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Financial Impact of Remedial Action Permits

Owners of properties that contain contaminated 'historic fill' face a difficult transition

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The Site Remediation Reform Act of 2009 (SRRA) completely altered the site remediation process in New Jersey. A majority of properties undergoing remediation will now be required to be cleaned up by private licensed remediation professionals regulating themselves through a licensing board rather than having the New Jersey Department of Environmental Protection (DEP) overseeing such cleanups. One particular change that the SRRA brought concerns properties that contain historic fill.

Historic fill is nonindigenous material, deposited to raise the topographic elevation of a site, which was contaminated prior to emplacement and is in no way connected with the operations at the site. Historic fill typically includes construction debris, dredge spoils, incinerator residue, demolition debris, fly ash or nonhazardous solid waste. Cer-

tain geographic areas in New Jersey are known to contain historic fill, such as the major cities of Newark and Jersey City. New Jersey law recognizes that property owners in the historic fill cities did not bring the historic fill onto the site themselves. Therefore, state law does not require property owners to excavate and dispose of contaminated historic fill. However, property owners are not permitted to knowingly leave the historic fill in place without implementing certain "controls."

Should the property owner have reason to perform a remediation of its property, such as, by way of example: 1) triggering the Industrial Site Recovery Act (ISRA); 2) discovering a discharge from an onsite storage tank; or 3) discovering a discharge of contamination pursuant to some transaction, the property owner may find itself having to deal with historic fill on its property. New Jersey law provides for a "presumptive remedy" which allows for the historic fill to remain in place with engineering and institutional controls. Institutional controls are mechanisms used to limit human activities at or near a contaminated site, or to ensure the ef-

fectiveness of the remedial action over time, when contaminants remain at a site at concentrations above the applicable DEP remediation standard, which would allow for the unrestricted use of the property. Institutional controls may include, without limitation: structure, land and natural resource use restrictions; well restriction areas; classification exception areas; deed notices; and declarations of environmental restrictions. Engineering controls are defined as any physical mechanism to contain or stabilize contamination or ensure the effectiveness of a remedial action. These may include, without limitation, caps, covers, dikes, trenches, leachate collection systems, signs, fences, physical access controls, groundwater monitoring systems and groundwater containment systems including, without limitation, slurry walls and groundwater pumping systems.

The typical institutional control for historic fill is a deed notice. A deed notice is a document that is recorded with the particular county's land records and provides notice that contamination exists on the property at concentrations above the applicable DEP unrestricted use soil remediation standards, and that restrictions apply to the property due to the contamination. The typical engineering controls that are included with the deed notice are building foundations, parking lots, vegetative areas and fenced-off portions of property.

Since property owners are required to record deed notices with the county recording office and implement engineering controls on historic fill properties,

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the new Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) (adopted after the SRRA was enacted) require the property owner, after recording the deed notice, to apply to the DEP for a soil remedial action permit. This permit will include conditions associated with inspecting and maintaining the engineering controls on the property. The remedial action permits for actions that include engineering controls require that the permittee post financial assurance for the estimated cost to operate, maintain and inspect all engineering controls over the life of the permit. Thus, despite the reasonableness of New Jersey law in not requiring property owners to excavate and dispose of historic fill, the financial assurance requirements for historic fill properties can be a heavy economic burden.

For example, if the property contains a parking lot as the engineering control, the amount of financial assurance that will be required by way of a remediation trust fund, letter of credit, line of credit or environmental insurance, can be a costly endeavor. The estimated cost to maintain a parking lot over the life of the permit can easily be estimated at over \$100,000. Not all property owners have the ability to maintain this financial assurance.

In light of this potential economic hardship, DEP regulations have exempted the following parties from this financial assurance requirement: 1) government entities; 2) parties who are not otherwise liable for cleanup and removal costs under the New Jersey Spill Compensation and Control Act, who purchased the property prior to May

7, 2009, and are remediating, or have remediated the contaminated site; 3) a person who undertakes remediation at that person's primary or secondary residence; 4) the owner or operator of a child care center; 5) a person responsible for performing remediation at a public or private school as defined in N.J.S.A. 18A:1-1, or a charter school established pursuant to N.J.S.A. 18A:36A-1 et seq.; and 6) owners or operators of a small business who are responsible for performing a remediation at his or her business property.

Notably, the exemptions do not include brownfield redevelopers per se. As a brownfield developer, it could be a significant hardship to have to post financial assurance for the remedial action permit. To address this concern with residential redevelopers, the DEP has proposed, by way of regulation, to allow residential condominium associations to meet the financial assurance requirements by submitting to the DEP an annual budget approved by the governing body of the residential condominium association that reflects an amount dedicated to the operation, maintenance and inspection of engineering controls, which is equal to the annual estimated amount required. Therefore, residential redevelopers can pass on the financial assurance obligations to the condominium association rather than having to set aside funds for those purposes.

In a recent regulatory adoption notice in the *New Jersey Register*, a commenter made note of requesting an exception to the posting of financial assurance in circumstances where the engineering con-

trol is only required for historic fill. The DEP responded to that comment by saying that sufficient funding must be made available to ensure that the engineering controls are maintained and therefore the DEP will continue to require financial assurance for a remedy of historic fill that includes engineering controls (unless the party meets one of the above-mentioned exemptions). However, the DEP has proposed regulatory amendments to no longer require the posting of financial assurance for a groundwater classification exception area (CEA) because a CEA is solely an institutional control and does not involve an engineering control.

While there are other significant changes to the New Jersey site remediation process brought about by the SRRA and the DEP's implementing regulations, the newly established remedial action permitting system imposed under the ARRCS will require a difficult transition for property owners in areas known to contain historic fill, such as Newark and Jersey City. Obviously, small lots in those areas or properties that never need to enter the site remediation process will not be exposed to the new permitting system. Other than the facilities subject to ISRA, the underground storage tank program or another regulatory regime, the vast majority of properties will not require permits under this new system. Nevertheless, the financial hardship imposed on property owners that happen to find themselves in the New Jersey site remediation program will become more pronounced due to the strict financial assurance requirements for remedial action permits. ■