

## Addressing Backlogs

### **Topic: Addressing Backlogs**

#### **Description of Issue:**

The Department's goal is to ensure timely and effective remediation of contaminated sites in order to protect both the residents of New Jersey and our natural resources. A variety of factors, such as the number and types of cases, noncooperation of the remediating party and increasing program demands and responsibilities deter us from meeting this goal.

There are more than 18,000 active cases in Site Remediation. Approximately 12,000 cases are being remediated under a regulatory program such as the Industrial Site Recovery Act (ISRA) or Underground Storage Tanks (UST). The Voluntary Cleanup Program (VCP) accounts for 6,000 cases of which approximately 4000 are homeowner UST removals. Included in these numbers are cases which have been issued conditional No Further Action letters (NFAs) and as a result require ongoing monitoring by Department staff pursuant to the biennial certification requirement. Although the number of cases requiring Department oversight increases every year, Site Remediation's work force has not significantly changed since FY1998. The Site Remediation Program has been tasked with additional responsibilities over the years due to a variety of factors, including new legislation; demands from financial institutions for documentation of assurances on unregulated sites or activities; having to address environmental issues that carry a low risk and are not directly regulated but are portrayed otherwise by the media; and the demands of complying with the Open Public Records Act (OPRA). The Site Remediation Program has had to allocate more than 34,000 hours to respond to greater than 45,000 requests for information in a five year period.

The average FTE (Full Time Equivalent equal to a person year) for the Site Remediation Program based on time coded over the past nine years is 505, ranging from 491 to 515. Of these FTE, 250 to 300 are case managers responsible for reviewing remediation documents submitted by the regulated community and developers. Providing support to these case managers are 90 technical support staff comprised of scientists and geologists. Whereas approximately 4000 new cases enter the program each year, only 3500 or so cases receive NFAs. Most of these NFAs are associated with homeowner UST cases, UST cases with soil contamination only, UST and ISRA initial notice cases and specific Areas of Concern (AOC) NFAs.

As the number of cases in-house grows each year, the Department is unable to provide remedial action work plan approvals and NFAs in a timely manner, which is frustrating to Department staff and managers, remediating parties, local community activists, environmental groups, developers and local officials. At this point in time, the Department's inability to approve and issue documents in a timely manner is an impediment to the progress of the remediation of a site. It is imperative, therefore, that mechanisms be identified to resolve the issue of a growing backlog in the Site Remediation Program. As part of any resolution, the Department must assess and evaluate how cases are processed.

Because of the strong environmental legislative history in New Jersey, the Department regulates more facilities and types of discharges than other states. For example, under the Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6, the Department is required to issue a negative declaration, approve a remedial action work or remediation agreement and/or issue a no further

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action letter for any industrial establishment planning to close or transfer ownership of operations. Under the UST program, the Department regulates the installation, modification, monitoring and testing of underground storage tanks and oversees the cleanup associated with any leaking tank. The Department also processes loans and grants for the upgrade, closure or remediation associated with regulated or unregulated tanks and assistance in the remediation of brownfield sites. In 2007, the Department received 178 applications for 113 projects and approved more than \$39 million from the Hazardous Discharge Site Remediation Fund (HDSRF) and received 666 applications and approved more than \$7.8 million from the UST fund.

### **DEP's Current Authority:**

The Spill Compensation and Control Act (Spill Act), N.J.S.A. 58:10-23.11 et seq., regulates all discharges of hazardous substances without regard to who was responsible for the discharge. That is, the requirements of the Spill Act apply equally to industrial facilities and homeowners. Further, unlike other states, there is no diminimus discharge limit at which the requirements of the Spill Act do not apply. The Spill Act provides that the Department may allow a responsible party to remediate a contaminated site.

The Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq., provides that the Department may issue a NFA letter to a person responsible for conducting the remediation upon a finding that, based upon Department evaluation of the historical use of a particular site or any other investigation or remediation performed by the person that the Department deems necessary, the contamination has been remediated in accordance with applicable Department remediation regulations. The NFA establishes compliance with the Industrial Site Recovery Act rules, N.J.A.C. 7:26B, the Underground Storage Tank rules, N.J.A.C 7:14B, an Administrative Consent Order or a Judicial Order. The Brownfield Act also establishes the Hazardous Discharge Site Remediation Fund. Moneys in the fund provide financial assistance or grants to persons who cannot establish a remediation funding source for the full amount of a remediation.

