

GOVERNMENT AFFAIRS TEAM

Melanie Willoughby
Senior Vice President

October 5, 2007

Sara Bluhm
Assistant Vice President
Energy & Federal Affairs

VIA E-MAIL

David Brogan
Vice President
Environmental Policy &
Small Business Issues

Attn: DEP Docket No. # 16-07-07/570
New Jersey Department of Environmental Protection
Ms. Leslie Ledogar, Esq.
Office of Legal Affairs
P.O. Box 402
401 East State Street, 4th Floor
Trenton, New Jersey 08625-0402

Christopher Emigholz
Director
Education Policy

Arthur Maurice
First Vice President
Economic Development &
Taxation

Re: DEP Docket No. # 16-07-07/570
NJBIA Comments on the Notification of the Remediation of
Contaminated Sites and Public Outreach Proposal: N.J.A.C. 7:26C-10.4
and 7:26E-1.4, 1.11, 3.7, 4.1, 5.1, 8.2

Frank Robinson
Vice President
Grassroots &
Transportation

John Rogers, Esq.
Vice President
Human Resource Issues

Dear Ms. Ledogar:

Christine Stearns, Esq.
Vice President
Health & Legal Affairs

I am writing in response to the above-referenced proposal on behalf of the New Jersey Business and Industry Association (NJBIA). NJBIA represents over 23,600 businesses in the State of New Jersey, many of which would be impacted by the proposed Public Notification rules. As the largest state-level employer association in the nation, we appreciate this opportunity to share our thoughts and concerns with the Department.

NJBIA supports meaningful public communication and notification as a key component of the site remediation process. Furthermore, with over 18,000 contaminated sites throughout the State, it is imperative that the state provide incentives, not disincentives toward remediation activities.

While NJBIA understands that the department was required to develop regulations within the framework of P.L. 2006, Ch. 65, we believe that the department went well beyond what was required in that law. By doing so, the department has potentially created a regulatory hurdle that will unnecessarily alarm the public, incite litigation, and discourage more cleanups. NJBIA would urge the department to support changes to the law and subsequent changes to the proposed regulations that provide meaningful notification and continue to promote cleanups throughout our state.

Below, we have provided detailed comments and questions on the Public Notification proposal. We appreciate the opportunity to comment on this proposal and look forward to working with the department on changes that make the notification process more workable.

Proposal and Law Do Not Appropriately Consider the Diverse Nature of Sites in New Jersey

As stated above, New Jersey has over 18,000 contaminated sites. The diverse nature of these sites warrants diverse and flexible responses when it comes to cleanup options and notification options. Under this proposal, large industrial sites are treated the same as corner gas stations. Furthermore, the type of contamination, extent of contamination, and health effects of specific contaminants are not considered in the notification requirements. The rule is simply based on proximity to the site, not proximity the contamination.

This is a one-size-fits all approach toward notification is not workable in our diverse state.

NJBIA would suggest a tiered approach that takes into consideration the type of contamination, extent of contamination, whether that contamination is contained or it has impacted adjacent properties. Specifically, site remediation projects that will have no impact on surrounding properties should simply trigger notification to the municipal government, while those that will have such an impact would warrant more stringent notification requirements. This would ensure that the public gets the information it needs without creating unwarranted alarm, potentially impacting property values, or slowing down remediations throughout the state.

NJBIA offers to work with the department and the sponsors of the legislation to provide enough flexibility to allow the department to create a system of notification based on site specific conditions.

Would the department support this type of notification process?

Redundant Submittals of Information

The rule requires multiple submittals of information throughout the notification process. In each case, these submittals must go to:

- 1) the case manager in the DEP
- 2) the DEP Office of Community Relations
- 3) Municipal Clerk
- 4) Health Official

The aforementioned individuals would receive the following information in both hard copy and electronic format:

- 1) A general information notice describing the site, contamination and other pertinent factors;
- 2) Sensitive population checklist;
- 3) Map showing the location of the site and sensitive populations;
- 4) If utilizing a sign to notify the public, they must submit a picture of the sign;
- 5) If notification is accomplished utilizing letters, they must send a copy of the letter and any updates;
- 6) Fact sheet;
- 7) Copy of advertisement placed in newspaper; and,
- 8) Any additional information required.

