

NJDEP's New Site Remediation Rule Proposal Contains Controversial New Reporting Requirements

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What You Need to Know

- The NJDEP has issued a rule proposal seeking to amend the regulations adopted in connection with the 2009 Site Remediation Reform Act (SRRA).
- Under current regulations, when a hazardous substance discharge is discovered at a New Jersey property, the person responsible must report it to the NJDEP or face significant penalties. The proposed new regulations seek to expand this reporting requirement to any person discovering a discharge as part of due diligence, as well as any other person with knowledge of the discharge.
- The proposal has been heavily criticized by attorneys and real estate industry groups, as it is expected to have a chilling effect on non-residential real estate transactions throughout the state. There are also numerous concerns about the proposal's legality, including that the regulation exceeds NJDEP's rulemaking authority.

The New Jersey Department of Environmental Protection (NJDEP) recently issued a rule proposal seeking to amend numerous regulations related to the Site Remediation Reform Act of 2009 (SRRA). Included among these proposed regulations is a controversial provision seeking to expand the responsibility for reporting discharges of hazardous materials to NJDEP to a party who discovers a discharge during pre-acquisition due diligence in connection with the purchase of real property, and also to any person who obtains knowledge of a discharge, in any context.

The Spill Compensation and Control Act (Spill Act) places the burden to report a discharge of hazardous substances on any person who "may be subject to liability" for such discharge. Similarly, New Jersey regulations

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state that any person legally responsible for a discharge of hazardous substances who knows (or should know) that the discharge occurred is required to report it to NJDEP. Failing to make such a report subjects the responsible person to a “non-minor” violation with a base penalty of \$25,000.

The regulation in question is proposed to be included in the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), with the title “Conducting remediation and all appropriate inquiry”. It is expressly aimed at requiring prospective purchasers of real property and their consultants to notify the owner and NJDEP of any historic discharges discovered during due diligence activities. Yet, in NJDEP’s attempt to ensure that all discharges get reported, the proposed regulation seemingly ignores fundamental motivations of purchasers and sellers in nonresidential real estate transactions.

Purchasers need to conduct due diligence to quantify their risks regarding environmental conditions that are reasonable discoverable and obtain innocent purchaser protections for any conditions which are not. On the other hand, sellers are usually reluctant to conduct environmental investigations whose results risk both: (a) the imposition of significant environmental liabilities on the sellers; and (b) the cancellation of the sale contract that prompted the investigation in the first place. Environmental attorneys have developed methods to facilitate moving these transactions forward while addressing both parties’ risks, however, NJDEP’s proposed changes to the disclosure responsibilities would prevent these methods from being used, and result in either the purchaser or the sellers from shouldering all the risk in a transaction.

Expected Impact on NJ’s Real Estate Industry

The Spill Act identifies the owner of a contaminated parcel as “a party in any way responsible” for any onsite contamination. Property owners know that they face potentially unlimited liability if any historic contamination is discovered on their property, even if a prior owner or operator caused the contamination. Owners clearly are hesitant to risk allowing unnecessary environmental sampling on their property, given the possibility of liability. Yet, in connection with the sale of property, the purchasers need to be able to quantify the environmental risks they would be taking on.

Environmental attorneys can structure the due diligence provisions of a real estate transaction to mitigate both the seller’s risk and the purchaser’s risk. Sometimes this involves purchasers conducting their investigations, while retaining the option to cancel the transaction at their sole discretion, without reporting the results back to the seller. Under these circumstances, purchasers can quantify their risk, and sellers can entertain offers to purchase the property without risking imposition of a previously unknown (and unlimited) liability. Transactions such as these are vital because they make possible the remediation of properties that would otherwise go unaddressed. Property owners often cannot bear the potentially steep costs of remediation without selling the property. But an effective sale of contaminated property can free up the capital to allow a seller to remediate the property, or even to allow for shifting some or all the remediation costs to a willing purchaser.

With this proposal, NJDEP is attempting to prevent situations in which contamination discovered during due diligence potentially goes unreported and unremediated if the transaction does not close. Yet, many attorneys and real estate professionals strongly object to this proposed regulation because it will erect a

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barrier between the purchaser and seller that will prevent many transactions from occurring. There are concerns that property owners may refuse to permit potential purchasers to conduct due diligence at all if doing so will risk imposing environmental liabilities. And purchasers will not be interested in gambling on whether a property might be contaminated. If the number of real estate transactions are reduced overall, it will likely result in a reduction in the number of environmental investigations conducted—a consequence NJDEP may not have considered.

If it is adopted (and if it is enforceable) the reporting obligation also raises issues regarding persons not involved with an investigation being required to report. Laboratory technicians could have an obligation to call the hotline when assembling a sampling report. Lenders, underwriters, and investors each could have their own obligation to call the hotline when considering a transaction. And, the proposal also raises attorney-client privilege issues if a property owner seeks legal advice on what to do about a discharge.

Proposal Appears Beyond NJDEP's Authority

While NJDEP has the power to adopt regulations, its rulemaking authority is limited to implementing the purposes and requirements of applicable statutes. A regulation can be challenged and invalidated if it can be shown that NJDEP exceeded its authority under the enabling statute.

NJDEP provided very little statutory authority—and no explanation—that would justify its proposed expansion of the reporting requirement. NJDEP cited the Spill Act's provision that it shall be liberally construed, and it cited a separate provision in which the Legislature placed the obligation to report on "any person who may be subject to liability for a discharge". Yet, NJDEP did not identify how liberally construing a reporting requirement the Legislature placed only on potentially responsible parties would (or could) grant NJDEP any jurisdiction over people who are not otherwise subject to the Spill Act. On the contrary, case law states that "agencies may not interpret a statute in a way that gives it a greater effect than its language permits." This raises significant concerns that the proposed action exceeds NJDEP's statutory authority and is not legally supportable.

A full copy of the NJDEP's rule proposal is available [here](#).

Conclusion

Every person or company who owns or is looking to invest in non-residential real property should be aware of this proposed new disclosure requirement. NJDEP has closed its comment period for this rule proposal, and although it is not currently law, it is possible this provision will be adopted within the next year.

Please contact the author of this Alert with questions related to NJDEP's rule proposal or to discuss any impacts these potential new requirements may have on your projects. **George W. Crimmins**

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