Topic: Addressing Backlogs

Description of Issue:
There are over 18,000 cases in Site Remediation's database. Approximately 12,000 of these cases are being remediated under a regulatory program such as the Industrial Site Recovery Act (ISRA) or Underground Storage Tanks (UST). Included in these numbers are cases which have been issued No Further Action letters (NFAs) but require ongoing monitoring by Department staff pursuant to the biennial certification requirement. The Voluntary Cleanup Program (VCP) accounts for 6,000 out of the 18,000 cases, 4,000 of which are homeowner UST removals. Although the number of cases requiring Department oversight increases every year, Site Remediation's work force has not significantly changed since FY1998. The average FTE (Full Time Equivalent equal to a person year) based on time coded over the past nine years is 505, ranging from 491 to 515. Of these FTE, 250 to 300 are case managers responsible for reviewing remediation documents submitted by the regulated community and developers. Providing support to these case managers are 90 technical support staff comprised of scientists and geologists. Whereas approximately 4000 cases enter the program each year, only 3500 or so cases receive NFAs. Most of these NFAs are associated with homeowner UST cases, UST cases with soil contamination only, UST and ISRA initial notice cases and specific Areas of Concern (AOC) NFAs.

As the number of cases in-house grows each year, the Department is unable to provide remedial action work plan approvals and NFAs in a timely manner, which is frustrating to Department staff and managers, remediating parties, local community activists, environmental groups, developers and local officials. What mechanisms are available to resolve the issue of a growing backlog in the Site Remediation Program?

DEP's Current Authority:

The Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., provides that the Department may allow a responsible party to remediate a contaminated site. The Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., provides that the Department may issue a NFA letter to a person responsible for conducting the remediation upon a finding that, based upon Department evaluation of the historical use of a particular site or any other investigation or remediation performed by the person that the Department deems necessary, the contamination has been remediated in accordance with applicable Department remediation regulations. The NFA establishes compliance with the Industrial Site Recovery Act rules, N.J.A.C. 7:26B, the Underground Storage Tank rules, N.J.A.C 7:14B, an Administrative Consent Order or a Judicial Order.

Background:
In order to obtain an NFA, a person responsible for conducting the remediation must submit documentation to the Department for its review establishing either that there is no contamination at the site or that the contamination at the site has been remediated in accordance with the Department's Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The NFA is necessary as evidence that the site does not pose a threat to public health and the environment. Throughout the years, market pressure has led to parties requesting NFAs in order to complete

financial or real estate transactions, thus increasing the number of cases requiring Department action. This is especially true of homeowners with unregulated heating oil tank systems. Often lending institutions require a NFA indicating that there is no contamination at the home before they approve a mortgage. Therefore, obtaining a NFA becomes necessary to sell a home. This has increased the Department's workload.

In addition to transactional NFA requests, the Department's VCP and growing interest in brownfields redevelopment have contributed to a significant increase in cases. Under the VCP, a party conducting a cleanup enters into a Memorandum of Agreement with the Department to establish the scope of cleanup activities. Such activities could range from a preliminary assessment and site investigation to determine if contamination exists at a site, to remedial actions necessary to clean up the site. The Department established the program in 1992 in order to allow parties to "volunteer" to remediate sites that pose no immediate threat to public health and the environment.

Lastly, for a variety of reasons, many cases required to undergo remediation under ISRA, UST, CERCLA and RCRA have been slow to exit the system as remediated sites with NFA's.

Stakeholder comments:
The Department presented seven options to address workload relief:

- Increase staffing. Staff could potentially be funded by higher fees for those who wish to pay for guaranteed Department review times (e.g. 30-60 day review times for all documents)
- Expand delegation to County Environmental Health Agencies (CEHA)
- Eliminate the need for DEP staff to work on homeowner cases through Clean Up Star program, an UST certification program, CEHA delegation, or other options.
- Expand Clean Up Star to handle additional lower risk cases
- Establish a Licensed Site Professional program similar to Massachusetts (LSP)
- Begin to use in-house contractors similar to EPA and other states
- Cease reviews on submittals that are not explicitly required by statute (NFA's for sites that have no history of contamination, homeowner UST removals).

