

Public Notification and Participation

Topic: Public Notification and Participation

Description of the issue:

Early public notification and participation in the site investigation and remedial alternative process helps to inform local residents of the site remediation activities in their community. At times, the level of public concern increases when sites are slated for redevelopment, other impacts to the community such as truck traffic, or when the community feels environmental concerns have not been addressed. In particular, communities are concerned when residential and educational uses are proposed on a previously contaminated property. These concerns are amplified in Environmental Justice communities dealing with a disproportionate number of health impacts. These communities may have multiple contaminated sites, multiple permitted sites, other risk factors, or limited options for siting residential redevelopments, schools, or child care facilities. Commissioner Jackson has suggested enhanced public participation for sites located in these communities and that public participation be expanded at other categories of sites based on end use, such as schools and residential developments. (Alternatively, enhanced public participation can occur at certain phases of the cleanup, such as remedy selection.) Lastly, Environmental Justice and other communities may not have resources available to contract with independent technical advisors who can interpret documents and help the community understand complicated scientific information about contaminated sites. The federal government allows for technical assistance grants to assist communities in hiring independent consultants.

DEP's Current Authority:

The Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-12 and the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 implemented through the Technical Requirements for Site Remediation N.J.A.C. 7:26E, provides no direct public participation process for site remediation. The State currently has no statutory language regarding technical assistance grants.

Background:

Historically, concerns have been raised about remediation activities being conducted without input from local communities. Local residents may have knowledge of past practices at a facility; knowledge that relates to who accesses a piece of property, when and for what purpose; and information/concerns that impact final remedy selection. Currently, there are statutory and regulatory requirements for notification to the community, but there is no similar requirement for a public participation process. Public participation and public hearings are required under CERCLA and under many Department permitting programs. Existing requirements call for notification to the municipal clerk at certain points in the remediation process. Notification is also required in the form of deed notices when there are Classification Exception Areas (CEAs) established by the Department or other engineering controls are implemented as part of a remedy. Biennial certifications for CEAs must be provided to the Department, the municipal and county clerk, the local, county and regional health officers, the designated CEHA agency and the county planning board, as well as the Pinelands Commission, if the site is located in the Pinelands. In cases with institutional or engineering controls other than a CEA, the additional

Public Notification and Participation

requirement for biennial certification and deed notice submittals go to municipal and county clerks and to designated local, county and regional health departments, each owner of property at the site and the Department.

Formal public input into remedy selection is only mandated for CERCLA (Superfund) sites in New Jersey. This process involves a public meeting and a responsiveness summary that addresses both verbal and written comments on the proposed remedy and requires that the comments be factored into the final remedy decision. Such a requirement does not exist under current law in New Jersey. The Department informally follows the federal model of community outreach and provides a public comment period for state-lead CERCLA sites once a remedy has been selected.

To address the absence of more direct public notification of site remediation activities, the Legislature passed the Municipal Notification Act in August 2006. The Act requires all parties responsible for remediation to provide municipal notification of their intent to conduct remedial actions and to advise a municipality of its right to receive any associated reports upon request. It further directs the Department to develop regulations to ensure notification to residents at various points in the remediation process. These regulations were proposed in the August 6, 2007 issue of the New Jersey Register as changes to the Technical Requirements. The proposed changes require public and municipal notification at the onset of both the remedial investigation and the remedial action and create a petition process for communities wishing more extensive outreach and communication. The rule, however, does not require public participation in remedy selection. Such a change would require a legislative change.

The federal government provides Technical Assistance Grants (TAGs) to communities to help them participate in decision making at eligible Superfund sites. TAGs are available at sites that are on EPA's National Priorities List and for which a response action has begun. The TAGs are awarded directly to community groups. New Jersey does not currently fund citizen groups to hire their own experts when there are local concerns over remediation activities in their community. It would require a legislative change and a source of funding for the Department to issue TAGs.

