

Historic Fill Material – Is it a discharge?

By: Mark Pietrucha, P.E., LSRP, Woodard & Curran, Inc.

On September 9, 2016, the New Jersey Department of Environmental Protection (the Department) sent an email entitled Subject "Clarification of the Remediation Requirements for Historic Fill" to Site Remediation Program Listserv recipients. The Department communicated that the email is intended to provide guidance to recipients with respect to statutory requirements for historic fill and to identify the remedial requirements when historic fill is encountered. The Department's email indicated the following.

As currently defined in statute, historic fill meets the definition of a discharge within the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11) and therefore requires remediation. The Brownfield and Contaminated Sites Act (N.J.S.A. 58:10B-1 et seq.) provides a rebuttable presumption that the Department shall not require any person to remove or treat historic fill in order to comply with applicable health risk or environmental standards in 58:10B-12h but it does not alter the requirement to remediate. In these areas engineering and institutional controls are designed to prevent exposure to humans. The Site Remediation Reform Act (N.J.S.A. 58:10C-1 et seq.) exempts reporting historic fill to the Department's Hotline at N.J.S.A. 58:10C-16k but it also does not alter the requirement to remediate.

Irrespective of whether the confirmed presence of historic fill is reported to the Department's hotline in accordance with the Site Remediation Reform Act, remediation is required in compliance with N.J.A.C. 7:26C-2.3.

This whitepaper is intended to provide additional references to aid Responsible Parties (RPs), Persons Responsible for Conducting Remediation (PRCRs), Licensed Site Remediation Professionals (LSRPs) and others in their decision making with regard to remediation needs for historic fill. The information and conclusions in this whitepaper are those of the author and do not necessarily represent the views or opinions of, nor are they endorsed by, the LSRPA. This information is provided for educational and informational purposes only, and LSRPs or other readers should consult with legal counsel and/or other risk management professionals regarding this information and how it might apply to their particular situation.

What is Historic Fill Material?

The Department defines historic fill material in the Technical Requirements for Site Remediation (N.J.A.C. 7:26E) as follows.

"Historic fill material" means non-indigenous material, deposited to raise the topographic elevation of the site, which was contaminated prior to emplacement, and is in no way connected with the operations at the location of emplacement and which includes, without limitation, construction debris, dredge spoils, incinerator residue, demolition debris, fly ash, or nonhazardous solid waste. Historic fill material does not include any material that is substantially chromate chemical production waste or any other chemical production waste or waste from processing of metal or mineral ores, residues, slag or tailings. In addition, historic fill material does not include a municipal solid waste landfill site.

Remediating parties are often faced with remediating historic fill material areas of concern (AOCs). Historic fill material is often identified during or after investigations of other AOCs that may be co-located within historic fill material areas.

How is Historic Fill Material Assessed, Investigated and Remediated?

The Department has published a guidance document, which provides recommendations for assessment, investigation and remediation of historic fill material – Historic Fill Material Technical Guidance (http://www.nj.gov/dep/srp/guidance/srra/historic_fill_guidance.pdf).

N.J.A.C. 7:26E-3.12 and N.J.A.C. 7:26E-4.7 specify the requirements for site investigation and remedial investigation of historic fill, respectively. N.J.A.C. 7:26E-3.12(a) indicates “If historic fill material is suspected to be present at a site, then the person responsible for conducting the remediation who is subject to N.J.A.C. 7:26E-3.3(b) shall determine whether historic fill material is present.” N.J.A.C. 7:26E-4.7(a) indicates “The person responsible for conducting the remediation shall conduct a remedial investigation of historic fill material by: 1. Determining the horizontal and vertical extent of the historic fill material to the boundary of the property being investigated; and 2. Characterizing the fill material by identifying the physical characteristics of the historic fill material.” In addition, N.J.A.C. 7:26E-4.7(b) indicates “The person responsible for conducting the remediation shall establish the extent of ground water contamination from the historic fill material.”

N.J.A.C. 7:26E-5.4 specifies the remedial action requirements for historic fill material. The Department’s prescribed remedy for “soil contamination associated with historic material” is “the establishment of engineering and institutional controls pursuant to N.J.A.C. 7:26C-7” (Administrative Requirements for the Remediation of Contaminated Sites Rules). The Department emphasizes the prescribed remedy by indicating that there is a “rebuttable presumption” that engineering and institutional controls will be implemented for historic fill material pursuant to the Brownfield and Contaminated Site Remediation Act (N.J.S.A. 5:10B-12h).

