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New Jersey Adopts Comprehensive Brownfield Legislation

THE redevelopment of brownfields has been hampered by the existence of environmental laws like the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA) [1], the federal Resource Conservation and Recovery Act (RCRA) [2] and similar state laws. New Jersey recently enacted the "Brownfield and Contaminated Site Remediation Act," [3] which creates important incentives and expands liability protections for owners and developers of contaminated property in New Jersey. This article will discuss the principal features of this comprehensive brownfield legislation.

Perhaps the principal disincentive to brownfield redevelopment is the concern of prospective purchasers and their lenders that they will be held liable for pre-existing contamination at these sites since the state Spill Compensation and Control Act [4] imposes strict liability on owners of property contaminated with hazardous substances.

The Spill Act does contain an innocent purchaser defense for the owners who acquire the property after Sept. 14, 1993 and who can show that they did not know or had no reason to know about the contamination. To establish this absence of knowledge, the purchaser must perform a preliminary assessment and site investigation.

The new legislation modifies the innocent purchaser's defense. First, the innocent purchaser's defense now only applies to liability under common law as well as the Spill Act.

Second, purchasers who discover pre-existing contamination may still qualify as an innocent purchaser if they (i) complete a remediation pursuant to Department of Environmental Protection (DEP) requirements, or (ii) obtain and comply with a DEP-approved remedial action workplan, or (iii) rely upon a validly issued No Further Action Letter (NFA) for a remediation performed prior to the acquisition.

In addition, the purchaser must implement and continue to maintain any institutional or engineering controls (e.g. caps, fences, signs, leachate collection systems) that are required at the site.

A purchaser who performs a remediation and receives an NFA or who relies on previously issued NFA shall not be liable for any further remediation including subsequently discovered contamination or a change in cleanup standards. However, a purchaser who simply relies on a previous NFA without performing its own investigation will not receive any liability protection for discharges of hazardous substances that occurred after the NFA was issued.[5]

The legislation also seems to have provided immunity from toxic tort and property damage claims for purchasers who acquire contaminated property after Jan. 6, 1998. To obtain this immunity, purchasers have to enter into a cleanup agreement with the DEP prior to acquiring title and must establish that:

- The discharge took place prior to acquisition;
- It did not discharge the hazardous substance, is not liable under the Spill Act for the discharge and is not a corporate successor to a discharger or anyone who is responsible for the discharge;
- It provides notice to the DEP upon actual discovery of the discharge;
- It must agree in writing within 10 days after acquisition of the property to provide access to the DEP for remediation and investigatory activities; and
- It must commence remedial actions within 30 days of acquisition that are in accordance with a remediation oversight document executed prior to acquisition.

Covenants Not to Sue

The new legislation requires the DEP to issue a covenant not to sue (CNTS) whenever it issues an NFA.[6] The CNTS will release the person performing the cleanup as well as subsequent owners and lessees operating at the site from all civil liability to the state to perform additional remedial activities. However, the CNTS will not provide liability relief to any person who is liable under the Spill Act and who cannot assert a defense to such liability.

The CNTS also will not apply to discharges of hazardous substances that have migrated off the property and are not covered by the NFA, discharges that take place after the purchaser takes title, any negligence by the purchaser which aggravates or contributes to a discharge, non-compliance with the requirements of the NFA including failing to maintain engineering or institutional controls. The CNTS will be revoked if the controls are not properly maintained. The CNTS will also not relieve any party from future compliance with environmental laws.

If engineering controls are used at a site, the CNTS will bar any person benefiting from the CNTS from seeking reimbursement of remedial costs from the Spill Fund or the Sanitary Landfill Contingency Fund. However, persons who performed a remediation involving institutional controls will not be barred from filing claims against these funds if the DEP subsequently orders additional remediation. If the DEP orders additional remediation to remove the institutional controls, the person performing the additional work will be barred from filing a claim against these funds.

Cleanup Procedures

Another drawback to brownfield redevelopment has been the arduous investigatory and cleanup process. Under the traditional approach, an investigation has to be performed, a number of remedial alternatives must be studied and then the DEP must approve one of the alternatives. Until a remedy is selected, a developer is uncertain what the ultimate cleanup costs may be at a site. The new legislation streamlines this process.

The DEP is required to publish guidance documents that identifies remedies that may be used to address soil contamination. If a party proposes one of these remedies, there will now be a presumption that this is an appropriate remedial action.

In addition, the DEP must approve a proposed remedial action if it meets agency criteria and cannot require the person to examine alternative remedial actions. The DEP is also precluded from disapproving a remedy using engineering or institutional controls so long as the selected remedial action meets the health-based standards established by the agency.

The DEP is required to adopt regulations allowing certain remedial actions to be implemented without prior DEP approval. To obtain an NFA, the person performing the remedial ac-

tions will only have to certify that the work was done in accordance with DEP regulations.

The DEP also is required to promulgate a variance procedure allowing cleanups to deviate from DEP requirements. The person requesting the deviation would have to show that the proposed alternative remediation method would be as protective of human health and the environment as the DEP standard.

