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## Brownfields Redevelopment— Time for the Next Step

by John F. Semple

**N**ew Jersey's brownfield statute, the Brownfield and Contaminated Site Remediation Act, L. 1997, c. 278 (the "Act") was passed over two years ago. Sufficient time has now passed to permit an assessment of the effectiveness of the Act in promoting brownfields redevelopment. This article reviews the Act's shortcomings and makes suggestions for improvement.

Broadly speaking, "brownfields" are "abandoned, idled, or under-utilized industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination." U.S. General Accounting Office, "Superfund: Barriers to Brownfield Redevelopment," GAO/RCED-96-125 (June 17, 1996); see also *N.J.S.A. 58:10B-1.2*. The enactment of the New Jersey Spill Act and the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in 1977 and 1980 respectively, had the predictable consequence of discouraging investment in and development of properties perceived to be contaminated. Consequently, developers making siting decisions selected "greenfields," usually undeveloped suburban or exurban sites which required little or no environmental remediation, over the perceived higher risk brownfields site.

The enactment of the Act shows that elected officials have realized that the sweeping (and

often unfair) liability provisions of CERCLA and the Spill Act are discouraging the redevelopment of contaminated sites. More needs to be done, however, to provide developers and investors with the incentives needed to promote the revitalization of New Jersey's many brownfields sites.

### The Need for an Actual Causation Requirement.

A centerpiece of the Act was its broadening of the affirmative defenses available to avoid Spill Act liability. What the Act neglected to do, however, was to limit and clarify the elements needed to establish Spill Act liability. The standard for Spill Act liability is broadly stated as follows:

*Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. [N.J.S.A. 58:10-23.11g.c(1)].*

The phrase "in any way responsible" is not defined in the Spill Act, which is typical of many state spill act statutes. The New Jersey Supreme Court interpreted this phrase broadly, based on the assumption that the Legislature intended the Spill Act to be "liberally construed to effect its purposes."

*Marsh v. Department of Environmental Protection*, 152 N.J. 137, 146 (1997). In *Marsh*, the Court determined that as a result of the 1979 amendments to the Spill Act, liability is not limited to those who “actively discharged hazardous substances” and that liability may be imposed if the person owned or controlled the property from which a discharge had occurred. *Marsh*, 152 N.J. at 146-147.

The United States Court of Appeals for the Third Circuit recently determined that proof of causation is not necessary to impose Spill Act liability, but instead, the plaintiff must “demonstrate some connection or nexus” between the hazardous substance at the site and the defendant. *New Jersey Turnpike Authority v. PPG Industries, et al.*, 1999 W.L. 1057213 (3rd Cir. Nov. 22, 1999).

Courts have generally agreed that a CERCLA plaintiff “need not prove causation in the traditional sense of the word.” *PPG*, 1999 W.L. 1057213,\* 13. In order to prove CERCLA liability, a plaintiff must show: (1) that the defendant is a PRP; (2) that a hazardous substance has been disposed of at a “facility”; (3) that there has been a release or threatened release of a hazardous substance from the facility into the environment; and (4) that the release or threatened release has required or will require plaintiff to incur response costs. 42 U.S.C. §9607(a). See also *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3rd Cir. 1997). The Spill Act and CERCLA broadly impose liability on current and former owners and operators of contaminated property and the potential for such liability has discouraged most people from becoming involved with the ownership, operation, cleanup and development of brownfields sites.

Instead of expanding the list of affirmative defenses, the Act should have encouraged brownfields development by requiring a plaintiff in a cost recovery action to prove that a defendant’s activities at the site actu-

ally caused the plaintiff to incur response costs. This would mean scrapping the existing liability scheme that allows liability to be imposed based on a person’s status as a current owner/operator or former owner/operator of a site. This change is needed as a matter of fundamental fairness and sound public policy because a party should not be subject to strict, joint and several liability for the incredibly high costs associated with a cleanup, unless that party’s



acts or omissions proximately caused a discharge of the hazardous substances that resulted in the incurrence of response costs. It is not unreasonable to spread at least some of the high cost of remediation among the taxpayers because, to some extent, they have used the products generated and services provided by the pollution-causing enterprises. The need to encourage the development of brownfields sites certainly outweighs whatever burden causation requirement imposes.

### **The Need to Broaden the Protection Afforded by Covenants Not to Sue.**

In New Jersey, the New Jersey Department of Environmental Protection (“NJDEP”) issues a “No Further Action letter” (“NFA”) when NJDEP determines that there are no discharged contaminants present at or migrating from the site or that any discharged contaminants have been remediated in accordance with NJDEP regulations. *N.J.S.A.* 58:10B-1. Before the Act’s enactment, the issuance of the NFA marked the completion of the remediation process but the NFA provided the

participant with no “real world” liability protection.

The Act intended to change this by requiring NJDEP to issue a Covenant Not to Sue whenever NJDEP issues a NFA. *N.J.S.A.* 58:10B-13.1. The purpose of a Covenant Not to Sue should be to release the person who remediated the site, as well as all subsequent owners and lessees/operators, from any civil liability relating to contamination at the site, including the performance of any additional remediation and for any cleanup costs. The Act does not do this, however. Under the Act, a Covenant Not to Sue only releases the person who undertook the remediation from all civil liability to the state to perform additional remediation or for any cleanup costs. Although a Covenant Not to Sue is issued to the person performing the remediation, the Covenant Not to Sue does not provide liability relief “under statutory or common law, to any person who is liable for cleanup and removal costs pursuant to [*N.J.S.A.* 58:10-23.11g.c].” *N.J.S.A.* 58:10B-13.1e.