While the Historic Fill Material Technical Guidance remains silent on the need for ecological evaluation of historic fill material, the Department’s Ecological Evaluation Technical Guidance (http://www.nj.gov/dep/srp/guidance/srra/ecological_evaluation.pdf) suggests that historic fill contaminants “should be investigated and evaluated for impacts to ecological receptors” “when an environmentally sensitive natural resource (ESNR) is located within historic fill or impacted by historic fill.” The Department’s Ecological Evaluation Technical Guidance further indicates, “if the historic fill determined to be regional, remedial investigation of ecological receptors is not required beyond the property boundary.”

What are the statutory requirements for notifying the Department of the presence of historic fill?

The Site Remediation Reform Act (58:10C-16) indicates that LSRPs are required to notify PRCRs and the Department when discharges are identified on contaminated sites for which the LSRP is responsible; however, the statutory language specifically excludes historic fill conditions from this requirement.

k. If a licensed site remediation professional obtains specific knowledge that a discharge has occurred on a contaminated site for which he is responsible, the licensed site remediation professional shall: (1) notify the person responsible for conducting the remediation of the existence of the discharge; and (2) notify the department of the discharge by calling the department's telephone hotline. The person responsible for conducting the remediation shall also be responsible for notifying the department of the existence of the discharge. The provisions of this subsection shall not apply to a discharge that may be a result of the existence of historic fill material.

When is a remediating party required to remediate?

The Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) Rules (N.J.A.C. 7:26C) indicate remediating parties are required to remediate when the following conditions apply.

7:26C-2.2 Criteria for determining when a person is required to remediate a site

(a) Unless exempted pursuant to N.J.A.C. 7:26C-1.4(c) or (d), a person shall remediate a site in accordance with this chapter when:

- 1. The person discharges a hazardous substance or otherwise becomes in any way responsible pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10.23-11g for a discharge;*
- 2. The owner or operator of a regulated underground storage tank:*

- i. Determines there has been a discharge or suspects there has been a discharge from the regulated underground storage tank, pursuant to N.J.A.C. 7:14B-7.2; or*
- ii. Undertakes closure of a regulated underground storage tank pursuant to N.J.A.C. 7:14B-8.1(b)6, 9.1(d) and 9.2(a)2; or*
- iii. Is required to conduct an unknown source investigation pursuant to N.J.A.C. 7:14B-7.4;*
- 3. Any of the events described in the Industrial Site Recovery Act Rules at N.J.A.C. 7:26B-3.2(a) occurs;*
- 4. The person discovers a discharge on property that person owns;*
- 5. A no further action letter is rescinded or a response action outcome is invalidated;*
- 6. The Department determines that additional remediation is necessary after the Department has issued a remedial action permit for a remedial action; or*
- 7. The person has executed or is otherwise subject to a judicial or administrative order, a judicial consent judgment, an administrative consent order, a memorandum of understanding, a remediation agreement, or any other oversight document for the remediation of a contaminated site.*

Scope of Remediation and Final Remediation Documents

N.J.A.C. 7:26C indicates that the scope of remediation for which a LSRP issues a Final Remediation Document (aka Response Action Outcome [RAO]) is limited to the scope of the remediation addressed in that document.

7:26C-6.5 Scope of final remediation document and covenant not to sue

(a) The scope of a final remediation document is limited by the scope of the remediation addressed in that document. Likewise, the scope of a covenant not to sue that accompanies a final remediation document is also limited by the scope of the remediation addressed in the final remediation document.

This regulatory citation suggests and NJDEP Guidance for Issuance RAOs (http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf) indicates that the scope of remediation can be entire site or AOC specific. The Department's RAO guidance includes the following language for a RAO notice when an AOC specific RAO is issued and historic fill has been identified at the site, but has not been remediated.

Known On-site Contamination Source Not Remediated – Historic Fill (Area of Concern RAO)

Please be advised that this Response Action Outcome does not include the remediation of contamination in the form of historic fill. In the event that an Entire Site RAO is to be issued, the historic fill must be remediated in accordance with N.J.A.C. 7:26E.

What is a discharge?

The Department defines a discharge in N.J.A.C. 7:26E as follows.

"Discharge" means any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of a hazardous substance, hazardous waste or pollutant into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters, or natural resources within the jurisdiction of the State.