Factors that the DEP may consider in approving a deviation include that the proposed alternative has either been used successfully in the past or has been previously approved by the DEP in similar situations, the alternative reflects current technology as documented in peer-reviewed professional journals, can be expected to achieve the same or substantially same results, and furthers the attainment of the goal of the remedial program.

The DEP may require an alternative remediation standard for a particular property based on site-specific characteristics. However, the alternative standards must not be "unnecessarily overprotective" of public health and the environment.

Many industrial or commercial properties in New Jersey have large quantities of historic fill material which may contain hazardous substances. There is now a rebuttable presumption that the DEP may not require the removal or treatment of those fill materials in order to comply with the applicable health risk or environmental cleanup standards.

Cleanup Standards

Previously, parties who had performed a cleanup could be liable for additional cleanup if the DEP subsequently adopted a more stringent remediation standard. The new legislation provides that only those parties who are liable under the Spill Act and cannot assert a defense may be required to perform the additional remediation triggered by a new DEP cleanup standard.

However, the DEP cannot compel such a person to perform additional remediation if that person can show that existing engineering or institutional controls on the site would prevent exposure to the contamination and that the site remains protective of human health and the environment.

In order to minimize the costs of complying with Industrial Site Recovery Act (ISRA), sellers often select a remedial action involving engineering or institutional controls. The potential existence of such controls can be the source of dispute between sellers and buyers since the institutional controls can interfere with the purchasers planned use of the property.

Sellers often insist that purchasers pay for any increased costs incurred to perform a remediation without engineering or institutional controls. The new legislation provides leverage to prospective purchasers or lessees because it states that that owners and operators cannot select a remedial action consisting of engineering or institutional controls without the consent of the transferee. [7]

Financial Assistance

Because brownfield sites have to undergo cleanups, liability relief or risk-based cleanup standards have often not been enough to direct development away from undeveloped "greenfields" to brownfields. The new legislation expands the kinds of financial assistance programs that may be used by owners of contaminated property to help defray cleanup costs and make development of these sites more viable.

Remediation Grants: Owners of contaminated property who qualify as an "innocent purchaser" may receive grants for 50 percent of the remediation costs up to $1 million. The new legislation also allows matching grants of up to 25 percent of "project costs" not to exceed $100,000 for "Qualifying Persons" who use remedial actions involving innovative technology or who perform cleanups that do not use engineering controls to achieve cleanup standards.

A qualifying person is someone who has a net worth below $2 million. The term "project costs" refers to the portion of the remediation costs associated with the innovative technology or the incremental costs incurred to implement a cleanup not involving engineering controls.[8]

Remediation Loans: Loans or loan guarantees for as much as 100 percent of the estimated remediation costs up to $1 million are available to owners or operators of industrial establishments that are remediated under the state Industrial Site Recovery Act (ISRA), [9] persons who voluntarily remediate a site, anyone who is responsible for a discharge at a site and qualifying persons using innovative technology or implementing remedial actions not involving engineering controls.[10] Innocent landowners who received a grant may obtain a loan for the balance of their remediation costs.

Remediation Property Tax Abatements: Vacant or underutilized property which is located in an Environmental Opportunity Zone and appears on the state DEP list of contaminated sites is eligible for a 10-year partial property tax abatement. If the property is remediated without using engineering controls, the tax abatement may be extended to 15 years. However, the tax abatement will end when the difference between the real property taxes otherwise due and the payments made in lieu of those taxes equals the total remediation costs for the property.[11] The tax exemption is assignable to subsequent property owners.

Redevelopment Remediation Reimbursements: Developers who are not otherwise responsible for the contamination may seek reimbursement of up to 75 percent of their cleanup costs associated with a redevelopment project.[12] To be eligible for reimbursement, a developer must enter into a Memorandum of Agreement (MOA) with the DEP to perform a remediation as well as enter into a redevelopment agreement with the Department of Commerce and Economic Development (DCED) and the State Treasurer.

In deciding whether to enter into a redevelopment agreement, the DCED must consider a number of factors including the economic feasibility of the redevelopment project, the economic and social conditions of the area, how the project fits into the local redevelopment strategy and the necessity of an agreement for the viability of the project.

The amounts, frequency and payment period are to be negotiated and set forth in the redevelopment agreement. However, the state will not be obligated to reimburse the developer until operations commence at the site and the Treasurer determines that the anticipated tax revenue from the redevelopment project will exceed the reimbursement amounts.

The developer also must demonstrate that it has complied with the MOA and that remediation costs were actually and reasonable incurred. Payments shall equal the percentage of the occupancy rate although when the occupancy rate achieves 90 percent, the developer shall be entitled to the entire amount of each payment. Reimbursements shall be offset by any tax abatements granted to the developer as well as any other local, state or federal tax incentives or grants.

(1) 42 U.S.C. 9601 et seq.
(2) 42 U.S.C. 6901 et seq.
(3) P.L. 1997, Ch. 278
(4) *NJSA* 58:10-23 et seq.
(5) P.L. 1997, ch.278, §20
(6) Id. at §6
(7) Id. at §8
(8) P.L. 1997, ch. 278, §14
(9) N.J.S.A. 13K:1-6 et seq.
(10) P.L. 1997, ch. 278 §14.
(11) Id. at §23
(12) Id. at §35