

Licensed Site Remediation Professional (LSRP) Timeframe Communication Requirements

On January 4, 2016, the New Jersey Site Remediation Professional Licensing Board adopted a new rule governing the licensed site remediation professional (LSRP) program, codified at N.J.A.C. 7:26I (“Regulations of the New Jersey Site Remediation Professional Licensing Board,” “Board rule”). The Board rule addresses LSRPs’ professional conduct and includes requirements at N.J.A.C. 7:26I-6.8(b) and (c) and N.J.A.C. 7:26I-6.18(b) concerning the LSRP’s duty to communicate with clients regarding applicable remediation timeframes, notify clients if those timeframes are unlikely to be met, and the consequences of missing those timeframes. Additionally, the rule requires that the LSRP notify the Department when he or she believes that applicable mandatory or expedited site-specific timeframes will likely be missed.

In order to assist LSRPs in communicating with their clients, the Department offers the following information concerning remediation timeframes and the consequences of missing those milestones. In addition, the Department is providing guidance about how an LSRP may meet the obligation to notify the Department that an upcoming mandatory or expedited site-specific remediation timeframe will be missed.

Remediation Timeframes

The Site Remediation Reform Act (SRRRA; N.J.S.A 58:10C-1 et seq.) establishes a statutory timeframe for completion of the remedial investigation for certain cases, authorizes the Department to establish mandatory timeframes for key milestones in the remediation process, and requires that the Department undertake direct oversight of a remediation in response to a missed statutory deadline, mandatory timeframe, or expedited site-specific timeframe. The Administrative Requirements for the Remediation of Contaminated Sites (ARRCS, N.J.A.C. 7:26C) include remediation timeframes and related penalties, as well as the requirements related to cases under the Department’s direct oversight, as defined under SRRRA.

The statutory timeframe of May 7, 2014, applies for completion of the remedial investigation at sites where the discharge was discovered before May 7, 1999. This provision was amended by P.L.2013, c.283 to allow for a two-year extension for sites that qualified.

The regulatory remediation timeframes that apply for a contaminated site can be found in ARRCS at N.J.A.C. 7:26C-3.2. This section makes general reference to timeframes in several regulations applicable to remediations, including the Technical Requirements for Site Remediation (N.J.A.C. 7:26E) and ARRCS, the Underground Storage Tanks rules (N.J.A.C. 7:14B), and the Industrial Site Recovery Act Rules (N.J.A.C. 7:26B).

The mandatory remediation timeframes that apply for a contaminated site can be determined based upon the information found in ARRCS at N.J.A.C. 7:26C-3.3. Mandatory timeframes apply to the submittal of specific key documents identified in N.J.A.C. 7:26C-3.3(a) and are generally determined based upon the regulatory timeframe plus two years.

The expedited site-specific remediation timeframes that apply for a contaminated site can be determined based upon the information found in ARRCs at N.J.A.C. 7:26C-3.4. The LSRP should conduct a file review, including a review of the Department's Data Miner reports, to determine whether the Department established an expedited site-specific remediation timeframe in, for example, a letter, directive, or enforcement action.

Extensions to the various timeframes may be available. Procedures to request an extension to a regulatory remediation timeframe can be found at N.J.A.C. 7:26C-3.2. The extension request must be submitted to the Department at least 30 days prior to the regulatory remediation timeframe. The criteria and procedures related to extensions of a mandatory remediation timeframe or an expedited site-specific remediation timeframe can be found at N.J.A.C. 7:26C-3.5. Note that the criteria for mandatory and expedited site-specific remediation timeframes are defined by statute and are very limited. Requests must be submitted to the Department in writing at least 60 days prior to the mandatory or expedited site-specific remediation timeframe and approval must be made by the Department in writing. Note that there is no option to further extend the statutory deadline to complete the remedial investigation for cases where the discharge was discovered before May 7, 1999.

Consequences of noncompliance

Pursuant to the Board rules at N.J.A.C. 7:26I-6.18(b)3, in addition to informing clients of remediation timeframes that apply to their site, the LSRP must also communicate to their clients the consequences set forth in applicable statutes and regulations if the timeframes are not met.