Stakeholder comments:

Some stakeholders supported the idea of early public participation in the site investigation and remedial alternatives process. They suggested that the current system is flawed because there are no requirements for public participation, and meaningful public participation must include opportunities for comment and input into the cleanup plan, remedy selection, future use of the site and overall community development plan. The stakeholders raised the idea of having a "Superfund type" process for public participation in remedy selection. They noted that this process could involve a public meeting and a responsiveness summary that addresses both verbal and written comments on the proposed remedy and includes a response to comments or objections. They noted a final remedy decision should factor in the public's comments.

Public Notification and Participation

Some stakeholders expressed several concerns about such a process. It was noted that as the Department has already acknowledged a drain on existing resources and that new public participation/public hearing requirements would further stress Department staff and money. Additionally, a public input process could add substantially to the time it takes to remediate a site which could be a disservice to the public since many sites are currently not moving forward in a timely manner. It was suggested that the Department institute a pilot program to accurately assess public sentiment as well as staff resources, rather than promulgating the final rule.

There was concern that public input could result in unnecessary changes being made to remediation strategies that were technically sound and adequately protective. The stakeholders suggested that since the approval of a proposed remedial action is based on whether the remedial action will be protective of human health and the environment, it is unclear how public participation would add to the process. Some stakeholders were also concerned that this process could provide groups that are not directly impacted by the cleanup of the site the ability to delay or derail the cleanup. They suggested that notification requirements should be crafted to ensure that notification is made to those with the greatest likelihood of being impacted, rather than a blanket notification that disregards the location of the contamination or other associated site conditions. While some of the stakeholders firmly support and believe in meaningful communication and notification where risks are real and where potential impact exists, they feel there should be no new notification requirements because this communication and notification already exists, and continues to occur on a regular basis.

Stakeholders expressed concern that additional notification requirements will result in extra costs to, and drains on municipalities as many citizens may contact their mayor or other local officials as a result of the notification process. Conversely, several other stakeholders recommended that posting a sign should be required at all known and suspected contaminated sites to protect against exposure to contamination by unsuspecting users of the site.

The stakeholders noted that additional notification requirements could unnecessarily alarm the public or cause increased distrust of both the Responsible Parties and the Department. Concern was expressed that media coverage would impact the public's view of the remediation process and there would be increased litigation.

Some stakeholders noted that the type of process used for public input is important. Some believe that formal public hearings alone offer limited benefits. It was suggested that a better process included information/education sessions and informal meetings that allow for one-on-one questions and answers. Some stakeholders suggested that no specific requirements be imposed, but that the notification process should be flexible to best fit the individual community's needs. They suggested that public notification should be straightforward so that it is not time-consuming or expensive and should be focused on information dissemination, not complex checklists or hearing processes that provide no additional factual input. It was also

Public Notification and Participation

noted there might be instances where languages other than English predominate in the affected community and it was suggested that a process be established to address language barriers.

Some stakeholders suggested the Department develop a standardized education process to teach the public about remediation programs in general and not to necessarily provide site-specific details. It could be an efficient way to provide basic information to citizen groups. Further, the Department could post on its website the basic information about sites and the remediation process, including information about the nature and extent of contamination, remediation timelines, milestones, and contact information for the remediating party and assigned Department staff. This would help interested members of the public in providing meaningful input. The Site Remediation Program recognizes the need to provide information to the public and continues to expand both general program and site-specific information on its website. Additionally, the Office of Community Relations (OCR) has developed and hosts semi-annual Site Remediation Basics Workshops for municipalities. OCR continues a municipal outreach program in which OCR proactively reaches out to targeted municipal officials to set up meetings in their communities with the goal of educating them on general Site Remediation policies and providing them with information about existing sites in their municipalities. OCR can examine expanding this type of outreach to other appropriate audiences such as realtors, attorneys and community organizations. Site Remediation does provide reports on its website in which information about a case, such as remedial levels, records of recent documents received or approved by the Department, case manager name and contact information can be obtained. The Department, however, needs to address the performance of these reports.

