

Municipal Issues

Topic: Municipal Issues

Description of the Issues:

A successful site remediation program requires involvement and participation at all levels of government. Municipal officials have a greater awareness and understanding of the properties and businesses in their communities. They control the planning, redevelopment, zoning and issuance of construction permits. The Site Remediation Program has a greater understanding of the location and the degree of contamination that may be present at properties throughout the State. There is a need for better communication and sharing of information between the State and the municipalities in order for both entities to effectively protect the citizens.

Municipal officials have expressed the following concerns:

1. Remediation of redevelopment projects is not happening in a timely manner.
2. Better lines of communication and easily accessible information are necessary to ensure that residents are aware of the location of contaminated sites in their neighborhood, the types and levels of contamination present and the existence of Engineering and Institutional controls.
3. The Department's existing inspection program for engineering controls is understaffed.
4. Abandoned sites not only create an eyesore in the community but they may also have contaminants present at levels that pose unacceptable health risks. The general public may not be aware that contaminants are present and may be accessing these sites. Signs should be posted at all known contaminated sites and not only those that are undergoing active remediation.

DEP's Current Authority:

The Brownfield and Contaminated Site Remediation Act at N.J.S.A. 58:10B-12 allows for a remedy of a contaminated site at which a responsible entity leaves contamination on-site, regardless of whether the property is going to be used for residential or industrial use, as long as the implementation of the engineering and/or institutional control at that site will result in the protection of public health, safety and the environment. Further, N.J.S.A. 58:10B-13 requires that the owner or lessee of any property for which there is an engineering and/or institutional control as part of the remedy, to maintain these controls. The Department's regulations, Technical Requirements for Site Remediation, N.J.A.C. 7:26E, require that the owner or lessee monitor the protectiveness of the engineering and/or institutional control, report to the Department its findings on a two-year cycle and notify the Department when a new party assumes responsibility to monitor and report. The Municipal Notification Act of August 2006 stipulates that municipal clerks must be notified when any remediating party advances to the Remedial Action phase of remediation. The Department recently (August 2007) proposed regulatory changes to the Technical Requirements for Site Remediation, which, when adopted, will require notification of remedial activities to both the municipal clerk and to the health officer of record. N.J.S.A. 58:10B-3 requires the establishment and maintenance of a remediation funding source in an amount necessary to pay the estimated cost of the required remediation. This requirement applies to a person in anyway responsible for a hazardous substance discharge, or otherwise liable for cleanup and removal costs pursuant to N.J.S.A. 58:10-23.11. It also applies to a person who has been issued a directive, an

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administrative consent order, or a person that has been ordered by a court to clean up and remove a hazardous substance discharge. The person responsible for performing the remediation may use the funding source to pay for the actual cost of the remediation. The Department may not require any other financial assurance.

Background:

The Department recognizes that current resources and business processes do not allow for sites to move through the remedial process as quickly as many would like. The Department cannot make all redevelopment sites the highest priority; even those deemed “the most important” by local government officials. The Department currently prioritizes the use of its resources based on the existence of immediate environmental concerns, health risks, ecological concerns and redevelopment potential and benefit to economic growth. These sites include those in designated Brownfield Development Areas (BDAs); “portfield” cases and other major redevelopment projects that are deemed significant based on economic growth opportunities. The Department is developing a GIS-based remedial priority system. This will be a dynamic relative ranking system that will take into account both conditions at and surrounding a site. For example, if the conditions around the site include high population density, potable water sources (surface or groundwater) or sensitive environmental conditions the site would score higher; on-site conditions will include such aspects as contaminant concentration and location. The system will assist the Department in allocating its resources to the highest risk sites.

Many of the redevelopment projects that local officials would like expedited are not ready for construction as they do not have other critical local and State approvals, or are not yet financed. For example, some projects may have outstanding issues related to potable water or wastewater capacity, or may be constrained by land use issues such as impacts to wetlands or threatened or endangered species habitat. As such, local officials and developers have complained that their redevelopment projects have not moved forward and local economic growth is stifled. It is perceived that political pressure is the only option available to receive “expedited Departmental review.” In recognition of the need to dedicate resources to economically significant projects as well as high priority environmental/public health projects, the Department has developed a project “readiness checklist” that will be used in the near future to gauge the redevelopment potential of projects based on a number of factors.

