

Pre-Purchase Administrative Consent Order Guidance

Contaminated Site Remediation & Redevelopment Program
New Jersey Department of Environmental Protection



The Site Remediation Reform Act (“SRRA”), N.J.S.A. 58:10C-1 et seq., established a statutory timeframe for the completion of the remedial investigation by either May 7, 2014, or May 7, 2016, provided certain criteria for an extension were met for sites where a discharge had been discovered prior to May 7, 1999. See SRRA at N.J.S.A. 58:10C-27 and 27.1. In addition, SRRA authorized the New Jersey Department of Environmental Protection (“Department”) to establish mandatory and expedited site-specific timeframes for certain aspects and phases of the remediation, including but not limited to an Initial Receptor Evaluation (“IRE”), Preliminary Assessment (“PA”) Report, Site Investigation (“SI”) Report, Remedial Investigation Report (“RIR”), Remedial Action Report (“RAR”), Light Non-Aqueous Phase Liquid (“LNAPL”) Reporting form, and Immediate Environmental Concern (“IEC”) - Response Action form. See the Administrative Requirements for the Remediation of Contaminated Sites (“ARRCS”) at N.J.A.C. 7:26C-3.3 and 3.4. Pursuant to ARRCS at N.J.A.C. 7:26C-3.3(c), these defined timeframes apply to the site, not the person responsible for conducting the remediation, and therefore do not change if there is a change in the person responsible for conducting the remediation.

If a statutory, mandatory, or expedited site-specific timeframe is missed, the site is subject to direct oversight by the Department. See SRRA at N.J.S.A. 58:10C-27 and ARRCS at N.J.A.C. 7:26C-14.2(a). The direct oversight requirements are a more prescriptive remediation process for the person responsible for conducting remediation. Some of the direct oversight requirements include, but are not limited to, the posting of a Remediation Funding Source (“RFS”), Department approval of all submissions, and Department direction of how the remediation proceeds. A complete list of the direct oversight requirements can be found in SRRA at N.J.S.A. 58:10C-27.c. and ARRCS at N.J.A.C. 7:26C-14.2(b).

Both SRRA and ARRCS include provisions that allow the Department to adjust certain direct oversight requirements, including when the Department determines that such adjustments are in the public interest and protective of public health and safety and the environment. See SRRA at N.J.S.A. 58:10C-27.g.(3); ARRCS at N.J.A.C. 7:26C-14.4.

The Contaminated Site Remediation and Redevelopment Program (“CSRRP”), Bureau of Enforcement and Investigations (“BEI”), is executing certain Administrative Consent Orders (“Pre-Purchase ACOs”) with potential buyers of contaminated sites subject to direct oversight, which allow for adjustments to certain direct oversight requirements, provided the potential buyer meets certain requirements as set forth in SRRA and ARRCS. Once a potential buyer of a site closes on a contaminated property, the potential buyer becomes a person “in any way responsible” for remediating the site pursuant to the Spill Compensation and Control Act (“Spill Act”), N.J.S.A. 58:23-11 et seq. Without the benefits of a Pre-Purchase ACO, a potential buyer of a site subject to direct oversight must strictly comply with all the direct oversight requirements set forth in SRRA at N.J.S.A. 58:10C-27.c. and ARRCS at N.J.A.C. 7:26C-14.2(b).

1. What is a Pre-Purchase ACO?

A Pre-Purchase ACO is intended to facilitate the remediation of sites that have not been remediated in a timely manner. The Pre-Purchase ACO allows certain adjustments to the direct oversight requirements for parties who are under contract to purchase a site that is subject to direct oversight.

The Pre-Purchase ACO enables a potential buyer who is neither a discharger, a responsible party, nor is in any way related to the responsible party(ies) (see item #5 below) at the site to purchase and remediate the site while maintaining compliance with the requirements of direct oversight. In addition, new compliance timeframes for the potential buyer to complete the remediation are established in the Pre-Purchase ACO.

2. What is the timing for a potential buyer to enter into a Pre-Purchase ACO?

A Pre-Purchase ACO must be fully executed by the Department (signed by all parties) **prior** to the potential buyer closing on the property (i.e., prior to becoming a Spill Act responsible party). Please note, the date of a court order transferring ownership of the property to the buyer is considered the closing date and not the date of the actual recording of the deed with the County Clerk’s office.

