

GUIDE TO REMEDIATION FUNDING SOURCE (RFS) REQUIREMENTS

WHAT'S NEW

November 2009

- * Letters of Credit are now acceptable mechanisms.
- * Updated Self Guarantee requirements and application– Audited financials with an auditor’s “unqualified opinion”.
- * Updated Remediation Trust Fund Agreement and Line of Credit model documents.
- * Annual 1% Surcharge now payable to “Treasurer, State of NJ”.
- * New disbursement procedures for Licensed Site Remediation Professionals (LSRP).
- * Annual Cost estimation submission required for all RFS posted.

Background

The posting of monies to ensure completion of cleanups in New Jersey has been a long standing requirement under numerous legislative authorities. Prior to 1993, these mechanisms were identified as Financial Assurance. The New Jersey Department of Environmental Protection (DEP) has recently codified new regulations (N.J.A.C. 7:26C-5) which require the establishment of a Remediation Funding Source (RFS) by certain obligated parties remediating sites under the Site Remediation Program. The purpose of the establishment of an RFS is to ensure the availability of funds for remediation and to ensure public funds are not spent in remediating these sites.

WHO MUST POST

The following parties are obligated to post RFS:

- A person required to perform remediation activities pursuant to ISRA, N.J.S.A. 13:1K-6 et seq., as required pursuant to a Remediation Certification (N.J.A.C. 7:26B-4.3), Remediation Agreement, Administrative Consent Order or approved Remedial Action Work Plan;
- A person liable for cleanup and removal costs pursuant to the Spill Act, N.J.S.A. 58:10-23.11 et seq., as required pursuant to a Spill Act directive, an order or an Administrative Consent Order; and
- A person who has been ordered by a court to clean up and remove a discharge pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.

The following parties are NOT obligated to post RFS:

- A person who performs a remediation in an environmental opportunity zone;
- A person who uses an innovative remedial action technology, provided that the exemption from the requirement to establish and maintain RFS shall only apply to the cost of the remediation involving the innovative technology;
- A person who implements an unrestricted use remedial action or a limited restricted use remedial action for all or part of a remedial action, provided that the exemption from the requirement to establish and maintain RFS shall only apply to the cost of the remediation involving the unrestricted use remedial action or the limited restricted use remedial action;
- A government entity;
- A person who undertakes a remediation at their primary or secondary residence;
- The owner or operator of a child care center licensed pursuant to N.J.S.A. 30:5B-1 et seq. who performs a remediation at the licensed child care center; or
- The person responsible for conducting a remediation at a public school or private school as defined in N.J.S.A.18A:1-1, or a charter school established pursuant to N.J.S.A. 18A:36A-1 et seq.

Amount of RFS to be posted:

The person responsible for conducting the remediation is required to establish and maintain RFS in an amount that is equal to or greater than:

- The amount calculated in a cost estimate of the implementation of the remediation, including the DEP's fees and oversight costs, but excluding the estimated cost to operate, maintain and inspect engineering controls as part of a remedial action permit as provided in N.J.A.C. 7:26C-7, as approved by the Department or as certified by the licensed site remediation professional and the person responsible for conducting the remediation;
- The initial amount to which the person responsible for conducting the remediation has agreed in an administrative consent order, remediation agreement, or remediation certification;
- The initial amount that the DEP has required in an order or directive;
- The amount that the DEP requires when it undertakes direct oversight of remediation pursuant to N.J.S.A. 58:10C-27; or
- The amount that a court has required.

Note: If the DEP determines that the documentation offered to support the cost estimate is incomplete, inaccurate or deficient, the person responsible for conducting the remediation shall, within 30 days after a request from DEP, submit a revised cost estimate and any additional documentation that DEP requests to enable the DEP to evaluate the cost of the remediation, including, but not limited to any work plans or reports that were used to determine the cost estimate submitted.

