

“What keeps you up at night?”

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Proposed NJDEP regulations address contamination in “linear construction projects”

By Cristina Stummer

SUMMARY

The New Jersey Department of Environmental Protection has proposed new site remediation regulations that will apply to entities conducting construction and development activities within public or private roadways, railroads or utility lines. The regulations are expected to be adopted by May 2012.

The New Jersey Department of Environmental Protection (the “NJDEP”) has proposed new regulations that will apply to entities conducting construction and development activities within public or private roadways, railroads or utility lines. The proposed regulations outline the requirements for remediating suspected or known contamination when constructing such “linear construction projects” (“LCPs”). The LCP rules are part of a comprehensive proposed rule package, associated with the implementation of the 2009 Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq.*, which created the Licensed Site Remediation Professional (“LSRP”) Program for the remediation of contaminated sites in New Jersey. The NJDEP has stated that it is aiming to adopt the proposed comprehensive rule package by May 2012.

The NJDEP has recognized that many parties often encounter known, or previously unknown contaminated sites when constructing LCPs. Historically, the remedial activities associated with linear construction projects were covered under Memoranda of Understanding (“MOU”) or Memoranda of Agreement (“MOA”) and were overseen by assigned NJDEP case managers. Due to the LSRP Program, MOUs and MOAs will no longer be applicable. Instead, the proposed rules outline when a party constructing an LCP must engage an LSRP to address contamination.

WHAT IS A “LINEAR CONSTRUCTION PROJECT?”

Under the proposed rules, “linear construction projects” are defined as: “construction and development activities within an area such as a public or private roadway, railroad, or utility line and

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the rights-of-way thereto that are undertaken to create, maintain or alter the public or private roadway, railroad or utility line that:

1. Includes one or more contaminated properties, or parts of properties; and
2. Will generate more than 200 cubic yards of contaminated soil or fill or disposal during the duration of the linear construction project.”

DO I NEED A LSRP AND DO I HAVE TO NOTIFY THE NJDEP?

If a company initiates an “LCP,” the NJDEP’s proposed rules will allow the LCP’s construction to commence without prior NJDEP approval, so long as the company:

1. Hires an LSRP to oversee the management of contamination encountered during the LCP;
2. Notifies the NJDEP of the LCP and the LSRP’s name either: “At least 45 days prior to initiating construction on a project with known or suspected contamination; or Within 45 days after detecting contamination on a project where it was assumed contamination was not present.”
3. Within 60 days after completion of the “project” (not the LCP) or upon request of the NJDEP whichever occurs sooner, send a report to the NJDEP that describes the management of contamination encountered during the LCP;
4. Allows the NJDEP access to inspect the LCP; and
5. Obtains and complies with all permits necessary for the LCP pursuant to N.J.A.C. 7:26C-7 (Remedial Action Permits) and N.J.A.C. 7:26E-5.7 (requirements to obtain all permits that are applicable to the remediation, such as, but not necessarily limited to land use permits).

ARE THERE ANY NJDEP FEES?

The proposed rules mandate the payment of two different fees. The first fee is a \$450 filing fee that must accompany the initial notice to the NJDEP of the LCP and LSRP referenced above. The second

set of fees are due when the final report is filed with the NJDEP and are based on the number of contaminated properties encountered during the LCP. Current proposed fees are (i) \$1,000 for one to five contaminated properties; (ii) 3,000 for six to ten contaminated properties; and (iii) \$5,000 for 11 or more contaminated properties.

ARE THERE PENALTIES FOR NON-COMPLIANCE?

Failure to comply with the LCP regulations or to pay the required LCP fees may result in the issuance of significant penalties. Each proposed penalty carries a proposed fine of \$15,000 and is not subject to a “grace period” that would allow the alleged non-complying entity to “fix” the alleged violation within a set time period without incurring a fine. Further, each day of non-compliance is treated as a new penalty.

Entities that may be engaged in LCPs should continue to monitor the New Jersey Register or the NJDEP’s website (www.state.nj.us/dep) for the final regulations. A free copy of the NJDEP’s proposed comprehensive rule package, including the LCP regulations, is available at <http://www.nj.gov/dep/rules/proposals/081511b.pdf>. If adopted as proposed, the LCP regulations will be located within a new subchapter, N.J.A.C. 7:26C-16. The NJDEP is also developing Best Management Practices for LCPs, which will be available on the NJDEP’s website when completed. To determine if an LSRP may be required as part of the planning process of an LCP, the NJDEP’s NJ-GeoWeb, also located on the NJDEP’s website, may be a valuable tool to help initially identify known, suspected or potentially contaminated areas through which a proposed LCP may be located.

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