

Time is Running Out to Hire an LSRP

No longer will responsible parties with existing clean up cases need to decide whether to “opt-in” and retain a Licensed Site Remediation Professional (LSRP): In less than six weeks, you will not have a choice. ***By May 7, 2012, you are required to retain the services of an LSRP for any existing remediation cases initiated prior to November 4, 2009, unless you receive a No Further Action approval (NFA) from the NJDEP or a Response Action Outcome (RAO) issued by an LSRP on or before May 7th.*** After that, NJDEP will be out of the traditional case oversight and NFA business, except for cases involving unregulated underground storage tanks. The RAO will be the only game in town for virtually all site remediation in New Jersey.

Presently, a total of 537 LSRPs have received their temporary licenses. NJDEP estimates that a total of approximately 5,800 existing cases need the services of an LSRP. A simple calculation confirms a simple truth: you need to act as soon as possible to make sure your preferred LSRP is available to work on your case. Undoubtedly, it is a seller’s market for LSRP services.

NJDEP is expecting your LSRP retention form to arrive on or before May 7, 2012, regardless of whether you have a report or other submission due. As noted below, NJDEP’s enforcement program will be actively following up with those responsible parties who fail to hire an LSRP in time.

Bottom line: Finalize your LSRP retention strategy for your existing case as soon as possible. If you do not have a fully developed LSRP retention strategy, you need to act now to develop one without further delay.

Some questions to consider: Do you want to retain your current environmental consultant as your LSRP (assuming he or she has an LSRP license)? Would you benefit more by hiring a new LSRP and having your existing environmental consultant serve as your advocate before an LSRP?

Also, you will need to negotiate an LSRP services agreement that addresses issues arising from the Site Remediation Reform Act (SRRA), such as allocating liability for possible audits of RAOs and other remediation documents by NJDEP, and a future audit of your LSRP by the LSRP Board. Negotiating the LSRP services agreement with your proposed LSRP takes some time.

NJDEP is Ready to Launch a More Robust Enforcement Strategy

As the SRRA program shifts into high gear, NJDEP's enforcement machine is revving up its engine. According to its representatives, NJDEP's emerging and well staffed enforcement program will initially focus on violations of the mandatory timeframes¹ and the May 7, 2012, LSRP retention requirement.

After a hiatus that was spent in "compliance assistance mode," NJDEP's enforcement program is back and eager for action. NJDEP has been transferring staff as part of this emerging emphasis on enforcement. Site Remediation Program enforcement has nearly doubled to almost 50 staff members. Model administrative orders are being drafted. Innovative uses of the NJDEP's Data Miner system to support enforcement actions are being investigated.

Although the "compliance assistance" approach enjoyed by the regulated community for the last few years will not disappear completely, NJDEP is ready to utilize its extensive data base and enforcement options to follow up with those parties who missed the mandatory March 1 deadline and those who fail to hire LSRPs by May 7. Apparently, NJDEP may be particularly tough on those parties who, despite receipt of recent mass mailings and other direct contacts, failed to work with NJDEP under the compliance assistance policy.

NJDEP insists that the objective of its revitalized enforcement actions will be compliance and not penalties. The increasingly sophisticated use of its electronic database puts virtually all cases on NJDEP's radar screen. For practical purposes, NJDEP plans on prioritizing its enforcement decisions for contaminated sites based on risks and impacts to public health, safety and the environment. If you missed a mandatory deadline or fail to hire an LSRP by May 7, and your site impacts NJDEP "hot button" issues (such as contamination in a well head protection area, vapor intrusion, absence of LNAPL source control, or your site ranks high on the Remedial Priority System²), you may be a priority case for NJDEP's upcoming enforcement program.

¹ Pursuant to SRRA, NJDEP has established mandatory timeframes for certain remedial activities. On March 1, 2012, several important mandatory timeframes expired for existing remediation cases initiated prior to November 4, 2009. In particular, a responsible party for an existing remediation was required to prepare and submit to NJDEP the following items: a preliminary assessment and site investigation report (as applicable); an initial receptor evaluation; a report on the source control for immediate environmental concerns (such as vapor intrusion); and an interim remedial measures report related to light non-aqueous phase liquids (LNAPL). (See N.J.A.C. 7:26C-3.3 and N.J.S.A. 58:10C-28).

² In March and April, 2012, NJDEP plans on mailing letters relating to the ranking of contaminated sites in New Jersey on the Remedial Priority System (RPS). For more information, please [click here](#) to find an October, 2011 Drinker Biddle alert on the RPS, titled "NJDEP Site Rankings Will Require Careful Attention Soon." In addition, Drinker Biddle's Environment & Energy Group will be holding an April 10, 2012 breakfast briefing on the RPS and its implications. Please [click here](#) for more information about attending the RPS seminar. CLE credit will be offered for NJ, PA and NY attorneys attending the RPS seminar.

Conclusion

The best way to avoid any future enforcement action is to remain in compliance with the SRRRA requirements. To that end, if you are responsible for a remediation case initiated prior to November 4, 2009, you need to ensure that you will have your preferred LSRP retained on or before May 7, 2012. If you missed any of the March 1, 2012, mandatory timeframes, you need to develop a plan to complete the overdue activity as soon as possible to mitigate the alleged violation and present your case to NJDEP in the most favorable light possible.

Environment & Energy Practice Group

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