

DIMENSIONS

NJDEP'S NEW GUIDANCE RULES: NEW OFF-SITE AND ON-SITE CONTAMINATION LIABILITY.

By Marc D. Policastro Esq. and David Miller Esq.

Parties responsible for investigation or remediation of a property are frequently confronted with issues when previously unidentified contamination is discovered on-site during the course of development activities. The discovery of a "new contaminant" raises numerous questions concerning the respective responsibilities and legal liabilities of (a) the person or entity conducting the environmental work or development of a site, (b) the owner or operator of neighboring properties, and (c) the consultant(s) or Licensed Site Remediation Professional ("LSRP") overseeing the remedial work.

In an effort to infuse some clarity on the issue, NJDEP is currently drafting technical guidance for those confronted with suspected off-site groundwater contamination. The "Off-Site Source Ground Water Investigation Technical Guidance Document" includes explanations of NJDEP's position regarding a responsible party's obligations, the responsibilities of the person conducting an environmental investigation on the subject property (usually an LSRP) and the technical procedures for responding to a confirmed off-site source. The proposed guidance, like other NJDEP guidance documents, is intended to assist the regulated community in complying with NJDEP's regulations. In short, a legal determination that a new constituent has been generated from an "off-site" source may, by law, relieve the non-discharger from liability. N.J.A.C. § 7:26E-3.9. Accordingly, adherence to the Department's guidance document may prove to be a game changer in subsequent litigation with third parties, the State or future homeowners. The

**Giordano
Halleran &
Ciesla** ATTORNEYS
AT LAW



**MASTER
SPONSOR**
Defending Our Industry

NEW JERSEY BUILDERS ASSOCIATION

M X D
New Jersey

Mixed-Use Developers
Patron Sponsor

results of off-site fingerprinting under the new guidance will also be instructive for developers required to make public offering statements and will affect the substance of contractual obligations between buyers and sellers.

When contamination is discovered at a site that is not already known to DEP, the guidance suggests that the investigator should immediately report the discharge to the State's "hotline" and file a Confirmed Discharge Notification within 14 days thereafter. Under the guidance, even if it is believed that the discovered contamination is migrating onto the site from an off-site source, the responsible party should remediate the contamination until it can be adequately demonstrated that it is from an off-site source. That remediation requires, in addition to handling removal or control of the on-site hazardous substances, the public notification mandated by NJDEP's regulations, especially in the

case of contamination considered to be dangerous, or contamination in environmentally sensitive areas, referred to as an "immediate environmental concern".

Significantly, a responsible party is not required to remediate contamination on their site that can be demonstrated to be emanating from an off-site source. If off-site investigations (e.g., a Preliminary Assessment) are completed and support the conclusion that the new contamination is the result of an off-site source, the guidance indicates that NJDEP should be notified that contamination has been discovered and is due to a verified off-site source. After notifying the State and otherwise complying with remediation requirements, the LSRP may be authorized to issue an Area of Concern-specific Response Action Outcome, which is similar to an "area specific" No Further Action Letter. Thereafter, the responsible party may proceed with the original remediation without concern for the contamination from the off-site source.

The guidance also provides more technical advice concerning investigatory approaches to support the conclusion that on-site contamination is the result of a verified off-site source by establishing "lines of evidence" that tend to show that the discovered contamination is not from an on-site source. Specifically, as examples, investigators should (1) determine groundwater flow (2) document that contamination is migrating or has migrated onto the site (3) demonstrate a migration pathway between the

[Continued on page 21](#)

About the Author

Marc D. Policastro is Chair of the Site Remediation Department at Giordano, Halleran and Ciesla. Mr. Policastro is a transactional business attorney, who focuses his practice in development, redevelopment, environmental compliance cases, corporate transactional matters, land use, zoning and business counseling. He is admitted to practice in New Jersey and New York. He can be reached at mpolicastro@ghclaw.com.

David Miller is an associate in the firm's Environmental Department, concentrating on environmental compliance and development matters.