3. When a potential buyer enters into a Pre-Purchase ACO, what types of adjustments are made to the direct oversight requirements?

A Pre-Purchase ACO allows the potential buyer to purchase a site that is in direct oversight and have compliance timeframes established for completion of the remediation. The Pre-Purchase ACO also includes the following adjustments:

- Any type of RFS mechanism (except self-guarantee) can be used;
- The one (1) percent RFS annual surcharge fee is waived (does not apply to sites subject to the Industrial Site Recovery Act (“ISRA”), N.J.S.A. 13:1K-6 et seq., see item #6 below);
- Proceed with the remediation without prior Department approval;
- Pay annual remediation fees in lieu of the Department’s oversight costs;
- Key document submittals continue to go through the Department’s Inspection/Review process;
- A Feasibility Study is not required to be submitted; and
- The person responsible for conducting the remediation chooses the remedy.

4. What direct oversight requirements are not being adjusted?

- A Licensed Site Remediation Professional (“LSRP”) must be retained/maintained to oversee the remediation;
- All known contaminated areas of concern must be addressed, including any contamination which has migrated offsite;
- An RFS must be established for the full cost of remediation; and
- Compliance timeframes will be established for all document submissions that are not in compliance.

5. What are the eligibility requirements to enter into a Pre-Purchase ACO?

For a potential buyer to be eligible for a Pre-Purchase ACO, the potential buyer must be able to certify the following three conditions pursuant to N.J.S.A. 58:10C-27.g.(3):

- The potential buyer must not be a discharger of a hazardous substance at the site, a person in any way responsible for a hazardous substance at the site, or a person otherwise liable for cleanup and removal costs at the contaminated site;
- The potential buyer must not presently own, nor have ever before owned the site, nor has the potential buyer ever previously been the operator of the site; and
- The potential buyer must not be a predecessor, successor, subsidiary, partner, shareholder, assign, trustee in bankruptcy, responsible corporate official, or receiver appointed pursuant to a proceeding in law or equity, to any discharger, including any other prior owner of, or any prior tenant at, the site.

6. **How does a potential buyer request a Pre-Purchase ACO?**

If the potential buyer meets all three (3) requirements listed in item #5 above, then the potential buyer should send a letter and a Pre-Purchase ACO Certification form to BEI at the address listed below. In the form, the potential buyer(s) must certify to the three conditions noted in Item #5 above. If there are related entities such as a parent company, holding company, assignment of rights entity, urban renewal entity, etc., each entity must fill out Section C of the Pre-Purchase ACO Certification form to certify that each entity meets these conditions. In addition, the potential buyer should include the following information in the letter:

- Provide a signed contract of sale to confirm the transaction. The entity executing the contract of sale should be the same entity executing the Pre-Purchase ACO, unless there is an assignment of rights;
- Provide a copy of the current deed for the site. Ownership reflected on the deed should match the seller reflected in the signed contract of sale;
- Identify any known outstanding enforcement actions, violations, penalties, liens, and/or judgments with any program area within the Department (NOTE: all enforcement actions, violations, penalties, liens, and/or judgments must be addressed before signing the Pre-Purchase ACO); and
- If the site is not subject to ISRA, confirmation whether an RAO-E is the remediation objective.

Prior to purchasing the site, a potential buyer of a property, whether a known contaminated site or not, should be conducting “all appropriate inquiry” as defined in the Spill Act at N.J.S.A. 58:23-11g.d.(2) (aka, “due diligence”) by performing a PA and, if necessary, SI to understand future remediation costs. A completed remediation based on a PA/SI will result in an LSRP issuing an RAO-E.

The potential buyer should send the letter and the Pre-Purchase ACO Certification Form to BEI Chief, Ann Wolf at the address noted below and via email at prepurchase.aco@dep.nj.gov.

Bureau of Enforcement & Investigations
Contaminated Site Remediation & Redevelopment Program
NJ Department of Environmental Protection
401-06U
PO Box 420
Trenton, NJ 08625-0420

Once the letter requesting a Pre-Purchase ACO and the certification form are received, a BEI enforcement manager will be assigned to the site and will help determine the amount of any overdue annual remediation fees and/or oversight fees.

