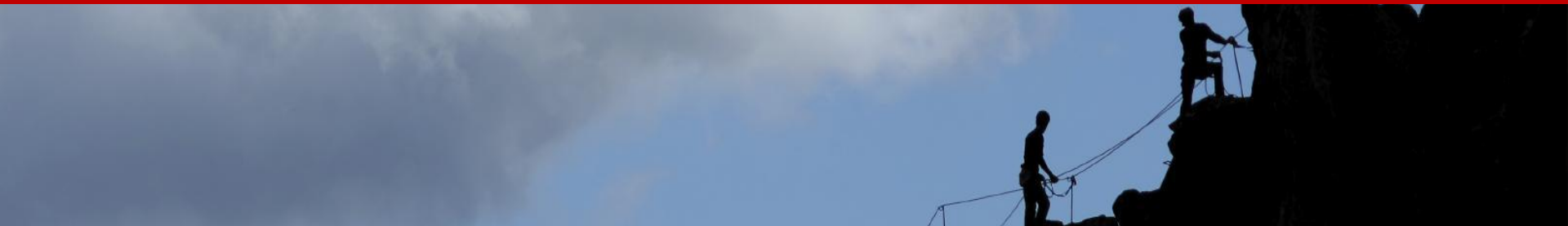


**ACCELERATE LAND REUSE FOR
COMMUNITY REVITALIZATION**
CENTER FOR CREATIVE LAND RECYCLING

**MIDDLESEX COUNTY FIRE ACADEMY
SAYREVILLE, NEW JERSEY
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I. When Are Municipalities Liable For Conducting Remediation?

1. **Situations Where Municipalities Acquire Title To Contaminated Sites As Sovereigns or to Promote Redevelopment.**
 - a. Municipalities which acquire ownership of environmentally contaminated sites through bankruptcy, tax delinquency, abandonment, eschert, eminent domain, condemnation or for the purpose of promoting the redevelopment of the property are not liable to the State or any other person for discharges of hazardous substances which occurred or began prior to that ownership under the New Jersey Spill Compensation and Control Act (“Spill Act”), N.J.S.A. 58:10-23.11 et. seq., or common law. N.J.S.A. 58:10-23.11gd.(4).
 - b. The Spill Act N.J.S.A. 58:10-23.11gd(4) exemption does not provide liability protection to municipalities (i) which caused or contributed to the discharge of the hazardous substances at the contaminated site or (ii) which acquired ownership of the site by condemnation or eminent domain where the site was being remediated in a timely manner at the time of the condemnation or eminent domain action.

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1. **Situations Where Municipalities Acquire Title To Contaminated Sites As Sovereigns or to Promote Redevelopment.**
 - c. The New Jersey Department of Environmental Protection (“NJDEP”) has stated that municipalities which are not liable for contaminated sites under the Spill Act are not required to pay annual remediation fees to the Department during years in which their budgets do not include funds for remediation and are not remediating the contaminated site, and are not required to conduct the remediation within NJDEP’s mandatory timeframes. N.J.S.A. 58:10C-28; NJDEP May 2014 Remedial Investigation Completion Deadline Compliance Alert.

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2. **Situations Where Municipalities Acquire Title To Contaminated Sites That Are Not Subject To Exemptions From Liability Under The Spill Act.**
 - a. In cases where municipalities do not qualify for a Spill Act liability exemption because they (i) caused or contributed to the discharge of the hazardous substances concerned, or (ii) acquired the contaminated site by condemnation or eminent domain where the site was being remediated in a timely manner at the time of the condemnation or eminent domain action, NJDEP's mandatory remediation deadlines and annual remediation fees do apply. Municipalities in those cases are not required to establish a Remediation Funding Source for the remediation of the contaminated site, however, N.J.A.C. 7:26C-5.2(b)(4).
 - b. The New Jersey Site Remediation Reform Act (SRRRA), N.J.S.A. 58:10C-1 et. seq., establishes an affirmative obligation for Spill Act responsible parties to remediate contaminated sites in accordance with NJDEP mandatory remediation deadlines.

II. The Need To Undertake Environmental Due Diligence Before Acquiring Title To Contaminated Properties.

- a. Given the potential for municipalities to acquire Spill Act liability in connection with their taking title to contaminated sites in some situations, it is important that environmental due diligence be conducted prior to taking title to the site.

- b. As part of the due diligence which municipalities should conduct prior to their acquisition of title to contaminated sites, they should attempt to determine, to the extent possible, projected remediation costs make certain that funds are available to complete the remediation. New Jersey environmental consulting firms and/or LSRPs should be hired for the due diligence.

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- c. Conducting environmental due diligence does not trigger SRRA's affirmative duty to remediate the contaminated site. Under N.J.S.A 58:10B-1.3, the New Jersey Legislature specifically exempted from the affirmative duty to remediate contaminated sites persons who (i) do not own the contaminated site; (ii) conduct a Preliminary Assessment or Site Investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the site, and (iii) have not discharged a hazardous substance at the site or are not in any way responsible for any hazardous substance discharged at the site under the Spill Act.
- d. By conducting environmental due diligence prior to the acquisition of title to the contaminated site, municipalities may be able to qualify for the Spill Act "innocent purchaser" defense.

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- d. **In order to establish the innocent purchaser defense, the following must occur:**
- The person acquired the site after the discharge of the hazardous substance there;
 - At the time the person acquired the site, the person did not know and had no reason to know that any hazardous substances had been discharged at the site;
 - The person did not discharge the hazardous substances, is not in any way responsible for the hazardous substances, and is not a corporate successor to the discharger or to any person in any way responsible for that hazardous substances or to anyone liable for cleanup and removal costs;
 - The person gave notice of the discharge to NJDEP upon the actual discovery of the discharge;


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- d. **In order to establish the innocent purchaser defense, the following must occur:**
- To establish that the person had no reason to know that any hazardous substances had been discharged at the site, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the site. All appropriate inquiry is defined as the performance of a preliminary assessment and site investigation, if the preliminary assessment indicates that a site investigation is necessary. N.J.S.A. 58:10-23.11g.d(2).

III. The Need to Properly Structure Municipal/Redeveloper Transactions to Access Brownfields Grant Funding.

- a. A new New Jersey Appellate Division case, In re: Hazardous Discharge Site Remediation Fund Public Entity Grant Application for Remedial Investigation and Remedial Action, Docket No. A-4439-15T2 (August 29, 2018), held that NJDEP properly denied Middlesex County's application for Brownfield Development Area Grant because the County did not perform the cleanup and the property Seller, which was performing the cleanup, was not undertaking the cleanup work on the County's behalf. The County had failed to designate the Seller as the redeveloper or as the County's agent responsible for the remediation.

- b. This case illustrates the need to carefully structure brownfields agreements so that public entities can qualify for brownfields grant funding for the properties which they acquire.



Questions?

About Our Speaker



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