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New York Law Journal

ENVIRONMENTAL LAW

Long-Term Stewardship Required For Contaminated Real Estate

September 14, 2023

In the 1980s, environmental agencies across the country, including the U.S. Environmental Protection Agency and the New York State Department of Environmental Conservation (NYSDEC), began to recognize that requiring owners and responsible parties to restore contaminated real estate to pristine condition was costly, time consuming and often unnecessary. Stringent environmental cleanup requirements were also driving development and jobs to pristine 'greenfields' while contributing to urban decay associated with contaminated 'brownfields.'

In response, cleanup programs evolved. As a result, under most federal and state programs, some contamination can now remain in place provided that residual contamination does not present an unacceptable risk.

The active investigation and remediation of polluted real property can take several years, while the monitoring and maintenance required when contamination is left behind continue for decades. In this article, we review New York's key requirements for long-term property stewardship when residual contamination remains in place.

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We also discuss some recently proposed NYSDEC guidance that will add a requirement to provide financial assurance to these long-term obligations.

Background

New York has a preference for remediation based upon permanent remedies. This preference for complete removal or treatment of impacted soil and contaminated groundwater is memorialized at 6 NYCRR §375-1.8(c) and can be found throughout various NYSDEC guidance and policy documents.

However, permanent remedies are not always possible. Because NYSDEC manages remediation using at least five different remedial programs based on separate and distinct enabling legislation, things can get a bit cumbersome. For example, when selecting a remedy for sites under its brownfields or environmental restoration programs, which aim to encourage redevelopment, NYSDEC considers land use at the site

and its surroundings to evaluate whether residual contamination would present unacceptable risks.

By contrast, the State Superfund, Spill Response Navigation Law and Resource Conservation and Recovery Act Corrective Action programs are aimed at abandoned inactive waste sites or illegal discharges, and these programs are generally intended to restore property to pre-disposal conditions.

Under these remedial programs, NYSDEC must conclude that complete cleanup is not technically feasible or cost effective before allowing residual contamination to remain. But at a minimum, any remedial action that proposes to leave residual contamination in place must be protective of public health and the environment.

When evaluating whether residual contamination should be permitted to remain in place, NYSDEC generally does not require responsible parties to conduct a formal risk assessment. Instead, remedial requirements are largely based upon cleanup goals that are expressed as soil cleanup objectives (SCOs).

Because SCOs are based upon assumptions about exposure, when NYSDEC decides to permit residual contamination to remain, it imposes binding restrictions.

SCOs are concentration-based limits for individual chemicals. The most stringent SCOs are 'unrestricted.' When property is cleaned to these levels, any lawful use is permitted. Less stringent 'restricted use' SCOs can only be approved if various conditions are satisfied. SCOs have been duly promulgated by rule and can be found at 6 NYCRR Subpart 375-6. These rules should be read in conjunction with CP-51, NYSDEC's Soil Cleanup Guidance.

SCOs are based upon a combination of two basic factors: whether the anticipated future use of the property will be restricted in ways likely to limit exposure to residual contamination, and whether risks to human health or protection of ecological resources are driving the need to clean up. Because SCOs are based upon assumptions about exposure, when NYSDEC decides to permit residual contamination to remain, it imposes binding restrictions. These restrictions 'run with the land' and are designed to ensure that future uses of the property are consistent with the assumptions used when SCOs are established.

These restrictions take the form of engineering and institutional controls. Engineering controls are physical barriers that contain or restrict the movement of contamination and must ensure the long-term effectiveness of a remedial action by eliminating potential exposure. Common engineering controls include pavement, caps, covers, vapor barriers, and water filtration devices on private water wells. By contrast, institutional controls are non-physical means of enforcing a restriction on the use of real property in a way that limits human or environmental exposure or restricts the use of groundwater.

Institutional controls also provide record notice to owners, prospective purchasers and the public that contamination remains in place. Institutional controls prevent interference with the engineering controls or use restrictions and support the exposure assumptions that permitted a non-permanent/restricted use remedy.

At some properties that were remediated under prior NYSDEC rules and guidance, environmental notices (informational documents filed in the public land records) and deed restrictions were acceptable institutional controls.

However, in 2004, the legislature amended Environmental Conservation Law §71-3601 and announced that "when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, or includes engineered structures that must be

maintained," then, with limited exceptions, NYSDEC is required to obtain an environmental easement (EE) before it can permit residual contamination to remain.

In New York, EEs establish use restrictions intended to ensure that future activities at the property are consistent with the engineering controls installed as part of the approved remedial action plan. The EE is enforceable by NYSDEC, and all subsequent deeds and conveyances must disclose that the property is subject to NYSDEC's rights and remedies.

Although the practice seems to constantly change, NYSDEC's present guidance (as described on its website) indicates that staff attorneys will prepare the EE based upon information supplied by the responsible party and its title company.

