

CHAPTER SEVEN

FACILITATING BROWNFIELDS CLEAN-UP

Municipal governments play a role in brownfields redevelopment by cleaning up properties that they own or by cleaning up privately-owned sites. New Jersey law governs the cleanup of contaminated sites that fall under state jurisdiction. As noted earlier, the law has undergone considerable change.

The Clean-up Process in New Jersey. As discussed in Chapter Five, brownfield sites in New Jersey will typically undergo a preliminary assessment (Phase I), followed by a site investigation (Phase II) if necessary. The next stage, the Remedial Investigation (RI), collects additional information about identified contamination in order to determine the type of remedial action needed.⁴⁴ Cleanup may be required for the soil, sediment, groundwater and indoor air at a site, and cleanup may be needed during demolition to address issues such as asbestos and lead-based paint. The Remedial Action Workplan (RAW) is the document required under New Jersey law setting forth the remedial action to be undertaken at the site.⁴⁵

The 2009 Site Remediation Reform Act (SRRA) altered significantly the cleanup process. One major change brought about is that the state will *no longer operate a Voluntary Cleanup Program (VCP)*. In the past, the VCP allowed parties to work with the state to remediate non-priority contaminated sites that pose no immediate threat to human health or the environment. Under the VCP the party conducting a cleanup entered into an agreement with the state which detailed the timing and scope of investigations and remediation. Participation was voluntary, and no penalties were assessed if participants chose to withdraw. The new law established an affirmative obligation on the part of persons to remediate any discharge for which they would be liable pursuant to the state's Spill Compensation and Control Act.⁴⁶ The Spill Compensation and Control Act exists to protect New Jersey citizens from "the adverse effects of environmental mishaps which may result from spills of petroleum products or other hazardous substances."⁴⁷ Through the Act, the state is authorized to levy a tax on the transfer of hazardous substances.⁴⁸ The money generated through this tax goes towards the New Jersey Spill Compensation Fund within the New Jersey Department of Environmental Protection, which exists to "insure compensation for cleanup costs and damages when spills occur."⁴⁹

Another big change under the law is that Licensed Site Remediation Professionals, and not the state, will supervise the day-to-day operations associated with most site cleanups,

⁴⁴ N.J.S.A. 58:10B-1; 13:1K-8.

⁴⁵ N.J.S.A. 58:10B-1; 13:1K-8.

⁴⁶ N.J.S.A. 58:10B-1.3.

⁴⁷ New Jersey Division of Taxation Technical Bulletin, TB-16(R).

<http://www.state.nj.us/treasury/taxation/pdf/pubs/tb/tb16a.pdf>

⁴⁸ Id

⁴⁹ Id

pursuant to state standards and time frameworks.⁵⁰ State agency approval is no longer required prior to proceeding with remediation. Once LSRPs determine that a cleanup is complete according to the health and environmental standards set forth in state law and rules, they issue a document known as a “Remedial Action Outcome” (RAO).⁵¹ Under the new law, the NJDEP is required to maintain direct NJDEP oversight in cases in which the remediating party does not meet mandatory cleanup deadlines and for those sites that pose the greatest risk to human health and the environment. In those cases, the NJDEP issues a “No Further Action Letter” when remediation is successfully completed.⁵²

Cleanup Standards and Remedies. New Jersey has established remediation standards designed to minimize harm to public health and the environment.⁵³ The standards allow for various uses, both residential and nonresidential, and remediation standards are selected taking into account current and future land uses for the site.⁵⁴