NJBIA believes that municipalities will be overwhelmed with documentation on each and every site. Should a municipality contain tens or hundreds of sites, municipal resources will have to be allocated to review, record and file this information.

At a time when State funding for municipal services is scarce, why would the department put in place a regulation that will most likely require municipalities to spend more on the necessary resources to organize this material?

Required Notification to non-English speaking people

The rule requires that the person responsible for remediating the site must ascertain non-English speaking people within 200 feet. This would include residences, parks, playgrounds, schools and daycare centers etc. We are very concerned about the potential liability associated with this requirement.

What would constitute due diligence?

What would trigger the fine for non-compliance?

In order to be in compliance with the regulation, what is the threshold for notification in that language? (i.e. One person, ten people, a percentage of the population in the surrounding area.)

We believe that this requirement is extremely onerous and could potentially expose RP's to fines, public relations problems, and litigation. We would respectfully request that this provision be removed.

Impact to Sites Where Remediation is Nearly Complete

The rule requires that for sites where the remedial investigation or single phase initiation was initiated prior to the effective date, that party will have to comply within one year of the effective date of the rule adoption.

If the remediation is complete or nearly complete, and the contamination has been removed or contained, why is notification necessary?

What is the public benefit in such cases?

Economic Impact and Regulatory Flexibility Analysis

We are encouraged that the department acknowledges that these requirements will increase the costs of performing a remediation. The department included a number of costs they believe will be incurred by those responsible for performing remediations, which are listed below:

- 1) The development of sensitive population and resource maps;
- 2) Cost of signs;
- 3) Cost of sending notification letters to everyone within 200 feet of the site via certified mail;
- 4) Cost of ascertaining non-English speaking people;
- 5) Translation costs of material sent to public;
- 6) Cost of creating a fact sheet;
- 7) Cost of advertising in a local paper;
- 8) Costs of alternative plans;
- 9) Costs of additional public outreach—information sessions/local newspaper advertisement/repository for information; and,
- 10) Costs of additional consultants, engineers, attorneys.

We would add the following to the list of potential costs:

- 1) Costs of potential litigation from concerned citizens;
- 2) Costs of necessary risk management and public relations personnel; and,
- 3) Potential fines of \$3,000 to \$8,000 per violation per day.

The State of New Jersey needs to be creating more incentives toward clean-ups, not disincentives. The cost of compliance with this rule will run in the thousands or tens of thousands of dollars. That money could be put to better use in cleaning up the site, rather than complying with onerous notification requirements.

We would ask the department to consider the potential impact on resources that could otherwise be put better use; primarily, the cleanup itself.

Furthermore, while any potential cost impacts the bottom line of a business, the impact is magnified for a small businesses working on slim gross margins. In an effort to mitigate potential costs to small businesses, NJBIA would respectfully request that more State resources be provided to answer the questions of small business owners as they try to comply with the rule.

Substantial Public Interest

The department requires additional outreach when “substantial public interest” is triggered. One “trigger” is a petition signed by 25 people who live or work within 200 feet of the property.

How does the DEP intend to certify that these petitions are valid?

The other trigger for additional outreach and notification is when any municipal official specifically requests, in writing, additional public outreach. NJBIA believes that this trigger will be established in every municipality in the State. When a mayor or other local official receives call from a concerned citizen regarding a contaminated site, the local official will immediately contact the DEP requesting additional public outreach in an effort to ensure that:

- 1) some of the burden is taken off of the municipality; and,
- 2) some level of insurance is provided there is shared liability if litigation ensues.

The cost of additional public outreach creates another disincentive toward investment in cleanups.

DEP Resources

NJBIA is concerned that even in cases where the notification is a sign posted at the site, concerned citizens will contact the DEP will be prior to contacting the person performing the remediation. Furthermore, we contend that even if the person performing the remediation is called first, the concerned citizen will still call the DEP for confirmation of the information provided by the former.

This would place a tremendous responsibility on the DEP to field those calls. While the Office of Community Relations (OCR) now has a total of ten staffers, we believe that this is woefully inadequate. Furthermore, those staffers will not have specific knowledge of the sites to provide adequate information to the callers. They would then have to call the case manager for answers.

