

# Guidance on When the Department Of Environmental Protection May Undertake Direct Oversight of a Remediation of a Contaminated Site

**Version: 1.0**  
**July 6, 2009**

Pursuant to Section 27b of the Site Remediation Reform Act, N.J.S.A. 58:10C-27, (See <http://www.nj.gov/dep/srp/regs/statutes/srra.pdf> ), the Department of Environmental Protection (Department) is authorized, under certain conditions, to undertake direct oversight of the remediation of a contaminated site or a portion of a contaminated site. The Legislature has established specific conditions that trigger the Department's evaluation of the remediation of a site for direct oversight. In addition, Section 27d the Site Remediation Reform Act requires the Department to issue guidelines establishing specific criteria that the Department will evaluate in order to determine when a site or a portion of a site will be subject to direct oversight pursuant to Section 27b. The purpose of this guidance document is to fulfill this requirement and to provide the public with notice of these criteria. As part of these criteria, the Department has included some general mitigating and aggravating factors that it will apply when conducting its evaluation in all four situations. The Department's intent in this evaluation is to identify those sites or portions of sites which represent the most significant risks to public health or the environment with respect to the four identified situations and to determine when, in the Department's sole discretion, it is in the public interest that the remediation of a site or a portion of a site should be subject to direct oversight, as described in Section 27c.

## **Exemption from this Guidance Document**

Section 27e(1) of the Site Remediation Reform Act exempts certain sites undergoing remediation from being placed into direct oversight. Section 27e(1) states:

Any oversight procedure, remedy, or other obligation in P.L. 2009, c.60 (C.58:10C-1, et. al.) shall not affect a remediation conducted pursuant to and in compliance with a settlement of litigation to which the Department is a party if the settlement (a) occurred prior to the date of enactment of P.L. 2009, c.60 (C.58:10C-1, et. al.), or (b) is a settlement of litigation pending on the date of enactment of P.L. 2009, c.60 (C.58:10C-1, et. al.).

It should be noted that this exemption applies only if a remediation is “**conducted pursuant to and in compliance with** a settlement of litigation to which the Department is a party”. If a remediation subject to such a settlement of litigation pending as of May 7, 2009 is not conducted pursuant to or is not in compliance with the settlement of litigation, the exemption provided in section 27e(1) no longer is in effect and the provisions of section 27a through d and this guidance document are applicable.

Section 27e(2) of the Site Remediation Reform Act also exempts certain sites undergoing remediation from being placed into direct oversight. Section 27e(2) states:

For any litigation pending or settled on the date of enactment of P.L.2009, c.60 (C.58:10C-1 et al.), concerning a remediation performed pursuant to the "Resource Conservation and Recovery Act," 42 U.S.C. s.6921 et seq., nothing in

P.L.2009, c.60 (C.58:10C-1 et al.) shall affect an oversight procedure, remedy, or other obligation imposed by a federal administrative order or federal court order.

If a remediation subject to a settlement of litigation pursuant to the "Resource Conservation and Recovery Act," 42 U.S.C. s.6921 et seq., is not conducted pursuant to the federal administrative order or federal court order, the Department is taking the position that the exemption provided in section 27e(2) no longer is in effect and the provisions of section 27a through d and this guidance document are applicable.

### **The Relationship Between this Guidance Document and Section 27a of the Site Remediation Reform Act**

Section 27a of the Site Remediation Reform Act identifies specific conditions where the remediation of a contaminated site, or a portion of a site, shall be subject to direct oversight as described in Section 27c. These conditions are independent of the conditions specified in Section 27b and this Guidance Document. In other words, any condition specified in Section 27a that triggers the direct oversight of remediation by the Department is done so regardless of any condition specified in Section 27b or in this Guidance Document. Likewise, any condition specified in Section 27b that results the direct oversight of remediation by the Department is done so regardless of any condition specified in Section 27a.

### **Situation Specific Conditions Where the Department May Undertake Direct Oversight of a Remediation**

Section 27b of the Site Remediation Reform Act specifies four situations where the Department may undertake direct oversight of the remediation of a contaminated site. Section 27d requires the Department to issue guidelines establishing specific criteria that the Department will evaluate in order to determine when a site or a portion of a site will be subject to direct oversight pursuant to Section 27b.