There are different ways to comply with the state’s cleanup standards and criteria. New Jersey law expresses a preference for permanent remedies, but also recognizes that it is not always necessary to remove all contamination at a site. NJDEP requires engineering and/or institutional controls when approving a remedial action that proposes to leave some contamination on site. *Engineering controls* are put in place to minimize the potential for direct contact with humans and/or exposure to the environment. Engineering controls can include a fence to block entrance to a contaminated area but most often include either a sufficiently-thick layer of certified clean soil or a hard cap on top of contamination to minimize the potential for direct human contact, or an impermeable cover that stops the rain from leaching contaminants into groundwater. Often, the various surfaces of a proposed redevelopment (i.e. asphalt or concrete pavement, concrete building slabs, landscaped areas underlain certified clean soil, etc.) are utilized as Engineering Controls, thereby integrating the remediation in to the redevelopment. *Institutional controls* are put in place to ensure that sites are used only for their intended purpose and not in a way that could expose people to dangerous pollutants. This may include the use of “proprietary controls,” such as deed restrictions that document the existence of contamination and/or the use of Engineering Controls and addressing how land may or may not be used, or “governmental controls,” such as zoning restrictions, permitting programs, and posting or mailing of public notices.⁵⁵ New Jersey regulations

⁵⁰ N.J.S.A. 58:10C-1 *et seq.* A party who is remediating a discharge from an unregulated heating oil tank is not required to hire an LSRP. N.J.A.C. 7:26C-1.4.

⁵¹ NJSA 58:10C-2, 14.

⁵² N.J.S.A. 58:10C-27.

⁵³ N.J.S.A. 58:10B-12; N.J.A.C. 7:26D. According to the SRRA, remediation standards are “the combination of numeric standards...and narrative standards to which contaminants must be treated, removed, or otherwise cleaned for soil, groundwater, or surface water...in order to meet the health risk or environmental standards. N.J.S.A. 58:10C-2. The Technical Requirements for Site Remediation cover all aspects of the remediation process. N.J.A.C. 7:26E (available at: <http://www.nj.gov/dep/srp/regs/techrule/>).⁵⁴ 7:26E-5.1.

⁵⁵ U.S. EPA Region 4, *Revitalizing Southeastern Communities: A Brownfields Toolkit* (“Keys to Success”), available at: <http://www.epa.gov/region4/brownfieldstoolkit/index.html>.

set forth the requirements for using Engineering and Institutional Controls as part of remedial actions for contaminated sites (see Text Box below).⁵⁶

New Jersey has established three categories of remedial actions that may be used, reflecting current and future uses and whether the cleanup will use site controls:

- “Unrestricted use remedial action” is any remedial action for soil that does not require the continued use of either engineering or institutional controls to meet the established health risk or environmental standards.
- “Restricted use remedial action” is any remedial action for soil that requires the continued use of engineering and institutional controls in order to meet the established health risk or environmental standards.
- “Limited restricted use remedial action” is any remedial action for soil that requires the continued use of institutional controls but does not require the use of an engineering control in order to meet the established health risk or environmental standards.⁵⁷

For some end uses, “presumptive remedies” apply. When new construction or a change in use is proposed for residential, school, child care, or other purpose that involves use by a “sensitive population,” the remedial action must be an unrestricted use remedy, a presumptive remedial action consistent with the NJDEP’s Presumptive Remedy Guidance on presumptive remedial actions, or an alternate remedy that is pre-approved by the NJDEP.⁵⁸ Other types of projects are not required to use a presumptive remedy but can choose to use one. The NJDEP has published numerous technical guidance documents covering various aspects of the cleanup law and regulations. See <http://www.nj.gov/dep/srp/guidance/srra/>.

The Covenant Not To Sue. Following issuance of the Remedial Action Outcome by a Licensed Site Remediation Professional, the party responsible is deemed – by law – to have received a covenant not to sue.⁵⁹ Obtaining a covenant not to sue is a critical step in the redevelopment of contaminated brownfield properties, as the covenant provides legal protection against further action relating to the cleanup and the contamination that was addressed by the cleanup. Subject to any conditions and limitations contained in the RAO, the covenant not to sue releases the party responsible for the cleanup “from all civil liability to the State to perform any additional remediation, to pay compensation for damage to, or loss of, natural resource, for the restoration of natural resources in connection with the discharge on the property or for any cleanup and removal costs.”⁶⁰ The covenant applies to all successors in ownership of the property and to all who lease the property or engage in operations on the property, but it does *not* apply to any discharge that occurs subsequent to the issuance of the RAO.⁶¹ The covenant only

⁵⁶ N.J.A.C. 7:26E-8.