Given that environment, how will OCR be able to respond to the volume of expected calls?

Unless a system is proposed to rank sites, placing more requirements on those that pose the greatest risk of impact to surrounding properties, every site could trigger hundreds of calls. Without an adequate number of DEP staff, this will simply bring the site remediation program to a halt.

Finally, we are still concerned about added costs of compliance.

Will the DEP bill the RP or person responsible for conducting a remediation if they field calls on a specific site? If so, why?

Municipal Resources Needed to Respond to Questions

I recently received a copy of a letter from a mayor, concerned that his office would not have the resources to respond to the large number of calls from concerned residents asking specific questions about sites that he may not be able to answer. He felt that he would put into a “no win” situation. Specifically, he wrote “...they [the residents who are notified] will be calling local elected officials wanting to know how dangerous the contamination is, and why they [the mayors] allowed this to occur in the first place?” There are no real answers for the latter question. Furthermore, if any mayor tells a resident to call the DEP for answers, they will be viewed as apathetic to the concerns of their constituency.

In short, a blanket notification policy will raise the concerns of the public, who will then call their mayors with questions the mayors will be ill prepared to answer. Furthermore, in highly populated urban areas, this issue will be exacerbated.

What does the DEP plan on doing to address the concerns of mayors who feel they will not have the expertise or resources to respond to constituent calls?

Potential Impact to the Value of Adjacent Properties

The value of real property is based on a number of factors. Residential real estate can be valued based on proximity to good schools, the quality of the neighborhood, proximity to conveniences such as public transportation, stores, etc. However, the value of a property can be diminished based on its proximity to major highways, crime ridden areas, and other potential hazards which could include contaminated sites.

An example of a situation where notification based on the 200 foot radius would impact property values, even if there is no risk of impact from contamination is as follows:

A 25 acre site where contamination is located and contained in a small area in the northwest corner of the site. The residential houses are located within 200' of the site boundary near the southeast corner of the site. There is no potential for impact, yet the residents are given information to make them think that there is a reason for concern.

If I am in the process of selling my house, and a sign is posted on the a fence surrounding that site indicating that I am in close proximity to a contaminated site and it impacts my ability to sell that house at a fair market price, do I have any recourse against the town, the RP, the county or the DEP?

Will the state provide any liability protection to responsible parties who are simply complying with the regulation, but get sued for diminution of adjacent property values?

Conclusion

At a time when the Governor is promoting economic growth and investment in our state, it seems contradictory that the department would propose a regulation that creates disincentives for both. We need only look at the trials and tribulations the department recently experienced in Paramus, with pesticide contamination at a local middle school. The DEP notified the public and the response was: negative media coverage; criticism from environmental groups; alarm and distrust from the public; and pending litigation. This type of response clearly foreshadows the reaction the regulated community will face when this rule is adopted.

The irony in the Paramus incident is that the DEP did everything it was supposed to do. It determined the extent and type contamination, developed a method of remediating the site to acceptable standards, notified the public, and completed the remediation. Even so, the public's perception of the department was one of distrust, and the belief that the DEP did not care about the health and safety of their children. The public sentiment was that the DEP simply did, as one environmental group stated, the bare minimum.

We must recognize that making site remediation projects easier and more attractive is in everyone's interest. In many cases, the people who were responsible for the contamination have gone out of business, and these sites have lain fallow for decades. The only way these sites will ever be cleaned up will be through the investment of a third party. The more disincentives the DEP imposes on remediations—such as impractical public notification requirements—the less likely these sites will ever get cleaned up. This benefits no one.

NJBIA supports the intent of the department and the sponsors of the law to promote public notification. However, the requirements in this proposal are costly, redundant, and may not accomplish the intended goal. NJBIA urges the department to reconsider this proposal and work with the sponsors of the law in an effort to create a flexible system of public notification that provides adequate information to those impacted by contamination, and at the same time, promotes the continued cleanup of contaminated sites.

NJBIA appreciates the opportunity to comment on this proposal. Should you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

David H. Brogan
Vice President, Environmental Policy
New Jersey Business and Industry Association