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IN PRACTICE

ENVIRONMENTAL LAW

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Reporting Historical Contamination

Report only when required, because doing so may create an obligation to investigate and clean up the property

One question that constantly arises in environmental law is whether the current owner or operator of a property has an obligation to report historical contamination they find in the soil, groundwater or surface water on their property.

This is an important question, because reporting the contamination to the government may create an obligation to investigate and clean up the property — an expense many owners and operators would like to avoid or postpone if they can lawfully do so.

The difficulty of answering the question originally arose from imprecise drafting of the governing statutes and regulations. Some of those problems have been corrected.

For purposes of this article, historical contamination is defined as hazardous substances or wastes that were entirely discharged prior to the time the owner purchased, or the operator began operations at, the property.

Spill Act

The applicable laws in New Jersey are the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.; the Hazardous Substance Discharge-Reports and Notice Act, N.J.S.A. 13:1K-15 through 18; and the Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq.

The Spill Act prohibits the discharge of hazardous substances — which are broadly defined — except in compliance with a federal or state permit.

The act's regulations define a discharge as any unpermitted "intentional or unintentional action or omission ... resulting in the releasing, spilling, pumping, pouring, emitting, emptying or dumping of a hazardous substance" onto the land or into the surface water or groundwater. N.J.A.C. 7:1E-1.6.

In the event of a discharge of a hazardous substance, the act provides that "any person who may be subject to liability for a discharge" shall immediately notify the Department of Environmental Protection. The regulations require reporting of discharges of any amount of hazardous substances, no matter how small. See *In re Adoption of N.J.A.C. 7:1E*, 255 N.J. Super. 469 (App. Div. 1992). Failure to report a discharge subjects a violator to potential penalties of up to $50,000 per day.

Thus, the question becomes: When is a current owner or operator "subject to liability for a discharge" of historical contamination so that they have a Spill Act obligation to report it?

Under the act, for a current owner or operator to be liable for historical contamination, they must be "in any way responsible for any hazardous substance." Since that phrase is not defined in the act, the answer to whether they are in any way responsible lies in the case law interpreting the act and its regulations.

While the courts have indicated that the current owner and operator are liable for a discharge that occurs during their period of ownership or operations, no New Jersey court has ever held the current owner or operator liable under the Spill Act for historical contamination.

In fact, New Jersey courts have held that a discharge only occurs when there is a new release from a contained area, so that continuing contamination caused by the leaching of a past discharge, without more, does not constitute a discharge from which liability will arise. See *State, DEP v. J.T. Baker Co*., 234 N.J. Super. 234 (Ch. Div. 1989), and *White Oak Funding, Inc. v. Winning*, 341 N.J. Super. 294 (App. Div. 2001).

The only provision of the regulations that could arguably be a basis for the liability of current owners or operators for historical contamination holds liable "each owner or operator of any facility ... from which a discharge has occurred." See N.J.A.C. 7:1E-1.6. "Facility" is defined as any place or equipment that is used to refine, produce, store, hold, handle, transfer, process or transfer hazardous substances.

Reading the two definitions together, for a current owner or operator to be liable

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under the act they must be an owner or operator of any place that is used to refine, produce, store, hold, handle, transfer, process or transport hazardous substances, from which a discharge has occurred.

Arguably, this language implies that a discharge must occur while the facility is used by the owner or operator. Thus, the regulations would not hold the current owner or operator liable for historical contamination.

Had the DEP wanted to impose such liability, they could have made it clear that current owners and operators are included among the persons responsible for a discharge. The DEP did not do that, and apparently did not intend that result — possibly because the Spill Act and the case law interpreting it would not permit such a result.

The adoption *S-1070* on June 16, 1993, which amended the Environmental Cleanup Responsibility Act by renaming it the Industrial Site Recovery Act, also included a section that amended the Spill Act and created an obligation for current owners to report historical contamination on real estate purchased *on or after* Sept. 14, 1993. See P.L. 1993, ch. 139.