The Industrial Site Recovery Act (ISRA), N.J.S.A. 13:1K-6, requires that an owner or operator of an industrial establishment planning to close operations or transfer ownership of operations obtain a cleanup plan approval before the transfer or upon the closing of the property and establish a funding source for the cleanup. Any remediation shall be conducted in accordance with criteria, procedures, and time schedules established by the department. ISRA requires owners or operators of an industrial establishment planning to close or transfer ownership or operations to notify the Department. After submittal of the notice, the industrial establishment must obtain an approved negative declaration, remedial action workplan, no further action letter, or remediation agreement from the Department.

The Underground Storage of Hazardous Substances Act (N.J.S.A. 58:10A-21) established the Underground Storage Tank program to provide for the registration, installation and modification as well as and the systematic testing and monitoring of underground storage tanks to detect discharges. Amendments to the Underground Storage Tank Act, (N.J.S.A. 58:10A-37.1) established the program to provide loans and grants to eligible owners and operators of regulated and non-regulated petroleum underground storage tanks (UST). Funding is provided to help finance project costs for the upgrade and closure of regulated underground storage tanks and remediation of discharges from regulated and non-regulated underground storage tanks. Further,

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persons who provide services on regulated and non-regulated USTs must be certified by the Department pursuant N.J.S.A. 58:24.1 et seq.

To meet the environmental requirements of the Department of Children and Families regulations, child care facilities must obtain a No Further Action Letter from the Department before a license to operate can be issued or renewed.

### **Background:**

A No Further Action letter (NFA) is a determination by the Department that based upon an evaluation of the historical use of a site, or an area of the site, and any action deemed necessary by the Department, any discharged contaminants present at the site have been remediated in accordance with applicable remediation regulations. NFAs were traditionally provided by the Department to confirm that a remediation was appropriately completed. Amendments to the Spill Act in 1993 provides that a person who purchases a property after 1993 is not liable under the Act if that person establishes that they had no reason to know that any hazardous substance had been discharged. In order to meet this criterion, the Act requires that a potential purchaser of a property perform a preliminary assessment and site investigation in accordance with Department regulations. Potential purchasers conduct the investigation and request an NFA from the Department to confirm the results and protect themselves from future liabilities. As a result of this amendment, NFAs are not only requested when a discharge has occurred and a site subsequently remediated, but also when no documented discharge has occurred. Further, NFAs are now being requested for both regulated and unregulated activities.

In order to obtain an NFA, a person responsible for conducting the remediation must submit documentation to the Department for its review establishing either that there is no contamination at the site or that the contamination at the site has been remediated in accordance with the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The NFA is necessary as evidence that the site does not pose a threat to public health and the environment. Throughout the years, market pressure has led to parties requesting NFAs in order to complete financial or real estate transactions. This is especially true of homeowners with unregulated heating oil tank systems. Often lending institutions require a NFA indicating that there is no contamination at the home before they approve a mortgage. These NFAs are being requested regardless of whether a site is contaminated or not. Simply the existence of a tank on a property drives the request for a NFA. NFAs are being required even when there will be no mortgage because of perceived liability issues. Therefore, obtaining a NFA becomes necessary to sell a home. Due to the caseload in the Department, it can take from six to 12 months to issue an NFA for these cases and in many instances delay the real estate transaction accordingly. The case managers who are processing NFAs for homeowners so that real estate transactions can proceed, are the same case managers processing documents for commercial, industrial or brownfield sites. These transactional NFAs are greatly increasing the cases requiring Department action and compounding the Department's backlog.

In addition to transactional NFA requests, the Department's Voluntary Cleanup Program (VCP) and growing interest in brownfields redevelopment have contributed to a significant increase in cases. Under the VCP, a party conducting a cleanup enters into a Memorandum of Agreement with the Department to establish the scope of cleanup activities. Such activities could range

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from a preliminary assessment and site investigation to determine if contamination exists at a site, to remedial actions necessary to clean up the site.

The demands on a case manager are greater than just reviewing and approving documents. Case managers assist responsible parties or potential purchasers of properties in determining how properties can be used in the future. They also provide the technical support for the UST and HDSRF funding program. Case managers arrange and attend public meetings, provide community relations with regular outreach, respond to press inquiries and OPRA requests and maintain data in the Department tracking system so that information is readily available to not only Department personnel but to the public. These are all tasks that are necessary but take away from the review and processing of documents.