NEW GUIDANCE RULES

Continued from page 8

off-site and the on-site area of concern and (4) demonstrate that there is no contribution or exacerbation from any on-site AOC. If investigations during the course of remediation lead to the discovery of contamination off-site that is not related to the contamination on-site, the guidance reaffirms current regulations and policy requiring “hotline” notification to NJDEP. The guidance leaves unscathed reporting requirements relating to immediate environmental concerns.

Significantly, parties evaluating contamination which may, even arguably, emanate from an off-site source cannot ignore the NJDEP’s suggested practices. In the course of due diligence, undertaking preliminary assessments and securing “innocent purchaser” status will become even more important in the wake of NJDEP’s new directives. Adherence to the new guidance could literally be the difference between inclusion, or exclusion of new contamination, and new costs and delays, in the process of obtaining final remediation approvals. Responsible parties should also consider “technical consultations” with NJDEP early to maximize opportunities to efficiently eliminate disputes between “on-site” and “off-site” liability.

If you have questions concerning the new guidance document you can contact Marc D. Policastro at mpolicastro@ghclaw.com, or via phone at 732-224-6507.

APPLICATION OF “CREDITS”

Continued from page 7

to the redevelopment, as well as the additional burden placed on the utility by the redevelopment compared to the previous development. This will ensure that the construction and financing costs of a utility system’s capital improvements are borne reasonably equally by all users, including redevelopers.

BUILDING INSURED?

Continued from page 9

all insurance policies that insure real property include replacement cost riders. The replacement cost rider agrees to provide insurance proceeds to replace ‘new for old’ with materials of ‘like kind and quality’. But the insurer’s obligation to pay replacement cost dollars is contingent upon rebuilding the structure at the location described in the policy. Suppose you don’t want to rebuild the building at that location. You would like to rebuild somewhere else. The insurance company says that’s okay, but they no longer have the obligation to provide replacement cost funding. Rather, the replacement cost clause states the insurer only needs to offer ‘actual cash value’ which means the claim payment will take into account depreciation. For older structures, the depreciation factor could reduce the claim payout by as much as 50% of the amount insured.

Carefully consider the cost to rebuild real property. Insurance company statistics show almost 70% of all buildings in the U.S. are underinsured by 28%. Don’t be one of them.

ENERGY SUBCODE UPDATE

Continued from page 14

- The impact of the HERS compliance path (predicted to provide an additional savings of 15 to 20% compared to the prescriptive path) on the NJ ENERGY STAR Homes compliance path was not addressed in the proposal.

As you can see, this is not your father’s energy code. The new code will require increased builder’s attention to proper installation of insulation and HVAC distribution systems. Consultation with an experienced energy design engineer, or certified HERS Rater, in the early stages of design and purchasing will assure that compliance and better home performance are achieved.

MORRISTOWN V. GRANT

Continued from page 10

contribution claims, and reasoned that the Legislature’s acquiescence to this understanding lends further support to the Court’s decision.

In an uncommon turn of events, environmentalists also laud the decision because it eliminates any benefit that responsible parties could glean from refusing to conduct the remediation. Since responsible parties can no longer avoid liability by waiting for the statute of limitations to expire, such parties may want to take an active role in the remediation to ensure that costs are minimized. Environmentalists are encouraged that this will lead to more, and faster, remediations.

PROPERTY TAX ASSESSMENTS

Continued from page 16

productive to resolution of assessment appeals. Currently, appraisals are not mandated within such a compressed time frame in property tax appeals. Also, a majority of cases are resolved without appraisals, yet this bill would require an appraisal for most matters in the Tax Court and also create an artificial and compressed deadline (90-days) for appraisal preparation, especially in light of the fact that most tax appeals are already filed within a compressed time period (by April 1 of each year). Thus, all required appraisals would be due during the same time frame, and negatively affecting the workload of appraisers by not affording them an opportunity to review all discovery obtained during the appeal to prepare a comprehensive report. Further, this measure would unnecessarily increase litigation costs to municipalities and taxpayers and possibly outweigh any tax savings, thereby having a chilling effect on the likelihood of future tax appeals as well as settlements.