

**SPECIAL EDITION:**  
**New Jersey DEP's Site Remediation Program**  
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# DIMENSIONS

*Newsletter of the New Jersey Builders Association*



## **DEP Adopts New Site Cleanup Standards With Only Limited Grandfathering Protection**

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The New Jersey Department of Environmental Protection (DEP) has adopted new Remediation Standards (N.J.A.C. 7:26D) which took effect on June 2, 2008. Following public comments on the proposed standards, DEP elected not to adopt controversial impact-to-groundwater soil remediation standards, stating that it would develop such standards on a "site-by-site basis." The new cleanup rules do, however, establish direct-contact soil cleanup standards for residential and non-residential uses of property, including stringent minimum cleanup levels for two dozen contaminants that are lower than the old soil cleanup criteria by an order-of-magnitude or more (i.e. one-tenth of the old levels). At least three of these contaminants are often found at sites in New Jersey: chloroform, naphthalene and 4-methylphenol.

### **NJBA's Position Regarding Changes in DEP's Cleanup Standards**

Redevelopment is the economic engine that drives privately-funded cleanups. The Brownfield and Contaminated Site Remediation Act (Brownfield Act) is emphatic that "in order to encourage the cleanup of contaminated sites, there must be finality in the process." Perpetual liability for changes in cleanup standards would be the death knell for voluntary cleanups of brownfield sites by those who did not cause the environmental problem.

With these economic realities in mind, the New Jersey Builders Association (NJBA) last year submitted written comments on the proposed cleanup rules. Among other

points, it urged DEP to reconsider a proposed "grandfathering" provision which exempted certain persons from complying with the new cleanup rules, but was subject to a blanket exception for all **order-of-magnitude** decreases in the new minimum cleanup levels ("order-of-magnitude reopener"). The NJBA urged DEP to amend the grandfathering provision to specify that the order-of-magnitude reopener does not apply to developers who have an innocent purchaser defense to cleanup liability under the Spill Compensation and Control Act (Spill Act). As a legal matter, the NJBA argued, DEP's indiscriminating imposition of all order-of-magnitude decreases in the new cleanup standards on all persons – without any regard to whether they were responsible parties or innocent purchasers – would be contrary to the Spill Act. As a practical matter, such a policy would thwart the Brownfield Act's goal of encouraging more cleanups.

### **DEP's Limited Grandfathering Provision**

With the adoption of DEP's new Remediation Standards, it appears that DEP has met the NJBA part way on the question of finality in cleanup projects. In this regard, the new cleanup rules offer good news and bad news for brownfield redevelopment projects. On the positive side, DEP has adopted a six-month phase-in provision with a grandfathering clause that exempts qualifying persons from complying with certain new cleanup standards. N.J.A.C. 7:26E-

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DEP's limited grandfathering policy in the new cleanup rules could have serious negative implications for brownfields redevelopment. Presumably, there are many active sites in New Jersey which obtained approval of a RAWP before DEP adopted its new cleanup standards, but which have not yet received an NFA letter and therefore must now comply with order-of-magnitude changes in the Remediation Standards. Environmental cleanups are not cheap. The substantial additional costs and delays associated with re-designing and implementing the RAWP to comply with all order-of-magnitude changes in DEP's new cleanup standards could stop some brownfield redevelopment projects in their tracks.

Litigation would be required to resolve the legal validity of DEP's order-of-magnitude reopener for all sites in the process of cleanup after June 2, 2008. Short of a legal

challenge, innocent purchasers and persons performing cleanup must deal with DEP's limited grandfathering provision as it is written. Time will tell to what extent DEP's limited grandfathering policy and troubling order-of-magnitude reopener will serve to deter the cleanup and redevelopment of numerous brownfield sites throughout the State.

**Conclusion**

Interested parties, including property owners, purchasers, developers, lenders and insurers, must assess the impact of DEP's new Remediation Standards on any brownfield redevelopment projects they may be planning or implementing. Where appropriate, they should consult with professional consultants and attorneys who are familiar with DEP's old and new cleanup standards, the Spill Act's innocent purchaser defenses,

and the legal protections provided by NFA letters. In view of the approaching December 2, 2008 deadline to qualify for even limited grandfathering protection, interested persons should not delay in assessing the impact of the DEP's new cleanup rules.

If you have any questions regarding the grandfathering provision for DEP's new Remediation Standards and their impact on existing and future development projects, you may contact Nielsen Lewis by telephone at (609) 734-6308 or by email at [nvl@hillwallack.com](mailto:nvl@hillwallack.com).

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