



ENVIRONMENTAL PRACTICE

ALERT

NJDEP TO LAUNCH “REMEDIAL PRIORITY SYSTEM” SCORING RESULTS PROGRAM WILL RANK CONTAMINATED SITES

By David Restaino

Under the Site Remediation Reform Act, the New Jersey Department of Environmental Protection (NJDEP) was tasked with establishing a ranking system that places contaminated sites into one of five categories and thereby ranks them from best to worst. The ranking must account for things such as public health and safety.¹

In early 2012, the NJDEP will launch its “Remedial Priority System” (RPS) program to do just that. All parties responsible for the thousands of contaminated sites in New Jersey should be ready because they will have one chance—and one chance only—to provide feedback on the ranking of a particular site.

Be Ready To Act Quickly

The NJDEP expects to issue letters in **January 2012** to responsible parties. All sites will be ranked, except for those involving (a) homeowner heating oil tanks of 2,000-gallons or less, (b) sites for which the NJDEP’s Bureau of Operations and Maintenance Monitoring is overseeing long-term operations and (c) sites with unknown sources. Parties responsible for more than one site will receive a letter containing a spreadsheet with a score for each site. With respect to sites for which there are multiple responsible parties, *each* party will receive a letter.

All recipients will be given **60 days in which to provide feedback on the scoring**, using a specially developed NJDEP web portal.

The Scoring Process

Sites will be ranked into Categories one through five, with Category five being reserved for those sites with a

higher potential risk to public health or the environment. Most sites will not fall within the higher (worst) category.

The scoring process involves a computer model that utilizes geographic data bases and layers, receptor information and site specific data. Scoring factors include the contaminants present at a site, whether they are located in soil and/or groundwater, the proximity of receptors (such as drinking water wells) and the distance/pathway between the site and any identified receptors.

In this process, sites with limited data will be subject to assumptions. For example, sites without certain analytical data will be given a “surrogate value” based on the type of site being evaluated, e.g., a site falling under the authority of the Bureau of Underground Storage Tanks (BUST) will be given surrogate values based on the 75th percentile of all BUST sites. The scoring model will also assume that all potential receptor pathways are “open” unless analytical data demonstrates that a pathway is closed.

Once the score is calculated and compared with other site scores, the NJDEP will utilize a data classification method, or algorithm, to place the sites into the five categories.

Will the NJDEP Take Over My Site?

The NJDEP’s intent is not to push all Category five sites into direct oversight, whereby the NJDEP would take over the remediation. Instead, the ranking exercise is merely intended to identify those sites with the *potential* for greater risk. After scoring, the NJDEP will determine

whether a site is being actively handled by the responsible party. If it is, then the NJDEP will not seek to invoke its direct oversight powers.

Stated differently, the RPS scoring is not intended to determine compliance. It is to be used as a tool in helping the NJDEP prioritize its scarce resources.

Should I Do Anything Now?

Doing nothing until after RPS scores are received will only serve to put off the issues until some future date.

Responsible parties already have an incentive to be proactive. For example, all responsible parties are required to have hired a “licensed site remediation professional” (LSRP) by May 2012.²

In order to satisfy the 60-day feedback window that will be established for the RPS scoring program, responsible parties need to be intimately familiar with a site’s environmental condition. Coupling the RPS feedback deadline with all existing site remediation requirements,

parties that put off the inevitable will only create additional headaches in the near future.

Final Thoughts

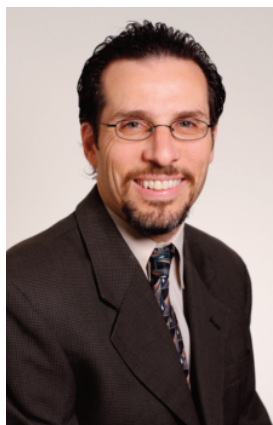
The RPS ranking, taken in conjunction with the existing public notification requirements, will give the public a readily available tool by which to assess the risks associated with nearby contaminated sites. Expect the RPS ranking to be reviewed by everyone.

The RPS process is undergoing final changes, so it may be tweaked and look slightly different than outlined above. Nevertheless, the early 2012 roll-out looks to be on schedule—and the time in which to provide feedback will be limited.

If you have questions about this Alert, please contact David Restaino at 609.895.6701 or drestaino@foxrothschild.com or any member of **Fox Rothschild’s Environmental Department**.

¹ See N.J.S.A. 58:10-23.16.

² Contracts with an LSRP should be reviewed by counsel to ensure, for example, that adequate liability protection is available.



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David has served as a member of the NJDEP’s “RPS” Stakeholders Group. He has more than 20 years of experience representing clients in regulatory compliance and complex commercial litigation matters, including environmental and health care disputes, before multiple federal and state courts and agencies. He is well-respected in the environmental bar and helps corporations, individuals and financial institutions comply with the ever-changing regulations concerning contaminated sites, air emissions, hazardous and solid waste, water quality and land use. He evaluates the compliance and liability that may affect business transactions and has represented numerous clients in complex litigation, including alternative avenues of dispute resolution and structuring creative settlements. David also advises the energy industry on developing environmentally sound operations. He is the immediate past chair of the New Jersey State Bar Association's (NJSBA) Environmental Law Section.



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