

NJDEP Adopts Amended Site Remediation Regulations

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Effective August 6, 2018, the New Jersey Department of Environmental Protection (“NJDEP” or the “Department”) adopted amendments to several key rules governing site remediation—including Discharges of Petroleum and Other Hazardous Substances (N.J.A.C. 7:1E); Heating Oil Tank System Remediation Rules; Administrative Requirements for the Remediation of Contaminated Sites (“ARRCS,” N.J.A.C. 7:26C); and the Technical Requirements for Site Remediation (“Technical Regulations,” N.J.A.C. 7:26E).

While this rule adoption made many modifications to these regulations, we call two significant changes to your attention. The first involves the use of alternative fill materials at remediation and redevelopment sites, while the second concerns the expansion of the definition of “person responsible for conducting the remediation.”

Alternative Fill

Alternative Fill is material used in a remediation containing contaminants exceeding the most stringent cleanup standard applicable to a site. The amendments to both ARRCS and the Technical Regulations will result in NJDEP being more involved in many cases using alternative fill, requiring review and approval prior to its use on a contaminated site. Previously, NJDEP did not have such broad authority, which allowed the use of fill without the delays caused by NJDEP review.

If the person responsible for conducting the remediation (“PRCR”) proposes to import alternative fill that does not meet the requirements of the Technical Regulations (N.J.A.C. 7:26E-5.2(b), discussed below), then the PRCR must obtain prior written approval from NJDEP.

However, prior NJDEP approval is NOT required if alternative fill from an off-site source is imported to a site as long as the alternative fill meets the following requirements set forth at N.J.A.C. 7:26E-5.2(b), in that the alternative fill:

1. Does not contain any contaminants not already present at the receiving area of concern (“AOC”) above the applicable soil remediation standard (“SRS”);
2. Does not contain a concentration of any individual contaminant above the 75th percentile of that contaminant’s concentration in the receiving AOC; and
3. Is not imported in excess of the volume necessary to restore the pre-remediation topography and elevation of the receiving AOC.

With respect to using alternative fill from an on-site source (i.e., moving contaminated material from one part of a site to another), prior NJDEP approval IS NOT required if the concentrations in the alternative fill are already present in concentrations above the applicable SRS at the receiving AOC. If the contaminants in the alternative fill are not above the SRS in the receiving AOC, then prior NJDEP approval IS required before using the on-site alternative fill.

In response to comments, NJDEP believes the potential to delay remediation is justified by preventing further contamination of sites through inappropriate use of alternative fill and associated additional costs (i.e., for its removal and possible penalties) for such inappropriate use. The NJDEP stated that “the person should communicate with the Department early in the remedial process so that the person does not expend significant time, resources, and capital without knowing whether the Department will approve the proposal” (Response to Comment 254; 50 N.J.R. 1754).

The NJDEP is not sympathetic to comments that the proposal is unduly restrictive. The NJDEP emphasized the “use of alternative fill is for the purposes of remediating a contaminated site, not for the development of that contaminated site.”

Definition of “Person”

The amended ARRCS rules now place responsible corporate officers squarely within the realm of enforcement liability, even under statutes which do not place them within the target of such liability. Given the specter of personal liability for certain corporate officers, they will need to be even more vigilant in ensuring their company’s compliance with environmental rules governing site remediation.

Specifically, the definition of “person” was broadened to include for the purpose of enforcement, “a responsible corporate official, which includes a managing member of a limited liability company or a general partner of a partnership” (N.J.A.C. 7:26C-1.3). Numerous comments to the rule proposal emphasized that New Jersey’s Spill Compensation and Control Act, and other similar environmental statutes do not include corporate officials or shareholders within the definition of “person.” One commenter noted well-established corporate law distinguishes between human beings acting in a personal capacity as distinguished when acting as a representative or agent of a corporate entity.

In response to the many comments it received to the amended definition, NJDEP argues its expanded definition of “person” is consistent with statutory language (including the Water Pollution Control Act, Solid Waste Management Act and Spill Act) and that there is a “need for a systematic and consistent approach to the detoxification” of contaminated sites in New Jersey (Response to Comment 255; 50 N.J.R. 1754). The Department further notes that the protections granted to individuals by the corporate form are not absolute.

For more information regarding the NJDEP's amended site remediation regulations, please contact your CSG attorney or the authors listed below.

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