Lastly, for a variety of reasons, many cases required to undergo remediation under ISRA, UST, CERCLA and RCRA have been slow to exit the system as remediated sites with NFAs. This may be due to a variety of factors. A recalcitrant responsible party can delay the completion of a remediation for years, or even decades. The ecological concerns of a site or adjacent areas, such as wetlands or waterbodies, can contribute to the complexity of a case. As the complexity of a site increases, so too does the complexity of the submittal and the subsequent review and approval of documents. The media impacted by contamination or the type of contaminant can also contribute to the complexity and duration of a case. A case that only impacts soils can be remediated faster than one impacting groundwater. For a complex case, the process of delineating contamination can take years and the actual remediation can take decades. A case can remain with the Department for years after an implemented remediation while the long-term effectiveness of the remedy is ascertained. For example, a groundwater recovery system must be inspected on a regular basis to ensure that the flow is being captured and the contaminant concentrations are reducing and approaching the standards. As the number of cases continuing to come in to the Department is combined with the number of active cases, it is apparent that the Department will never have sufficient resources to inspect and monitor all the sites. Therefore, it is imperative that an effective self-reporting system be maintained.

Historically, the Department has treated all cases the same. That is, a homeowner and a large industrial facility are both subject to the same investigative requirements and techniques. While the Department acknowledges that the same final standard needs to be applied to these cases, the path to achieve these standards should vary depending on the site. It is not always necessary for the Department to prescribe every step in the cleanup process in order to achieve the desired outcome. For example, the Department has recently proposed under subchapter 16 that based on impacts to receptors, it is appropriate to allow certified contractors to perform work on homeowner underground storage tanks that do not pose any impact to any off-site receptors. Certified contractors will perform the remedial work and certify that the work has been performed in accordance with the Department's rules and regulations. The Department will issue a No Further Action/Covenant Not to Sue (NFA/CNS) for the completed remedial work. The Department plans to audit of the contractors to ensure the work is properly completed.

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### **Stakeholder comments:**

The Department presented seven options to address workload relief:

- Increase staffing. Staff could potentially be funded by higher fees for those who wish to pay for guaranteed Department review times (e.g. 30-60 day review times for all documents)
- Expand delegation to County Environmental Health Agencies (CEHA)
- Eliminate the need for DEP staff to work on homeowner cases through Cleanup Star program, an UST certification program, CEHA delegation, or other options.
- Expand Cleanup Star to handle additional lower risk cases
- Establish a Licensed Site Professional program similar to Massachusetts (LSP)
- Begin to use in-house contractors similar to EPA and other states
- Cease reviews on submittals that are not explicitly required by statute (NFA's for sites that have no history of contamination, homeowner UST removals).

Increase Staffing: Although there was strong support from some stakeholders for hiring the number of new staff required to address workload relief, it was noted that such an action would be difficult considering New Jersey's existing budget problems. DEP estimates 1000 new staff would be needed to ensure a 60-day turnaround on all submittals. That is not to say that limited additional staffing could not be considered. One stakeholder recommended converting the technical support staff (technical coordinators and geologists) to case managers.

Another stakeholder stated that the Site Remediation Program is "critically understaffed" and noted that staffing has been essentially flat for many years due to early retirement and retirement surges, work week reductions, and hiring freezes preventing backfilling of lost positions. They suggested such fixes as lifting the hiring freeze and increasing staffing, particularly for those positions that are "self-funded through fees or fines". They also suggested reducing the case backlogs through overtime projects, better prioritizing of sites by environmental and health considerations, and creating more realistic deadlines (not 60 days as stated earlier). Funding considerations included offering expedited reviews for a higher fee and increasing enforcement, legal action and fees to recoup costs to the Site Remediation Program.

Delegation to CEHAs: The Department noted that the option of further delegation of oversight of certain cases to CEHA agencies was not a promising alternative as many counties have similarly limited resources and Departmental funding is not available to fund additional CEHA obligations. It was noted that some counties currently have delegation agreements with the Department for homeowner UST cases but the level of funding the Department provides does not adequately cover the county's cost.

Homeowner Cases: The Department discussed a proposal for addressing the number of homeowner cases it reviews. The New Jersey Underground Storage of Hazardous Substances Act at N.J.S.A. 58:10A-24.3 requires the Department to establish and conduct examinations to certify persons as qualified to perform services on regulated and unregulated USTs. The department has developed a process using the UST certification regulations along with changes to both the Oversight and Technical rules to expedite the review of certain low risk cases. The Department has drafted rules for proposal in the New Jersey Register in the summer of 2008 to

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establish a certification program for unregulated heating oil tank systems (mostly homeowner tanks) consistent with the statute. The proposal will require all homeowners to use a contractor certified by the Department to conduct remediation of their tank in order to get a NFA letter from the Department. Remediation of the majority of homeowner cases is straightforward and these sites pose minimal risk to public health and the environment. As such, upon certification by the environmental contractor, these cases will receive an NFA. The Department will conduct the appropriate audits to ensure compliance with the regulations and protection of human health and the environment. Those cases that impact receptors will continue to receive direct Department oversight. Eliminating the majority of homeowner cases from direct Department oversight will free up case managers to focus on higher priority cases. Once the rules are issued, the Department anticipates that 90% of the unregulated tank cases will be processed using the expedited procedures. It is anticipated that the processing time will be reduced from an average of six to twelve months to approximately 2 weeks.