This definition of a discharge is consistent with the definition of a discharge in N.J.S.A. 58:10-23.11.

What do New Jersey courts say about responsibility for discharges?

In its summary of NJDEP v. Ofra Dimant (<https://njlaw.rutgers.edu/collections/courts/supreme/a-2-11.opn.html>), the New Jersey Supreme Court indicates the following in the context of responsibility for discharges.

To obtain damages under the Spill Act, the DEP must demonstrate, by a preponderance of the evidence, a reasonable connection between the discharge, the discharger, and the contamination at the damaged site.
And...

The purpose of the Spill Act is “to provide liability for damage sustained within this State as a result of any discharge of” hazardous substances. N.J.S.A. 58:10-23.11a. One who is “in any way responsible for any hazardous substance” is strictly liable, upon its discharge, for “all cleanup and removal costs no matter by whom incurred.” N.J.S.A. 58:10-23.11g(c)(1). The phrase “in any way responsible” was added when the Legislature amended the Act to expand liability to a broader class of responsible parties and include those who had some control over the direct discharger in each matter. Cases discussing that phrase underscore that it requires some connection that ties the discharger to the discharge alleged to be a culprit in the environmental contamination in issue.

Further...

The Spill Act strictly prohibits the discharge of hazardous substances, N.J.S.A. 58:10-23.11c, and defines a “discharge” as

any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of hazardous substances into the waters or onto the lands of the State, or into waters outside the jurisdiction of the State when damage may result to the lands, waters or natural resources within the jurisdiction of the State . . . [N.J.S.A. 58:10-23.11b.]

*By covering acts and omissions, and by including many verbs describing the manner in which a hazardous substance might reach land or water, the category of what constitutes a “discharge” is self-evidently broad. Decisional law has delimited the outer contours of a discharge only to some degree. See, e.g., *White Oak Funding, Inc. v. Winning*, 341 N.J. Super. 294, 299 (App. Div.) (holding that discharge did not occur when hazardous substance, already present in water or soil, merely migrates through that medium).*

In its summary of *White Oak Funding v. George Winning* (<https://njlw.rutgers.edu/collections/courts/appellate/a5530-99.opn.html>), the New Jersey Appellate Division indicates the following in the context of responsibility for existing conditions.

*New Jersey courts have consistently interpreted the definition of “discharge” to exclude the migration of hazardous substances already present in the soil or in groundwaters. See *J.T. Baker Co., supra*, 234 N.J. Super. at 240; *State, Dep’t of Env’tl. Prot. v. Arky’s Auto Sales*, 224 N.J. Super. 200, 207 (App. Div. 1988); *Township of South Orange Village v. Hunt*, 210 N.J. Super. 407, 417-19 (App. Div. 1986); *Atlantic City Mun. Utils. Auth. v. Hunt*, 210 N.J. Super. 76, 96-100 (App. Div. 1986). In *Atlantic City Mun. Utils. Auth.*, for example, we stated:*

the Legislature did not intend either that contamination be considered a discharge or that, if a discharge occurred before the Act but the effects continued after, the effects were covered under the Act for all purposes. We also conclude that a discharge is some action resulting in an environmental effect caused by an interaction with the environment. Contamination is not such an action but it is the result.

Conclusion

There is conflicting information presented in New Jersey case law, guidance, regulations and statutes when it comes to assessment, investigation and remediation of historic fill. New Jersey case law suggests that identification of a historic fill condition alone may not meet the criteria for determining when a person is required to remediate (N.J.A.C. 7:26C-2.2(a)1). In fact, the requirement for remediation of historic fill is dictated by the scope of the remediation itself. If the PRCR’s scope of remediation is entire site and a historic fill AOC is identified, then remediation of the historic fill AOC is required. If the PRCR’s scope of remediation is AOC specific, a separate historic fill AOC is identified, and the

PRCR does not remediate the historic fill AOC, then the “Known On-site Contamination Source Not Remediated – Historic Fill (Area of Concern RAO)” can be utilized in the AOC specific RAO document once remediation of the initial AOC is complete.

In light of the LSRPs highest priority (N.J.S.A. 58:10C-16a - Protection of public health, safety, environment highest priority), when remediating sites, considerations should be given to remediation of historic fill AOCs when they are identified. This is true even if the PRCR may not have responsibility to report the historic fill condition or be responsible for the historic fill pursuant to the Spill Compensation and Control Act.