In order to encourage brownfields remediation, the Act should be revamped so that anyone who receives a NFA will receive complete liability protection against any state action for cleanup and removal costs, even if the person is otherwise liable under the Spill Act.

There is no legitimate reason for NJDEP or anyone else to object to such a change. Covenants Not to Sue only protect the person who performed the remediation from liability to the state for performing any additional remediation or for any cleanup and removal costs incurred by the state. If a remediation has been performed and a NFA issued, then there should not be a need for any additional remediation by the state. Thus, the person taking the initiative to remediate the site should be rewarded with a Covenant Not to Sue, regardless of whether the person may be liable pursuant to *N.J.S.A.* 58:10-23.11g.c. Of course, liability

protection would not be available if the NFA was granted based on inaccurate or incomplete information.

### **Covenants Not to Sue Should Provide Protection Against Natural Resource Damage Claims.**

The Act's Covenant Not to Sue provides civil liability protection against state claims for (a) performing additional remediation and (b) any cleanup and removal costs. *N.J.S.A. 58:10B-13.1a(1)*. The phrase "cleanup and removal costs" is defined at *N.J.S.A. 58:10-23.11b* as "all costs associated with the discharge, incurred by the state or any person with written approval from [NJDEP]...." This definition does not include natural resource damage claims. This means that arguably Covenants Not to Sue do not provide the person who performed the remediation and received the NFA with protection against natural resource damage claims.

Under several federal environmental statutes, including CERCLA, the Oil Pollution Act, 33 *U.S.C.* §2702(b) and the Clean Water Act, 33 *U.S.C.* §1321(f) and several state environmental statutes, including the Spill Act, the Water Pollution Control Act, *N.J.S.A. 58:10A-1 et seq.* and the common law public trust doctrine, the government has the authority to recover natural resource damages in addition to cleanup and removal costs. "Natural resources" are broadly defined as "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the state." *N.J.S.A. 58:10-23.11b*. In order to entice developers and

investors to spend the amount of money needed to remediate contaminated properties and also limit the development of "greenfields," Covenants Not to Sue need to include protection against natural resource damage claims.

### **Clarifying the Requirements for the Innocent Owner Defense.**

One of the Act's more significant amendments was to expand the scope of the innocent owner defense by allowing a person to avoid liability for cleanup and removal costs or for any other damages to the state or to any other person for the discharge of hazardous substances pursuant to the Spill Act or common law, if the prospective purchaser discovered the existence of hazardous substances during the pre-purchase due diligence investigation. Under the Act, a person is entitled to the innocent owner defense if: (a) the person acquired the property after hazardous substances were discharged and the discharge was discovered at the time of acquisition as a result of a due diligence investigation; (b) the person performed a remediation of the site in accordance with NJDEP approved standards, or the person relied upon a valid NFA for a remediation performed prior to acquisition, or the person obtained approval of a remedial action workplan; and (c) the person established and maintained all engineering and institutional controls. *N.J.S.A. 58:10-23.11g.d(2)(e)*.

In addition to these innocent owner incentives, the Act contains a provision which purports to provide liability relief for claims asserted by anyone other than the state or federal government, when the person seeking the affirmative defense failed to perform a pre-purchase due diligence investigation. *N.J.S.A. 58:10-23.11g.f.* This provision, however, is confusing and inconsistent with other Spill Act provisions. First, innocent owner status under *N.J.S.A. 58:10-23.11g.f.* does not attach if a

person is "in any way responsible for the hazardous substance" at the site. Accordingly, it does not appear that someone who failed to conduct a pre-purchase due diligence investigation would be entitled to the innocent owner defense under *N.J.S.A. 58:10-23.11g.f.*, even though that was the apparent aim of that provision. Second, in order to qualify for innocent owner status under *N.J.S.A. 58:10-23.11g.f.*, the purchaser must commence remediation of the discharge within 30 days after acquisition of the property. This requirement cannot be met since a party attempting to acquire innocent owner status under *N.J.S.A. 58:10-23.11g.f.* is doing so because that person failed to conduct a pre-purchase due diligence investigation. Thus, the person would not be in a position to commence remediation. For these reasons, it does not appear that *N.J.S.A. 58:10-23.11g.f.* offers any real incentive for purchasing contaminated property, and, in fact, the inconsistencies and apparent contradictions create confusion that may act as a deterrent to brownfields development.

### **The Innocent Owners Defense Should Apply to Off-Site Migration.**

According to *N.J.S.A. 58:10-23.11g.d(2)(e)*, satisfying all requirements needed to achieve innocent owner status does not provide liability relief "for a discharge that is off-site of the property covered by the No Further Action letter." This exception to the innocent owner defense is another example of the Act's failure to provide the finality and liability protection needed to encourage brownfields redevelopment. If a purchaser acquired the property after the hazardous substances were discharged on the site and that person has performed all remediation in accordance with NJDEP's technical regulations, then that person should be entitled to an affirmative defense for any contamination that may have migrated



off-site, There is no good reason to treat off-site and onsite contamination differently.

Additionally, the neighboring property owner and NJDEP, still have the right to pursue the person who actually released the hazardous substances that migrated off-site. This exception to the innocent owner defense has significant consequences because groundwater contamination

obviously migrates and is likely to move off the property covered by NFA.

The enactment of New Jersey's brownfield statute, like many state brownfield statutes, is an important but imperfect step in the right direction. Adjustments and clarifications such as those discussed here are needed to promote the redevelopment of brownfields sites.

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