

TIME TO GET READY: NEW JERSEY DEADLINE FOR PUBLIC NOTICE OF SITE REMEDIATION LOOMS

Are you working on a remediation project that started prior to September 2, 2008, at a contaminated site in New Jersey? Do you expect that your No Further Action approval will not be issued by the New Jersey Department of Environmental Protection (NJDEP) prior to the beginning of September, 2009? If you answered “Yes” to both of these questions, you have less than *six months* to provide the public with notice of your site remediation activities.¹ ***The deadline for compliance is September 2, 2009.*** Now is the time to start planning your public notification strategy.

In accordance with recent amendments to the Technical Requirements for Site Remediation (Tech Rule Amendments for Public Notice), those responsible for performing remediation of contaminated sites in New Jersey must:

- (i) identify sensitive populations that are located within 200 feet of their sites; and
- (ii) post a minimum of one sign or distribute notification letters informing local residents of the progress on your site remediation project (*See generally*, N.J.A.C. 7:26E-1.4).

The Tech Rule Amendments for Public Notice also allow the NJDEP to require additional notification, outreach or education on a site-specific basis in instances where the NJDEP determines that the minimum requirements for signs or notification letters do not fulfill the needs or expectations of a particular community. At this point, NJDEP has not provided any guidance relating to circumstances that would require additional public notification above the minimum requirements.

Again, for sites where a remedial investigation or single phase remediation² was initiated prior to September 2, 2008, the deadline for providing public notice of in-progress site

¹ Please note that the Tech Rule Amendments for Public Notice apply without delay to all new site remediation activities initiated in New Jersey after September 2, 2008. In these new cases, the requirements for a sign or letters must be undertaken “no later than two weeks prior to initiating field activities associated with a remedial investigation of a multi-phase remediation or initiating a single phase remediation.” (*See* N.J.A.C. 7:26E-1.4(h)2.i. and 1.4(i)1.i.).

² A “single phase remediation” occurs when contamination is identified and the Person Responsible for Conducting the Remediation determines that it is not necessary to perform a Remedial Investigation before proceeding directly to the Remedial Action Phase. (*See* Response to Comment #23, September 2, 2008 New Jersey Register at 40 *N.J.R.* 5014).

remediation is **September 2, 2009**.

Do the NJDEP's Public Notice Requirements Apply to My Site?

The Tech Rule Amendments for Public Notice define any "Person Responsible for Conducting the Remediation" as:

any person who executes or is otherwise subject to an oversight document, and any person who is performing the remediation or has control over the person (for example, contractor or consultant) who is performing the remediation, including, without limitation, an owner or operator who is subject to either ISRA or UST. (*See* N.J.A.C. 7:26E-1.8).

Under this broad definition, the Tech Rule Amendments for Public Notice apply to any person or entity who: (a) is required to perform a remediation in accordance with the requirements of the Industrial Site Recovery Act ("ISRA"); (b) is required to perform a remediation in accordance with the Underground Storage Tank ("UST") regulations; or (c) has executed an Administrative Order, an Administrative Consent Order, a Memorandum of Understanding, a Memorandum of Agreement or a Remediation Agreement under which a site is being remediated. Basically, the Tech Rule Amendments for Public Notice apply to the entire universe of remediation cases under the oversight of the NJDEP.

These notice obligations are not triggered solely by cleanup activities. These requirements are also triggered by "actions to investigate contamination and the problems presented by a discharge." (*See* definition of "Remedial Investigation" at N.J.A.C. 7:26E-1.4). According to the NJDEP's response to comments on the Tech Rule Amendments for Public Notice, "actions to investigate contamination and the problems presented by a discharge" include the Remedial Investigation and site cleanup, but not the Preliminary Assessment or Site Investigation. (*See* Response to Comment #22, September 2, 2008 *New Jersey Register* at 40 N.J.R. 5014).

What Type of Public Notification Is Required?

The Tech Rule Amendments for Public Notice require Persons Responsible for Conducting Remediation to complete a checklist to identify sensitive populations and resources that are located within 200 feet of their site boundaries.³ Sensitive populations and resources include schools, residences, child care centers, playgrounds, public parks, surface waters, drinking-water wells and priority well-head protection areas. The Sensitive Population and Resource Checklists will assist the NJDEP and local officials in evaluating site risks. The Sensitive Populations and Resources Checklist is available at http://www.nj.gov/dep/srp/guidance/public_notification/checklist.pdf.

When signs are used to provide the public with notice of a site remediation project, all signs must be at least two feet by three feet in size and they must be placed in locations that are clearly visible to the public. Signs must include the following wording:

³ The NJDEP Office of Legal Affairs has informally told us that the requirements for preparation and submission of Sensitive Population and Resource Checklists do *not* apply at sites where a remedial investigation or single phase remediation was initiated prior to September 2, 2008. Hopefully, the NJDEP will formally clarify this policy in future guidance documents. However, any new remediation commenced at an existing remediation site after September 2, 2008, would seem to require the submission of a Sensitive Population and Resource Checklist.