It was acknowledged that the public participation process would take time and money, so some stakeholders felt the public input process could initially be limited to more complex cases, sites where future site use includes schools, child care facilities and parks, residential areas, or where there is redevelopment involving change of use. Other stakeholders suggested that the requirements should be limited to sites where contaminated media or the remediation process itself occurs off site, rather than transportation of materials to or from the site. It was suggested that the Department set up a tiered approach to notification. The tiered approach would assess the risk(s) for each site and set up a communication plan based on the risks. It was pointed out that in California, public participation is mandated for Tier 1 sites (more complex sites), but also happens in other cases based on the level of public interest. There were those among the regulated community that acknowledged that the presence of such a requirement caused them to think proactively about concerns from the public and thus resolve potential problematic issues early.

There was recognition by most stakeholders that TAGs could be useful. In California, citizen groups can get TAGs from the state to hire their own consultants. In some cases, the responsible party is asked to contribute money to citizen groups for this purpose. The TAGs are modest (\$10-15K) and, while it can extend the time to conduct a remediation, it also can help citizens understand the technical and feasibility issues for themselves and view the process as a more honest one. Consultant assistance can be beneficial when the information about a site is highly

Public Notification and Participation

technical. It was noted that sometimes it can be difficult for citizens to understand technical discussions. It was also noted that local residents may trust their own consultant more than a responsible party's consultant or the Department. It was noted that it may also be helpful for citizens to have their own consultant because they will be able to come to public meetings better educated; having a better feel for the science behind what is or is not feasible. Stakeholders recognized the value of such funds, but some expressed doubt as to the utility of such funds given the state's oversight capacity. Some stakeholders suggested that licensed site professionals use TAGs to assist communities with limited state oversight. (Please see "Addressing Backlogs" white paper for more information regarding licensed site professionals.) A source of funding would need to be established. Others recognize that there could be instances where local distrust of all parties could make such a grant useful in achieving a cleanup.

It was stated that for some sites a citizens' group may only need to have a qualified consultant read through the technical reports and make a list of questions for them. There was mention of the need for criteria for the type of entity who could provide technical assistance to ensure that such parties are qualified consultants. It was also suggested that the response to their input be considered a work product.

There was discussion of Environmental Justice community's interest in hiring legal services in addition to technical consultants. There is a perception that wealthy communities generally have access to legal help. It was stated that grants for this purpose could be critical in eliminating a perception of unfair treatment of low-income communities.

There was also a recommendation that eligibility for TAGs be tiered according to toxicity, size, time factors and proximity to other community uses (e.g., schools or playgrounds). The desire on the part of community members for earlier and more frequent information sharing would be enhanced by a TAG process.

Other States:

New York State encourages consultation with the public before the Department selects a remedy. New York Department of Environmental Conservation (NYDEC) requires that opportunities for public participation be included in the development and implementation of a remedy, by requiring all remedial programs to include citizen participation activities at some level. A site specific public participation plan describes the level of citizen participation and the tools that will be utilized to facilitate this involvement. The plan must be submitted to the NYDEC for review and approval. Although this plan provides information on the remedial activities and platform for discussion on technical decisions, it doesn't allow the public to select a remedy.

In New York State, not-for-profit groups can apply for TAGs (up to \$50,000 per site) if they are a non-responsible party that may be affected by the site and whose interests represent the community. There are two types of sites that are eligible for TAG: Class 2 sites on the NY Registry of Inactive Hazardous Waste Disposal Sites and sites being remediated under the State's Brownfield Cleanup Program that pose a significant threat to public health and/or the

Public Notification and Participation

environment. The TAG may be used for independent technical assistance for interpretation of existing environmental information, the proposed and selected remedy and its implementation, and for community outreach including disseminating site related environmental information to the affected community. Since January 2006, NYDEC received ten applications for grants but only two were accepted. Eight were rejected either because the site was not applicable or because the applicant did not have the proper Internal Revenue Service designation as a not-for-profit. As of October 2007, there are 505 active Class 2 sites and 797 active sites under the Brownfield Cleanup Program in New York.