Submission of RFS Mechanisms

The person responsible for conducting the remediation who is required to establish and maintain a RFS shall submit the RFS to DEP no later than the following deadlines as applicable, unless the DEP approves an extension of that deadline:

- No more than 14 days after either DEP approval of an ISRA remedial action work plan or DEP's receipt of a remedial action work plan certified by a licensed site remediation professional;
- Upon submission to the DEP of a Remediation Certification pursuant to N.J.A.C 7:26B-4.5;
- As required by a directive issued by the DEP pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11f;
- As required by an order the DEP issues pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11u, or the Water Pollution Control Act, N.J.S.A. 58:10A-10;

- Along with signed copies of an administrative consent order;
- As required by a court; or
- A person who has received notice from the DEP that the DEP will undertake direct oversight of the remediation of the contaminated site pursuant to N.J.S.A. 58:10C-27 shall submit evidence of a remediation trust fund agreement established in accordance with N.J.A.C. 7:26C-5.4, no later than 30 days after receipt of such notification.

Acceptable Types of RFS Mechanisms

The person responsible for conducting the remediation who is required to establish and maintain RFS may use any one or any combination of the following instruments:

- Remediation Trust Fund Agreement in accordance with N.J.A.C. 7:26C-5.4;
- Environmental Insurance Policy in accordance with N.J.A.C. 7:26C-5.5;
- Line of Credit Agreement in accordance with N.J.A.C. 7:26C-5.6;
- Letter of Credit in accordance with N.J.A.C. 7:26C-5.7
- Self Guarantee in accordance with N.J.A.C. 7:26C-5.8; or
- Loan or a grant in accordance with N.J.A.C. 7:26C-11 and 12.

Click on each link to see specific requirements for each mechanism.

NOTE: Any person may establish, on behalf of any person required to establish a RFS, any type of RFS listed except for a self-guarantee.

RFS Model Documents

Remediation Trust Fund Agreement
Line of Credit Agreement
Letter of Credit
Self Guarantee Application

NOTE: DEP does not have a model document for the Environmental Insurance Policy. DEP's regulatory requirements may be found at N.J.A.C. 7:26C-5.5.

Annual 1% RFS Surcharge

A surcharge in the amount equal to one percent (**1%**) of the RFS amount pursuant to N.J.S.A. 58:10B-11 and N.J.A.C. 7:26C-5.9 is required to be paid annually for every person who is required to establish and maintain a RFS in the form of a letter of credit, line of credit, remediation trust fund and/or environmental insurance policy. There are no surcharges for Self-Guarantees. The 1% surcharge checks should be made payable to: "**Treasurer, State of New Jersey**". Please include the NJDEP program interest number (PI #) or case number on the check. The initial surcharge check is due with RFS document and any subsequent checks along with the required annual verification statements for the RFS form being utilized. A 1% surcharge payment is due annually thereafter on the same date. DEP will send invoices for payment after receipt of the first surcharge.

Annual RFS Renewal Verification

On an annual basis the RFS's are to be renewed and verified:

- Self Guarantee: 30 calendar days prior to the current approved expiration date, a new application is to be submitted based on the most current FY end financials. See Self Guarantee guidelines.
- Remediation Trust Funds, Lines of Credit and Environmental Insurance Policies: 30 calendar days prior to the anniversary date of establishment of the remediation funding source, a written statement must be submitted to the Department from the Lender or Insurer confirming the value of the funding source and renewal of the funding source for the next 12-month period. See [RFS Annual Renewal Notification template](#).
- Letters of Credit: stipulate 'evergreen' clauses that self renew unless 120 days prior to the expiration date the Lender notifies DEP of the nonrenewal. No annual verification is required.

***NEW* Annual Remediation Cost Review**

Pursuant to N.J.A.C. 7:26C-5.10, the person responsible for conducting the remediation shall submit to the DEP 365 calendar days after the date that that person is required to submit the RFS, and annually thereafter on the same calendar day, a detailed cost review on a Remediation Cost Review Form available on the Department's website at www.nj.gov/dep/srp/srra/forms, that is certified by the person responsible for conducting the remediation and by the licensed site remediation professional if applicable, that includes the following:

- A detailed summary of all monies spent to date to remediate the contaminated site;
- A detailed estimate of the remaining costs to complete the remediation pursuant to the N.J.A.C. 7:26E and N.J.A.C. 7:26C , excluding the cost to operate, maintain and inspect engineering controls as part of a remedial action permit pursuant to N.J.A.C. 7:26C-7; and
- An explanation of any changes from the most recently submitted cost review.