⁵⁷ N.J.S.A. 58:10B-1, 12.

⁵⁸ N.J.S.A. 58:10B-12(g); N.J.A.C. 7:26E-5.1(i). See also NJDEP, *Presumptive Remedy Guidance*, available at: http://www.nj.gov/dep/srp/guidance/srra/presumptive_remedy_guidance_DRAFT.pdf.

⁵⁹ N.J.S.A. 58:10B-13.2.

⁶⁰ N.J.S.A. 58:10B-13.2.

⁶¹ N.J.S.A. 58:10B-13.2.

protects against suits by the state. It does not cover liability to private parties, either in tort or for damage to property, nor does it cover liability under federal law.

In cases involving direct oversight of the cleanup by the NJDEP, a covenant not to sue is triggered when the department issues a No Further Action (NFA) letter upon successful completion of the remediation.⁶²

Cost of Cleanup. The cost of a cleanup depends on many factors. The level, type, and extent of contamination are key determinants. For example, if the ground water under the site is contaminated, the cost of cleanup will likely to be much higher than if just the soil is contaminated. If the contaminated materials need to be transported off site for treatment that will also affect the cost. The cost will also depend on the reuse option selected for the property and the resulting approach/standards that are selected – that is, whether a property is being cleaned to an unrestricted (more expensive) or a restricted (less expensive) standard.⁶³

⁶² N.J.S.A. 58:10B-13.1.

⁶³ See generally, Environmental Law Institute, A Guidebook for Brownfield Property Owners 39 (1999), available at: http://www.elistore.org/reports_detail.asp?ID=459.

Engineering and Institutional Controls in New Jersey

Under New Jersey's Technical Requirements for Site Remediation, remedial actions that use engineering or institutional controls must demonstrate that: (1) the selected remedial action will remain protective of public health, safety and the environment for as long as contamination exists above an unrestricted use level; (2) access to the site and human exposure to the contamination can be controlled to ensure the protectiveness of the remedial action; and (3) the current and planned future uses of the site will be consistent with all implemented controls. 7:26E-8.1. The state recently established a permit program for remedial actions that require institutional or engineering controls or that include operations and maintenance systems. N.J.S.A. 58:10C-19; N.J.A.C. 7:26C-7.1, *et seq.* Under the program, parties receive a soil remediation action permit and/or a ground water remedial action permit and must comply with all maintenance, monitoring, and evaluation requirements contained in all approved remedial action workplans, remedial action reports, and final remediation documents. N.J.A.C. 7:26C-7.4(a). Permittees must maintain financial assurance to cover the full cost to operate, maintain, and inspect all engineering controls over the life of the permit, though government entities and certain other parties are exempt from this requirement. N.J.A.C. 7:26C-7.7.

Those holding soil remediation action permits must comply with the conditions in each Deed Notice recorded for the property. N.J.A.C. 7:26C-7.5. The state's Technical Requirements for Site Remediation set forth the circumstances under which a Deed Notice is required, as well as the requirements for preparing the Deed Notice. See N.J.A.C. 7:26C-8.1, 8.2. Parties holding a ground water remedial action permit must comply with well restrictions associated with each ground water classification exception area (CEA). N.J.A.C. 7:26C-7.6. CEAs, which are established by the NJDEP as part of a remedial action when groundwater does not meet the state's groundwater quality standards, serves as an institutional control by providing notice that there is groundwater pollution in a localized area caused by a discharge at a contaminated site. N.J.A.C. 7:26E-8.3(a).

A core element of the state's program for monitoring institutional controls is the requirement that all permittees prepare and submit to the NJDEP a biennial certification, and state rules set out the requirements for permittees to conduct periodic inspections to monitor the controls. N.J.A.C. 7:26C-7.4(b), 7:26E-8.5. A covenant not to sue obtained for a property that has engineering or institutional controls in place also includes a requirement for maintenance, monitoring and reporting of those controls, as well as a provision that the covenant is revoked by operation of law if the controls are not being maintained or are no longer in place. N.J.A.C. 58:10B-13.2. In addition to its administrative rules, the NJDEP has developed several guidance documents that must be used when designing remedial actions with institutional controls and/or engineering controls or submitting Deed Notices for approval. See <http://www.nj.gov/dep/srp/regs/deednotice/dnguide.htm>.

