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Introduction

This booklet focuses on environmental issues that affect real estate transactions and businesses in New Jersey. We hope to add to it from time to time as issues arise that merit additional attention. Most of the issues covered relate to the continuing evolution of NJDEP and EPA regulations and their effects on the regulated community. We will attempt to interpret the regulations and give some general guidance in our discussion of the issues however the reader is reminded that every case is fact specific and should be reviewed in light of the facts and the current regulatory climate.

The NJDEP is undergoing a major change and restructuring in the next two to three years including a total regulatory overhaul to change the nature of the agency from one of oversight and control of remedial projects to a focus on audit and enforcement. To accomplish this they are in the process of creating Licensed Site Remediation Professionals ("LSRPs") who will conduct investigations and remediations without department oversight and who will issue a clearance document that will be subject to audit. That change coupled with regulatory overhaul will help to simplify the site remediation and clearance process while at the same time shifting liability and adding some level of uncertainty and possibly added cost.

This booklet is organized as a series of articles which describe an issue, how it can affect you and your clients, and some recommended strategies for addressing it. We recommend that you scan the first paragraph of each issue paper and then the strategies. If the issue affects you or arises in a future transaction you may want to go into greater depth. The articles have been structured to facilitate quick review. For more depth and detail we will be pleased to discuss individual cases.

Overview of Recent Changes in NJDEP Regulations

The NJDEP has made significant changes in rules and regulations over the past three years. During these changes various grace periods or phase-in periods were established which have now expired. The effect of these rule changes is to upset some previously established guidelines. The following changes have been implemented or are in the implementation stages.

Soil and groundwater remedial standards have been completely revised. This can result in a previously issued No Further Action ("NFA") letter being revoked.

Stormwater regulations promulgated four years ago have become fully effective with the expiration of the phase-in period. Some of the restrictions make entire parcels unbuildable and can drastically affect existing properties.

There are new community outreach requirements for sites undergoing remediation. These requirements impose notification requirements on property owners on specific timetables.

Vapor intrusion investigation and mitigation rules have been put into effect with the result that site investigation and remediation costs have increased.

The NJDEP is also strictly enforcing the requirement for a Baseline Ecological Evaluation ("BEE") which is an extensive and costly evaluation, on every site remediation except for residential underground storage tank cleanups. Previously, sites with minimal contamination limited to only soil cleanups were not required to submit a BEE.

The NJDEP is delegating authority to consultants to do more work on the site without supervision. The residential Underground Heating Oil Storage Tank Program ("UHOT") has been implemented and consultants must now register and qualify for the UHOT program and all residential UST remediations (with certain limitations) must go through the program.

The Licensed Site Remediation Professional ("LSRP") program is being implemented. This will delegate sign off authority to consultants with only an audit by the NJDEP. As part of this program the Memorandum of Agreement or "MOA" program has been discontinued for all new cases.

There has been some recent attention to the issue of Radon emissions from granite countertops. This comes not from the EPA or the DEP but from the popular press.

Finally, the NJDEP has issued a draft of Presumptive Remedies for soils at schools, child care centers and residences.

These issues are discussed in more depth on the following pages.

NFA Letters

Issue:

No Further Action Letters or "NFA" letters issued at the conclusion of a cleanup can no longer be accepted as evidence of a clean site.

Impact:

In real estate transactions, buyers have relied on NFA letters to ensure that the site is clean and additional environmental remediation will not be required. This allowed the buyer and seller to make a clean break in ownership and the buyer could rest assured that he would not incur costs to clean up the site. This is no longer the case and every real estate transaction involving a site that has had remedial action conducted and which has an NFA letter must be reviewed to determine if the case could be re-opened. If the case is subject to a reopener, provisions must be made at the time of sale for retention of cleanup responsibility by the seller through a bond, insurance policy, escrow or other guarantee or a reduction in price which compensates the buyer for the risk going forward. The NJDEP issued guidance on August 10, 2009 on when cases will be re-opened.

Origin:

The NJDEP's reauthorization of soil and groundwater cleanup standards caused some standards to be reduced by an order of magnitude (a factor of 10 or more for the non-mathematically inclined). This triggered the potential for a re-opener since the Site Remediation Rules have always included the order of magnitude clause. In cases where the site was remediated to non-detect levels for all compounds this is a non-issue. However if a site was remediated to a level just below the prior standard (for example to a level of 9.5 PPM versus a cleanup standard of 10) it would have received an NFA. If that standard has now been reduced to 1 PPM, the order of magnitude rule kicks in and the site could be reopened.