NOTE: This applies retroactively and all parties who have RFS posted are required to post an annual remediation cost review.

Increase in Remediation Funding Source Amount

The person required to establish the RFS shall increase the remediation funding source amount within **30 calendar days** after:

- Submission to the DEP of any remediation cost review, required pursuant to N.J.A.C. 7:26C-5.10, that indicates that the cost of remediation has increased to an amount greater than the existing RFS;
- Receipt of a demand from the DEP to increase the amount of the RFS to match the amount of the estimated costs; or
- Receipt of written certification, with a copy provided to the DEP, from a licensed site remediation professional that the estimated cost of the remediation has increased.

Decrease in RFS Amount

The person required to establish RFS who wishes to decrease the amount of the remediation funding source may at any time submit a Remediation Cost Review Form, available on the Department's website at www.nj.gov/dep/srp/srra/forms, that provides a revised estimate of the cost of the remediation and that indicates why that cost is less than previously estimated. The amount of the RFS maybe decreased upon:

- Receipt from the DEP of written approval in response to a request submitted provided, however, that the DEP will respond to requests within 45 calendar days after the DEP's receipt of the request; or
- Submission to the DEP of a Remediation Cost Review Form if that submission includes a certification by the licensed site remediation professional justifying the revised cost estimate.

Disbursements from the RFS

The person responsible for conducting the remediation who is required to establish and maintain a RFS, and who has established a remediation trust fund, an environmental insurance policy or a line of credit, may submit, **no more frequently than once every three months**, a written request to use the RFS to pay for the actual cost of remediation.

❖ Licensed Site Remediation Professional (LSRP) Retained Cases:

If a LSRP has been retained and the case is proceeding under the new LSRP regulatory requirements the request may be submitted directly the Lender/Provider with a copy to the DEP with the information specified below is prepared and certified by a LSRP and the person posting the RFS:

- Identification of the site, including name, address, case number (if applicable), program interest name, program interest number (preferred ID), and status of the remediation;
- Information related to remediation costs, prepared and certified by a LSRP including:

- 1) A detailed description, including documentation, of remediation costs incurred and the specific remediation that has been completed under this request;
 - 2) A detailed description, including documentation, of remediation costs to be incurred and the specific remediation that will be completed under this request;
 - 3) The total amount of disbursement being requested; and
 - 4) An updated, detailed estimate of the cost of implementing the remaining remediation.
- A certification by the person responsible for conducting the remediation, and by the LSRP, that the disbursement request represents actual remediation costs of the subject site, incurred or to be incurred, and does not include legal fees.

The person responsible for conducting the remediation shall provide the DEP with notice of the disbursement or denial from the Lender/Provider and the amount of the remaining remediation funding source within 30 days of disbursement or denial.

❖ NON Licensed Site Remediation Professional Cases – Traditional Oversight

The disbursement request should be submitted to the DEP with the information specified below is prepared by the retained consultant and certified by the person posting the RFS:

- Identification of the site, including name, address, case number (if applicable), program interest name, program interest number (preferred ID), and status of the remediation;
- Information related to remediation costs, prepared by a environmental consultant, including:
 - 1) A detailed description, including documentation, of remediation costs incurred and the specific remediation that has been completed under this request;
 - 2) A detailed description, including documentation, of remediation costs to be incurred and the specific remediation that will be completed under this request;
 - 3) The total amount of disbursement being requested; and
 - 4) An updated, detailed estimate of the cost of implementing the remaining remediation.
- A certification by the person responsible for conducting the remediation, that the disbursement request represents actual remediation costs of the