While New Jersey requires certain parties to establish a Remediation Funding Source (financial assurance), municipalities and other government entities conducting remediation are exempted from this requirement, as are parties who undertake

remediation in an environmental opportunity zone or who implement an unrestricted use remedial action or a limited restricted use remedial action.⁶⁴

Strategic Considerations for Brownfields Cleanup

► **Involving the local community in the cleanup process.** The participation of community residents and stakeholders is especially important during the cleanup phase of a brownfields project, as the remediation plan selected will have a direct impact on the health and environment of people living near the site. New Jersey recently adopted new rules requiring parties responsible for the site to provide notice about cleanup activities to people living nearby. Municipal officials can help ensure that these minimum notice and participation requirements are met, that information about the cleanup process reaches all affected community members, and that residents and stakeholders are afforded a meaningful opportunity to contribute to the decision-making process. A key component of effective participation is assistance in understanding the technical information used to make cleanup decisions. Resources available to help residents include New Jersey's new Technical Assistance Grants program (<http://www.state.nj.us/dep/srp/guidance/srra/>) and the Technical Assistance to Brownfields Communities program run by the N.J. Institute of Technology (<http://www.njit.edu/tab/>).

Site Remediation and Public Outreach: New Jersey Legal Requirements

In 2008, NJDEP amended its Technical Requirements for Site Remediation to encourage communication among all parties affected by a site remediation. N.J.A.C. 7:26E-1.4. The new rules require public notification of ongoing remedial action at sites subject to departmental oversight and create a mechanism for public participation in the remediation process. The NJDEP has provided information on the rules on its website:

http://www.nj.gov/dep/srp/guidance/public_notification/. Under the new rules, parties responsible for conducting site investigation and/or cleanup must, among other things:

- **Notify owners and residents of cleanup activities.** The person responsible for conducting the remediation must provide public notice, either by posting a sign or by sending periodic notification letters to owners and tenants, as well as child care and school administrators, located within 200 feet of the site. The rules outline the requirements for each type of notice.
- **Provide additional opportunities for community involvement in certain circumstances.** NJDEP may determine that additional public outreach is needed due to site-specific conditions, or due to "substantial public interest." The department may determine that substantial public interest exists if 25 people who work or live within 200 feet of the site (or the contamination) sign a petition indicating their interest in the cleanup activities, or if a municipal official makes a written request. In such cases, the responsible party must conduct additional public outreach based on the needs expressed by the community. According to the regulations, this outreach may include publicizing and hosting an information session or public meeting; publishing basic site information in the local newspaper, or establishing a local information repository.

Responses received as a result of these public notices must be taken into account by persons responsible for the remediation when they are selecting, developing, and implementing the remedial action. N.J.A.C. 7:26E-5.1.

⁶⁴ NJAC 7:26C-5.2(b).

► **Researching Cleanup Options.** There are many approaches to site cleanup and many types of technologies that can be utilized. Site-specific factors will influence the types of technologies that are best suited for a particular property. Both EPA and the state of New Jersey can help municipal officials and community stakeholders understand the available cleanup approaches and technologies. EPA provides information online about numerous remediation technologies, including information designed for citizens. See <http://www.epa.gov/superfund/remedytech/>. In addition, EPA had created the Brownfield and Land Revitalization Technology Support Center to help decision-makers evaluate strategies for streamlining site investigation and cleanup; identify and review information about complex technology options; evaluate contractor capabilities and recommendations; and explain complex technologies to communities. See <http://www.brownfieldstsc.org/>.