Guidance:

First, in any transaction have a competent environmental consultant review the documents leading up to the NFA for order of magnitude changes. With the new rules there is a bias toward permanent remedies and non-permanent remedies will be assessed an annual oversight and maintenance fee. Look for the DEP to focus on these cases since its budget is funded in large part by its fees and fines. If your client is engaged in a transaction as either a buyer or seller of a property with an at-risk NFA, this change is problematic. Lenders and home inspectors may not yet be fully aware of these requirements and it is important that the NFA for any property with any history of contamination be evaluated.

The guidance for reopening cases is:

For cases not yet issued NFA approval an evaluation must be made as part of the Remedial Action on the site and, even if an approved Remedial Action Work Plan exists, the new standards must be applied essentially modifying the approval.

For cases with an NFA, the following guidance applies:

1. The order of magnitude evaluation applies to the contaminants listed in tables provided in the guidance document for residential and commercial properties only if the concentration of a contaminant present at the site is greater, by an order of magnitude or more, than the new remediation standard.

2. An evaluation is needed to determine the protectiveness of the selected or the implemented remedy.

3. If the remedy does not control exposure to the new remediation standard, additional remediation will be required.

4. If the remedy continues to be protective due to the use of engineering and institutional controls, no additional remediation would be needed.

5. Contamination, as defined by the new remediation standard, would need to be accurately reflected in an amendment to the deed notice.

For sites with NFA Approval the following will trigger a reopening:

1. Sites with engineering and/or institutional controls (conditional NFA) require that the person responsible for maintaining the engineering and/or institutional control perform the order of magnitude evaluation as part of the biennial certification pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-8.5 and 8.6.

2. Sites without engineering and/or institutional controls (unconditional NFA) require that the order of magnitude evaluation be conducted whenever a site “re enters” the Site Remediation Program (i.e., an ISRA trigger, child care facility license renewal, property sale that requires update of site conditions for loan approval, etc.) pursuant to the Technical Requirements for Site Remediation, N.J.A.C. 7:26E-3.2(a).

Deed Notices – Biennial Certifications

Issue:

Properties with Deed Notices or Declarations of Environmental Restrictions which encapsulate or otherwise segregate pollutants without conducting a cleanup have been permitted. The Deed Notice typically includes an engineering control such as a cap, fencing, signage etc. to notify and protect the public against disturbing pollution. There is a requirement for a biennial certification that the engineering controls have been maintained and are still protective of human health. Failure to submit the required certification can result in fines and penalties.

Impact:

Property owners with Deed Notices should diligently follow-up on the biennial certification. The certifications must be signed by a professional engineer (and in the future probably by either an engineer or an LSRP). The DEP is enhancing its scrutiny of maintenance and poorly maintained engineering controls cannot be certified by a responsible engineer and if they are, both the property owner and the engineer are subject to fines and penalties. If an order of magnitude reopener occurs the deed notice must be modified.

Guidance:

Attorneys involved in transactions involving deed notices should require a current inspection and certification from an engineer and ensure that all biennial certifications have been filed prior to closing. If the engineer finds that the engineering controls have deteriorated they should be repaired or an adjustment made at closing. The deal should also reflect the ongoing costs of maintaining the engineering controls and filing the biennial certifications.

If the order of magnitude rule has been invoked, the required DEP clearance must be obtained and the modified deed notice filed with the new deed.

Clients with Deed Notices or CEAs should conduct a review prior to the next recertification period.

Site Remediation Program and LSRP

Issue:

The NJDEP is instituting a Licensed Site Remediation Professional Program (LSRP). This program will delegate authority to complete site investigations and remediations without NJDEP oversight and the LSRP will issue the closure document. The DEP will transition from an oversight and control role where they review every step and approve work plans, review and approve remedial actions, and issues NFA's to one of an audit and enforcement function. The LSRPs will issue a new form of project release called an Remedial Action Outcome or RAO. There will no longer be NFAs issued by the NJDEP.