Establish a License Site Professional Program (LSP): In 1991, the Massachusetts Department of Environmental Protection (MADEP) was faced with a tremendous backlog of cases needing remediation, and suspected that there were many more sites that had yet to be identified and were potentially more dangerous than the sites currently in the system. Less than 24% of the known sites were in the process of being assessed or cleaned up and of those, less than 54% were priority sites. The cleanups were proceeding slowly and less contaminated sites failed to move at all. Environmentalists were concerned that too few sites were being investigated and remediated and that there was no comprehensive site discovery program; the business community was frustrated by delays or inability to obtain the necessary MADEP approvals; and the MADEP was overwhelmed by inadequate resources to allow the agency to identify, assess, and remediate the number of sites mandated by law. In response, reforms were instituted in 1993 to improve the efficiency and effectiveness of the program.

One major piece of the reform was the creation of the Licensed Site Professional (LSP) program. The LSP program established a licensing process for individuals and business firms engaged in the practice of remediating contaminated sites. The law required the use of a LSP to oversee the assessment and remediation of most contaminated sites. LSPs are hired by property owners and other responsible parties to oversee the assessment and cleanup of contamination and ensure that these actions are performed in compliance with the standards. The LSP gathers and evaluates information and recommends a remedy. The recommendations are contained in a written opinion signed by both the LSP and responsible party. Most opinions do not require MADEP approval for cleanup to proceed. Once a cleanup is completed, the LSP submits a final opinion to the MADEP stating that the property has been remediated in accordance with the standards.

A board, independent of the MADEP, is responsible for granting, denying, suspending and revoking a professional's license and issuing penalties against the LSP. The board also works with the MADEP to establish the requirements and credentials necessary for an individual or business firm to obtain a license. A license is obtained based on education, experience and passing an examination on applicable regulations and standards. In order to maintain a license, the LSP must meet and maintain professional standards set by the Board. The Board is authorized to take action against LSPs whose work fails to meet the standards.

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The MADEP is required to annually audit at least 20% of all completed sites. The level of the audit is dependent on the complexity of the cleanup.

If such a program were adopted in New Jersey, the Department could identify the types of cases that a LSP can oversee. Delegating the responsibility to oversee the remediation of contaminated sites to a LSP would allow the Department to focus its limited resources on the highest priority and most complex cases; dedicate its resources to enforcement; and audit the LSP submittals. All agreed that creation of a LSP program will take significant time, 2-3 years. Legislation would be needed to provide authority for such a program. In addition, the time necessary to create a licensing board and develop a testing program would be lengthy. Some stakeholders supported the LSP program with the provision that the Department have proper oversight and auditing of the licensed professionals.

The environmental community and union representatives do not favor a LSP program. Concerns ranged from "privatization" to potential collusion between consultants and remediating parties. Additionally noted was the fact that this work was inherently governmental and should not be delegated to third parties. Individuals representing other associations and organizations were split in their support for a program exactly like Massachusetts and thought more discussion about detail would be necessary before support could be provided. Some did express agreement for licensing of consultants. In general, the development community was in favor of the Department remaining the entity that issued NFA's.

Use of In-house Contractors: The option to use in-house contractors to review documents was not discussed in detail at the stakeholder meetings. The Department is further evaluating the use of in-house contractors in a support role to alleviate backlogs. Many environmental regulatory agencies, including those in Delaware and Pennsylvania, as well as the USEPA have expanded their resources through the use of remedial action contracts. These contracts provide manpower that has the same technical capabilities as agency staff to assist the agency in performing its work. Contractors can be tasked with reviewing technical data, summarizing issues or concerns and providing recommended actions to agency personnel; thereby, freeing up agency personnel to concentrate on priority work.

As stated earlier, one stakeholder strongly opposes "privatization" and "outsourcing" such as contracting support services with outside contractors that perform "parallel" work continued to be conducted by DEP employees. The stakeholder believes the program's level of control is undermined by using outside experts. Second, the Stakeholder suggests it would be more costly to the State to utilize contractors that build in benefits and overhead to the price of their work than it would be to hire additional staff. Third, they state that the DEP could be taking an enforcement action against a party using the same consultant we have now hired to represent the Department.

