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The Real Estate Finance Journal

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SPRING 2021

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Complying with New Jersey's Upcoming Site Remediation Action Deadline

*Alexa Richman-La Londe**

The author suggests some steps that companies with a site remediation case in New Jersey should consider taking in connection with the upcoming deadline for remedial action.

If the date May 7, 2021 has significance to you, it may mean that you have a site remediation case in New Jersey. For a large segment of these cases with contamination that pre-dates 1999, the deadline for "Remedial Action" to be complete is May 2021. (A site remediation case in New Jersey goes through several phases; the Remedial Action phase involves physical activities that remove, reduce, or contain the contamination at issue, such as excavation and off-site disposal or establishment of engineering and institutional controls.)

While the deadline is still some time away, there are likely actions that you should be taking now to make sure your case remains in compliance. Below are a few suggestions that may be generally applicable to these cases with pre-1999 contamination; however, each case should be evaluated based upon its specific facts and circumstances.

Determine What Type of Timeframe It Is

When the Site Remediation Reform Act

("SRRRA") was enacted in 2009, it created a statutory Remedial Investigation ("RI") timeframe of May 7, 2014, for then-older cases with contamination that pre-dated 1999.

In January 2014, when the statutory RI timeframe was coming due, the legislature enacted an amendment to SRRRA that provided an extension of two years to parties that made a timely and proper application certifying that their site remediation case met certain conditions, including that a licensed site remediation professional ("LSRP") had been retained, all other applicable mandatory timeframes had been met, a remediation funding source had been established and all annual fees not in dispute had been paid.

An extension was "deemed approved" upon submission of a complete application to the New Jersey Department of Environmental Protection ("NJDEP"), although NJDEP upon written notice to the responsible party could at any time during the extension period revoke

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the extension if the conditions imposed were no longer met.

Application of the May 2021 Remedial Action timeframe depends upon the media impacted and whether or not your case obtained and maintained the statutory RI extension.

If your case only involves impacted soil and you have not yet received a Response Action Outcome (“RAO”) from your LSRP, your case is already out of compliance.

If your case involves soil and other impacted media (for example, groundwater), whether the May 2021 timeframe is regulatory or mandatory depends on whether your case received the statutory RI extension in 2014.

If you received and maintained the extension, then May 2021 is a regulatory timeframe.

Otherwise, the May 2021 deadline is a mandatory timeframe.

As discussed briefly below, the procedures to extend, and the consequences of missing, a regulatory as opposed to a mandatory timeframe are significant so this is an important determination.

Determine If You Can Complete Remedial Action

The answer to this inquiry depends in large part on what it means to complete Remedial Action.

Under New Jersey regulations, completion of the Remedial Action means:

- Implementing all remedial actions;
- Submitting a remedial action report; and

- Ensuring that the LSRP submits the RAO to NJDEP.¹

However, the regulations also state that the person responsible for completing remediation shall complete implementation of the remedial action and submit a remedial action report within the applicable regulatory timeframe.² The NJDEP Administrative Guidance Regarding Compliance with the Remedial Action Report Timeframes,³ as can be gleaned from the title, indicates that the timeframes, both mandatory and regulatory, are for submission of the Remedial Action Report.

NJDEP representatives, however, have said the department does not consider the Remedial Action complete for timeframe purposes until the RAO is submitted to NJDEP. Accordingly, there is some ambiguity as to whether submission of the Remedial Action Report may meet the timeframe or whether the LSRP must issue the RAO.

This is a critical question because the LSRP cannot issue an RAO until all applicable Remedial Action Permits (“RAP”) are issued. (NJDEP controls issuance of all applicable RAPs, and it can take more than six months for an RAP to be issued.) Thus, unless your LSRP will be able to issue an unrestricted use RAO, you should consider the impact of NJDEP processing time on the submission of the RAP and whether the LSRP will be able to issue an RAO by the May timeframe.

Plan for Seeking an Extension

As stated above, seeking an extension of a regulatory timeframe is an easier process than an extension of a mandatory timeframe. If May 2021 is a regulatory timeframe in your case, then 30 days prior to that date submit an

extension request which is deemed approved, unless otherwise notified by the Department.

To extend a mandatory timeframe, however, the request must be made 60 days prior to the timeframe but is not approved unless granted by NJDEP based upon written rationale including the cause for the extra time and the steps taken to minimize the extra time. A delay in NJDEP granting a permit based upon a timely and technically and administratively complete permit application or a delay in obtaining federal or state funding, can be the basis for an extension of the mandatory timeframe. Accordingly, these provisions should be carefully considered, especially if a RAP will be obtained as part of your case.

Stay Abreast of Developments

In April 2020, NJDEP approved a Notice of Rule/Waiver/Modification/Suspension that established a temporary extension of certain regulatory and mandatory timeframes for an initial period of 90 days while Executive Order ("E.O.") No. 103, declaring a state of emergency due to the COVID-19 pandemic, is in effect. E.O. 103 has been and will likely continue to be extended, quite possibly until May given that the virus continues to cause

serious health impacts in the state. If so, then there may be a 90-day extension applicable to all cases.

Under this Notice, NJDEP also stated that it will consider extension requests beyond the 90 days on a case by case basis.

Recently, NJDEP has announced that it is considering a specific 12-month extension of the May 2021 timeframes (regulatory and mandatory) for all cases. Remediating parties, however, are advised to monitor these developments but not to act as if this extension will definitely be provided.

Conclusion

Determining what timeframe applies to your case and how best to meet it can be a complex evaluation. Remediating parties should be conferring with their LSRP and environmental attorneys now to ensure they remain in compliance.

NOTES:

¹N.J.A.C. 7:26E-5.8(a).

²N.J.A.C 7:26E-5.8(b).

³April 4, 2017.