

ADMINISTRATIVE GUIDANCE REGARDING ENVIRONMENTAL REMEDIATION UNDERTAKEN BY THE NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY

May 1, 2017

A. Purpose.

The purpose of this administrative guidance is to delineate and clarify issues relevant to environmental remediation performed by the New Jersey Schools Development Authority (“NJSDA”) in connection with School Facilities Projects being constructed under the Educational Facilities Construction and Financing Act, N.J.S.A. 18A:7G-1, et seq. (“EFCFA”). It specifically provides guidance on the extent to which the NJSDA, as a governmental entity that has a defense to liability under the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, et seq. (“Spill Act”), must remediate a property on which it is constructing a School Facilities Project.

B. Background.

The NJSDA is an instrumentality of the State of New Jersey exercising public and essential governmental functions. The NJSDA was specifically created to implement the Educational Facilities Construction and Financing Act (“EFCFA”), P.L. 2000, c. 72, as amended by P.L. 2007, c. 137, N.J.S.A. 52:18A-237, legislation enacted by the Legislature of the State of New Jersey to address inadequacies in the quality, utility and safety of public school facilities throughout the State and to meet the State constitutional mandate to provide a thorough and efficient system of free public schools.

In carrying out its legislative mission, the NJSDA is charged with the redevelopment of properties in certain designated school districts of this State (“SDA Districts”) for the construction of educational infrastructure (“School Facilities Projects”) and, in connection therewith, to protect the interests of the taxpayers of the State of New Jersey who ultimately bear the associated financial burden.

The NJSDA School Construction Program is financed through the sale of public bonds, the proceeds of which are to be used solely for the repair, renovation, and construction of School Facilities Projects (including, in some instances, the acquisition of real property through the exercise of eminent domain powers granted to NJSDA under P.L. 2007, c. 137 (N.J.S.A. 52:18A-238(d)) under a governance structure tailored to its mission to construct School Facilities Projects in such a manner as to both meet educational priorities and to responsibly control costs in furtherance of its express purpose. P.L. 2007, c.137, N.J.S.A. 52:18A-235.

C. NJSDA Governmental Entity Defense to Liability Under the Spill Act.

As a State governmental entity acquiring properties through eminent domain or by any other means and for the purpose of the redevelopment of properties for use as public schools, consistent with the governmental entity defense to liability set forth in the Spill Act at N.J.S.A. 58:10-23.11g.d.(4), the NJSDA has a defense to liability under the Spill Act for the remediation of pre-existing environmental contamination at properties it acquires.

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D. NJSDA Remediation of School Facilities Projects

Construction of School Facilities Projects under EFCFA, whether located on property owned by an SDA District or acquired by or designated for redevelopment by the NJSDA under EFCFA, may be found to have pre-existing soil and groundwater contamination caused by discharges of hazardous substances. Although the NJSDA is not the responsible party for the contamination, construction of School Facilities Projects on such properties may require, upon completion of a thorough environmental review process, appropriate remediation to ensure that the School Facilities Projects to be constructed thereon are protective of the health and safety of the children, faculty, staff, and public. The Site Remediation Reform Act (“SRRA”) of 2009 established the performance obligations for the remediation of contaminated sites and provides for the oversight of the remediation of such properties by a Licensed Site Remediation Professional (“LSRP”).

E. LSRP Oversight of Remediation of School Facilities Projects

In recognition of the NJSDA’s status as a governmental entity that has a defense to liability under the Spill Act in the instances described above, the NJSDA may limit the scope of the tasks to be performed by an LSRP it hires by limiting the LSRP’s work to a certain area or areas of concern (“AOC”) with regard to the remediation of a School Facilities Project.

For example, the NJSDA may limit the LSRP’s site tasks to the defined boundaries of the area subject to construction as described in the construction permit for the School Facilities Project (the “School Construction Site”).

Thus, in connection with an LSRP’s work on remediation of a School Construction Site, an LSRP may issue a Medium Specific response action outcome (“RAO”), as described in current Guidance for the Issuance of Response Action Outcomes (“RAO Guidance”), for each AOC located within the School Construction Site. In light of the fact that the LSRP will be hired for a specific set of AOC’s, the LSRP shall not be required to:

1. Perform an off-site groundwater quality investigation to delineate the extent of dissolved-phase groundwater contaminants, where continuing sources of the groundwater contaminants on the School Construction Site were remediated, and drinking water is to be provided to the School Facilities Project by a public community water system; or
2. Investigate vapor intrusion issues on adjoining or nearby off-site properties; or
3. Investigate or delineate off-site soil contamination. NJSDA, nonetheless, may elect to perform remediation work on property immediately adjacent to a School Construction Site in its sole discretion; or
4. Install monitoring wells, whether on-site or off-site, beyond any on-site monitoring wells prescribed by the LSRP as part of the NJSDA’s remediation of sources of dissolved phase groundwater contamination originating at areas of concern on the School Construction Site, provided that (i) the LSRP’s prescribed remediation, is, in the LSRP’s professional

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judgment, protective of the public health and safety at the School Construction Site; and (ii) the same are not necessary to demonstrate the effectiveness of the source remediation. NJSDA's remediation shall not preclude further remediation of groundwater contamination by anyone. Under the Technical Guidance for Investigating Child Care Centers and Educational Facilities, interior building conditions are within the purview of the New Jersey Department of Health.

Consistent with the intent and purposes of EFCFA, upon completion of the construction of a School Facilities Project equipped with required engineering controls, title to and long term environmental stewardship obligations and responsibilities are required to be performed by the SDA District. Those obligations and responsibilities may include the execution and delivery of an institutional control in the form of a deed notice for the School Construction Site, the retention of an LSRP for purposes of complying with conditions of a remedial action permit issued by the Department of Environmental Protection ("DEP") with respect to the School Construction Site, and the payment of all required administrative and remediation fees imposed by the DEP. Accordingly, any necessary remedial action permits shall name the SDA District, and not the SDA, as the permittee and/or the Person Responsible for Conducting the Remediation, along with other permittees and/or parties responsible for conducting the remediation, if necessary.

The NJSDA shall, upon transfer of a completed School Facility Project to a District, advise the District of the environmental remediation performed at the School Construction Site and inform the District, in writing, of any ongoing environmental stewardship obligations required of the District with respect to the School Construction Site, with a copy to the DEP.

With respect to AOC's identified on the School Construction Site, but which extend off-site, upon the issuance by the LSRP of a Response Action Outcome ("RAO") for such School Construction Site, the NJDEP shall revise its records and update its database to reflect that the NJSDA is no longer reflected as the Party Responsible for Conducting the Remediation.

While the scope of remediation to be performed by the LSRP may be limited as described in this document, if the LSRP obtains specific knowledge that a discharge has occurred on a contaminated site for which he or she is responsible, the LSRP shall: (1) notify the NJSDA, as the person responsible for conducting the remediation, of the existence of the discharge; and (2) notify the Department of Environmental Protection (DEP) of the discharge by calling the DEP's telephone hotline. NJSDA shall also be responsible for notifying the DEP of the existence of the discharge. These notification requirements shall not apply to a discharge that may be a result of the existence of historic fill material.

F. Department Review of Remediation of School Facilities Project

The DEP shall use its best efforts to complete its inspection and review, as appropriate, of the protectiveness of the remediation performed at a School Construction Site, as provided under N.J.S.A. 58:10C-23, as soon as practicable after the issuance by the LSRP of a final School Area of Concern RAO.