The Pre-Purchase ACO **MUST** be signed by both the potential buyer and the Department **PRIOR** to the potential buyer closing on the property. The Department prefers a minimum two-month lead time to draft and fully execute the Pre-Purchase ACO, however, simple sites may require less time and complex sites may require more time. To ensure the meeting of a closing date, potential buyers should contact the Department as soon as possible and submit all information required by the Department in a timely manner.

7. **Remediation Funding Source Procedures**

- A Remediation Cost Review and RFS-FA Form with the Detailed Remediation Cost Estimate checklist (available at <https://www.nj.gov/dep/srp/rfs/>) must be certified by the LSRP retained for the Site and submitted via email to the enforcement manager for review and approval. On the form, please check the box labeled “Initial Direct Oversight Remediation Cost Review pursuant to N.J.A.C. 7:26C-14.2(b)4”;

- Once the cost estimate is approved by the enforcement manager, the potential buyer will submit the RFS package as a hard copy to the Bureau of Case Assignment and Initial Notice (“BCAIN”). This should include the LSRP certified Remediation Cost Review and RFS-FA form. On the form, please check the box labeled “Initial Remediation Funding Source pursuant to N.J.A.C. 7:26C-5.2(a)”, the RFS instrument and the initial one (1) percent annual RFS surcharge fee, if applicable.

8. Specific Requirements for Industrial Establishments

- For an Industrial Establishment, as defined at N.J.A.C. 7:26B-1.4, that is subject to ISRA and does not have an Entire Site No Further Action (“NFA-E”) or Entire Site Response Action Outcome (“RAO-E”), all remaining remediation required at the site shall be based on a complete PA/SI;
- Prior to closing, all applicable General Information Notices (“GIN”) will be submitted to the Department;
- When an ISRA Remediation Certification form is required, then prior to closing, the potential buyer will submit an ISRA Remediation Certification form (available at <https://www.nj.gov/dep/srp/srra/forms/>) and sign sections F and G on that form;
- Prior to closing and concurrently with the submittal of the ISRA Remediation Certification form, the potential buyer and its LSRP retained for the Site will submit the LSRP certified Remediation Cost Review and RFS-FA form;
- Concurrently with the submittal of the ISRA Remediation Certification form, the potential buyer will establish and maintain an RFS;
- Concurrently with the submittal of the ISRA Remediation Certification form, and annually thereafter, the potential buyer will submit the one (1) percent annual RFS surcharge fee; and
- Concurrently with the submittal of the ISRA Remediation Certification form, the potential buyer will submit the Site and Contact Information Update form (available at <https://www.nj.gov/dep/srp/srra/forms/>).

9. What are the consequences if a person signing a Pre-Purchase ACO does not comply?

- While the Department encourages that a potential buyer of a contaminated site purchase the site only after conducting all appropriate inquiry (see Spill Act at N.J.S.A. 58:10-23.11g.d.(2)), and after fully understanding the financial commitment of completing the remediation of the site in question, the Pre-Purchase ACO includes terms that if the party signing the Pre-Purchase ACO does not comply, the requirements of full direct oversight (see ARRCs at N.J.A.C. 7:26C-14.2) will be reinstated.
- Any owner of a contaminated site, unless exempted from liability under the Spill Act, that does not comply with State statutes and Department regulations is subject to penalties. Penalty amounts are referenced in ARRCs at N.J.A.C. 7:26C-9.5.
- Pre-Purchase ACOs do not include stipulated penalties because the Department encourages parties to buy, remediate, and redevelop sites where cleanups have languished. However, non-compliance with the Pre-Purchase ACO may still include penalties of up to \$25,000 per day, depending on the violation(s).
- The Department, after appropriate notice of non-compliance, may draw down on the RFS and use that money to conduct remediation at the site pursuant to N.J.A.C. 7:26C-5.13.

For more information on Pre-Purchase ACOs, please contact BEI at (609) 633-1480 and ask to speak with the Duty Officer.

To conduct an Open Public Records Act (“OPRA”) review of the Department’s files for the site of interest, please refer to the directions at the following link:

<https://www.nj.gov/dep/opra/opraform.html>

The Department recommends that a potential buyer of a potentially contaminated site seek legal advice prior to purchasing the property. The Department does not provide legal services.