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The End of Innocence? DEP's End Run Around 'All Appropriate Inquiry' Spill Act Protections

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The responsibility to remediate contaminated property is a heavy burden. Liability under New Jersey's extensive environmental laws is broad based and far reaching, and the process to achieve compliance is often complex, time-consuming, and costly.

The strength and scope of the state's remediation program stems, in part, from the unfortunate legacy of contamination associated with the state's industrial and manufacturing history. New Jersey has demonstrated leadership by implementing a robust and progressive remediation program, intended to facilitate timely and cost-effective remediation, most recently with the Licensed Site Remediation Professional (LSRP) Program under the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq.

The LSRP Program is hailed as a tremendous success, facilitating faster and more remediations. However, a recent rule proposal by the New Jersey Department of Environmental Protection (DEP), with the stated purpose of promoting remediation goals through early notification of contaminants found by persons conducting due diligence for land acquisition, is likely to have the opposite, unintended, effect.

Knowledge that a discharge of a hazardous substance has occurred and notice to DEP is critical to liability. Oftentimes, property owners

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may not know or have reason to know of a discharge on their property and questions about environmental conditions only arise because of a potential sale. When negotiating the sale of property, both buyers and owners want to protect themselves from environmental liability; however, these protections are achieved through opposite means.

On one hand, buyers want to examine environmental issues by conducting "all appropriate inquiry" during due diligence. In turn, they can assess the potential risk of exposure and make an informed decision whether to proceed. On the other hand, owners want to shield themselves from knowledge of contamination because they, as owners, would then have an affirmative

obligation to notify DEP of the discovery; and in such a circumstance, the buyer may cancel the sale, leaving the owner with the dilemma of having to remediate without the benefit of the proceeds of the sale.

Conflict With Statutory Protections

In light of these countervailing concerns, the New Jersey Legislature provided a small safe harbor, benefiting owners and buyers, from otherwise mandatory reporting obligations (and the consequences of such reporting) in the event contamination is discovered by a prospective buyer while conducting pre-acquisition due diligence. However, in an apparent thumb of the nose at the Legislature, on Oct. 21, 2024, the DEP proposed a new rule that clearly contravenes the existing statutory protections. (56 N.J.R. 2021(a).)

The DEP has proposed to amend the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C-1.1 et seq., to include new N.J.A.C. 7:26C-2.4, titled "Conducting remediation and all appropriate inquiry."

The proposal states, in pertinent part: "When a person performs remediation as defined at N.J.A.C. 7:26C-1.3, including performing all appropriate inquiry in accordance with N.J.S.A. 58:10-23.11g, and obtains knowledge that a discharge has occurred at any location on a property, that person shall immediately notify [DEP] ... and shall notify the record owner of the property"; and "whenever a person obtains knowledge that a discharge has occurred at any location on a property, that person shall immediately notify [DEP]."

The proposal is contrary to the cornerstones of New Jersey site remediation laws, namely, the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq., and SRRA. These statutes work hand-in-hand to impose liability for contamination and facilitate remediation, while also promoting informed decision-making by buyers and protecting property owners from liability for conditions unknown to them.

The Spill Act imposes strict liability on "any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance ... for all cleanup and removal costs no matter by whom incurred." In addition, the Spill Act requires "[a]ny person who may be subject to liability for a discharge" to "immediately" notify DEP. This notice obligation is largely imposed on owners, operators, the actual discharger, or persons otherwise "in any way responsible." In other words, persons who may be liable for a discharge have a mandatory obligation to notify DEP.

'Innocent-Purchaser' Defense

Exceptions and defenses to Spill Act liability are few. However, the Legislature provided limited protection for persons who unknowingly acquire title to contaminated property despite due diligence investigations by including an "innocent-purchaser" defense, akin to similar defenses under federal law. Those seeking to invoke the defense must, among other prerequisites, demonstrate that, pre-closing, they "did not know and had no reason to know that any hazardous substance had been discharged at the real property."

To establish that they had "no reason to know," "the person must have undertaken, at the time of acquisition, *all appropriate inquiry* [(AAI)] into the previous ownership and uses of the property." N.J.S.A. 58:10-23.11g(d)(2) (emphasis added). AAI in this context means "the performance of a preliminary assessment, and site investigation [if applicable]."

While activities involved with AAI overlap with activities included within the definition of "remediation," a distinction must and does exist when those activities are performed for purposes of pre-acquisition AAI. Prior to acquiring title, those undertaking AAI are not considered

responsible parties under the Spill Act. Thus, it is generally understood that a person performing AAI is not conducting "remediation," and, as such, is not subject to the reporting obligation.

The requirements for "remediation" under the Brownfield Act and SRRA provide additional support for the conclusion that the Legislature's intent was to distinguish AAI-related activities from actual remediation. The Brownfield Act requires "the discharger of a hazardous substance or a person in any way responsible for a hazardous substance" to "remediate the discharge." In addition, under both the Brownfield Act and SRRA, a person performing remediation is required to retain an LSRP. However, the Brownfield Act explicitly states that the requirements of N.J.S.A. 58:10B-1.3 (remediate a discharge and hire an LSRP) "shall not apply to any person who ... conducts a preliminary assessment or site investigation of the contaminated site for the purpose of conducting [AAI] into the previous ownership and uses of the property." Therefore, a person conducting AAI is not required to retain an LSRP or address a detected discharge. Given these legislative exemptions, a distinction must exist between AAI work and "remediation."

