

New Site Remediation Reform Act Significantly Changes Remediation of Contaminated Sites in New Jersey

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On May 7, 2009, New Jersey Governor John S. Corzine signed into law the Site Remediation Reform Act, also known as the Licensed Site Remediation Professional Act (the "Act").

On the same day he signed the Act, Governor Corzine issued Executive Order Number 140 which aims to insure that environmental safeguards and transparency are part of the cleanup process.

The primary purpose of the Act is to expedite the cleanup of nearly 20,000 impacted environmentally contaminated sites in New Jersey. However, the effect of the Act will be seen in the way environmental transactions, redevelopment, and remediation are accomplished. The Act attempts to accomplish its purpose by establishing a licensing program for environmental consultants. These licensed consultants, known as Licensed Site Remediation Professionals ("LSRPs"), will now face rigorous licensing standards, and shoulder the responsibility currently resting with the New Jersey Department of Environmental Protection ("NJDEP"), to implement and certify that cleanups satisfy all applicable standards.

The Act will impact environmental transactions, remediation activities, and remediation costs in a variety of ways. Examples of certain significant changes are:

ISRA

- In most cases, on behalf of their clients, LSRPs will process ISRA compliance without the supervision of ISRA Case Managers.
- Remediation Agreements used to close transactions involving industrial establishments before cleanups are complete will be replaced with Remediation Certifications issued by LSRPs. The amount of the required Remediation Funding Sources will be determined by the LSRPs.

Reporting Issues

- LSRPs are required to report to the NJDEP when they are hired and fired.
- LSRPs have an independent, affirmative obligation to report immediate environmental concerns, discharges and deviations, regardless of the amount of such concern, discharge or deviation.

Site Remediation Issues

- LSRPs now determine the amount of money needed to fund a remediation.
- Letters of Credit are again allowed to be used as Remediation Funding Sources.
- Self guarantees are limited to 50% of the total cost of remediation.
- Once they are satisfied that a remediation is complete, the LSRP will issue a "Response Action Outcome" (an "RAO"), which takes the place of the No Further Action letter currently issued by the NJDEP. Covenants not to sue are part of the RAO.
- RAOs may be audited by the NJDEP for up to three years after they are issued, with the ability to reverse the decision and rescind the RAOs.
- The Act extends the statute of limitations for natural resource damages, which now begins to run from the date remediation is completed, not at the end of remedial investigations.

NJDEP Oversight

- Within 24 months after the effective date of the Act, NJDEP will audit 10% of all documents submitted by the LSRPs and include at least one review of case documents submitted by each LSRP.
- NJDEP is required to increase its auditing at sites where groundwater has been impacted by pollutants above remediation standards, or where the site may be used as residential housing, or for educational purposes, including use as a child care or day care center, a public, private, or charter school, or a playground or ball field.
- An internet site will be established on which the NJDEP will be required to post all documents submitted by LSRPs as well as all audit findings.

While the Act will likely result in expedited remediation of contaminated sites, it also has the potential to lead to additional costs for the parties involved. LSRPs will now have a legal obligation to report to the NJDEP and their licenses will be conditioned on strict compliance with all laws and proper handling of sites. This will likely cause the LSRPs to adopt an extra- conservative approach to site remediation and caution before issuing RAOs. Also, since the NJDEP has three years to audit and possibly rescind RAOs, the issuance of an RAO by the LSRP is not immediately final. Given that cleanups will likely occur over a shorter period of time, certain costs, such as transactional costs and NJDEP Oversight fees, may be reduced. The ultimate economic effect of the Act will largely depend on the implementation regulations adopted by the NJDEP.

From a practical standpoint, some property owners may be hesitant to allow potential purchasers to have their LSRPs conduct due diligence activities on a site prior to a sale as the LSRPs must report any contamination directly to the NJDEP regardless of whether the transaction proceeds, thus triggering an obligation to address the contamination on the part of the property owners. At this time, prospective purchasers and their lenders will likely require that LSRPs be used, thereby creating tension during negotiations. Additionally, in light of the changes to the remediation process, remediation funding, final approvals and the three year RAO review window, transactional documents, lease agreements, as well as lending documents, will need to be modified accordingly, so they accurately reflect the parties' obligations and responsibilities.

Because the Act has the potential to expedite the timeframe for remediation of contaminated sites, as well as increase remediation costs associated therewith, it is of significance to business and property owners, as well as to commercial and property insurers.

Should you wish to discuss this new Act in more detail and discuss how it may impact your business, please do not hesitate to contact us.