Below are the specific conditions the Site Remediation Reform Act established, along with the situation specific criteria that the Department will apply to determine when, in its sole discretion, it will put the remediation of a site, or a portion of a site, in direct oversight.

#### **(1) The contamination at the site includes chromate chemical production waste**

The Department will consider the remediation of a site or portion of a site for direct oversight if chromate chemical production waste is present at the site and if either hexavalent chromium (Cr+6) is detected in the soil in excess of 20 milligrams per kilogram of dry weight soil (mg/kg or ppm), or the Cr+6 contamination in ground water exceeds 70 micrograms per liter of solution (ug/l or ppb).

#### **(2) The Department determines that more than one environmentally sensitive natural resource has been injured by contamination from the site**

The Department will consider undertaking direct oversight of the remediation of a site or portion of a site if more than one environmentally sensitive natural resource has been injured as a result

of a discharge of hazardous substances or pollutants at the site. For the purposes of this guidance document, “environmentally sensitive natural resource” means:

(a) all areas defined as “environmentally sensitive areas” pursuant to the “Discharges of Petroleum and Other Hazardous Substances” at N.J.A.C. 7:1E-1.8(a) (see [http://www.nj.gov/dep/rpp/brp/dp/downloads/NJAC\\_7\\_1E.pdf](http://www.nj.gov/dep/rpp/brp/dp/downloads/NJAC_7_1E.pdf)),

(b) areas and/or resources that are protected or managed pursuant to the Pinelands Protection Act, N.J.S.A. 13:18A-1 et seq. and the Pinelands Comprehensive Management Plan, N.J.A.C. 7:50, and

(c) areas and/or resources that are protected or managed pursuant to the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq and the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38.

**NOTE:** This guidance relating to the injury of more than one environmentally sensitive natural resource is specifically limited to the Department’s obligations pursuant to Section 27 of the Site Remediation Reform Act, and in no way limits or restricts the Department’s authority to pursue any person for natural resource damages at any site.

**(3) The site has contributed to sediments contaminated by polychlorinated biphenyl, mercury, arsenic, or dioxin in a surface water body**

The Department will consider the remediation of a contaminated site or portion of a site for direct oversight if the concentration of polychlorinated biphenyl, mercury, arsenic, or dioxin found in sediment contained in a surface water body exceeds the Severe Effects Level for freshwater conditions (Persaud, D., Jaagumagi, R., and Hayton, A. 1993. *Guidelines for the protection and management of aquatic sediment quality in Ontario*. ISBN 0-7729-9248-7. Ontario Ministry of the Environment, Ottawa, Ontario) or the Effects Range Medium for saline conditions (Long, E.R., MacDonald, D.D., Smith, S.L., and Calder, F.D. 1995. *Incidence of adverse biological effects within ranges of chemical concentrations in marine and estuarine sediments*. Environmental Management Vol. 19, No.1. pp. 81-97 for marine/estuarine sediments) pursuant to the Department Ecological Screening Criteria as found on the Department website at <http://www.nj.gov/dep/srp/guidance/ecoscreening/>.

**(4) The site is ranked by the Department in the category requiring the highest priority pursuant to the ranking system developed pursuant to section 2 of P.L.1982, c.202 (C.58:10-23.16).**

The Department will consider the remediation of a contaminated site or portion of a site for direct oversight if the site ranks in the highest priority category using the ranking system developed pursuant to Section 2 of N.J.S.A. 58:10-23.16 (See Section 39 of the Site Remediation Reform Act – <http://www.nj.gov/dep/srp/regs/statutes/srra.pdf>). The Department will implement this criterion once it has completed the ranking system.

## **Mitigating and Aggravating Conditions Applicable to Each of the Four Specific Conditions in Section 27b**

The Department has also established general mitigating and aggravating conditions applicable to all four situations presented above to further aid the Department in determining whether the remediation of a contaminated site or a portion of a site will be subject to direct oversight. The Department's intent in identifying a remediation for direct oversight is to identify those sites or portions of sites which represent the most significant risk to public health or the environment with respect to the four identified situations and to evaluate such sites or portions of sites within the four situations against applicable mitigating and aggravating factors to determine when it is in the public interest to have the remediation subject to direct oversight. Sites or portions of sites with mitigating conditions will reduce the likelihood that the remediation will be subject to direct oversight; conversely, sites or portions of sites with aggravating conditions will increase the likelihood that the remediation will be subject to direct oversight.

