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Privatization Of State Cleanups Sparks Enviro Anger

By Jesse Greenspan

Law360, New York (April 22, 2010) -- Certain states like New Jersey that lack the resources to properly supervise thousands of industrial waste site cleanups have begun turning a large portion of the oversight process to private contractors, sparking concern that the quality of remediations will suffer.

By making this change, cash-strapped state governments get a leaner system that is easier to superintend, while companies get more control over the timing of the process, according to Robby Sanoff, a partner at Foley Hoag LLP.

"I think the government likes it, I think the private parties like it and I'm sure the consultants like it," Sanoff said.

But many environmental groups say it is akin to leaving the fox in charge of the henhouse.

"You can't let a business clean up their own toxic waste sites when they have a financial interest in the outcome of that cleanup," said Robert Spiegel, executive director of the Edison Wetlands Association. "It's absolute insanity."

The battle has been particularly pronounced in New Jersey, where lawmakers passed a bill in 2009 that changed the process used to conduct environmental investigations and cleanups at the more than 20,000 contaminated sites located statewide.

Under the bill, approval from the New Jersey Department of Environmental Protection is no longer required prior to proceeding with remediation. Instead, a state board will issue licenses to qualified consultants, who will then be hired by the owners of contaminated properties to conduct and oversee cleanups.

The consultants will be bound by a strict code of ethics, violation of which could result in penalties as well as the suspension or revocation of their licenses, and the New Jersey DEP

will retain the ability to audit any remediated site, according to the state agency.

Nick DeRose, a senior principal at Langan Engineering & Environmental Services Inc. and president of the New Jersey Licensed Site Remediation Professionals Association, said it was a very rigorous application process and that consultants had to document their qualifying experience in detail.

"Some folks say they got it done in 20 hours," DeRose said. "It took me a lot longer than that."

Any consultants who practice at a substandard level will be weeded out by the DEP, he added. So far, at least 350 have received licenses from the state, with hundreds more applications pending.

"Most concerns I hear from my clients is that they feel I'm going to be very conservative in how I interpret rules and regulations because I don't want to lose my license," DeRose said.

Experts agree that thus far it is too early to tell whether the program is working.

"The program is in its infancy," said John McKinney, a New Jersey-based member of Wolff & Samson PC. "People are still finding their way, and there's not all that much experience with the program. But it's growing."

Richard F. Ricci, a New-Jersey-based partner at Lowenstein Sandler PC, said the main goal of the legislation was to move cleanups along.

"The DEP had way more sites than it was really staffed up to handle, and as a result it was difficult to get anything done," he said.

As an added bonus, the legislation will eventually reduce the state resources that are needed to oversee cleanups, according to Ricci.

But Spiegel said the DEP had given up way too much authority.

"The responsible parties couldn't be happier," Spiegel said. "They love it."

He said many contaminated sites that are supposed to be remediated would instead just basically be capped.

"A cap is not a cleanup," Spiegel said. "A cap is an engineering control, and all engineering

controls over time fail. It's just a question of how long."

New Jersey once had very aggressive cleanup standards, but little by little it has taken steps backward, according to Spiegel.

"We need to go back to the original programs we had in the 80s where we had strict oversight, strict enforcement and where the companies who polluted the site paid to clean it up," he said.

He recommended that the federal EPA take over more New Jersey cleanups, and that fees collected from responsible parties be dedicated to remediation rather than going into the state's general fund.

Larry Schnapf, an environmental lawyer with his own practice who also teaches at New York Law School, said he originally agreed with the criticisms from environmental groups, but that he changed his mind after closely examining the bill.

He pointed out that the owners of contaminated sites will have an affirmative obligation to remediate any discharge, and that certain time frames will have to be satisfied.

"It's pretty stringent," said Schnapf, who added that the privatization would free the DEP from a case backload and allow it to focus on the most dangerous sites.

"Some [New Jersey] case managers have like 200 cases," he added. "If they spend one day on each case, that's two-thirds of the year."

At least 10 states currently have some sort of private licensing program, and more are likely on the way, according to Schnapf.

"This may have to be the trend on the state level because of the staffing levels and the resources," he said.

In fact, the New Jersey bill was modeled largely on a program that has been in place in Massachusetts since the early 1990s.

Sanoff, who is based in Massachusetts, said his state's program had been widely considered successful.

"I'd be surprised if in five years the New Jersey environmental groups had the same perception they have now," Sanoff said.

"The privatized system just means that the consultants have more authority to reach conclusions," he said. Those consultants are subject to regulatory standards that the state sets, he added.

Martha Judy, a professor at the Vermont Law School, pointed out that private contractors have always been hired to study and clean up contaminated sites.

"People have developed whole businesses around remediating chlorinated solvents — that's a pretty common contaminant — so you want to go to the people who have experience with these kinds of sites and this type of contamination and who have decent insurance to cover when things go wrong," Judy said.

She added, however, that oversight has typically remained in the hands of the government.

"I would certainly hope that they would hold on to that work themselves," Judy said. "On the other hand, if there's someone really good at that who they trust, I don't know ..."

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