

October 24, 2010

Subject: SRRA - DEP proposed rule to eliminate and delay mandatory timeframes inconsistent with legislative intent

Dear Senator Smith and Assemblyman McKeon:

I am writing to you as sponsors of the Site Remediation Reform Act, P.L. 2009, c. 60 (hereafter "SRRA")

I previously wrote to advise that in the October 4, 2010 *NJ Register*, the DEP proposed new rules that would eliminate and delay implementation of the mandatory remedial timeframes and related requirements established by interim rules adopted pursuant to the SRRA in December 2009 (for DEP proposal, see: <http://www.nj.gov/dep/rules/notices/100410a.html>)

I also previously requested that you make legislative inquiry to DEP regarding this proposal, that you conduct oversight hearings, and - should DEP not agree to withdraw the proposal - to use your legislative powers to invalidate the proposed rules as inconsistent with legislative intent pursuant to the NJ Constitution. As you know,

*Article V, Section IV, paragraph 6 of the Constitution of the State of New Jersey provides that the Legislature may review any rule or regulation of an administrative agency to determine if the rule or regulation is consistent with the intent of the Legislature and, upon a finding that the rule or regulation is not consistent with legislative intent, may transmit such finding to the Governor and the head of the agency*

Below, in summary points I-V, please find the relevant statutory provisions and statements of legislative intent. These are clearly violated by the subject DEP rule proposal.

Note that DEP will hold a public hearing on the proposal on November 1 at DEP's Trenton HQ.

I reiterate my prior requests and look forward to your timely and favorable response.

Sincerely,

Bill Wolfe, Director  
New Jersey PEER (Public Employees for Environmental Responsibility)

## Legislative Intent Violated by Proposed Rules

### I) SRRA Remedial timeframe requirements are mandatory, not discretionary - DEP assumption of oversight is mandatory, not discretionary:

<http://www.njleg.state.nj.us/2008/Bills/PL09/60 .HTM>

A. Section 27 provides, in pertinent part:

*C.58:10C-27 Direct oversight of remediation by department; conditions.*

*27. a. The department shall undertake direct oversight of a remediation of a contaminated site under the following conditions:*

*(1) the person responsible for conducting the remediation has a history of noncompliance with the laws concerning remediation, or any rule or regulation adopted pursuant thereto, that includes the issuance of at least two enforcement actions after the date of enactment of P.L.2009, c.60 (C.58:10C-1 et al.) during any five-year period concerning a remediation;*

*(2) the person responsible for conducting the remediation at a contaminated site has failed to meet a mandatory remediation timeframe or an expedited site specific timeframe adopted by the department pursuant to section 28 of P.L.2009, c.60 (C.58:10C-28), including any extension thereof granted by the department, or a schedule established pursuant to an administrative order or court order;*

### II) SRRA Remedial timeframe extensions are mandated (pursuant to 28 c) under limited conditions. Those conditions do not include providing a "safety cushion" as proposed by DEP rules. Extensions are allowable in 28.d. under limited conditions, however, any extension must be justified on and is limited to a site specific basis and can not be done categorically by rule.

*C.58:10C-28 Establishment of mandatory remediation timeframes.*

*28. a. The department shall establish mandatory remediation timeframes, and expedited site specific timeframes when necessary, to protect the public health and safety and the environment, for each of the following:*

*(1) a receptor evaluation;*

*(2) control of ongoing sources of contamination;*

*(3) establishment of interim remedial measures;*

*(4) addressing immediate environmental concern conditions;*

*(5) the performance of each phase of the remediation including preliminary assessment, site investigation, remedial investigation and remedial action;*

*(6) completion of remediation; and*

*(7) any other activities deemed necessary by the department to effectuate timely remediation.*

*b. In establishing remediation timeframes pursuant to subsection a. of this section, the department shall take the following into account:*

*(1) the potential risk to the public health, safety, and the environment;*

*(2) the results of the receptor evaluation;*

- (3) *the ongoing industrial or commercial operations at the site;*
- (4) *whether, for operating industrial or commercial facilities, there are no releases of contamination to the groundwater or surface water from the site; and*
- (5) *the complexity of the contaminated site.*

c. *The department shall grant an extension to a mandatory remediation timeframe as a result of:*

