

The Legal Intelligencer

NJDEP Proposes Changes to Hazardous Substance Discharge Reporting Rules

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On Oct. 21, 2024, the New Jersey Department of Environmental Protection (NJDEP) published a proposed rule amending and expanding the regulations that control the remediation of a contaminated site.

This new rule proposes transformative changes to hazardous substance discharge reporting requirements that, if passed, will drastically change the way a party must respond to the discovery of a discharge of hazardous substances. In addition, the rule plans to amend the regulations governing NJDEP direct oversight and the procedure for obtaining remedial action permits, as well as update the site remediation regulations to reflect the recent adoption of a new environmental medium, indoor air, among other proposed changes.

The rule plans 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 amendments are intended to codify and implement the provisions enacted in 2019 amending various sections of the Site Remediation Reform Act (SRRA 2.0) as well as supplement various



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parts of New Jersey statutory law concerning the remediation of contaminated sites.

SRRA 2.0 became effective on Aug. 23, 2019; however, the site remediation regulations have not been updated to reflect it. This rule is intended to remedy any inconsistencies that currently exist between the regulations and statutory law. SRRA 2.0 amended several sections of New Jersey's cornerstone environmental statutes, which made various changes to the laws controlling licensed site remediation professionals (LSRPs) and the remediation of contaminated sites. In addition to implementing SRRA 2.0, NJDEP has proposed amendments to hazardous substance discharge reporting rules creating new requirements for the regulated community.

The most notable amendment is a proposed new section to ARRCs, N.J.A.C. 7:26C-2.4, which addresses discharge reporting during real estate environmental due diligence, otherwise known as all appropriate inquiry under the Spill Compensation and Control Act.

Under the proposed rule, if any person, including a proposed buyer, discovers a discharge during the course of all appropriate inquiry, the person is obligated to report the discharge to both NJDEP and the record owner of the property. If the person conducts all appropriate inquiry and does not discover a discharge, the person is not required to report anything and will not be liable for the discharge when the person actually acquires the property. Additionally, the new section creates for the first time an affirmative obligation on any person who obtains specific knowledge of a discharge to notify NJDEP of the discharge.

This new section would substantially change the New Jersey discharge reporting laws and alter the way prospective buyers of real estate perform due diligence. Currently, a party is only required to report a known discharge if it is the party responsible for remediating the discharge. This distinction is critical when performing real estate environmental due diligence because it does not require prospective buyers to disclose any contamination discovered to the NJDEP or the owner of the property, potentially triggering an investigation and remediation at the property subject to sale. NJDEP believes that changes to the current discharge reporting requirements will ensure it is alerted to the discovery of any hazardous substance discharge, so that it can effectively carry out its duty to protect human health and the environment.

Additionally, the proposed rule seeks to clarify that an LSRP does not have to be retained to conduct sampling or investigation to confirm or

evaluate a remediation previously performed or supervised by a prior LSRP, provided that the sampling or investigation is not: legally required; conducted to obtain a Response Action Outcome; and conducted to investigate, clean up, or respond to any known, suspected, or threatened discharge of a contaminant. This was the original intent of SRRA 2.0, but apparently NJDEP feels that was not clear under its original language and requires clarity.

The rule proposal also intends to amend ARRCs with certain changes to the direct oversight program consistent with SRRA 2.0. The amendments will allow NJDEP to modify a direct oversight requirement if the person responsible for conducting the remediation demonstrates financial hardship that prevents performance of the remediation due to the imposition of direct oversight, and will allow for the use of any financial mechanism other than a self-guarantee to establish a remediation funding source. Current rules only allow for a remediation trust fund as a remediation funding source. NJDEP believes this change is needed to alleviate the financial burden placed on responsible parties to put forth the entire cost of remediation in a remediation trust fund, a goal made clear within the legislative amendments of SRRA 2.0.

The amendments further incorporate changes made in SRRA 2.0 establishing that the requirements of direct oversight run with the site, regardless of a transfer of ownership of property, and that if a person responsible for conducting a remediation fails to meet certain conditions, NJDEP will not undertake direct oversight if the delay triggering direct oversight was due to access to offsite property being denied by the property owner.

Next, the rule proposes substantial amendments to the regulations governing the remedial action permit process to broaden permit options and simplify the administrative process to obtain

a permit. Currently, NJDEP requires a permittee to obtain a separate permit for each impacted medium. Since a contaminated site may have up to three different impacted media present (soil, groundwater, indoor air), the rule proposes combining all impacted media into one permit for each contaminated site. NJDEP believes that the one permit system will simplify the administrative permit process, as well as an LSRP's oversight of a contaminated property, and expedite the issuance of remedial action permits. Moreover, the proposal clarifies the different types of specific focused remedial action permits that may be obtained more quickly with less Department review for certain regulated activities.

NJDEP also proposes to amend the existing rules for site investigation and remedial investigation to reflect the May 2021 adoption of indoor air remediation standards. The amendments will ensure the investigation and remediation of potential vapor intrusion into a building from contaminated soil or groundwater is done appropriately, and will now require an LSRP to certify in any Response Action Outcome that contaminants at the site meet the required indoor air remediation standards.

These proposed changes have caused concern among the regulated community, primarily in regard to the changes to hazardous substance discharge reporting. Members of the real estate community have expressed concern that these new reporting rules could stall future development.

If a prospective buyer of property discovers contamination while performing due diligence, there is now an affirmative obligation to notify NJDEP, which will place investigation and remediation obligations on the owner of the property. Real estate sales often include confidentiality

provisions in contracts, 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.

NJDEP proposes changes that would obviate the need for these provisions and may eventually cause sellers of real property to prohibit due diligence altogether during real estate transactions. These changes and the potential impacts are unappealing to many buyers, which may lead to properties becoming essentially unmarketable as there will be a decreased desire to purchase and develop property.

While NJDEP believes this will allow it to more effectively carry out its duty to protect human health and the environment, it may actually have the opposite effect with contaminated sites being unmarketed and the existing contamination remaining undetected given the anticipated decrease in redevelopment of brownfield properties.

A virtual hearing on these proposed changes was held on Nov. 21, 2024, in which members of the real estate community stated concerns about the new reporting requirements and requested more clarity be added to the rule if adopted. The period for submitting comments to the proposed rule has been extended through Jan. 31, 2025. If adopted, the rule would become effective in the following months.

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