Many state regulations require notification of the Department’s actions (issuance of permits, remedial activities) or decisions to municipalities through the municipal clerks or health officers, but not a mayor’s office. As such, a mayor’s office may not receive information directly or in a timely manner. Mayors may not be fully aware of all site remediation activities in their municipality yet their constituents’ expectations are that they are fully knowledgeable. The Department has addressed this issue through various mechanisms. A recent rule proposal requires a person conducting a remediation of a contaminated site to post a sign or send a notification to local officials and the public, including the owners and tenants of properties located within 200 feet of the site’s boundary. The Department is also conducting Mayors’ Roundtables on a regular basis. These meetings are an opportunity for the mayors to obtain appropriate and relevant

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information about the Site Remediation Program and how it relates to their municipalities and development plans. It also provides an opportunity for the mayors to meet directly with program managers. To further provide timely information, the Department continues to develop its website. Current information on sites can be obtained through the Department's on-line Data Miner Reports; these reports contain information such as the location of known contaminated sites. It contains information on which cases received a No Further Action (NFA) or completed status, and which sites have restricted uses such as groundwater classification exception areas (CEA); and deed notices (engineering/institutional controls) are also readily available. Some municipalities have found these tools to be very helpful and as such, have provided links to the SRP website from their municipal website. The Department recognizes that there are still limitations to the type of information available to the public. For example, it is not possible at this time to access site-specific contaminant data. The Department, however, intends to address limitations through the development of a computer based repository know as "COMPASS" which is Comprehensive Organizational Monitoring Program and Assessment Support System, and by requiring the submittal of electronic information.

Because of the limited resources, the Department inspects properties with known restrictions no more than once every five years. Because the Department standards are based on chronic exposure and assume 30 years of inhalation or ingestion over a 70 year lifetime, short term breaches to engineering controls should not result in unacceptable chronic exposure risk. However, the party responsible for ensuring the engineering controls should still be inspecting the control and certifying to the Department on a two year basis regardless of the Department's schedule.

There is no requirement to notify the Department when a property that has not undergone a permanent remedy and/or is under long-term monitoring and maintenance changes use from industrial to residential. Although there is a regulatory requirement to notify the Department when a property changes ownership, compliance is weak. Sites are subject to Department imposed deed restrictions when they have 1) engineering controls; 2) have been remediated to restricted standards; or 3) have contaminants above drinking water standards. The degree to which new owners have been notified or understand the restrictions placed on the property is questionable. Property owners could, through any construction activity unknowingly disrupt an engineering control or through the installation of a well create the potential for exposure to contamination. If tenants or property owners are unaware of restrictions they may plant vegetables for consumption, and thus potentially be exposed to health risks if the vegetables have been planted in an area that may still contain some level of contamination. It is also possible for vapor intrusion problems to occur if engineering controls are not properly maintained.

Developers or property owners are not required to disclose to the Department or the local government that they are building on a known contaminated site or a site with a conditional NFA. Without this requirement, the possibility exists that known contaminated sites are being developed without proper remediation or that engineering controls on sites with conditional NFAs are being compromised. The potential therefore exists for individuals to be unknowingly exposed to contamination. Further, there are no requirements mandating that a developer come to the Department for oversight of a

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cleanup. Developers may choose to enter into the voluntary cleanup program or be compelled to do so when required by a financial institution.

There are abandoned or “warehoused” sites in economically depressed neighborhoods that are not being addressed because there is no viable responsible party, there is no current development interest and there is no immediate environmental concerns (IEC) condition for the Department to address. Although the Department does use public funds to address IECs such as contaminated drinking water, vapor intrusion and high levels of soil contamination when no viable responsible party exists, staffing and funding resources are not available to remediate all abandoned sites. Without fencing or signage, the public may be unknowingly accessing contaminated sites. Municipalities do have the ability to access HDSRF funding to perform investigations at these sites so as to characterize and market them, but many do not take advantage of these funds.

Stakeholder Comments:

Timeliness of remediations – In order to expedite the Department’s review of redevelopment projects, numerous stakeholders, felt developers could pay an impact fee or other type of fee to help move projects through the system more quickly. These fees could be escrowed for use by the Department to pay for new staff dedicated to prioritized redevelopment sites and/or be used by local agencies to pay for inspecting or maintaining engineering controls. Utilization of local resources, increased Departmental staffing, CEHA agencies or Licensed Site Professionals to review critical redevelopment projects were other options discussed. (More detailed discussion can be found in other white papers.)

A stakeholder recommended that if a project in a Brownfield Development Area is prioritized by the site remediation program for expedited review, that it also be prioritized by all other department programs. Any other necessary state approvals or permits for the project should be treated in the same manner. Another recommendation was that project reviews be expedited when remediation did not rely on engineering or institutional controls or the person conducting the remediation agreed to clean up to a more stringent level of remediation than that required by law.

Notification of Engineering and Institutional Controls - Stakeholders suggested the Department create a website/database for municipal officials, local residents, developers and construction and utility contractors to access information about engineering controls and institutional controls (ECICs) at sites. The information on the website could include the date the cap was installed, construction details, the level and types of contaminants under the cap, and who is responsible for maintaining the cap. It was also suggested that there was an opportunity to involve local health officers through the County Environmental Health Act to assist the Department inspection and enforcement actions, or include environmental commissions in audits of capped sites. Further additional funding could be made available to support new Department inspectors. It was felt that the public would have a greater confidence in the effectiveness of ECICs with increased inspections and readily available information.

Other recommendations involved local controls. For example, the BOCA (Building Officers and Code Administrators) codes could be changed to include vapor barriers to

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eliminate any potential future vapor intrusion situations. Another was to involve code officials through a revision of the UCC F100-1 Construction Permit Application Requirements by adding a deed restriction query to their standard form governing local construction approvals. A third recommendation was to require the Construction Code Official's approval for any change of use of a property.