(1) *a delay by the department in reviewing or granting a permit, provided that there was a timely filing of a technically and administratively complete permit application;*

(2) *a delay in the provision of State funding for remediation, provided that there was a timely filing of a technically and administratively complete application for funding; or*

(3) *a delay by the department for an approval or permit required for long-term operation, maintenance and monitoring of an engineering control at the site provided the request for approval or permit application is technically and administratively complete.*

d. *The department may grant an extension to a mandatory remediation timeframe on a case-by case basis as a result of:*

(1) *a delay in obtaining access to property, provided the person responsible for conducting the remediation demonstrates that good faith efforts have been undertaken to gain access, access has not been granted by the property owner, and, after good faith efforts have been exhausted, a complaint was filed with the Superior Court to gain access, in accordance with applicable rules and regulations;*

(2) *other circumstances beyond the control of the person responsible for conducting the remediation, such as fire, flood, riot, or strike; or*

(3) *other site-specific circumstances that may warrant an extension as determined by the department.*

**III ) The SRRA statute requires mandatory enforcement - there is no discretion provided to DEP to waive mandatory requirements as DEP has done via "compliance advisory" (see: <http://www.nj.gov/dep/enforcement/advisories/2010-12.pdf>)**

*e. Any person who violates P.L.2009, c.60 (C.58:10C-1 et al.), or any rule, regulation, code of conduct, or order adopted or issued pursuant thereto, or who fails to pay a civil penalty or civil administrative penalty in full or to agree to a schedule of payments therefor, shall be subject, upon order of a court, to a civil penalty not to exceed \$10,000 for a first violation and not more than \$20,000 for every subsequent violation. Any civil penalty imposed pursuant to this subsection may be collected with costs in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).*

**IV) The SRRA statute provides for mandatory assumption of DEP oversight when specific legislative criteria are not met - there is no discretion provided to DEP to waive or deviate from these criteria via regulation**

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*(2) the person responsible for conducting the remediation at a contaminated site has failed to meet a mandatory remediation timeframe or an expedited site specific timeframe adopted by the department pursuant to section 28 of P.L.2009, c.60 (C.58:10C-28), including any extension thereof granted by the department, or a schedule established pursuant to an administrative order or court order;*

**V) The clear legislative intent is to expedite cleanups via SRRA mandatory timeframes.**

**See 2/26/09 - press release by sponsor:**

**SMITH SITE REMEDIATION BILL MOVES FULL STEAM AHEAD  
Bill Would Help Accelerate Clean-up of Contaminated Sites & Create New State & Local Revenue**

<http://www.njsendems.com/release.asp?rid=2692>

“First and foremost, it will be a victory for public health if we can address the environmental concerns on these properties **more quickly** and efficiently.

If the site starts out under an LSRP **and then they do not meet mandatory timeframes for the cleanup**, DEP would assume direct oversight of the project.

**See also the following news clipping:**

**Smith Licensed Site Professionals Bill Approved By Full Senate**

<http://www.politickernj.com/jbutkowski/28239/smith-licensed-site-professionals-bill-approved-full-senate>

[By Jason Butkowski](#) | March 16th, 2009 - 7:35pm

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SMITH LICENSED SITE PROFESSIONALS BILL APPROVED BY FULL SENATE - Measure Would Break Backlog Of Site Remediation Projects By Allowing Professional Review, Approval

TRENTON – A bill sponsored by Senator Bob Smith, Chairman of the Senate Environment Committee, which would establish a licensed site remediation professional program in New Jersey **to speed up** the clean-up of contaminated sites around the State was approved by the full Senate today by a vote of 34-4, receiving final legislative approval. “Right now, New Jersey has a backlog of over 20,000 known contaminated sites in the State that are not being cleaned up fast enough,” said Senator Smith, D-

Middlesex and Somerset. ...Senator Smith noted that the bill contains safeguards against abuse of the program, to ensure that consultants are acting in the public interest. The bill would require that consultants meet rigorous licensing standards and adhere to a strict code of conduct to protect against conflicts of interest....