Penalties

N.J.A.C. 7:26C-9 concerns enforcement of all site remediation related provisions. The table at N.J.A.C. 7:26C-9.5(b) identifies each requirement and specifies whether a violation is minor (meaning the Department must allow a grace period for correction of the violation prior to the assessment of penalties) or non-minor (allowance of a grace period is not required prior to penalty assessment). The table specifies a base penalty amount for each violation. Note that each day that the violation continues is considered a separate and distinct violation subject to assessment of the base penalty, and N.J.A.C. 7:26C-9.6 identifies circumstances that may warrant an increase in the base penalty. Penalties can add up quickly. The Department can assess penalties for multiple violations as well as for multiple days of violation. Penalty liability may quickly accrue to multiple hundreds of thousands of dollars.

Direct Oversight

Pursuant to SRRRA and ARRCs (N.J.A.C. 7:26C-14.2(a)), for all sites where the statutory deadline to complete the remedial investigation (either May 7, 2014 or May 7, 2016, as applicable), a mandatory remediation timeframe, expedited site-specific timeframe or ordered timeframe was missed, the site is immediately subject to the Department's direct oversight and the person responsible for conducting the remediation must comply with the direct oversight requirements at N.J.A.C. 7:26C-14.2(b).

Under direct oversight, the person responsible for conducting the remediation loses much control over remediation decision-making; the Department directs the remediation,

selects the remedy and the person responsible for conducting the remediation must establish and maintain a Remediation Trust Fund in the amount of the projected cost of the completed remediation. An annual 1% surcharge on this amount is assessed until issuance of a response action outcome (RAO) by an LSRP. The person responsible for conducting the remediation is also responsible for payment of the Department's oversight costs while the case is subject to direct oversight.

Once triggered, the remediation of the entire site remains under the Department's direct oversight until remediation is complete. Pursuant to ARRCS at N.J.A.C. 7:26C-14.4, the Department may, in its discretion, decide to adjust the direct oversight requirements at N.J.A.C. 7:26C-14.2(b), based upon a finding that such an action would be in the public interest and protective of public health and safety and the environment. However, cases for which the Department decides to adjust the direct oversight requirements at N.J.A.C. 7:26C-14.2(b) are still considered direct oversight cases.

Department Draw on Remediation Funding Source

Another significant consequence of non-compliance is the Department's ability to draw on an established remediation funding source. In the event that a person responsible for conducting remediation who has an obligation to establish a remediation funding source fails to conduct remediation, the Department may avail itself of those funds to complete the remediation, or may disburse those funds to another party to complete the remediation.

Issuance of a Spill Act Directive

Pursuant to ARRCS at N.J.A.C. 7:26C-9.11, the Department may issue a "Directive" under the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11 et seq.). Failure to comply with a Spill Act Directive carries an exposure of three times the cost of Department or private party funds expended toward that remediation (i.e., treble damages).

LSRP Notification to Clients (N.J.A.C. 7:26I-6.18(b))

The LSRP must be aware of each applicable timeframe (statutory, mandatory, regulatory, site-specific) and, pursuant to N.J.A.C. 7:26I-6.18(b), communicate that information to their client. A summary of remediation requirements, related timeframes, and regulatory citations can be found at: www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf.

To assist LSRPs in determining the remediation timeframes that apply to specific sites for which they have been retained, the Department has developed a Data Miner report, which can be accessed at: datamine2.state.nj.us/DEP_OPRA/OpraMain/categories?category=Case+Tracking.

When explaining the importance of complying with remediation timeframes to clients, the Department suggests that the following information be stressed:

Site Remediation Costs < Site Remediation Costs + Penalties + Legal Fees

In other words, while it may be costly to conduct remediation, staying in compliance with remediation timeframes helps avoid additional costs including penalties and legal costs to defend against enforcement actions and tort claims. The Site Remediation and Waste Management Program's message has been "avoid the triple pay" - comply with statutory and regulatory requirements in order to avoid paying a penalty, paying legal counsel to defend against the enforcement action issued by the Department, and then still paying for the remediation.

LSRP Notification to Department (N.J.A.C. 7:26I-6.8(c))

To notify the Department that, in his or her professional judgment based on site history, any one or more applicable mandatory or expedited site-specific timeframes referenced in ARRCS at N.J.A.C. 7:26C-3 is unlikely to be met, the LSRP must complete the form "Notice of Failure to Comply with a Mandatory or Expedited Site-Specific Remediation Timeframe, which is available at: www.nj.gov/dep/srp/srra/forms/.