December 3, 2024

Proposed NJDEP Rules Could Reshape New Jersey Real Estate Transactions

The New Jersey Department of Environmental Protection (NJDEP) has proposed significant amendments to its site remediation regulations that could fundamentally alter the commercial and industrial real estate market in New Jersey. If adopted as proposed, these changes would impose new mandatory discharge reporting obligations on potential purchasers, making them legally obligated to report any discharges discovered during due diligence—not only to NJDEP but also to the seller. The proposed mandatory reporting obligations would also extend to any persons with knowledge of a discharge.

These proposed changes have the potential to disrupt how real estate transactions in New Jersey are frequently structured, limiting sellers' ability to rely on confidentiality clauses or other contractual provisions in purchase and sale agreements to manage the risks associated with a potential purchaser discovering a discharge during due diligence. As a result, sellers may become increasingly reluctant to allow invasive environmental testing, knowing that any identified discharge would need to be immediately reported to NJDEP, thereby triggering the mandatory remediation obligations imposed by existing state law. This could create new and significant risks for both buyers and sellers and associated disruptions to the real estate market.

The proposed amendments go beyond disclosure obligations, introducing new remedial action permit types; new institutional control and remedial action permit requirements for indoor air; and enhanced requirements for biennial certifications, classification exception areas, and the use of alternative fill and remedial funding sources, among other proposed changes. While some changes merely codify existing guidance, others, like expanding the current mandatory discharge reporting rules, could have far-reaching implications for site remediation and real estate transactions alike.

A public hearing on the proposed regulations was held by NJDEP on November 21 where the disclosure requirements garnered attention and concern from the handful of stakeholders who participated. The public comment period remains open until January 31, 2025.

Day Pitney encourages our commercial and industrial clients to take the opportunity to submit written comments on the rule proposal to NJDEP, as these could influence the final regulations. We are available to assist you with drafting and submitting comments or to discuss how these proposed changes may affect remediations, business operations and real estate transactions.

We will continue to monitor the rulemaking process and provide updates as new developments arise. Please contact us directly to discuss next steps or to learn more about how these changes may affect your business.

Authors



Todd W. Terhune
Partner

Parsippany, NJ | (973) 966-8040

tterhune@daypitney.com



Drew A. Levinson
Senior Associate

Parsippany, NJ | (973) 966-8051

dlevinson@daypitney.com



Jessica M. Laird
Associate

Parsippany, NJ | (973) 966-8100

jlaird@daypitney.com