



NJDEP Offers Relief From Strict Compliance With Direct Oversight Requirements for Those Willing to Enter Into Administrative Consent Orders

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The Site Remediation Reform Act ("SRRA") authorizes Licensed Site Remediation Professionals ("LSRPs") to oversee the remediation of contaminated sites, including selecting and implementing appropriate remedial actions based upon their own professional judgment. However, if the party responsible for conducting remediation fails to complete the cleanup within mandatory timeframes, and in other limited circumstances, the SRRA authorizes the New Jersey Department of Environmental Protection (the "NJDEP" or "Department") to undertake "Direct Oversight" of the work. Although the Direct Oversight program imposes onerous requirements on remediating parties, it is our understanding that the Department may exercise discretion to provide relief for parties that come forward and demonstrate a willingness to come into compliance and move forward with remediation.

Representatives of the Department have said since the beginning of the LSRP Program that "being in Direct Oversight is not a place you want to be." Those remediating parties that find themselves in Direct Oversight are subject to additional regulatory requirements, financial obligations and potentially significant penalties. Furthermore, parties in Direct Oversight lose the ability to choose their own remedies as the NJDEP has the ultimate right to select the remedial action for the site, which could result in a more costly and involved remediation. During Riker Danzig's annual Site Remediation Seminar earlier this year, Assistant Commissioner Mark Pedersen encouraged those parties that find themselves subject to Direct Oversight to proactively contact the Department to initiate discussions regarding how the subject site will be managed. He noted that remediating parties may "earn" adjustments to the Direct Oversight requirements through demonstrating the willingness and ability to comply with

the Department's requirements. Assistant Commissioner Pedersen also noted the Department's willingness to enter into "pre-purchase Administrative Consent Orders ("ACOs")" with potential purchasers of contaminated sites subject to Direct Oversight to reduce the requirements for these parties that agree to remediate the site. This poses a win-win situation in that the potential purchaser receives leniency from the rather draconian Direct Oversight rules and the NJDEP obtains compliance and comfort that the contaminated site will be remediated appropriately.

More recently, we have learned that the Department may enter into ACOs with qualifying responsible parties, wherein the responsible party will agree to remediate under relaxed Direct Oversight requirements. Prior to entering into the ACO, the responsible party must prepare and submit to the Department a public participation plan, establish a remediation funding source ("RFS") in the form of a Remediation Trust Fund and agree to pay a penalty. If the responsible party meets particular timeframes set forth in the ACO, the Department then adjusts the Direct Oversight requirements. These adjustments may include 1) the ability to use any form of RFS except for a self-guarantee, 2) no requirement to perform a remedial action feasibility study, and 3) the ability for an LSRP, as opposed to NJDEP, to select the remedy for the site. These adjustments could significantly reduce the costs associated with Direct Oversight and put the decision-making back into the hands of the responsible party through its LSRP. As such, responsible parties subject to Direct Oversight should consider a proactive approach to compliance and seeking a favorable ACO with the Department.

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