“Environmental Investigation/Cleanup in Progress at this Site” and provide a contact person and telephone number for the entity or person conducting the remediation, as well as the phone number for the NJDEP Office of Community Relations.

If letters are used, they must include the name and address of the site, lot and block information, and a common-language description of the contamination. The letters must also include a statement that the party performing the remediation will provide copies of all environmental reports to the municipality upon request of the municipality.

Where the Person Responsible for Conducting the Remediation determines that a language other than English is predominately spoken by property owners and tenants in the area within 200 feet of the site boundary, additional signs or letters that are written in the non-English language must also be provided.

If contamination has spread off of a site, the Person Responsible for Conducting the Remediation must distribute a fact sheet to the community and publish the fact-sheet in a local newspaper.

In addition to these requirements, the NJDEP may require community-specific public outreach meetings when local residents demonstrate significant public interest through a petition to the NJDEP or if the NJDEP receives a written request from a local official. The NJDEP public notification requirements provide opponents of projects with another vehicle to attempt to delay and stop a proposed development. Careful preparation of your public notice program is a vital part of your remediation strategy.

Proposals for Alternative Signs and Letters

As an alternative to meeting the regulatory requirements for signs or notification letters, the Person Responsible for Conducting the Remediation may propose an alternate plan for public notice and outreach.

An alternative plan for public notice and outreach must be submitted to the Case Manager and the NJDEP Office of Community Relations for approval. If the NJDEP determines that the application for alternative public notice and outreach provides adequate public notice, the NJDEP will provide the Person Responsible for Conducting the Remediation with written approval of the plan. On the other hand, if the NJDEP determines that the application for alternative public notice and outreach is deficient, the NJDEP will provide written comments and permit the Person Responsible for Conducting the Remediation to address the deficiencies.

Any NJDEP review process will take time. Upon review of the NJDEP’s requirements, you may decide that an alternative type of sign or letter is the proper public notice and outreach for your project. If so, you will need to give NJDEP adequate time for review, comment and approval. With the deadline for compliance fast approaching in less than six months, you need to prepare and submit any alternative proposals as soon as possible.

Implementation of the Public Notification Program

The NJDEP’s public notification program is still developing and evolving. At this point, it

appears that the NJDEP's Office of Public Outreach Program within the Office of Community Relations is taking a very practical and common-sense approach to the implementation of this new program. Also, the early indication is that the Persons Responsible for Conducting Remediation are selecting signs over letters to provide the public with notice of site remediation. As long as the minimum requirements are met (*i.e.*, mandatory wording and size of sign), we anticipate that NJDEP will be flexible in the design of signs. For letters, NJDEP has posted a model notice letter on its web site as guidance. (See http://www.nj.gov/dep/srp/guidance/public_notification/model_letter.htm.) We understand that additional guidance from NJDEP will be on the web site in the near future.

As for alternative public notification requirements, the NJDEP's Office of Public Outreach Program has advised that, at a minimum, it appears ready to approve three different types of alternative compliance plans:

- > a single sign for multiple cases at one property;
- > the inclusion of the NJDEP's public notice sign as part of a larger sign announcing the construction of a new development; and
- > for federal lead sites, accepting compliance with the public participation requirements of the United States Environmental Protection Agency in lieu of any additional compliance with NJDEP's public notice requirements.⁴

NJDEP must approve any alternative public notification requirements and that process will take some time (See N.J.A.C. 7:26E-1.4(n)), so the time to develop and implement your public notification strategy is now!

Bottom line: NJDEP, at present, seems to be open to a creative implementation of its public notice requirements. Time will tell if this trend continues.

Please do not hesitate to contact Joseph N. Schmidt, Jr. at Joseph.Schmidt@DBR.com or (609) 716-6578, Mark Maser at Mark.Maser@DBR.com or (609) 716-6607, or any of the lawyers in our Environmental Practice Group with any questions about the Tech Rule Amendments for Public Notice. Also, the lawyers at Drinker Biddle have prepared a detailed checklist to assist clients in complying with the Tech Rule Amendments for Public Notice. Please let us know if you would like a copy of our public notice requirement checklist.

⁴ Unless this policy is formally adopted, the issue of whether the NJDEP will assert that the Tech Rule Amendments for Public Notice apply at Superfund sites - where compliance with federal public participation requirements is necessary - will remain subject to debate, particularly with regard to USEPA-lead Superfund sites.

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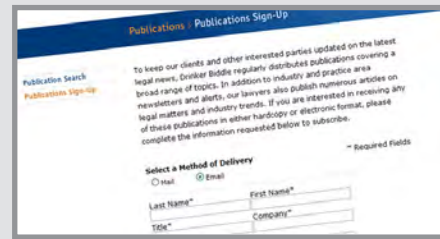
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