This licensing program is similar to the one in Massachusetts and will include a licensing board, fees, and continuing education requirements. After an initial temporary license to get the program started all LSRPs will have to sit for a test. There are significant experience requirements and persons without a bachelor degree in a science field who are relying on experience in lieu of a degree will only get one chance to get licensed. This program was precipitated by the ever increasing workload at the DEP where there are some 20,000+ open cases with a growth of about 500-1,000 per month.

Since increased staff was not an option and the regulated community is chafing under the delays, the legislature decided to implement the LSRP program via statute P.L. 2009 Chapter 60 Assembly no, 2962. The legislation was opposed by environmental groups such as the Sierra Club but the legislature saw the merits and passed the bill overwhelmingly. Governor Corzine allowed the bill to languish on his desk and, three days before it would become law by default, he signed it but issued an executive order (#140) to put some more teeth in the program as an olive branch to the environmental interests. Mostly he required greater auditing initially of sites utilized by children and required the DEP to audit 10% of the cases submitted in the first 24 months including at least one case submitted by every LSRP. He also ordered that every document from every case be posted online, including the audit, within 60 days of being finalized.

Impacts:

The LSRP will stand in the place of the NJDEP and become the de-facto regulator. The LSRP's first priority is to be protective of human health and the environment. There are enhanced powers and responsibilities including the requirement to report any evidence of pollution to the NJDEP that the LSRP becomes aware of. This has the potential to complicate tasks such as Phase-1 environmental audits where the LSRP is working for the buyer but not the property owner. Buyers will want to use an LSRP to conduct Phase-1 audits but sellers will not want to allow LSRPs on their property since it is akin to authorizing an environmental search warrant without probable cause. It should

not be a problem for a seller with a clean site but sellers with questionable sites or some environmental skeletons in the closet may strongly resist a phase-1 by an LSRP.

The requirement for the NJDEP to audit at least one submission by every LSRP within the first two years of the program will probably slow down the initial audit process or result in cursory audits.

There is a provision that the RAO can be reopened for a period of three years after submission and any RAO issued by an LSRP who fails any audit can be reopened. How this will all work out in practice remains to be seen but there will likely be more caution on the part of LSRPs. Expect costs of site remediation to increase and for the marginal consultants and cleanup firms to be forced out either by the audit process or by costs. Also expect greater conflict with insurance companies on pollution cleanup claims. The LSRP has the last word and the site does not get signed off until the LSRP releases it so insurance company conflicts and slow payment may negatively impact clients.

There is a provision that engagement of an LSRP must be communicated to the department within a specified time frame and if the LSRP is fired or quits he must communicate to the DEP that he is no longer the LSRP of record. Every site undergoing remediation or an ISRA assessment must have an LSRP of record.

There are specified time frames for completion of various phases of the cleanup process. These were imposed because some sites have dragged on for years with the Responsible Party doing the minimum necessary to keep the DEP at bay. There is also a provision for certain high priority sites to come under the direct supervision of the DEP. Finally, there are requirements for Responsible Parties to put guaranteed funding in place for remedial activities at the beginning of the project.

There are provisions in the statute exempting certain persons for responsibility for cleanup of contamination on their site if they did not know of the contamination when the site was acquired and if they conducted due diligence meeting the All Available Inquiry (“AAI”) standards of the EPA.

Guidance:

The LSRP program is still evolving. Prior to transferring property or conducting a remediation or a site assessment an evaluation of the consultant’s LSRP status and the current status and direction of the regulations emanating from A 2962 should be undertaken. There is also a concern on the part of the potential LSRPs about liability and risk of having an audit reject an RAO. Insurance costs are likely to increase.

The requirement for funding to be put in place at the beginning of a cleanup means that in any transaction where the property transfers prior to cleanup, an

adequate escrow or guarantee fund needs to be established. This will complicate deals since the difficulty of estimating costs for completion of a cleanup will lead to protracted negotiations over the size of any escrows.

Stormwater Regulations

Issue:

Stormwater regulations promulgated with an effective date of February 2, 2004 with a phase-in period have been fully implemented by the NJDEP. These regulations were proposed in 2003 with a 5 year-phase in period which has now expired. The greatest impact will be on land use in areas adjacent to stormwater conduits such as streams, wetlands, and tidal waters. The rules include several Best Management Practices ("BMPs") for managing storm water flow that can be implemented for new development. The rules require removal of nutrients and dissolved solids from stormwater. The rules apply to all properties, commercial, industrial, and residential. There is no exemption for the type of property.

