

NJ Adopts New Site Remediation Rules, Affecting Real Property Owners and Users



ALERT | December 3, 2018

Gregory S. Narsh | narshg@pepperlaw.com
Thomas M. Letizia | letiziat@pepperlaw.com

New Jersey has one of the nation's strictest site remediation regimes, and new amendments to the law may create further compliance challenges for property owners and users. The Industrial Site Recovery Act (ISRA), which is a "transaction trigger" law, requires remediation of certain sites when there is a change in the ownership or operations of the business or property, such as signing an agreement to sell the property. In August, the New Jersey Department of Environmental Protection (NJDEP) adopted several new amendments that property owners and users should be aware of. In this article, we discuss two of the more significant changes.

THIS PUBLICATION MAY CONTAIN ATTORNEY ADVERTISING

The material in this publication was created as of the date set forth above and is based on laws, court decisions, administrative rulings and congressional materials that existed at that time, and should not be construed as legal advice or legal opinions on specific facts. The information in this publication is not intended to create, and the transmission and receipt of it does not constitute, a lawyer-client relationship. Please send address corrections to phinfo@pepperlaw.com.

© 2018 Pepper Hamilton LLP. All Rights Reserved.

Background

NJDEP implemented ISRA in 1993 to create a strong mechanism for cleaning up the numerous contaminated sites across the state. The law requires investigation, quantification and remediation of contaminated property that may not have been required had the triggering transaction not occurred.

ISRA resulted in a backlog of more than 20,000 sites to be addressed, so NJDEP adopted amendments to the law a decade ago to shift responsibility and authority to the regulated community and private consultants to ensure compliance with the statute, implement any necessary remediation, and even certify that the process was complete. These amendments were known as the Site Remediation Reform Act (SRRA).

2018 Amendments

In the last decade, the backlog has diminished, allowing NJDEP to impose new restrictions to several of the rules that affect site remediation and related activities. In August, NJDEP adopted amendments to the Technical Requirements for Site Remediation (N.J.A.C. 7:26E), the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) (N.J.A.C. 7:26C), and Discharges of Petroleum and Other Hazardous Substances (N.J.A.C. 7:1E), among other rules. While the amendments are too numerous to cover in one article, two changes stand out as significant to owners and operators of “industrial establishments.”

Update to the Definition of ‘Person’

The definition of “person” under the ARRCS before the amendments was typical and included corporations, corporate entities and individuals. In the new amendments, however, NJDEP added the following sentence:¹

“Person” shall, *for the purpose of enforcement*, also include a responsible corporate official, which includes a managing member of a limited liability company or a general partner of a partnership.

N.J.A.C. 7:26C-1.3 (emphasis added).

NJDEP has claimed this new text merely “clarifies” its existing authority. It seems clear, however, that the agency wants to increase compliance by expressly extending the specter of enforcement (including, but not limited to, significant monetary penalties) down to individuals whose companies are involved in ISRA-covered transactions.

Many commenters have argued against this change, claiming that it undercuts the “intentional and fundamental distinctions” between individuals and corporations that exist under well-settled corporate law. These distinctions are generally forfeited only when a party is able to “pierce the corporate veil” or otherwise show that the individual has acted outside his or her capacity as a corporate official.

NJDEP rejected these comments, however. The agency stated that the corporate protections are “not absolute” and that the new language is meant to give notice to the regulated community of when an individual may be subject to enforcement. NJDEP also noted that the revised definition is consistent with other New Jersey statutes, including the New Jersey Water Pollution Control Act. N.J.S.A. 58:10A-3.

However, this change to the ARRCs may face legal challenges. While the protections created under corporate law can be defeated or forfeited, they serve an important purpose — protecting individuals from liability that is more appropriately assigned to a corporate entity. The absence of these protections will create strong disincentives for individuals to accept positions that can be described as a “responsible corporate official” or “managing member” and that may expose them to personal liability.²

New Restrictions on Use of Alternative Fill

Another change affecting real property owners and users is NJDEP’s new rules on the use of alternative fill, promulgated as amendments to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.

Alternative fill is used in connection with active remediation at a site. It is often necessary to bring in material to backfill an excavation created by soil removal or related activities. Since it is not economically feasible (or even environmentally beneficial) to use “clean fill” for such a purpose, the person responsible for conducting remediation will generally propose using “alternative fill,” which contains contaminants that exceed standards applicable to the site.

NJDEP has now imposed new restrictions on the use of alternative fill from both off-site and on-site sources, restricted the volume of alternative fill that may be used, and defined circumstances when prior written NJDEP approval will be required. For **off-site** sources, the person responsible for conducting the remediation may incorporate alternative fill provided that no alternative fill:

- 1 Contains any contaminant that is not already present at the receiving area of concern above the applicable soil remediation standard in order to ensure that no new contaminant above the applicable soil remediation standard is brought to the receiving area of concern;
- 2 Contains a concentration of any individual contaminant above the 75th percentile of that contaminant's concentrations at the receiving area of concern in order to ensure that the existing concentration of that contaminant is not exceeded; and
- 3 Is imported in excess of the volume required to restore the pre-remediation topography and elevation of the receiving area of concern in order to ensure that the volume of alternative fill used in the remedy for the receiving area of concern only includes the volume of alternative fill necessary to achieve this objective.

If the off-site alternative fill does not meet the three requirements above, prior written approval of NJDEP is required before it can be used. See N.J.A.C. 7:26E-5.2(b).

For alternative fill from **on-site** sources, the person responsible for conducting the remediation may use the alternative fill:

- 1 Without prior written approval from the Department, provided that the individual contaminants present in the alternative fill are also present at the receiving area of concern at concentrations above applicable remediation standards; or
- 2 Only after obtaining prior written approval from the Department before incorporating that alternative fill at the receiving area of concern if the concentrations of the individual contaminants at the receiving area of concern are not above applicable remediation standards. The person responsible for conducting the remediation shall include the technical information outlined in N.J.A.C. 7:26E-1.7(a) as part of the request for written approval from the Department.

N.J.A.C. 7:26E-5.2(d).

Commenters have stated that the new restrictions will create needless extra expense in conducting cleanups. They also expressed concerns about delays while waiting for NJ-DEP approval. The agency responded that "the delays are justified because Department prior approval prevents further contamination of the site."

With respect to the new limits on the volume of alternative fill, NJDEP was equally unpersuaded by detractors, stating that additional fill may be used — with prior department approval — but reminding commenters that “the use of alternative fill is for purposes of remediating a contaminated site, not for the development of that contaminated site.”

Implications

NJDEP’s expansion of the definition of “person” and its new rules governing the use of alternative fill raise new enforcement concerns and compliance challenges for real property owners and users subject to ISRA. It is strongly recommended that those entering a property transaction carefully review the amended rules and consult their legal advisor before proceeding with any remediation.

If you have any questions on the new amendments imposed by NJDEP or about site remediation, please contact the authors or another member of Pepper’s Environment and Energy Practice Group or Real Estate Practice Group.

Endnotes

- 1 In its response to comments, NJDEP notes that ARRCS was promulgated under multiple statutes including, among others, the NJ Water Pollution Control Act, the NJ Spill Act, ISRA and SRRA.
- 2 By analogy, not long after CERCLA was enacted, it became apparent that lenders were reluctant to foreclose on contaminated properties for fear of becoming a “potentially responsible party.” The result was numerous abandoned sites that became eyesores and dangers to the surrounding communities. Congress finally reacted by promulgating “lender liability” (and other) laws aimed at protecting lenders and encouraging redevelopment of contaminated sites.