NFAs: The option to refuse to review requests for NFAs not required by the Department was not discussed in detail at the stakeholder meetings. One stakeholder did comment that they were surprised to learn that the program issues NFAs on sites that have no discharge and believed we should better educate the appropriate parties that the NFA is unnecessary in these cases.

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In addition to regulatory and legislative solutions, stakeholders discussed policy changes to address the problem. The regulated community noted that the delineation phase of site remediation takes an inordinate amount of time. The concern articulated was that case managers apply the Technical Requirements for Site Remediation too conservatively, requiring data that may not be necessary in making decisions to delineate the contamination at a site. The regulated community and the Department agreed that case managers should apply the Technical Requirements for Site Remediation in a reasonable manner, considering site-specific conditions. Further, the regulated community suggested the use of a performance-based rather than a prescriptive regulatory model for determining the remediation requirements at a site. This could save time and money by allowing persons responsible for conducting the remediation to have less contact with Department case managers. This would take into consideration the differences in site conditions, and not require a “cookie cutter” approach to site remediations. For example, the compliance points at a site could be based on site use and the presence of receptors. The regulated community also suggested that a performance-based system would need a stronger enforcement model in order to keep parties motivated to do things correctly. (see Performance vs. Prescriptive white paper.)

### **Other States:**

#### Massachusetts:

The Massachusetts DEP (MADEP) uses LSPs to oversee the cleanup of most contaminated sites. An LSP is an environmental scientist or engineer experienced in performing site cleanups. A board independent of the MADEP licenses LSPs. A license is obtained based on education, experience and passing an examination on applicable regulations and standards. In order to maintain a license, the LSP must meet and maintain professional standards set by the Board. The Board is authorized to take action against LSPs whose work fails to meet the standards.

LSPs are hired by property owners and other responsible parties and oversee the assessment and cleanup of contamination and ensure that these actions are performed in compliance with the standards. The LSP gathers and evaluates information and recommends a remedy. The recommendations are contained in a written opinion signed by both the LSP and responsible party. Most opinions do not require DEP approval for cleanup to proceed. Once a cleanup is completed, the LSP submits a final opinion to the MADEP stating that the property has been remediated in accordance with the standards.

The MADEP is required to annually audit at least 20% of all completed sites. The level of the audit is dependent on the complexity of the cleanup.

#### Connecticut:

The Connecticut DEP (CTDEP) also uses Licensed Environmental Professionals (LEP) to oversee the cleanup of contaminated sites. The licensure and issuance, re-issuance, and suspension or revocation of licenses of LEPs is conducted by a board established within the CTDEP. The LEP can verify that an investigation has been conducted and a remediation has been completed in accordance with the standards for an established category of cases.

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The authorizing legislation allows the CTDEP to conduct an audit of any action authorized by law to be performed by an LEP. The LEP Verification Audit Program has been established to ensure that the "verifications" of the LEP are based on an appropriate understanding of the environmental conditions of the site and that the verification is in compliance with all applicable statutes and regulations.

### Illinois:

The Illinois EPA (IEPA) requires that all remediation site activities be conducted by or under the supervision of an Illinois licensed professional engineer (LPE). All plans and reports submitted for review and evaluation must also be prepared by or under the supervision of a LPE. The IEPA must approve or disapprove any report submitted.

The responsible party may elect to contract with a Review and Evaluation Licensed Professional Engineer (RELPE) to perform review and evaluation services on behalf of and under the supervision of the IEPA. The responsible party must provide the IEPA with any terms and conditions of a contract with a RELPE prior to entering into the contract. At a minimum, the contract must provide that the RELPE will submit any plans or reports directly to the IEPA, take directions for work assignments from the IEPA, and perform assigned work on behalf of the IEPA. In addition, the contract must set forth the scope of work for which the responsible party has engaged the RELPE, the effective date of the contract and the costs incurred by the RELPE shall be paid directly to the RELPE by the responsible party.

Reasonable costs incurred by the IEPA for oversight of the RELPE and its review and evaluation services must be paid by the responsible party directly to the IEPA in accordance with the terms of the review and evaluation services agreement. Project documents submitted for review on behalf of the responsible party may be submitted concurrently to both the IEPA and the RELPE, but all subsequent communications, telephone calls, meetings, etc. must be coordinated with the assigned IEPA project manager. The RELPE's review/evaluation notes, comments, etc., must be addressed to the IEPA for final approval, prior to communication back to the responsible party.

In no event shall the RELPE acting on behalf of the IEPA be an employee of the responsible party or the owner or operator of the remediation site or be an employee of any other person the responsible party has contracted to provide services relative to the remediation site.