Impacts:

The major impact is the increase in the buffers around stream corridors and wetlands and the added restrictions on construction in those buffers. The buffers for class 1A waters, their tributaries, and special value wetlands have increased to 300 feet measured from the bank of the stream or the delineation boundary of the wetland. The buffer applies to all sides so a class 1-A stream has a 600 foot wide buffer plus the width of the stream.

Virtually all obstructions and impervious cover is banned within these buffers. No building permits will be issued for any increase in impervious cover. This means that a large parcel, say 5-6 acres, that is 300 feet wide with a stream running down one side is totally unbuildable. It also means that such a property cannot increase existing impervious cover in any way including the addition of porches, patios, swimming pools, etc, even if the increased lot coverage meets zoning requirements. Even suspended structures, such as a balcony, that encroach on the buffer are prohibited.

Expect an expansion of the rules to prohibit practices like washing of vehicles in the open, further controls on fertilizers, pesticides, and herbicides, and increased controls on animal wastes. There will be a focus on domestic animal waste as well as geese controls and controls on small hobby farms including those with a single horse, a small chicken coop, or a small flock of sheep or goats.

Guidance:

Ensure that any property that includes a stream or wetland is evaluated and that the buyer is made aware of the limitations. The property can be maintained but absolutely no expansion or change of any type is permitted without extensive and expensive applications for a waiver from the NJDEP.

Existing property owners may want to apply for tax abatement since the value of the property is clearly diminished.

Engage a wetlands consultant and/or a surveyor who can provide clear boundaries of wetlands and streams and be sure that the buffer is clearly delineated on any survey.

Have an engineer review the site and implement Stormwater Best Management Practices or “BMPs” to reduce and control runoff, minimize chemical and other contaminants and to minimize total dissolved solids.

Clients who are selling “horse properties” need to ensure that they are in compliance with the stormwater rules with regard to manure storage, pasture runoff, and any stream impacts for water courses on or adjoining the property.

Industrial and Commercial properties need to have a stormwater management plan and implement and maintain stormwater pollution prevention measures.

Community Outreach

Issue:

The NJDEP has promulgated regulations for community outreach that require any party investigating or remediating a site to notify the surrounding community as well as the Municipal Clerk and the local Board of Health. These notifications must follow certain schedule, must include certain minimum information, and meet certain other requirements to comply with the regulations. Failure to notify or meet the time requirements can result in penalties.

Impacts:

The notifications, which must include all property owners and tenants within a 200 foot radius of the site boundaries as well as all occupants of a site (such as each tenant in a shopping mall or each tenant in an industrial park) must be either in the form of certified mail or a sign posted conspicuously on the property. The intent of the regulation is to ensure that all potentially affected parties are aware of the pollution that exists on site. The municipality must also be notified and copies of any reports supplied to the municipality if requested. The reports are available to anyone under the Freedom of Information Act and Open Public Records Act.

The notification of individuals or businesses risks precipitating litigation and the posting of signs risks negative publicity for the property. A sign notifying the public of pollution on a shopping center property could negatively affect the business of the tenants and expose the owner to financial risks from lease cancellation or from difficulty renting properties.

Guidance:

Notifications should always be made in a timely manner and include the required information. However, efforts to reassure those notified that work is progressing while giving accurate information about health impacts can play a role in mitigating risks. We recommend a personal letter, that has been reviewed by the owner's attorney, to each affected party from the person leading the remediation. Reassurances that the ongoing threat has been abated by stopping the pollution and undertaking the immediate cleanup of the areas of greatest concern are helpful. References to published information on the internet at EPA, NJDEP, or industry websites can also help individuals feel a certain degree of control and assurance that they are receiving impartial information not slanted in favor of the responsible party.

Vapor Intrusion

Issue:

The EPA and NJDEP have instituted a vapor intrusion investigation and mitigation requirement. Vapor intrusion into buildings and the negative effect on indoor air quality and health of the building residents are a concern and the need to mitigate these effects is the impetus behind the regulation. Vapors can migrate from contaminated groundwater or through contaminated soils. Preferential pathways such as underground building utility lines (water, sewer, gas, electric) can permit vapors to migrate long distances.