The obligation arises from the Legislature's attempt to create an innocent purchaser defense to Spill Act liability. The amendment provides that owners of such property would be responsible for the discharged hazardous substance unless they could establish "by a preponderance of the evidence that subparagraphs (a) through (d), or if applicable, subparagraphs (a) through (e), apply:"

(a) They acquired the real property after the discharge of that hazardous substance at the real property. Thus, they must prove that the contamination is historical contamination;

(b) At the time they acquired the property, they did not know and had no reason to know that any hazardous substance had been discharged at the real property (or they acquired the real property by devise or succession). To establish that they had no reason to know that any hazardous substance had been discharged, they must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, namely, an environmental investigation pursuant to the DEP's Technical Requirements for Site Remediation, N.J.A.C. 7:26E-1.1 et seq.;

(c) They did not discharge the hazardous substance and are not in any way responsible for the hazardous substance, nor are they a corporate successor to the discharger or to any person in any way responsible or to anyone liable for cleanup and removal costs;

(d) They gave notice of the discharge of historical contamination to the DEP upon actual discovery of the discharge; and

(e) They performed remediation prior to acquisition and received a no further action letter or relied upon a previously issued no further action letter. [This requirement only applies when hazardous substances are known to be present before closing.]

Further amendments to the act passed in 2002 basically provide the same protections to property owners who purchased property prior to Sept. 14, 1993.

Thus, for the current owner to qualify for the innocent purchaser defense, they must report the known historical contamination to the DEP. If they fail to do so, they do not qualify for the defense and become responsible for the historical contamination — the exact status that creates an obligation to report under the act. Either way, they must report the historical contamination.

Hazardous Substances

The Hazardous Substance Discharge-Reports and Notice Act (HSD-RNA) is a New Jersey law that requires the reporting of discharges of hazardous substances independent of the Spill Act. The law only applies to an owner or operator of an industrial establishment, or of real property that was once the site of an industrial establishment. An industrial establishment is a place of business engaged in operations that involve hazardous substances and that has a Standard Industrial Classification number of 22 through 39, 46 through 49, 51, 55, 75 or 76. The classification numbers are established by the SIC Manual published by the federal Office of Management and Budget.

Although the definition of "industrial establishment" under the HSD-RNA is similar to that under the Industrial Site Recovery Act, it includes several businesses that are exempt from ISRA, such as certain warehouses, automobile dealerships, gasoline stations and automotive repair shops.

The HSD-RNA requires the owner or operator — "who knows or suspects the occurrence of any hazardous (substance) discharge on-site, above or below ground at the industrial establishment or real property" — to make an inspection and file a written report with the municipality's governing body and the local board of health. (No notice to the DEP is required.)

Liability for the cleanup of the discharge is not a factor in determining the obligation to report. Failure to report may result in daily fines of up to $50,000.

Thus, the act requires a current owner or operator to report historical contamination that is known or suspected to exist on the property.

This greatly expands the reporting obligation of current owners or operators for historical contamination. The only way for them to avoid the act's obligation to report is if they do not own or operate an industrial establishment *and* the real property was never used as the site of an industrial establishment in the past.

Underground Storage

The New Jersey Underground Storage of Hazardous Substances Act requires the owner and operator of an underground storage tank to report a discharge — that is, an intentional or unintentional act or omission resulting in the releasing, spilling, leaking, emptying or dumping of a hazardous substance into the environment — from a tank regulated by the Underground Storage of Hazardous Substances Act. (Residential heating oil tanks of 2,000 gallons or less are specifically excluded from the act's definition of an underground storage tank.)

The regulations define an owner as a person who owns one or more underground storage tanks or who has title to a site with one or more tanks. However, in the case of a nonoperational tank, its owner is the person who owned it immediately prior to the discontinuation of its use. See N.J.S.A. 58:10A-22j; N.J.A.C. 7:14B-1.6.

Thus, the current owner of a particular piece of real estate is not the tank owner where the use of a tank was dis-

continued before the current owner bought the property. That property owner would have no obligation under the act to report either an active discharge or historical contamination from such a tank, although they may have a reporting obligation under other laws.

An operator is defined as any person who leases, operates, controls, supervises or has responsibility for, the daily operation of one or more underground storage tanks. See N.J.S.A. 58:10A-22i; N.J.A.C. 7:14B-1.6. Thus, it is possible to be the operator of a property without being the operator of the tanks located on the property — if some other party is the operator of the tanks, for example — in which case the property operator would not be obligated by the act to report either an active discharge or historical contamination from such a tank.