It was noted that legislation could require real estate transactions to disclose deed restrictions prior to sale rather than rely on title searches or attorney reviews, where there was a possibility for a deed restriction to be overlooked. A title search verifies ownership and existing liens against a property. Attorney reviews generally focuses on the contracts pertaining to the sale, rather than deed restrictions. An additional disclosure item in real estate transactions could serve to protect buyers and ensure compliance with deed restrictions.

It was also suggested that the Municipal Land Use Law could be amended to require an analysis of historic use of sites when seeking zoning or planning board approvals. This could include a review of Department records when local development applications are made, including a zoning change from industrial to residential, or a more direct disclosure obligation by conducting of an Environmental Impact Statement..

Another suggestion was to seek community input when remediation of a site includes an engineering or institutional control so that local concerns are incorporated into the cleanup decision. Some stakeholders believed that community involvement should not be limited to those sites with engineering and institutional controls, but that it is important to provide financial resources so that community groups could perform a proper technical review, perhaps through the hiring of an independent consultant.

It was suggested that the Department institute a new permitting process for Engineering and Institutional controls. The permit could be tagged to the property; compliance with the permit would be the responsibility of the property owner and could be transferred to any new owner. These permits could be maintained in the Department's NJEMS database and viewed on the web so that the general public would have access to the information about the ECICs. Renewal of the permits or issuance for change of ownership could be handled through an automated process. The fees associated with the permits could support additional inspectors in the Department. The permits could replace the existing biennial certification program.

One recommendation included allowing the Department to deny the use of ECICs when contaminant levels are present above a certain threshold level; how these levels would be set was not determined. A similar suggestion was to prohibit the use of ECICs altogether or at least when the site is located in an environmental justice community or the end use is residential or educational. Some stakeholders felt that ECICs allow developers to leave unacceptable levels of contamination on site. It was suggested that the Department could require remediating parties to establish escrow accounts to ensure caps are inspected and maintained. Others noted that placing additional financial responsibilities on developers or requiring more stringent controls when higher levels of contaminants remain on site would create additional expenses for remediating parties. These action could be seen as onerous and thus discourage developers from remediating brownfields sites.

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Additionally, it was expressed that any new prohibitions or limitations on the use of ECICs would adversely impact redevelopment and revitalization of urban areas.

Notification to Mayors – Stakeholders felt that sharing more information directly with mayor's offices could alleviate concerns related to lack of notification. Informational sessions held by Department staff and increased correspondence are two other alternatives. There was a discussion of the Department's web-based reporting tool, DataMiner. DataMiner can be used to generate a variety of reports, including inactive site remediation cases. It was noted, however, that the system is at times slow and is not easy to use.

Signs - It was suggested that State, county or local government could require the posting of signs informing the public of potential risks associated with accessing abandoned sites. This could be achieved by local ordinance, however, some stakeholders were concerned that local ordinances regarding remediation or soil testing would result in a 'hit or miss' approach and should be a matter of course through a mandatory approach established in either the Municipal Land Use Law or some other legislative mandate. Alternatively, the Department could be required to track abandoned sites with contamination and post signs if the Department is made aware of these sites and has the available resources. Stakeholders felt utilization of local resources or CEHA agencies could also be a solution.

Generally, the stakeholders recognize the Department's plan to build a new GIS-based site ranking system based on the level and type of contamination present at a site; proximity to receptors; site specific conditions, etc. The stakeholders recommend that this system include those abandoned sites which the Department is aware of and identify those with the highest degree of environmental/health risk so that action can be taken

Other States:

Many states notify public officials at various stages of remediation activity. Maryland Department of the Environment (MDE) requires, upon submission of an application to the Voluntary Cleanup Program, that an applicant post a notice at the property with the name and address of the applicant and the property, MDE contact information, and the deadline for the 30-day time period during which MDE will receive and consider written comments from the public. MDE also maintains a website where the public can view a list of sites that have deed restrictions and what those restrictions are.

California's Department of Toxic Substances Control (DTSC) requires that a notice is posted at site location when there is a Draft Remedial Action Plan (RAP). They also require appropriate agencies be notified of the Draft RAP. California maintains a database of Deed Restrictions/Deed Notices that is available to the public on its website. The database provides the location, facility name, and a copy of the deed notice.

The West Virginia Department of Environmental Protection must notify the municipality and the county commission where the site is located upon receipt of a Notice of Intent to Remediate. The Notice is issued to the county and/or municipal land use agency, or the area's Regional Planning and Development Council and the Bureau for Public Health and other state or federal agencies that may have an interest in the remediation project. Also,

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when the Intent to Remediate is sent to the state, a sign that is a minimum of three feet by four feet must be posted at the site. It must state "This site is under consideration for environmental cleanup and participation in the state's Brownfield Program under the Voluntary Remediation and Redevelopment Act;" and must include the number and address of the Department of Environmental Protection's Brownfield office.