Impacts:

Vapor intrusion studies are costly and disruptive. The testing is expensive and very sensitive, requiring that the building be cleared of all potential sources of vapors before a valid test can take place. For a residence this would mean removing all stored cleaners, paints, solvents, motor fuels and internal combustion engines from the building before testing. In a shopping center it would mean shutting down nail salons, hair salons, pharmacies, hardware and paint stores, gift shops containing candles or fragrance generating products. In an industrial operation it would require the removal of all paints, adhesives, coatings, and lubricants. In schools it requires removing all paints, cleaning products, art supplies, or any other item containing a solvent. The test requires about 8-24 hours during which time continuous air samples are collected. The samples are then analyzed in a lab. Larger structures require multiple sample sites. If the air samples reveal contamination, holes must be drilled through the floor and an under-floor sample must be collected and analyzed.

Guidance:

Vapor intrusion investigations cannot be avoided however the development of a proper sampling plan can help mitigate the costs and disruption. Sampling under the floor for vapors should be done first if major relocation of materials or people is required. This can be done without clearing the building. If the floor is concrete and free of major holes, cracks, or gaps testing can be completed in about a day. If there are major cracks, holes or opening in the floor, patching the floor to seal it may be necessary before sampling. If there are no vapors present under the floor the need for sampling in the space can be avoided if it can be shown that a hardship or business disruption would result. If samples are taken above the floor, an extensive inventory of solvents and solvent bearing materials can be conducted and only the items containing target compounds need to be removed. If the vapor concern relates to gasoline, only items containing the major constituents of gasoline and those found beneath the floor need to be removed. Sampling can also be conducted overnight and on weekends if the business is closed during these times. The collection of background samples is also

recommended to ensure that any contamination is truly due to vapor migration. Vapor intrusion studies should not be conducted in buildings that have recently been painted and cleaning should be discontinued for at least a week prior to the study.

Baseline Ecological Evaluation

Issue:

The NJDEP is requiring a Baseline Ecological Evaluation ("BEE") for all sites except residential underground storage tank sites that affect soil only. Until recently, sites with minor soil contamination or sites within urban areas were exempted. The exemption was informal but recent moves toward absolute conformance with the regulations without much judgment from the case managers has increased the requirements on all remedial investigations. A BEE evaluates the environment surrounding the site for impacts on surface waters, groundwaters, water supply, wetlands, areas of ecological importance, and the flora and fauna surrounding the site and particularly threatened or endangered species.

Impacts:

A BEE is expensive and time consuming. Costs of $7,500 to $15,000 for an average site are not uncommon. The BEE is conducted by certified wetlands specialists or others with specialized ecological training. The requirement to conduct a BEE on any site with contamination includes commercial and residential sites and will impact any ISRA filing where there is any area of concern identified.

Guidance:

Allow additional time for site clearance in transactions and provide for additional cost. Any property undergoing a site investigation where remediation has been conducted will not get an NFA approval without a BEE (except for residential heating oil tanks involving only soil).

The UHOTS Program

Issue:

In order to reduce the case load and speed the handling of residential heating oil tank closures, frequently occurring at the time of sale, the NJDEP introduced the Underground Heating Oil Tank program. This program applies only to residential tanks up to 2,000 gallons nominal capacity. It allows persons who have registered with the DPE and attended a DEP approved certification program top complete the tank closure and certify the result. The DEP then audits the submission and confirms the closure. The certified consultant completes a checklist and follows a specific report format making the audit a matter of reviewing the checklist. Submissions are randomly selected for a full, in-depth review to validate the audit process.

Impacts:

The stated goal of the program was to issue the NFA letter within 14 days of the NJDEP receiving the UHOT submission. In reality it is more like 30 days since the clock does not start to run until the submission is received by the UHOT auditor. The NJDEP mailroom takes about 5-7 business days to receive the report, log it in to the tracking system and transfer it to the UHOT auditor. The clock then begins to run and the time is dependent on case load. There is only one person doing the audits and the transaction time is subject to sick days, vacation, training schedules etc. The actual time to complete the review, however, is substantially better than the 90 day average that preceded the UHOT program.

