

# The Evolution of NJDEP Regulation and the No Further Action Letter

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February 6, 2017

Except for unregulated heating oil tanks, the New Jersey Department of Environmental Protection (NJDEP) no longer issues No Further Action (NFA) letters for properties that have completed the remediation process. Rather, under the New Jersey Site Remediation Reform Act (SRRA) enacted in 2009, Licensed Site Remediation Professionals (LSRPs) issue Response Action Outcomes (RAOs), which are considered the "functional equivalent" of NFA letters. From 2009 to 2012, site remediation in New Jersey transitioned to LSRPs who took the reins from NJDEP, and the holy grail (the "final remediation document") became the RAO in place of the NFA letter. After this transition, however, NJDEP regulation of site remediation has evolved and arguably has expanded.

As one may recall, NFA letters were essentially boilerplate letters prepared and issued by the NJDEP that memorialized remediation closure approval sought by responsible parties—oftentimes, after several years of comment letters exchanged between the NJDEP and the environmental consultant, phone calls, notices of deficiency, notices of violation, etc. Other than whether or not the subject property had restricted use conditions or open groundwater monitoring wells, the terms of the NFA letters were almost identical to one another. There was little, if any, discussion or negotiation between NJDEP and the responsible party concerning the language in the NFA letter.

Under SRRA, the NJDEP adopted a Model RAO document which is included as Appendix D to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C-1 et seq. (ARRCS). The Model RAO document contains language similar to the NFA letter except for the references to the LSRP program and SRRA. However, in the post-SRRA world, NJDEP frequently creates and updates technical guidance on its website to address several remedial action scenarios to be included in the final RAO for a particular site. The most recent "Technical Guidance for the Issuance of Response Action Outcomes" is dated April 2016 and referenced as Version 2.0. This RAO Guidance consists of 44 pages and includes several additional recommended paragraphs (or "Notices") to be included in RAOs, as applicable.

Under SRRA and the ARRCS, LSRPs are required to apply any available and appropriate technical guidance concerning site remediation as issued by the NJDEP. Thus, environmental professionals must frequently review the NJDEP website for updates to not only the RAO Guidance, but also other technical guidance relating to all aspects of site remediation, because guidance documents and forms are constantly created and updated by the NJDEP. Moreover, under the ARRCS, LSRPs shall correct all deficiencies identified by the NJDEP in the NJDEP's inspection and review findings. Any mistakes or errors in the final RAO may result in detrimental reliance on the RAO by a third party.

In fact, an LSRP is required to withdraw and reissue an RAO upon finding by the NJDEP that the RAO was not prepared in accordance with the ARRCs. In finding that the RAO was not prepared in accordance with the ARRCs because it contains administrative errors, the LSRP shall within 30 days amend the RAO by correcting the administrative errors, including but not limited to improper use of Notices, changes to the Model RAO that are inconsistent with that Model RAO or the ARRCs, and missing or incomplete site-specific identifiers. The NJDEP mandate for LSRPs to "fix" the RAO occasionally causes the LSRP some real world problems, especially if NJDEP does not provide notice of any "errors" to the LSRP for several months (a few LSRPs received an administrative errors email from NJDEP's RAO review team more than a year) after the RAO was issued. The longer the NJDEP takes to reach out to LSRPs to fix the RAO, the higher the likelihood that the client relationship has terminated with the LSRP, the client contact is no longer reachable, the remediating party no longer exists as a corporate entity, or that the real property that has undergone the remediation has been sold.

The RAO Guidance has added several RAO Notices that are required to be included in the RAO, should the remediation scenario present itself. For example, there are additional Notices for scenarios involving: Groundwater Contamination Due to Regional Historic Fill (Groundwater confirmation sampling has not been conducted); Historically Applied Pesticides Not Addressed; Naturally Occurring Levels of Constituents in Groundwater; Soil Contamination From an Off-Site Source Not Remediated-Diffuse Anthropogenic Pollution; Soil Contamination From an Off-Site Source Not Remediated-General; Historic Fill Not Remediated for an RAO-Area of Concern; and In-Service Railroad Lines, Spurs and Sidings Not Remediated. Most recently, as of Nov. 21, 2016, NJDEP published on its website a new Notice for Sediment Contamination from an Off-Site Source. For each of these scenarios, the NJDEP has prepared language that the LSRP shall include in the RAO should the specific property and remedial action be applicable.

While the RAO Notices are designed to provide clarity and consistency to third parties and responsible parties concerning the scope and limitations of the RAO, the NFA letters of years past were not nearly as site specific. Rather, the underlying details associated with site remediation prior to SRRA were addressed in the underlying reports and correspondence submitted to the NJDEP and any comment letters from NJDEP that were generated for the particular site. The NFA letters did not provide anywhere near the level of specificity that NJDEP expects RAO letters to contain vis-a-vis the Notices reflected in the RAO Guidance.

SRRA was enacted in 2009 in response to the NJDEP's inability to maintain and ultimately lessen its caseload of contaminated sites in New Jersey. The NJDEP of today is creating volumes of technical guidance and forms for environmental professionals to use to flesh out emerging conditional remedial action endpoints and to avoid having to invalidate LSRP-issued RAOs by way of future audits, which the NJDEP is entitled to conduct under SRRA. The volumes of technical guidance documents, including the most recent guidance for RAOs, while oftentimes helpful, are becoming overwhelming and avoid the Administrative Procedure Act notice and comment requirements for agency regulation. Since SRRA was enacted, the technical guidance approach to regulation has been the new normal for NJDEP as the Department has few opportunities to approve or deny an LSRP's remediation strategy.

And for now, the SRRA and ARRCs require the regulated community to comply with all NJDEP technical guidance as it is continuously and frequently updated. So long as the underlying legislation mandates the regulated community to apply (and comply with) agency technical guidance, professionals in the environmental industry must continuously review the NJDEP's website for new and updated guidance. The information age and growth of online technology has facilitated the regulation by guidance approach, for better or for worse. Although RAOs are issued by LSRPs, the NJDEP has entrenched de facto control over the RAO language by utilizing and enforcing the RAO Guidance. •

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