



## Brownfields Bill Signed

The long-awaited "Brownfields and Contaminated Site Remediation Act" was signed into law by Governor Whitman. The Act is a combination of several bills, amendments and substitutes negotiated by Senate, Assembly and Administration representatives over a two-year period. The law, which took effect immediately on January 6, 1998, has significant ramifications for New Jersey business community and for commercial lenders.

The primary intent of the legislation is to promote and facilitate the remediation and redevelopment of older, frequently abandoned industrial sites in the state. A majority of these sites, often referred to as "brownfields," are located in urban areas and are contaminated with hazardous substances or suspected of being so. The uncertain costs of remediating such sites and the threat of liability have been major deterrents to the revitalization of these areas and to the extension of credit by lenders being asked to finance such projects. This legislation is intended to remove impediments to redevelopment while, at the same time, protecting the public health and environment. A secondary, though major, goal of this bill is to ease the difficulties in undertaking all site remediation activities throughout the state by reducing certain of the remedial requirements and standards.

Included in the law are new provisions, as well as amendments to the Industrial Site Remediation Act ("ISRA," formerly known as ECRA), the Spill Compensation and Control Act ("Spill Act," New Jersey's "Superfund" equivalent), and the Environmental Opportunity Zone Act ("EOZA"), the original brownfields legislation. Certain provisions apply only to brownfields located in an Environmental Opportunity Zone ("EOZ"), some apply only to "innocent purchasers," and others impact site remediation in general. It is important to keep these distinctions in mind in reviewing the law.

We have highlighted briefly some of the major provisions below.

**Tax Abatement.** Financial incentives provided in the Act include the extension of the property tax exemption currently in place pursuant to the EOZA from 10 to 15 years, if an unrestricted use or limited use restricted remedial action is used to address brownfields located within those zones. The exemption has been expanded to include sites being redeveloped for residential or other productive use, in addition to those targeted for industrial

or commercial use, as was required previously. Once remediation costs, as defined in the EOZA, are recovered, the property tax exemption will end.

The term "unrestricted use remedial action" refers to any remedial action that does not require the use of engineering or institutional controls. "Limited restricted use remedial action" means any remedial action that requires the continued use of institutional controls (e.g., deed notice) but does not require the use of engineering controls (e.g., fencing, capping, signage). "Restricted use remedial action" means any remedial action requiring the continued use of engineering and institutional controls.

**Remediation Reimbursement.** A brownfield site developer will be able to enter into an agreement with the Commissioner of Commerce and Economic Development to be reimbursed for up to 75% of the cost of remediation as long as the State tax revenues to be realized from any new business located at the redeveloped site will exceed the amount necessary to reimburse the developer. Total reimbursement, including property tax exemptions and any other incentives, may not exceed 75% of the cleanup cost.

**Incentive Grants.** Financial incentives in the form of 25% matching grants or loan guarantees of up to \$100,000 from the Hazardous Discharge Site Remediation Fund, administered by the New Jersey Economic Development Authority, will be available to persons having assets of less than \$2 million for the use of innovative technologies or for the implementation of unrestricted or limited restricted use cleanup remedies.

**Remediation Funding Source Waiver.** A person who performs a remediation in an EOZ or who voluntarily undertakes a remediation pursuant to a memorandum of agreement with the New Jersey Department of Environmental Protection ("NJDEP") is not required to establish a remediation funding source. The funding source waiver also applies to a person conducting remediation pursuant to ISRA or the Spill Act who implements an unrestricted or limited restricted use remedial action or employs innovative technology. The remediation funding source surcharge similarly is waived.

**Reduced Oversight Fees.** Amendments to the Spill Act, embodied in the Act, provide that NJDEP oversight fees can no longer include indirect administrative and fringe benefit costs. This will have the effect of lowering charges assessed by NJDEP to review site remediations.

**Treble Damage Suits.** A significant provision of this legislation amends the Spill Act to grant private parties the right to pursue treble damages in cost recovery actions in the courts without first obtaining NJDEP authorization. An award of treble damages may be granted only if the plaintiff has entered into an agreement with NJDEP to remediate the site and the defendant was subject to a directive issued by the department and failed to comply.

**Liability Protection.** Provisions regarding "innocent purchasers" have been clarified and expanded to include all

properties in the State acquired on or after September 14, 1993. A purchaser who unknowingly acquires contaminated property after performing a proper investigation, or who knowingly acquires contaminated property and performs the required remediation, will not be liable to the State or to any other person under the Spill Act or under common law even if additional contamination is discovered or standards change. This protection is considered to be one of the major aspects of the bill and may be of great significance to lenders involved in deeds-in-lieu foreclosure or other remedial actions.

The Act also provides that NJDEP shall issue a covenant not to sue whenever it issues a "no further action" letter for a remediation. As long as any required engineering or institutional controls are maintained, additional remediation will not be required at the site. It is important to note that no liability protection is to be afforded to responsible parties who are liable under the Spill Act to clean up and remove a discharged hazardous substance.

The legislation also amends current law to limit public entity liability for contaminated property acquired by any means and extends the immunity from liability to third party suits.

**Regulatory Flexibility.** Regulatory flexibility is to be encouraged by NJDEP, allowing the person performing a remediation to select the remedial action to be implemented and providing incentives for unrestricted remedies. NJDEP is to provide a mechanism whereby deviance from strict adherence to regulations is permitted if it is demonstrated that the deviation would be equally protective of human health and the environment. The agency will have final discretion in these situations. Remedial regulations are to be result-oriented, risk-based and flexible. While unrestricted use remedial actions are to be preferred, the department may not disapprove restricted use or limited restricted use remedial actions as long as health risk and environmental standards are met.

**Presumptive Remedies.** A person can choose from a list of remedial actions deemed effective by NJDEP as a presumptive remedy, without obtaining further agency approval of the selection of that remedial methodology.

**Innovative Technologies.** Innovative technologies are to be encouraged through the use of various incentives such as 25% matching grants, the elimination of the requirement to post financial assurance and other regulatory changes.

**Task Forces.** A Brownfields Redevelopment Task Force to be made up of five representatives from State agencies and six public members, will be charged with preparing and updating an inventory of brownfield sites throughout the state. Additionally, the Task Force is to coordinate state policy on brownfields redevelopment and to actively market the sites for redevelopment.

A seven-member legislative study commission, to be known as the Legislative Underground Storage Tank Remediation Task Force, is to study the implications of implementing a risk-based corrective action program for

petroleum releases that allows for alternative remediation standards and natural attenuation.

**NJDEP Responsibilities.** NJDEP is required to investigate and map known areas of historic fill and to investigate and delineate the extent of contamination in the state's aquifers. This information will be made available to the public by entering it into the Geographic Information System. Persons performing remediations will be able to rely upon that information in their submissions to the department.

The agency's role is to be expanded to include coordination and facilitation of remediating the brownfield sites and communication of the risks posed by site remediations.

The new law has other aspects and nuances that could be significant in particular cases. Specific attention must be given individual situations to determine the potential applicability of various provisions. On balance, however, the Act represents a significant effort to provide incentives and motivation for the development of projects which might have previously been viewed as "untouchable." As a result, there may be enhanced lending opportunities for the New Jersey lending community.

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