Guidance:

In real estate transactions involving the removal of a heating oil tank, agents should suggest to the homeowner at the time of listing that any underground tank be removed and a new tank installed. When the removal is completed during the time between contract and closing, an escrow may be required once the tank is removed and the UHOT filing is submitted. In cases where there is no leak from the tank, no DEP action is required and only the local code official and, in some cases, the local or county health department, can sign off. Owners should also be aware that state regulations require even residential tanks to be removed by a certified and registered firm. Previously, any contractor with a backhoe could remove an unregulated residential oil tank that was not leaking. This led to some discharges that could have otherwise been prevented and to some fraud and unnecessary risks for the homeowner.

Radon Issues

Issue:

There is some concern that has been raised about Radon emissions from granite countertops. This concern was fueled by a July 24, 2008 article in the New York Times entitled "What's Lurking in Your Countertop?" There was a follow-up on the CBS Early Show which interviewed a radiation expert who stated that all granite countertops should be tested. The actual impact of Radon emissions from granite countertops is overblown and some testers and manufacturers of alternate counter top materials are fueling the hype. Some testing concerns have recommended placing a radon detection canister under a pot on a countertop. This results in unrealistically high levels of detection since it measures short wave gamma radiation as well as the Radon levels in air. The EPA Radon website has largely debunked the hype but some home buyers still demand a radon test of the granite countertops. The testing cited in the Times article was using a gamma counter. Radon is only a risk to the extent that it exists in air and is breathed. The presence of a source of gamma radiation does not necessarily correlate to air levels. Unfortunately, Snopes.com labeled the story as true but then gave a relatively balanced explanation of Radon.

The radiation issue arises because granite contains trace amounts of uranium, thorium and potassium. The Times article acknowledged that,

"Indeed, health physicists and radiation experts agree that most granite countertops emit radiation and radon at extremely low levels. They say these emissions are insignificant compared with so-called background radiation that is constantly raining down from outer space or seeping up from the earth's crust, not to mention emanating from manmade sources like X-rays, luminous watches and smoke detectors."

Impacts:

Improper testing of countertops for Radon can lead to demands by buyers that countertops be replaced prior to sale or lead homeowners to unnecessarily replace the counters. Sales could be lost due to improper testing.

Guidance:

Use only the EPA approved test method and question the Radon test company as to the protocol they will follow. Most of the reputable and certified firms are aware of the hype and will give good guidance. The most reasonable approach is to test a room or rooms immediately adjacent to the kitchen if granite countertops are a concern to determine if the countertops are emitting Radon in an amount that is actually raising the level in the home. Background tests of basements and other rooms on each level may be warranted to get a true picture of the actual effect of any granite that is emitting radiation.

Presumptive Cleanup Remedies for Soils

Issue:

The NJDEP has proposed "Presumptive Remedies for Soils at Schools, Child Care Facilities and Residences". These regulations set requirements for remediation that are very specific and vary by the cause of the contamination. Different standards exist for type of contamination and use.

Impacts:

Where certain properties may have been remediated to levels that were above certain limits, the so called restricted use levels, most of the standards, except for historic fill areas destined for use as a play area must be remediated to a depth of 10 feet to the unrestricted use standard. Play areas are subject to remediation that includes minimum depths of clean fill over impermeable geomembranes. The use of landfills that have gas or leachate controls are prohibited from use for any school, child care center or single family dwelling but are permitted with significant oversight of the remedial action by the DEP.

Guidance:

Buyers of homes built on or near a formerly contaminated site need to verify that the site meets the new remedial criteria. Failure to do so could result in a substantial reduction in value. Sellers need to fully disclose any information they have about contamination on or near their property.

Schools and child care centers must use caution when locating facilities to ensure that an incomplete remediation of a contaminated site does not expose them to risks and additional costs of development. School and child care centers locating on existing properties, such as in or adjacent to a shopping mall, should ensure that the location is not involved in a site remediation or that any remediation is complete and meets the new standards.

Landlords need to ensure that they do not offer properties for rent for schools, child care centers or residential use that overlie a contaminated area unless that area has been remediated to the new cleanup criteria.

Developers of former commercial or industrial sites need to do a full evaluation of the potential development costs in view of the new standards.