



A Preliminary Assessment of the Plague Year: How COVID May Interfere with Environmental Due Diligence and Liability Protections in New Jersey

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The extraordinary events of 2020 have disturbed settled expectations in all areas of business and life, and the environmental field is no exception. One seemingly minor consequence of public health driven office closures—the difficulty of fulfilling public records requests while in-person government offices are shuttered—may have significant repercussions for the environmental liability faced by purchasers of real property in New Jersey. Under both State and federal law, prospective purchasers of real property may insulate themselves from liability associated with pre-existing contamination by conducting specified due diligence activities, including a search of public records concerning historic uses of the property. Before the pandemic, New Jersey has strictly applied the requirement that the buyer review public records before closing, whereas federal law already contemplates that a buyer might still maintain some protection from environmental liability even if it does not receive the requested government documents. Purchasers of property in New Jersey should be aware that, even if the customary due diligence otherwise is completed, acquiring property before receiving the public records could result in the loss of a defense to environmental liability under state law. However, there are a few options for purchasers that want to proceed with transactions during this time period while still limiting environmental risk.

Due Diligence and Liability Protection under New Jersey Law

A property owner has a defense to liability for pre-existing contamination under the Spill Compensation and Control Act (the “Spill Act”), [N.J.S.A. 58:10-23.11 et seq.](#), if it performed “all appropriate inquiry” into the previous ownership and uses of the property before acquiring it. New Jersey defines all appropriate inquiry as the

performance of a preliminary assessment (“PA”) (consisting of a site inspection and review of paper records) and a site investigation (environmental sampling of the property) if the PA recommends such an investigation. The regulations of the New Jersey Department of Environmental Protection (“NJDEP”) require that a PA include a “diligent search” of all documents which the person performing the PA has a legal right to access and that are reasonably likely to contain information about a site. Accordingly, performing a PA customarily includes making Open Public Records Act (“OPRA”) requests to NJDEP and the municipality in which the property is located. As noted, office closures since the spring have interfered with state government response to OPRA requests. Although the state continued to provide newer records kept in electronic form, the inability to access archives of paper records created a backlog of requests that NJDEP has not yet fully resolved, despite significant efforts.

In our experience, NJDEP has strictly applied the requirement that a “diligent search” of public records be completed before acquisition of property. Where an owner acquired property without receiving documents in response to an OPRA request, NJDEP has taken the position that the owner is liable for contamination, as the required “all appropriate inquiry” was not completed.

Because of the pandemic, the Department has relaxed some of its regulations, such as timeframes for investigating and remediating contaminated sites, but there has been no indication yet that NJDEP will relieve a property owner of liability when an owner did not receive public records because of the office closures. Of course, it is possible that NJDEP or a court called on to interpret these provisions will conclude that a buyer conducted a “diligent search” where it requested documents from a government agency but the agency was unable to provide documents at all, or unable to provide them within a reasonable time. It also might be determined that the party performing a PA did not have a legal right to access documents that an agency was unable to provide within a reasonable time, as circumstances have thwarted the public’s usual right to access government documents. Despite these potential arguments, neither NJDEP nor a court may provide a more definitive interpretation of the applicable regulations for some time, whereas parties to pending or contemplated real estate transactions must determine now their tolerance for environmental risk.

Due Diligence and Liability Protection under Federal Law

In contrast to New Jersey law, the analogous defense to liability for purchasers of contaminated property that performed “all appropriate inquiries” in the federal Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. 9601 et seq., contemplates that public records may not be available. Federal regulations define “all appropriate inquiries” as performing a Phase I Environmental Site Assessment (“Phase I”), a similar but not identical exercise to performing a PA under New Jersey law. Those regulations allow a Phase I report to be completed with “data gaps,” identified missing information that nonetheless may not foreclose a purchaser from relying on the completion of the Phase I as a defense to environmental liability.

Potential Responses to Public Record Limitations

Purchasers of property in New Jersey who performed pre-purchase environmental due diligence during this time while access to public documents remains limited may find that they have a defense to environmental liability under federal law, but not State law. Although waiting until all government documents can be produced is the safest course, that may not be a realistic option. Instead, prospective purchasers might seek some measure of protection through a few alternate methods.

- Seeking Documents from Other Sources. Missing documents might be obtained during this time period from the licensed site remediation professional (“LSRP”) if one has been retained for the site, but an LSRP only would be retained if the property was known to be contaminated, and a complete PA is not as valuable to a buyer when known contamination exists. Documents might also be obtained from other environmental professionals that are (or previously were) involved with the site, whether on behalf of seller or another entity, such as a prior purchaser or tenant. These other environmental professionals might have older documents that are otherwise only available from the NJDEP. In fact, legal counsel often maintain detailed records of the environmental reports and correspondence relating to a particular property. But again, these professionals are only likely to be involved with sites that are known to be contaminated and thus are not helpful in all circumstances.
- Conducting Additional Invasive Sampling. Prospective purchasers (or parties providing financing) also might insist more strongly on performing environmental sampling in light of the uncertainty surrounding the customary defense for prospective purchasers. While additional sampling is not a perfect replacement for the inability to obtain public documents under the legal requirements for “all appropriate inquiry,” more information about the environmental condition of the site certainly provides valuable information for the parties to evaluate environmental risk and could be another basis for a purchaser to assert that it conducted “all appropriate inquiry” required for a defense to Spill Act liability under New Jersey law, i.e., the site investigation that could be required following the PA.
- Enhancing Representations and Contractual Protections. Buyers might seek private contractual protections

from sellers since the availability of statutory liability protections buyers typically rely on is uncertain. Representations regarding the condition of the property and indemnities for pre-existing conditions are of heightened importance during this period, as are environmental insurance policies. But, as was the case before COVID-19, sellers can be expected to push back on such contractual provisions.

Regardless of how the parties to a particular transaction choose to address this issue, buyers and sellers of New Jersey property should account for the possibility that a purchaser in 2020 may be unable to conduct the “all appropriate inquiry” required for a defense to Spill Act liability.

For more information, please contact the author Michael Kettler at mkettler@riker.com or any attorney in our [Environmental Practice Group](#).

Attorney:

Michael S. Kettler

Practice:

Environmental Law