Although there was strong support from some stakeholders for hiring the number of new staff required to address workload relief, it was noted that such an action would be difficult considering New Jersey's existing budget problems. DEP estimates 1000 new staff would be needed to ensure a 60-day turnaround on all submittals. That is not to say that limited additional staffing could not be considered. One stakeholder recommended converting the technical support staff (technical coordinators and geologists) to case managers.

The Department noted that the option of further delegation of oversight of certain cases to CEHA agencies was not a promising alternative as many counties have similarly limited resources and Departmental funding is not available to fund additional CEHA obligations. It was noted that some counties currently have delegation agreements with the Department for homeowner UST cases but the level of funding the Department provides does not adequately cover the county's cost.

The Department discussed a proposal for addressing the number of homeowner cases it reviews. The New Jersey Underground Storage of Hazardous Substances Act at N.J.S.A. 58:10A-24.3 requires the Department to establish and conduct examinations to certify persons as qualified to perform services on regulated and unregulated USTs. The Department is drafting rules for proposal in the New Jersey Register in the fall of 2007 to establish a certification program for unregulated heating oil tank systems (mostly homeowner tanks) consistent with the statute. The proposal will require most homeowners (those with USTs not impacting receptors, etc) to use a contractor certified by the Department to conduct remediation of their tank in order to get a NFA letter from the Department. Remediation of the majority of homeowner cases is straightforward and these sites pose minimal risk to public health and the environment. Eliminating the majority of homeowner cases from direct Department oversight will free up case managers to focus on higher priority cases. The Department would still audit these cases and issue NFAs.

Another option discussed was establishing a Licensed Site Professional (LSP) program based on the Massachusetts program. The LSP program entails establishing a licensing process for individuals and business firms that wish to engage in the practice of remediating contaminated sites. In Massachusetts, an LSP review board that is separate from the MADEP works with the MADEP to establish the requirements and credentials necessary for an individual or business firm to obtain a license. The board is also responsible for granting, denying, suspending and revoking a professional's license and issuing penalties against the LSP. If such a program were adopted in New Jersey, the Department could identify the types of cases that a LSP can oversee. Delegating the responsibility to oversee the remediation of contaminated sites to a LSP would allow the Department to focus its limited resources on the highest priority and most complex cases; dedicate its resources to enforcement; and audit the LSP submittals. All agreed that creation of a LSP program will take significant time, 2-3 years. Legislation would be needed to provide authority for such a program. In addition, the time necessary to create a licensing board and develop a testing program would be lengthy.

The environmental community and union representatives do not favor a LSP program. Concerns ranged from "privatization" to potential collusion between consultants and remediating parties. Additionally noted was the fact that this work was inherently governmental and should not be delegated to third parties. Individuals representing other associations and organizations were split in their support for a program exactly like Massachusetts and thought more discussion about detail would be necessary before support could be provided. Some did express agreement for licensing of consultants. In general, the development community was in favor of the Department remaining the entity that issued NFA's.

In addition to regulatory and legislative solutions, stakeholders discussed policy changes to address the problem. The regulated community noted that the delineation phase of site remediation takes an inordinate amount of time. The concern articulated was that case managers apply the Technical Requirements for Site Remediation too conservatively, requiring data that may not be necessary in making decisions to delineate the contamination at a site. The regulated community and the Department agreed that case managers should apply the Technical Requirements for Site Remediation in a reasonable manner, considering site-specific conditions. Further, the regulated community suggested the use of a performance-based rather than a

prescriptive regulatory model for determining the remediation requirements at a site. This could save time and money by allowing persons responsible for conducting the remediation to have less contact with Department case managers. This would take into consideration the differences in site conditions, and not require a "cookie cutter" approach to site remediations. For example, the compliance points at a site could be based on site use and the presence of receptors. The regulated community also suggested that a performance-based system would need a stronger enforcement model in order to keep parties motivated to do things correctly. (see Performance vs. Prescriptive white paper.)

