available in the event of agency delay or other site specific conditions.

D. ENGINEERING/INSTITUTIONAL CONTROLS

Currently sites that are remediated utilizing engineering controls (asphalt caps, signs, trenches) or institutional controls (deed notices) are required to file biennial certifications with the DEP indicating that the "control" continues to be protective of human health and the environment. These obligations have often not been complied with and the DEP has had difficulty in monitoring these obligations.

The Act directs DEP to develop a permit program addressing institutional and engineering controls. The permit program will include operation, maintenance and inspection requirements relating to the controls. Subject to certain exemptions, the DEP may also require financial assurance along with a permit in order to guarantee that a funding source is available to operate and maintain the control.

E. REVISIONS TO EXISTING LAW

In addition to the new licensing program, the Act amends the New Jersey Spill Compensation and Control Act, the Industrial Site Recovery Act, and the Brownfields and Contaminated Site Remediation Act, to include the LSP and RAO concepts. The Act also expands the funding sources allowed to be posted with DEP to include a letter of credit.

The DEP is required under the Act to develop a ranking system, which must be available online, for sites based on risk to public health, safety or the environment, length of time remediation has been ongoing, economic impact, and other factors. Site information will therefore be widely available to the public. The Act also amends a limitation period with respect to actions regarding natural resource damage recovery.

The foregoing is a brief overview of the legislation. Please contact Randi Schillinger, head of Saiber's environmental group, with specific questions.

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¹This requirement is not applicable to the remediation of unregulated heating oil tanks (which need not utilize a LSP), nor is it applicable to a due diligence investigation.

²For example, the DEP may conduct direct oversight if (i) there is chromate chemical production waste on site; (ii) more than one environmentally sensitive natural resource has been injured; (iii) there is polychlorinated biphenyl, mercury, arsenic or dioxin contamination; or (iv) the site is highest priority ranked per DEP's classification system.