

NJDEP Site Ranking Letter and Draft Data Forms Will Require Prompt and Careful Attention

Significant consequences may result from the upcoming remedial priority ranking of approximately 12,000 contaminated sites by the New Jersey Department of Environmental Protection (NJDEP). In mid-May NJDEP initiated its formal communications with parties responsible for contaminated sites by sending data forms that identified the information that NJDEP will use to compute the remedial priority rankings of most contaminated sites. After about a 90 day review and comment period, NJDEP will rank all of the sites on a scale from 1 to 5, with “1” being the “lowest risk potential” and “5” being the “highest risk potential.” Within about sixty days of receipt of the data form, each recipient will have to register with the NJDEP to preserve its right to submit comments. Only the Licensed Site Remediation Professional (LSRP) for the site, required to be retained by responsible parties by May 7, 2012, may submit the actual comments on the data form. NJDEP intends to publish site rankings in the Fall and to update the rankings quarterly commencing in 2014, as more data becomes available for each site during the course of remediation.

NJDEP originally planned to publish draft site rankings and submit the rankings for comment. However, it decided to issue these draft forms instead, explaining that it wanted to focus its efforts on giving parties the opportunity to make sure that it had up-to-date site remediation information before it calculated the site ranking.

NJDEP’s ranking will be based on:

- risk to the public and the environment;
- length of time the site has been undergoing remediation;
- economic impact; and
- other factors deemed relevant.

I. Why Is NJDEP Ranking Sites, and How Will Sites Be Affected by the Ranking?

Besides a long overdue statutory obligation to rank contaminated sites, NJDEP wants to insure that the sites with the highest potential risk are being remediated. Although nothing is certain, NJDEP likely will not take any action, even if a site is highly ranked, so long as:

- the site is undergoing active remediation;
- no enforcement actions have been commenced; and
- an LSRP has been retained.

However, if the remediation is not proceeding in compliance with these criteria, a high ranking may cause NJDEP to place the site under its “Direct Oversight,” and “Direct Oversight” is not a place that most responsible parties want to be. (See Section III. below) It is also true that a highly ranked site, even if not placed under NJDEP “Direct Oversight,” is more likely to receive public scrutiny and potential adverse publicity than is a lower ranked site. NJDEP, the United States Environmental Protection Agency (USEPA) and legislators constantly receive requests

from environmental groups and others to take remedial action or investigate the progress of a remediation. Undoubtedly, a site with a high ranking is a target for future attention, especially because NJDEP will be posting the rankings on its website.

II. How Will the Rankings be Calculated?

The rankings will be computer generated using a model that assesses site-specific human health impacts from groundwater, surface water, soil, and from vapor intrusion and ecological impacts to wetlands, threatened and endangered species habitats, natural heritage areas, Pinelands, Highlands, flood prone areas, buffer zones, etc. The information on the data form that is being sent to responsible parties is information obtained by the NJDEP using Geographic Information System (GIS) tools, databases from the New Jersey Environmental Management System (NJEMS), the known Contaminated Sites (KCS) list and data collected and reported during the investigation and remediation process that has been entered in the NJDEP database (HazSites). Using this information as supplemented by responsible parties, NJDEP will develop a Final Human Health Ranking and a Final Ecological Ranking that are combined to produce the site ranking. This model has been designated by NJDEP as the Remedial Priority System (RPS). NJDEP's objective is for this computer generated RPS to produce consistent defensible rankings that provide reproducible results and minimize human subjectivity

The site sampling data NJDEP uses to rank sites is limited to the highest, most recent results available to NJDEP for each hazardous substance in each environmental media. The higher the sampling result is above the applicable standard, the higher the "Exceedance Quotient." Because the score for each media is multiplied by the Exceedance Quotient, the Exceedance Quotient is a major driver of the environmental ranking of the site.

However, an even stronger driver of the score will be whether there is a contaminant pathway to potential receptors. Fortunately, the types of receptors that NJDEP has identified on the draft form probably can be evaluated for accuracy by someone familiar with a specific site.

If there are questions about the basis for the information on the draft data form and there is concern about a potential high ranking, it may be necessary to submit an Open Public Records Act (OPRA) request for information to NJDEP.

III. Why Care if a Site is Subject to Direct Oversight by NJDEP?

Any site that is under Direct Oversight by NJDEP incurs more remediation costs and loses the "right" to select the remedy. In order to understand the impact of Direct Oversight, it is necessary to review how the NJDEP remedial program is changing. Effective May 2012, responsible parties had to hire an LSRP for most sites. The LSRP is responsible for insuring that all remedial investigations and remedial actions have been performed in compliance with NJDEP requirements and that the remedial actions are protective of public health and the environment. When the LSRP is satisfied that a site meets these criteria, the LSRP has the authority to issue a Response Action Outcome, which is the equivalent of the old No Further Action Letter issued by NJDEP.

When a site is under Direct Oversight, not only are you required to hire an LSRP, but the following requirements also apply that generally do not apply in the absence of Direct Oversight:

- NJDEP reviews each document submitted by the LSRP and approves or rejects the required submissions. In other words, the responsible party incurs the cost of retaining an LSRP, but the NJDEP also reviews the documents and issues all of the approvals and denials and, of course, the responsible party also reimburses NJDEP for all of its oversight costs.
- A feasibility study for the remedial action must be performed in accordance with NJDEP requirements and submitted to NJDEP for approval. Only sites under Direct Oversight are subject to this requirement.
- NJDEP selects the remedial action for the site. In the absence of Direct Oversight, the LSRP, in consultation with the responsible party, selects the remedy.
- The person responsible for conducting the remediation must establish a remediation trust fund in the amount of the estimated cost of remediation, and all disbursements must be approved by NJDEP. Sites that are not under Direct Oversight have five other NJDEP approved options for a remediation funding source.
 - The LSRP must provide all submissions simultaneously to NJDEP and the person responsible for conducting the remediation. The responsible party does not have an opportunity to review a document before it is sent to NJDEP.
 - A public participation plan must be prepared and approved by NJDEP so that members of the surrounding community have an opportunity to provide comments concerning the remediation of the site.

IV. What Should Parties Do When they Receive the Draft Data Form?

- Timely register to preserve the right to submit comments
- Review the draft data form to determine if you have the site specific information needed to assess the form
- Submit an OPRA request to NJDEP if you need additional information to understand the draft data form
- Timely submit comments on the draft data form

Recognize that it may be easier for certain comments on the draft data form to be accepted by NJDEP than are others. For example, if NJDEP bases the scoring on the fact that the exposure pathway was identified as “open” when, in fact, the area has been remediated and the exposure is now “closed”, it may not be difficult to demonstrate to NJDEP that the score should be adjusted. However, if NJDEP used its GIS landscape maps to determine that the contamination may impact a threatened or endangered species habitat, then it may be more difficult to demonstrate that the area is not a habitat for any threatened or endangered species.

V. Conclusion

The draft data forms that NJDEP is sending to responsible parties identify the site specific human health impacts and ecological impacts that will be used by NJDEP to perform its remedial priority ranking. Responsible parties will have approximately 90 days to advise NJDEP if there are errors in the draft data form and to provide additions and corrections. If the responsible party's LSRP does not respond before the end of the 90 day period, NJDEP will assume that the information is accurate and will rank the site based on the information in the draft data form. This ranking will be published on the NJDEP website and may result in placement of the site in Direct Oversight.

Finally, if there is not sufficient detail in the draft data form to understand all of the information contained in the draft data form, a carefully tailored request immediately should be submitted to NJDEP pursuant to OPRA