The options of the use of in-house contractors and refusing to review requests for NFAs not required by the Department were not discussed in detail. The Department is further evaluating the use of in-house contractors in a support role to alleviate backlogs. Many environmental regulatory agencies, including those in Delaware and Pennsylvania, as well as the USEPA have expanded their resources through the use of remedial action contracts. These contracts provide manpower that has the same technical capabilities as agency staff to assist the agency in performing its work. Contractors can be tasked with reviewing technical data, summarizing issues or concerns and providing recommended actions to agency personnel thereby freeing up agency personnel to concentrate on priority work.

Other States:
The Massachusetts DEP (MADEP) uses LSPs to oversee the cleanup of most contaminated sites. An LSP is an environmental scientist or engineer experienced in performing site cleanups. A board independent of the MADEP licenses LSPs. A license is obtained based on education, experience and passing an examination on applicable regulations and standards. In order to maintain a license, the LSP must meet and maintain professional standards set by the Board. The Board is authorized to take action again LSPs whose work fails to meet the standards.

LSPs are hired by property owners and other responsible parties and oversee the assessment and cleanup of contamination and ensure that these actions are performed in compliance with the standards. The LSP gathers and evaluates information and recommends a remedy. The recommendations are contained in a written opinion signed by both the LSP and responsible party. Most opinions do not require DEP approval for cleanup to proceed. Once a cleanup is completed, the LSP submits a final opinion to the MADEP stating that the property has been remediated in accordance with the standards.

The MADEP is required to annually audit at least 20% of all completed sites. The level of the audit is dependent on the complexity of the cleanup.

The Connecticut DEP (CTDEP) also uses Licensed Environmental Professionals (LEP) to oversee the cleanup of contaminated sites. The licensure and issuance, re-issuance, and suspension or revocation of licenses of LEPs is conducted by a board established within the CTDEP. The LEP can verify that an investigation has been conducted and a remediation has been completed in accordance with the standards for an established category of cases.

The authorizing legislation allows the CTDEP to conduct an audit of any action authorized by law to be performed by an LEP. The LEP Verification Audit Program has been established to

ensure that the "verifications" of the LEP are based on an appropriate understanding of the environmental conditions of the site and that the verification is in compliance with all applicable statutes and regulations.

The Illinois EPA (IEPA) requires that all remediation site activities be conducted by or under the supervision of an Illinois licensed professional engineer (LPE). All plans and reports submitted for review and evaluation must also be prepared by or under the supervision of a LPE. The IEPA must approve or disapprove any report submitted.

The responsible party may elect to contract with a Review and Evaluation Licensed Professional Engineer (RELPE) to perform review and evaluation services on behalf of and under the supervision of the IEPA. The responsible party must provide the IEPA with any terms and conditions of a contract with a RELPE prior to entering into the contract. At a minimum, the contract must provide that the RELPE will submit any plans or reports directly to the IEPA, will take directions for work assignments from the IEPA, and will perform assigned work on behalf of the IEPA. In addition, the contract must set forth the scope of work for which the responsible party has engaged the RELPE, the effective date of the contract and the costs incurred by the RELPE shall be paid directly to the RELPE by the responsible party.

Reasonable costs incurred by the IEPA for oversight of the RELPE and its review and evaluation services must be paid by the responsible party directly to the IEPA in accordance with the terms of the review and evaluation services agreement. Project documents submitted for review on behalf of the responsible party may be submitted concurrently to both the IEPA and the RELPE, but all subsequent communications, telephone calls, meetings, etc. must be coordinated with the assigned IEPA project manager. The RELPE's review/evaluation notes, comments, etc., must be addressed to the IEPA for final approval, prior to communication back to the responsible party.

In no event shall the RELPE acting on behalf of the IEPA be an employee of the responsible party or the owner or operator of the remediation site or be an employee of any other person the responsible party has contracted to provide services relative to the remediation site.