Massachusetts has regulations that establish a TAG program. Incorporated citizen groups must be non-responsible parties and have members that live near or are affected by a hazardous waste site to be eligible. Municipal agencies and political entities that operate public water supply systems are also eligible. The site must be ranked by severity and classified as Tier 1 or Tier II, deemed to be adequately regulated pursuant to the Massachusetts Contingency Plan (MCP) or by the Massachusetts Department of Environmental Protection (MADEP), be classified under the old (1988) MCP as Priority or Non-Priority with a Waiver, or on U.S. EPA's National Priority List or deemed adequately regulated. The following activities are eligible for funding: interpretation of technical information and analyses; observation of assessment, sampling, or cleanup activities; analysis of split samples; surveys to gather existing health information; legal advice; public education activities; mediation related to the cleanup efforts. Funding is limited to one grant for any specific site, up to \$10,000. Additional funds may be granted for TAG applications that cover more than two related sites, or a site that includes more than two properties, a single site that has affected more than two municipalities or a single site that has affected more than two environmental media (i.e., air, water, and land).

In Pennsylvania, eligibility is limited to the host municipality of a site where DEP is considering a remedial response. Grants can be used to reimburse costs incurred, up to \$50,000, by a municipality for independent technical review of the proposed cleanup plan. More than 1 grant may be provided if the site is technically complex, if the cleanup operation includes more than 1 phase, or the plan has more than one proposed remedial response plan. The activities eligible for reimbursement include: interpretation of the proposed cleanup plan; technical consulting or reimbursing a township engineer to review studies; meetings with local governments and public; travel costs to meetings and hearings; and preparing comments to be submitted by a municipal official.

California's Department of Toxic Substances Control (DTSC) has extensive public participation requirements during the remediation process. When performing a response action (removal or remedial action), DTSC must provide any persons affected by a response action (removal or remedial action) with the opportunity to participate in the decision-making process, provide fact sheets based on the expressed level of public interest about plans to conduct the major elements of the site investigation and response action(s), as well as provide interested parties with notification of public meetings.

Public Notification and Participation

The state statutes also require DTSC to conduct a baseline community survey, inform the public of the existence of the site and DTSC's plans for the site, and solicit and evaluate public concerns. Based on this survey, DTSC provides public involvement at key stages that may include health risk assessment, the preliminary assessment, the site inspection, the remedial investigation, and the feasibility study. Communities are able to form a Community Advisory Group (CAG). The CAG is designed to give the community the opportunity to review any response action proposed by DTSC. DTSC must assist in the formation of the CAG, and must also regularly communicate and confer as with the CAG. In addition, DTSC is required to advise local environmental, regulatory and other appropriate local agencies about planned response actions, and provide them with the opportunity to comment.

Maryland Department of the Environment (MDE) has required public participation in decision making in approval of projects under their Brownfields Redevelopment Reform Act and Voluntary Cleanup Program to clean up contamination, and requests for a "variance" that would allow less strict standards than normally required. The Maryland Act also requires the MDE to post on its website notice of the Voluntary Cleanup Program application and the opportunity for public comment. It also requires the applicant to hold a public informational meeting for all Proposed Response Action Plans.

The West Virginia Department of Environmental Protection (WVDEP) requires all brownfield applicants to file a Notice of Intent to Remediate a Brownfield site with the secretary, at which point a 30-day comment period and information meeting is required. To notify the public of the start of the 30-day comment period, the brownfield applicant must post a sign at the site indicating the intent to remediate. The brownfield applicant must also establish a Public Involvement Plan if requested by the public, county, municipality, or the WVDEP. This plan must include provisions for further meetings in the community; and opportunities for participants to review and comment on each work plan as well as review and comment on the voluntary agreement before it is finalized and accepted by the state.