Conditions that the Department will consider are:

### **Environmental compliance status of the site being remediated**

The Department will consider the compliance status of the person responsible for conducting the remediation of the site for all applicable environmental rules, regulations, and guidance. The greater the level of compliance, the less the likely that the remediation will be subject to direct oversight. Conversely, the less compliance, the greater the likelihood that the remediation will be subject to direct oversight.

It should be noted that the issuance of at least two enforcement actions after May 7, 2009 during any five-year period will result in the remediation being subject to direct oversight pursuant to Section 27a(1). It should also be noted that a person's failure to meet a mandatory remediation timeframe or an expedited site specific timeframe adopted by the Department pursuant to Section 28, including any extension thereof granted by the Department, or a schedule established pursuant to an administrative order or court order, will result in the remediation being subject to direct oversight pursuant to Section 27a(2).

### **Natural Resource Injury**

The Department will also consider the extent or size of the injury, the magnitude or severity of the injury, and duration or longevity of the injury to each environmentally sensitive natural resource in determining whether it is in the public interest that the remediation be subject to direct oversight.

The larger the extent or size of the injury, the greater the likelihood that the remediation will be subject to direct oversight. A further aggravating condition is present when the ground water plume is greater than 5 acres or there is wetland soil or sediment contamination greater than 5 acres.

The larger the magnitude or severity of the injury, the greater the likelihood that the remediation will be subject to direct oversight. The following are further aggravating conditions:

Contaminants found in sediment contained in a surface water body that exceed for any given contaminant the Severe Effects Level concentration for freshwater conditions or the Effects Range Medium concentration for saline conditions as per

the Department Ecological Screening Criteria as found on the Department website at <http://www.nj.gov/dep/srp/guidance/ecoscreening/> .

Contaminants found in a surface water body that exceed for any given contaminant the acute aquatic surface water quality standard as found in the Department's Surface Water Quality Standards at N.J.A.C. 7:9B-1.14(f) ([http://www.state.nj.us/dep/wms/bwqsa/docs/0608\\_SWQS.pdf](http://www.state.nj.us/dep/wms/bwqsa/docs/0608_SWQS.pdf) ).

For ground water that is discharging into a surface water body, contaminants found in ground water that exceed for any given contaminant the acute aquatic surface water quality standard as found in the Department's Surface Water Quality Standards, N.J.A.C. 7:9B-1.14(f), at the area of discharge into the surface water body.

Contaminants, except for pesticides, found in soil that exceed for any given contaminant the highest value cited in the Department's Ecological Screening Table relevant to soil (<http://www.nj.gov/dep/srp/guidance/ecoscreening/>) multiplied by a factor of 100. For pesticides, soil concentrations that exceed 1 mg/kg for any given pesticide. **Note:** This guidance does not supersede any recommendations contained in the report entitled "Findings and Recommendations for the Remediation of Historic Pesticide Contamination" prepared by the Historic Pesticide Contamination Task Force (<http://www.nj.gov/dep/special/hpctf/final/>)

The larger the duration or longevity of the injury, the greater the likelihood that the remediation will be subject to direct oversight. Implementation of an interim response action to contain or stabilize contaminants in all media to prevent contaminant migration and exposure of receptors is a mitigating condition.

When the person responsible for conducting the remediation enters into a voluntary agreement with the Department to resolve the natural resource injury caused by contamination at or emanating from the site (<http://www.nj.gov/dep/nrr/> ) the Department will factor this in as a mitigating condition.

### Green Remediation

The use of Green Remediation concepts as part of remedial activities at sites will be considered a mitigating condition. Green Remediation is defined by the United States Environmental Protection Agency (USEPA) as "the practice of considering all environmental effects of remedy implementation and incorporating options to maximize the net environmental benefit of cleanup actions". Additional information concerning green remediation can be found on the USEPA Region 2 web site at [http://www.epa.gov/region2/superfund/green\\_remediation/](http://www.epa.gov/region2/superfund/green_remediation/) .