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Proposed Amendments to DEP Site Remediation - Mandatory and Regulatory Timeframes

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In October, the New Jersey Department of Environmental Protection (“DEP”) proposed several amendments to two of its site remediation regulations, the Administrative Requirements for the Remediation of Contaminated Sites (the “ARRCs”) (N.J.A.C. 7:26C) and the Technical Requirements for Site Remediation (N.J.A.C. 7:26E).

There are three primary components to the proposed amendments. The first is to extend the Mandatory and Regulatory Timeframes established under the ARRCs, the second is to clarify the definition of a vapor intrusion immediate environmental concern (“IEC”), and the third addresses timing for receptor evaluation reporting. The proposed rule changes are subject to a 60-day public comment period that expires on December 3, 2010.

Mandatory and Regulatory Timeframes

In revamping the DEP’s site remediation program through its enactment of the Site Remediation Reform Act (see [January 6, 2010 post](#)), the legislature required the DEP to enact certain mandatory and regulatory remediation timeframes. The DEP established certain mandatory and regulatory time frames in the ARRCs. The DEP required responsible parties to undertake the following actions within one year from either March 1,

2010 (for cleanups commenced before November 4, 2009) or a specified triggering event:

- submit a preliminary assessment report and site investigation report for a cleanup under the Industrial Site Recovery Act
- submit a site investigation report under the Underground Storage of Hazardous Substances Act
- submit an initial receptor evaluation
- complete the delineation of an IEC source area, initiate IEC source control and submit to DEP an IEC Source Control Report
- complete (i) the installation of a Light Non-Aqueous Phase Liquid (“LNAPL” or “free product”) recovery system, (ii) initial operation monitoring of that system and (iii) submit to DEP an interim remedial action report

The SRRA originally contained a Regulatory Timeframe for an LNAPL recovery system report to be submitted to the DEP within 270 days after free product is identified. Under the proposed Regulatory Timeframe rule change, if free product was identified before March 1, 2010, the free product recovery system report shall be submitted to DEP by March 1, 2011 (extended from 270 days to one year). If free product is identified on or after March 1, 2010, the LNAPL Recovery System Report must be submitted to DEP within one year after discovery.

Under the proposed regulatory amendment, the one-year Mandatory Timeframe deadlines will be extended to two years. If the amendment is enacted, existing cases will have until March 1, 2012 to complete these mandatory requirements. This proposed change would provide significant flexibility to responsible parties, especially given the draconian penalties from failing to meet a Mandatory Timeframe. Those penalties include having the DEP take direct oversight/control of the cleanup and penalties of up to \$20,000 per day for a continuing violation.

Note that with respect to the free product requirements, the proposed Regulatory Timeframe deadline will become one year while the Mandatory Timeframe deadline will be extended to two years. The difference relates

to the fact that Regulatory Timeframes can be more easily extended than Mandatory Timeframes, which are essentially “drop-dead” deadlines.

Finally, until the amendments are approved and go into effect, responsible parties need to either continue to proceed under the currently enacted deadlines (i.e., one year) or seek approval from the DEP for an extension of the deadlines.

Vapor Intrusion

Vapor intrusion concerns relate to the potential for volatile contaminants to enter building interiors and negatively impact indoor air quality. The DEP has issued guidance for addressing vapor intrusion concerns. In that guidance, DEP has set out a number of indoor air contaminant levels which it defines as “rapid action levels.” These are contaminant levels which require immediate action, including interim remedial measures. The DEP’s proposed rule amendments make clear that an exceedance of the rapid action level for an indoor air contaminant is an IEC, which triggers certain obligations under the state cleanup rules. For instance, interim remedial measures are required within fourteen days of determining that the indoor air exceeds the rapid action level, and is thus an immediate environmental concern.

Receptor Evaluation Reporting

The current rule required a Receptor Evaluation Report to be submitted to the DEP by November 26, 2010. However, the proposed rule states that if remediation was initiated before March 1, 2010, the initial Receptor Evaluation Report must be submitted by March 1, 2011. If remediation is initiated on or after March 1, 2010, the initial receptor evaluation must be submitted within one year of the initiation of remediation. Again, this proposed Regulatory Timeframe changed from 270 days to one year.

NJDEP has issued a Compliance Advisory Update which indicates that they will not take enforcement action against the person responsible for conducting the remediation if they do not meet the regulatory timeframes contained in the current rule as long as they meet the newly proposed regulatory deadlines.

For more information on the proposed amendments to the rules governing site remediation, go to <http://www.nj.gov/dep/rules/proposals/100410a.pdf> and for a summary of the regulatory and mandatory timeframes go to http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf.

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