► **Working with Environmental Consultants.** Under the new law, site remediation is to be overseen by a Licensed Site Remediation Professional. It is possible to use the same firm that conducted the environmental site assessment, if that firm provides LSRP services. The state maintains a listing of LSRPs (currently the list is for those who have obtained a temporary license pending establishment of the permanent program). The list is available on the NJDEP Data Miner site (http://datamine2.state.nj.us/DEP_OPRA/OpraMain/categories?category=SRRA). Although the state is responsible for licensing qualified professionals, it is important to conduct a thorough search to identify a consultant that is well suited to the project (see Chapter Five).

► **Monitoring Site Controls Following Cleanup.** A number of tools are available for keeping track of site controls. Currently, the i-MapNJ database can be used to access information about certain institutional controls in New Jersey (<http://www.nj.gov/dep/gis/depsplash.htm>). GeoWeb can be used for the same purpose (<http://www.state.nj.us/dep/gis/geoweb splash.htm>). Terradex is an example of a private company that performs a similar service through its LandWatch application (<http://www.terradex.com/PublicPages/Services/ServicesHome.aspx>). As noted above, the NJDEP oversees compliance with the requirements for properties with site controls. A report of cases that have not submitted the required biennial certification is available on NJDEP's Data Miner website (<http://www.nj.gov/dep/opra/online.html>).

Resources for Brownfields Cleanup

Appendix B contains a listing of the key state and federal financial assistance programs that are available to fund various stages of brownfields redevelopment initiatives. Following are resources that are available to municipalities for cleanup activities.

- *Hazardous Discharge Site Remediation Fund (HDSRF).* This fund provides matching grants for public entities to conduct remedial actions. The amount of the match varies depending on the use selected for the site. For example, a matching grant for up to

75% of the costs of an RA is available if the property will be redeveloped for recreation and conservation purposes, while a 50% matching grant is available for affordable housing projects. Public entities may also receive matching grants up to 25% of the cost of a limited restrictive use or unrestrictive use remedial action. Public entities may also receive loans for remedial actions.

- *Environmental Equity Program (E²P)*. Loans through this program can help fund remediation and demolition activities associated with brownfields redevelopment projects in NJRA-eligible municipalities. The site must be part of a broader redevelopment plan and the scope and timeline of remediation must be known.
- *Environmental Infrastructure Financing Program*. New Jersey Environmental Infrastructure Trust manages this program in partnership with NJDEP, providing loans for brownfield remediation activities that improve water quality. Projects are eligible for loans at one-quarter or one-half of the market rate and for reduced financing costs.
- *Petroleum Underground Storage Tank Remediation Upgrade and Closure Fund*. Through this fund, housed by NJDEP and administered by NJEDA, municipalities facing financial hardship may apply for loans or grants to upgrade, close, and remediate discharges associated with regulated and unregulated underground storage tanks.
- *New Jersey Redevelopment Investment Fund*. This NJRA program makes available direct loans, real estate equity, loan guarantees, and other forms of credit enhancements for business and real estate ventures in NJRA eligible municipalities.
- *Brownfield Cleanup Grant Program*. This U.S. EPA program funds government entities and nonprofit organizations to carry out cleanup activities at brownfield sites contaminated by petroleum and hazardous substances and contaminants. Site owners may apply for up to \$200,000 per site for up to five sites, and must contribute a 20 percent cost share unless a hardship waiver is obtained.
- *Brownfields Revolving Loan Fund*. Selected municipalities may apply to NJ EDA for low-interest loans for brownfields remediation activities. Funding comes from an initial \$2 million grant capitalized by the U.S. EPA.
- *Community Development Block Grant (CDBG) Program*. This U.S. HUD program provides an annual grant to municipalities on a formula basis and may be used for brownfields-related activities such as site assessment, cleanup, demolition, rehabilitation, and construction. Related programs, the *Section 108 Loan Guarantee Program* and the *Brownfields Economic Development Initiative (BEDI)* are available to finance redevelopment projects that increase economic opportunity for low-income and moderate-income persons or stimulate and retain businesses and jobs that lead to economic revitalization. Funds may be used for a range of activities, but applications are discouraged whose scope is limited only to site acquisition, assessment, and/or remediation, where there is no immediately planned redevelopment.