The conclusions above must be qualified because the act's implementing regulations provide that, in addition to the owner or operator of an underground storage tank, "any person ... hired to install, remove, test or perform a subsurface investigation of an UST system, shall, upon confirming a discharge, immediately report the discharge to the appropriate local health agency and to the DEP Action Hotline."

This appears to obligate consultants and contractors to report confirmed discharges from tanks regulated by the act, even if the discharge is no longer active. However, since the reporting requirements of the act are imposed solely on the owner or operator of an underground storage tank system, and the act does not require reporting by others who confirm a discharge, the regulations may be invalid as ultra vires the statute. (Bear in mind that the penalty for failing to report is $50,000 for each violation.)

Federal Law

The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 et seq. — commonly known as Superfund — is a federal law designed to identify and clean up unpermitted releases of hazardous substances into the environment. It is the only federal law that would obligate the current owner or operator of a property to report historical contamination.

The principal reporting provision of CERCLA requires:

> Any person in charge of a ... facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such ... facility in quantities equal to or greater than those determined pursuant to [this Act], immediately notify the [Coast Guard's] National Response Center.

A release is broadly defined to include any spilling, leaking, emitting, discharging, escaping, leaching or disposing into the environment of a hazardous substance. Failure to report may result in civil (up to $25,000 per violation) or criminal penalties.

Current owners or operators of property may not be required by CERCLA to report historical contamination for several reasons. First, the CERCLA definition of hazardous substances is narrower than that of the Spill Act, specifically excluding petroleum and certain petroleum products. If the historical contamination is fuel oil, gasoline or other petroleum products, as is often the case, there would be no CERCLA reporting requirement.

Second, even if the historical contamination is a CERCLA hazardous substance, there is no reporting requirement unless there was a release of a reportable quantity. Unlike the Spill Act, the reporting obligation under CERCLA only arises if the person obligated to report knows that there has been a release of at least the threshold quantity of a CERCLA hazardous substance as specified in the regulations. If the current property owner or operator lacks knowledge sufficient to conclude that a reportable quantity has been released, no reporting obligation arises.

Third, it is arguable that CERCLA was intended only to apply to the initial release of a hazardous substance, and not to historical contamination. While the definition of a release is arguably broad enough to require the reporting of the leaching of historical contamination, had Congress intended to achieve that result, it could easily have done so without requiring resort to strained statutory interpretations.

In 1984 the Resource Conservation and Recovery Act was amended to regulate certain underground storage tanks. The RCRA underground storage tank program imposes various obligations on owners and operators of new and existing underground storage tank systems.

Owners and operators of tank systems must report any suspected release or confirmed release to the implementing agency within 24 hours, or another reasonable time period specified by the implementing agency. See 40 C.F.R. §280.50; 40 C.F.R. §280.61. Failure to report may result in civil penalties of up to $10,000 for each tank for each violation. See 42 U.S.C. §6991(d).

The statute provides that the term "release" is defined as any spilling, leaking, emitting, discharging, escaping, leaching from an underground storage tank into groundwater, surface water or soils.

An owner is any person who owns an underground storage tank that is used for the storage, use or dispensing of regulated substances on or after Nov. 8, 1984, or a person who owned a tank immediately before the discontinuation of its use prior to Nov. 8, 1984.

Therefore, any person acquiring property on which were located underground storage tanks, the use of which was abandoned before acquisition of the property, would not be considered a tank owner for the purposes of the federal underground storage tank program. Such a person would have no obligation under RCRA to report either an active release or historical contamination from such a tank. Operators are defined as any persons in control of, or having responsibility for, the operation of an underground storage tank. Operators only have an obligation to report releases from tanks they are operating; thus, there would be no obligation under RCRA for an operator to report any historical contamination.

While the safest course may always be to report historical contamination to the government, under certain circumstances, there may be no legal obligation to do so. Current owners or operators may find it useful to evaluate the situation to determine if they are legally obligated to report historical contamination. ■