

Ins and Outs of Environmental Contamination Discovery At New Jersey Construction Sites

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New Jersey Law Journal
December 13, 2010

Whether you are building your project in an empty field or on a site with existing improvements (being demolished for new construction or simply renovated), environmental contamination may be discovered.

In a former farm field, the contamination could be associated with an old farm dump or the result of years of pesticide usage, equipment maintenance, spills from above-ground or below-ground storage tanks or from degreasers used generally or for specific farm equipment cleaning and maintenance applications.

On real property that had prior industrial or commercial operations, the contamination could be from anything used during those operations, previously spilled chemicals, petroleum products or components, as well as completed products containing hazardous substances that were disposed onsite.

Regardless of the nature or source(s) of the contamination, once it is discovered, construction on the project cannot proceed in the normal course, and often must stop until the contamination is adequately reported, disclosed and addressed.

The first response on the part of the owner and contractors working on the project would likely be governed by two separate sets of obligations. The first set is found in the contract(s) between the parties. The second set arises under New Jersey statutes and regulations. While the contract(s) cannot insulate a party from statutory and regulatory reporting, and notice and disclosure obligations, those obligations could be contractually allocated to a particular party.

Regardless of whether the responsibilities have been contractually addressed, there remains an immediate obligation on the part of anyone, who is both responsible and liable for and knows or should reasonably know of a discharge of contaminants, to report the discharge to the state Department of Environmental Protection. Responsible persons include the owners of the real property where the contamination exists, the person responsible for conducting the remediation of the contaminated property, as well as anyone that actually caused the discharge. A Licensed Site Remediation Professional (LSRP) associated with

the site work or site inspections and due diligence also has a reporting obligation.

Once the contamination is discovered and reported, the comparatively new notification and public outreach regulations require periodic notices and disclosures to be prepared and distributed by the party performing the remediation. More often than not, the environmental consultant in charge of the remediation will be aware of all the notice and disclosure obligations and can attend to them. Regular notices, updates and reports must go to a number of people and institutions, including, without limitation, the DEP case manager, the DEP Office of Community Relations, the municipal clerk in the municipality where the contaminated site is located, the county health department, the local health official, and "the public." The public notice and disclosure can take different forms. A sign can be prepared and posted or notice letters can be prepared and distributed to everyone within 200 feet of the site boundaries.

Notice letters must include: (1) The name and address of the site; (2) The tax block(s) and lot(s); (3) The DEP's preferred ID number as provided in the most recent edition of the "Department's Known Contaminated Sites in NJ" report, or the valid EPA site identification number. If neither is available, the DEP's communications center incident number provided by the DEP's hotline may be used; (4) A statement that contamination has been identified; (5) A brief description of the type of contamination in common language, the affected environmental media, the current remediation phase, actions being taken at the site and the date field activities are expected to begin; (6) Contact information for the person responsible for conducting the remediation and the name and telephone number of the LSRP. If there is no LSRP for the remediation project, the contact information for the DEP's Office of Community Relations must be included; and (7) A statement that the person responsible for the remediation will provide a copy of all environmental reports to the municipality where the site is located upon the municipality's request.

If the notices are being sent by letter, they must be sent no later than 14 days prior to initiating field activities associated with the remedial investigation. Additional notification letters must be sent every two years detailing the status of the site investigation and remediation until the final remediation document is filed or

issued. The notice letters must be sent by certified mail. Copies of all notice letters must be sent to the assigned DEP case manager, the DEP's Office of Community Relations, the local municipal clerk(s) and the designated local health official.

Public notices on signs must comply with specific criteria. (See N.J.A.C. 7:26 e-1.4 detailing the notification and public outreach requirements by written notice letters or posted signs.) They must be in English (unless the local population speaks predominantly another language, in which case it must be in both English and the other language). The sign must be clearly visible to the public. It must be posted no later than 14 days prior to initiating field activities.

The sign must be maintained so that it is legible at all times until the required remediation is completed. The sign must be at least two feet by three feet in size and must include, at a minimum, the following language: (1) "Environmental Investigation/Cleanup in Progress at this Site"; (2) "For further Information Contact ..." followed by the name and telephone number of the person responsible for conducting the remediation and the LSRP's name and telephone number. If there is no LSRP for the remediation, the contact information for the DEP's Office of Community Relations must be posted; (3) The DEP's preferred ID number as provided in the most recent edition of the "Department's Known Contaminated Sites in NJ" report, or the valid EPA site identification number. If neither is available, the DEP's communications center incident number provided by the DEP's hotline may be used; and (4) Finally, the date the sign was first posted (this is known as the "posted on" date) must also be included. Within 14 days subsequent to the "posted on" date, the person responsible for conducting the remediation shall confirm the posting by submitting a photograph of the sign showing its location and content to the DEP, the municipal court of each municipality where the site is located, and the designated local health official along with submitting all of the other information required to be provided by written notice letters as is more specifically set forth in N.J.A.C. 7:26e-1.4 (J4).

Additional notice requirements, including the preparation and distribution of a "fact sheet," are triggered in the event the contamination migrates off-site. The fact sheet must have the same information required for the letter and sign notifications, and must also contain a more detailed description of the contamination including the following: the contaminants of concern, the affected environmental media, the contaminant concentrations, the remediation standard applicable to each contaminant, the extent of contamination, a list of online resources for information

about the contaminants, the date of the fact sheet, the contact information for the person or people responsible for the remediation, and the name and phone number for the LSRP or the DEP's Office on Community Relations, if no LSRP is engaged. The fact sheet must also be published in an acceptable newspaper within 30 days of discovery of the off-site contamination.

Under the applicable regulations, an alternative public outreach notification plan can be developed and proposed. If it is accepted by the DEP, it can then be implemented in lieu of the codified notice and public outreach requirements. The DEP can also require yet additional notification and public outreach if it determines that there is substantial public interest or site-specific needs that could not be fulfilled by the codified notice requirements.

While the foregoing generally outlines some of the reporting, notice and disclosure requirements and information which an owner, builder or contractor needs to provide in the event contamination is discovered on one of their sites, it does not include everything. There are federal public participation requirements if the contamination is subject to the Comprehensive Environmental Response, Compensation and Liability Act and the National Contingency Plan regulations. For special regions within the state, additional notice and disclosures are required. As an example, for properties located in the Pinelands, copies of all materials must be submitted to the Pinelands Commission for approval before any remediation can begin.

Given the expansive, sometimes convoluted and continuing notice obligations under applicable New Jersey law, environmental consultants, engineers and attorneys should be integrated as early as possible into the process of responding to the discovery of environmental contamination at a construction site. More importantly, all contingencies associated with discovery of environmental contamination should be addressed in agreements between the parties on the construction project, including contracts setting forth obligations of the owner, the design professionals, the surveyors, the excavators, site contractors and all other trade contractors, subcontractors and suppliers.

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