To ensure that future development approvals consider the engineering controls and residual contamination, the SMP must also be shared with local governments and future owners.

The EE must include a survey. Surveys are a common source of problems and when preparing a survey intended to support an EE, the current minimum requirements should be downloaded from NYSDEC's website and shared with the licensed surveyor.

Unfortunately, even strict compliance with the published survey requirements is no assurance that NYSDEC will approve the proposed EE because additional information may be required on a case-by-case basis.

Once the EE is signed by NYSDEC, the responsible party must record the EE. Upon filing the EE with the County Clerk or New York City Registrar, responsible parties must provide notice to all affected local governments. Copies of the filing receipt demonstrating that the EE has been recorded, along with proof of mailing to the local authorities, must be promptly filed with NYSDEC.

Engineering controls generally require inspection and maintenance to ensure that they remain effective. These obligations are memorialized in a detailed site management plan (SMP), which is prepared by the party performing the remediation and approved by NYSDEC. To ensure that future development approvals consider the engineering controls and residual contamination, the SMP must also be shared with local governments and future owners.

NYSDEC's Requirements for Engineering Controls and EEs

Over the years, NYSDEC, through its Division of Environmental Remediation (DER), has augmented the SCOs and its duly promulgated remediation regulations, found at 6 NYCRR Part 375, with a bewildering array of guidance documents that direct how responsible parties perform remediation. This guidance included Technical and Administrative Guidance Memorandums, the Spill Technology and Remediation Series, the Spill Prevention Operations Technology Series and the Spill Guidance Manual. NYSDEC has reportedly embarked upon an effort to update and replace these various guidance documents with a single set of numbered DER guidance documents.

Of course, remedial parties should consult the entire series of issued guidance found on DER's webpage, but when considering the use of engineering and institutional controls, it is especially important to be familiar with DER-10: Technical Guidance for Site Investigation and Remediation and DER-33: Institutional Controls – A Guide to Drafting and Recording Institutional Controls.

In addition to these formal guidance documents, NYSDEC posts on its website various checklists and templates for key documents including forms that apply to SMPs and templates for EEs. It is essential to use the most up-to-date forms and checklists for two reasons.

First, NYSDEC technical staff and legal advisors expect strict adherence to the model language and other detailed instructions found in this material. Even seemingly minor deviations can result in documents being rejected. Indeed, DER-33 includes the warning that: "[a]ny proposed modifications to [institutional controls] will require additional time to review, process and approve. Accordingly, the remedial party should evaluate the importance of such changes in conjunction with any timing concerns."

Second, whenever engineering controls are used as part of a remediation project, all of the supporting institutional controls, including, at a minimum, the SMP and EE, must be approved before NYSDEC will review any final engineering reports documenting the remediation. NYSDEC will not issue final approvals—called certificates of completion—until all the applicable requirements for engineering controls, SMPs and EEs are completed and in place.

From time to time, it might be necessary or appropriate to replace, modify or extinguish EEs due to changes in property conditions, or changes in the engineering or institutional controls. The site-specific SMP governs such modifications or EE termination. If NYSDEC approves modifying or terminating an EE, notice is required to local governments.

Impending Requirement for Financial Assurance

On July 26, 2023, NYSDEC published notice that it was "seeking public comment on a proposed new program policy, DER-41 / Financial Assurance Guidance for Sites in the State Superfund Program and Brownfield Cleanup Program." This newly proposed financial assurance (FA) guidance is intended to ensure that funds are available to perform operation, maintenance and monitoring of institutional and engineering controls required by the SMP or some similar oversight document if the responsible party no longer has the financial capability to perform due to insolvency or dissolution.

6 NYCRR §375-1.11(c) presently authorizes NYSDEC to require FA "as a condition of accepting an institutional or engineering controls." NYSDEC has seldom done so except when required by a federally delegated program.

This will change if DER-41 is finalized. Under proposed DER-41, FA "will be required" whenever the present net worth of the operation, maintenance and monitoring of institutional and engineering controls exceeds $3 million or if the engineering controls are intended to remain in place for more than 10 years. Considering that permanent improvements, such as parking lots and landscaped surfaces, are routinely incorporated into engineering controls, FA is likely to be required in most cases once DER-41 is finalized.

The amount of FA is set by NYSDEC based upon the estimated cost to monitor and maintain the engineering and institutional controls. These costs include obvious remedial actions—such as operation of soil vapor extraction systems—and activities that might seem like routine property maintenance like mowing grass or repairing a parking lot incorporated into a soil cap.

Under its present regulations, NYSDEC authorizes five alternatives for satisfying FA requirements: a fully funded trust; a surety bond; an evergreen standby letter of credit; an environmental insurance policy or a self-guarantee based upon the net worth of the responsible party. DER-41 as proposed does not allow self-guarantees.

DEC is accepting comments on this new proposed policy until Oct. 12, 2023. It is presently unclear when this new policy might become effective.