ALM | LAW.COM

The Legal Intelligencer

NJDEP Revises and Re-Proposes Requirement to Report Contamination Discovered During Real Property Due Diligence

By Debra Rosen, Daniel Farino & Charles Dennen
January 29, 2026

For decades prior to 2024, in most circumstances, only a party responsible for remediating a discharge of hazardous substances in New Jersey has been required to report a known discharge.

This approach has been critical when performing real estate environmental due diligence because it does not require prospective buyers to disclose to either the New Jersey Department of Environmental Protection (NJDEP) or the owner of the property any contamination discovered, which could trigger an obligation to investigate and remediate the property subject to sale.

However, in October 2024, NJDEP published a proposed rule that sought to amend the Industrial Site Recovery Act rules, N.J.A.C. 7:26B; the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C; the Technical Requirements for Site Remediation, N.J.A.C. 7:26E; and the Heating Oil Tank System Remediation Rules, N.J.A.C. 7:26E.

The most notable amendment in the proposed rulemaking was a new section to ARRCS,

Courtesy photos

L-R: Debra S. Rosen, Daniel R. Farino and Charles J. Dennen of Archer & Greiner.

N.J.A.C. 7:26C-2.4, which addressed discharge reporting during real estate environmental due diligence, otherwise known as "all appropriate inquiry" under the New Jersey Spill Compensation and Control Act (Spill Act).

Specifically, the proposed amendment sought to mandate the reporting of environmental contamination discovered during real estate environmental due diligence by prospective buyers and their representatives, even if those representatives are not Licensed Site Remediation Professionals (LSRPs). In other words, if any person, including a pro-

posed buyer, discovered a discharge during the course of all appropriate inquiry, that person would be obligated to report the discharge to both NJDEP and the record owner of the property. If the person conducted all appropriate inquiry and did not discover a discharge, the person was not required to report anything and would not be liable for a past discharge upon acquisition of the property.

Additionally, the new section would have created an affirmative obligation on any person who obtained specific knowledge of a discharge to notify NJDEP of the discharge, which would result in remediation of the property being initiated.

This proposed rule was highly controversial and attracted significant attention from various sectors due to the resulting upheaval to the long-standing reporting requirements (or lack thereof) related to environmental due diligence in real estate transactions. The proposed rulemaking was met with staunch objection, including oppositional comments and testimony through the public comment period. Among those who expressed concern about the proposed rule was Senator Bob Smith, who has sponsored many of New Jersey's prior environmental legislative initiatives.

This was not the first time NJDEP attempted to upend real estate environmental due diligence.

Indeed, NJDEP sought to codify stricter reporting requirements during both the Site Remediation Reform Act (SRRA) legislative process in 2009 and the SRRA amendments a decade later. The Legislature rejected NJDEP's efforts on both occasions, choosing instead to maintain the status quo. This legislative history was highlighted by Senator Smith in a letter to NJDEP Commissioner LaTourette that raised concerns with the proposed rule.

As a result of opposition, on Nov. 17, 2025, NJDEP withdrew its original proposed all appropriate inquiry reporting requirement and proposed a newly amended rule with revisions.

Under the re-proposed rule, any person who discovers a discharge of a hazardous substance during all appropriate inquiry must notify the record owner of the property where the discharge is discovered. This requirement to inform the record owner of the property applies to any person conducting all appropriate inquiry, including environmental consultants, LSRPs, and other persons. Once the record owner is informed of the presence of the discharge, the owner has a legal obligation under the Spill Act to report the discharge to NJDEP and to initiate remediation of the contamination.

The re-proposed rule appears to be a distinction without a difference from the October 2024 original proposed rulemaking. Although the re-proposed rule imposes the obligation to report to NJDEP on fewer people involved in all appropriate inquiry, it shifts all responsibility to the record owner of the affected property.

Indeed, if a prospective purchaser of real property (or their representative) discovers a discharge during all appropriate inquiry, they are legally obligated to inform the record owner of the property they are seeking to purchase. It is then incumbent upon the property owner to immediately inform NJDEP that a discharge has been discovered, leading to the same ultimate result as the initially proposed rule amendment.

As a result, the re-proposed rule does not actually address many of the concerns noted in response to the original rule amendment

proposed in October 2024. Real estate contracts have long included confidentiality provisions where a buyer who discovers contamination during due diligence is obligated to disclose to a seller only upon the request of the seller. Buyers also typically agree not to use an LSRP in its due diligence investigation, as an LSRP may have an independent obligation to report.

With the re-proposed rule, there is a widespread fear that the reporting requirements contained therein may chill real property transactions and redevelopment. Under the proposed reporting requirements, a property owner who attempts to sell real property subjects themselves to the risk that contamination will be identified during all appropriate inquiry and opens themselves to the corresponding requirement to report and remediate the contamination even if the property transaction does not close. This could serve as a significant disincentive for property owners to market real property that is otherwise ideal for redevelopment, as the potential for costly remediation is heightened under the proposed rule.

Moreover, the proposed rule could result in real property transactions occurring without due diligence, which would add the risk of discovering contamination and the cost associated with remediating contamination to the prospective purchaser.

The Spill Act provides the "innocent purchase defense" for buyers of real property if they acquire the property after a discharge has occurred, conducted all appropriate inquiry prior to purchasing the property, and did not cause or otherwise have knowledge of the discharge. Critically, the innocent purchaser defense is not available to any real property buyer who does not conduct all appropriate inquiry.

Thus, a desire by the property owner/seller to avoid the potential cost of discovering a discharge during all appropriate inquiry could result in the buyer incurring significant liability if contamination is discovered at any point after the property transaction closes.

In fact, the innocent purchase defense could be rendered moot altogether by the proposed rule because there will either be ongoing remediation once the seller is informed of a discharge and reports the discharge to NJDEP, or no due diligence will be allowed so a buyer will not be able to establish the elements of the innocent purchase defense.

Moreover, without all appropriate inquiry, the discovery of discharges will necessarily be delayed until a point in the future, rather than the potential for discovering a discharge during all appropriate inquiry.

Interestingly, public comments to the re-proposed rule were due on January 16, 2026, less than a week before the Sherrill Administration took over from the Murphy Administration. Whether the Sherill Administration promulgates the rule, further amends the proposal, or does away with it altogether will be worth keeping an eye on over the coming months.

Debra Rosen, **Daniel Farino**, *and* **Charles Dennen** *are partners in Archer & Greiner's environmental law group, where they focus on all areas of toxic tort and environmental litigation.*