

Grace Period Rules Proposed for Site Remediation Program

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LAST YEAR, THE SUPERIOR COURT, APPELLATE Division, chastised the New Jersey Department of Environmental Protection (DEP) for failing to promulgate regulations to implement the New Jersey Grace Period Law (N.J.S.A. 13:1D-127 to -133), which had been enacted nine years earlier in 1995 (*see NJDEP Hazardous Waste Compliance and Enforcement v. Marisol, Inc. 367 N.J. Super. 614 (App. Div. 2004)*).

The intent of the Grace Period Law is to provide relief to the regulated community by allowing time for correcting unintentional, "minor" violations of environmental laws without the imposition of penalties. In the Oct. 15, 2005 *New Jersey Register*, the DEP proposed Grace Period regulations for the Site Remediation Program that will amend the Industrial Site Recovery Act (ISRA) rules, the Underground Storage Tank regulations, and the DEP's Oversight regulations. By cross-reference, the Oversight regulations will include violations for virtually every section of the Technical Requirements for Site Remediation, which governs cleanups.

The proposed regulations distinguish between "Minor" and "Non-Minor" violations for purposes of asserting a Grace Period defense. The proposal sets forth a penalty matrix identifying the time period for correcting Minor violations; significantly, it also establishes base penalties for failure to comply. The time periods to correct Minor violations range from 30 to 90 days, depending on the specific regulation. For Non-Minor violations, there is no timetable to come into compliance but instead there are only significant penalties.

What are classified as Non-Minor violations is disconcerting. For example, failure to report a discharge of hazardous substances or failure to conduct a well search are each classified as Non-Minor violations, each having a base penalty of \$20,000. Under the ISRA regulations, failure to submit a General Information Notice within five days of a triggering event is classified as a Non-Minor violation, with a base penalty of \$5,000. Failure to comply with Deed Notice and Classification Exception Area (CEA) requirements are Non-Minor and

carry a base penalty of \$8,000 with additional penalties added for a violation of each section of the applicable regulation pertaining to engineering and institutional controls (N.J.A.C. 7:26E-8).

What is even more troubling is that each subsection of the site remediation regulations has a corresponding base penalty. Therefore, it is foreseeable that enforcement actions will cite numerous violations with the cumulative effect being an accumulated penalty assessment in the six-figure—or more—range. The proposal further provides that the base penalty amounts may be increased by a factor of two, the second time a violation occurs, and may be increased by a factor of five the third time the violation occurs. The base penalty amounts may be increased by up to 100 percent for intentional and knowing violations.

The proposed rules also make changes to the DEP's model Administrative Consent Order and Remediation Agreement. The wording of these two documents will become more consistent with each other, and will eliminate references to stipulated penalties. Instead, the documents will cross-reference the penalties established through the regulations. The documents will explicitly provide that the cleanup responsibility includes contaminants that have migrated away from the subject site.

This proposal raises significant concern for Brownfields redevelopers, for the regulated community presently engaged in cleanups, or any whose property is encumbered by a Deed Notice or groundwater Classification Exception Area.

While the DEP's Site Remediation Program has in the past often used its enforcement discretion wisely, assessing monetary penalties only in the most egregious circumstances, the proposed rules present tempting fruit for assessing penalties for a cash-poor state agency.

Indeed, the proposal's preamble makes it clear that the classification of a violation as Minor does not preclude the DEP from using its discretion to upgrade a violation to Non-Minor. Thus, a regulatory program that has historically been based on mutual cooperation could take on a "command and control" character that harkens back to the 1980s.

The regulated community will likely see a vast increase of Notices of Violations when these regulations are adopted. Accordingly, the Environmental Business Council of the Commerce and Industry Association has submitted comments on the rule proposal. ■

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