In addition to contravening the relevant statutes, the proposed rule also conflicts with other provisions of the AARCS. In particular, the rules state that the requirements thereunder "do not apply to any person ... who is conducting due diligence in accordance with N.J.S.A. 58:10B-1.3d(2)," unless there is a separate basis for liability, including if the person is in any way responsible pursuant to the Spill Act.

Notably, no changes are proposed to the foregoing rule in the recent proposal. The acknowledgment that DEP's rules governing the conduct of remediation activities do not apply to persons performing AAI clearly stems from the fact that such persons are not liable for remediation under the Spill Act.

SRRA 2.0 Stakeholdering

Significantly, the issues of whether the DEP must be notified of discharges discovered during due diligence and LSRPs must be used for AAI were hotly debated and extensively discussed as part of a series of stakeholder meetings convened by the DEP in the lead-up to the Legislature's amendments to SRRA and related amendments to the Spill Act and the Brownfield Act in 2019, legislation commonly referred to as SRRA 2.0. During the discussions, the DEP expressed concern about the industry practice of parties not using LSRPs for due diligence in consideration of an LSRP's heightened reporting obligations under SRRA.

The DEP raised the specter of taking the "nuclear option" of requiring any person who conducts AAI and identifies contamination to notify the property owner and/or the state regardless of LSRP involvement. DEP's "nuclear option" was not implemented by the Legislature pursuant to SRRA 2.0. However, in consideration of DEP's concern, SRRA was amended to require LSRPs to give notification of the discovery of a discharge to DEP and the "person responsible for conducting the remediation" if they are "retained" to perform remediation. That change was intended to ensure that if an LSRP is used for AAI, they would be required to provide notice of a discharge despite the discovery occurring during due diligence. But the Brownfield Act exception allowing parties to conduct AAI without use of an LSRP was left intact.

With the current rule proposal, the DEP has seemingly ignored the existing law, the discussions preceding SRRA 2.0, and the underlying policies that support maintaining limitations on reporting obligations in relation to AAI activities. Surprisingly, the DEP has presented the proposal as the implementation of SRRA 2.0.

Singular Focus

The DEP's proposal myopically speaks of the goal of learning about contamination immediately upon

discovery. By mandating immediate notification in the AAI context, the DEP ostensibly believes that remediation activities will be implemented at a faster pace. However, in reality, the rule (if adopted) would thwart the implementation and completion of remediation activities and would not lead to early notification of contamination.

Under the proposed rule, a property owner who allows a prospective buyer to conduct environmental testing of their land will run the risk of having the buyer be obligated to immediately report an identified discharge to the state and to the owner. Such notification triggers immediate remediation obligations of any person who is "in any way responsible" for the contamination, such as the owner, including the retention of an LSRP and completion of remedial activities within mandatory timeframes.

It is likely that property owners will significantly limit the scope of pre-acquisition AAI activities such as subsurface testing in light of this risk. It is further likely that prospective purchasers will be reluctant to engage with sellers if they will be prohibited from conducting reasonable investigative work.

By facilitating pre-acquisition AAI under the existing statutory law, the Legislature is encouraging informed investment in property. Parties complete such activities to better assess and understand the risk of exposure and scope of liability that may be associated with property ownership. The vetting of environmental liability risks is often critical to secure financing for redevelopment projects, which are widely recognized as a primary driver for remedial activity in the cleanup of contaminated sites, including brownfields, throughout the state.

Prospect of Chilled Economic Investment

The protections related to AAI under the current statutory structure ultimately spur the goal of effectuating remediation activity and the cleanup of the state's contaminated properties. In contrast, imposing conditions that limit the completion of AAI will chill economic investment in the state's contaminated and underutilized lands and result in fewer contaminated sites being remediated.

Imposing notification requirements on persons conducting AAI threatens to effectively render superfluous the utility of the Spill Act's innocent-purchaser defense, which is oftentimes pivotal to a buyer moving forward with a purchase. Buyers must establish that they have performed AAI in order to obtain innocent-purchaser status. However, with this new rule, fearful owners are likely to substantially limit what due diligence work may be conducted and, in turn, buyers will be unable to establish that they have performed AAI. Should this become the norm, the benefit of the Spill Act innocent-purchaser defense will be severely curtailed.

To the extent that DEP does not withdraw or change its rule proposal, the Legislature could remedy the situation through legislative amendments clarifying that a party who conducts AAI is not conducting remediation and is not required to give notification of the findings of its efforts to DEP or the owner. That would facilitate meaningful AAI, ensure the continued viability of the Spill Act innocent-purchaser defense, and promote economic investment in and remediation of contaminated lands.

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