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## ENVIRONMENTAL LAW

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### Compliance Checkup

The financial assurance requirements of nonpermanent remedies

Recent news media reports have caused some to criticize nonpermanent site cleanups generally. Such cleanups most often involve a soil or asphalt cap and recordation of a deed notice. Kiddie Kollege, Ultimate Scholar day care, Martin Luther King/Jefferson School, Mercer Rubber and other such sites are discussed elsewhere, including by this author, "The Brownfield Priority," 186 N.J.L.J. 918, Dec. 4, 2006. In testimony before the State Senate Environment Committee, during which she defended the use of nonpermanent remedies, New Jersey Department of Environmental Protection Commissioner Lisa Jackson said the use of a cap and a deed notice had become so prevalent that a slang term of art has been developed: "pave and waves."

Pave and wave is unquestionably better than the alternative, which most often is simply the "wave" as the site remains a dormant eyesore overgrown with weeds, attracting trespassers and midnight dumping, and not contributing to employment or ratable tax rolls.

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Further, current federal and state rules governing financial assurance requirements are more than adequate, including coverage for nonpermanent remedies. They can not, and should not, be changed to increase financial requirements in the name of discouraging nonpermanent remedies. Lastly, this article encourages those, who are responsible for financial assurance and other requirements of nonpermanent remedies, to check up on their compliance status before it is too late to avoid a penalty.

What is considered a permanent remedy and what is considered a nonpermanent remedy? Permanent remedies remove all contamination in the air, water and soil. An example for soils is excavation and removal of soils for disposal at a landfill. This is always the most expensive option and it is almost always cost-prohibitive. Other disadvantages include dirt and dust from digging, truck traffic and air quality impacts, and use of already scarce space in landfills. An advantage is that it does not require future onsite land use controls, e.g., caps or deed notices. Nonpermanent remedies leave some contaminants on-site either temporarily or permanently and may require land use controls, including engineering controls (e.g., clean soil or asphalt cap) or institutional controls (e.g., deed notice).

Existing federal and New Jersey requirements for financial assurance or "remediation funding source" are adequate. Existing statutes and department

rules already provide that anyone required to conduct remediation establish a remediation funding source, including costs of monitoring and maintaining all necessary engineering and institutional controls. N.J.S.A. 58:10B-3, and N.J.A.C. 7:26C-7.2. A DEP or court order is required first. The funding source then ensures that funds will be available in the future for these purposes. The funding source can be by a trust fund, insurance policy, line of credit agreement, self-guarantee, or a loan or grant in accordance with the rules. The federal RCRA rules permit a trust agreement, surety bond, letter of credit, insurance certificate or corporate guarantee with a financial test.

Violations pertaining to financial assurance under New Jersey grace period rules are listed as high as \$5,000/day. Violations of federal requirements under CERCLA or RCRA carry penalties of up to \$32,500/day (\$97,500/day for subsequent violations).

What about increasing or adding financial assurance requirements to discourage pave and wave? Department of Environmental Protection has met with the banking and insurance industry to discuss financial assurance products that would be available for, but discourage use of, nonpermanent remedies. Also, certain state legislators are evaluating efforts towards increasing financial assurance requirements to discourage pave and wave.

However, as described herein, existing federal and state laws and rules already require posting of financial assurance to cover all remediation costs, including the costs of maintaining non-

permanent remedies. Further, none of the risks presented at any sites recently reported in the media would have been prevented or mitigated by increased financial assurance requirements. None of those sites involved inadequate financial assurance. If increased financial requirements had been imposed to make a nonpermanent remedy as expensive as a permanent remedy (include digging up and hauling away materials to meet the most stringent standards), the sites would very possibly be vacant and abandoned with every cubic yard of contamination still in place and no engineering or institutional controls.

Given increased attention on nonpermanent remedies and financial assurance, parties should confirm their compliance with existing financial assurance, and other nonpermanent remedy, requirements. Violations can result in significant penalties. Before any of the recent New Jersey media reports, the EPA's Office of Enforcement and Compliance Assistance made financial responsibility a national priority for 2006 through 2007. This enforcement priority resulted from studies in 2005 by the USEPA's Office of Inspector General and the U.S. Government Accountability Office finding. The GAO acknowledged that institutional controls can be critical to a cleanup and long-term protection, but concluded that EPA has done little to ensure that businesses comply with existing financial assurance requirements in cleanup agreements and orders pursuant to federal laws such as Superfund. Accordingly, EPA currently has in place programs to target those required to post and maintain financial assurance pursuant to CERCLA, RCRA and TSCA. EPA is also providing states with tools, guidance and training to enforce state financial assurance requirements.

Requirements for most site cleanup financial assurance, whether federal or state imposed, will often be defined in the applicable order(s) for the site. Common pitfalls result from the failure to follow these requirements.

*Calendar.* New Jersey rules require, for example, in ISRA cases, that the financial assurance instrument be provided within 14 days of DEP's approval of a remedial action workplan or execution of a remediation agreement.

Otherwise, New Jersey rules require that the instrument be submitted with the executed administrative consent order or as otherwise provided in an administrative or judicial order or settlement. In the confusion of negotiating and signing an order, do not overlook financial assurance requirements, and build in lead time for the bank or insurance company. Do not rely on the government agency for a prompt reminder without possible penalties.

*Language.* Each type of instrument — trust fund, letter of credit, etc. — must contain the precise language required by the applicable rules, e.g., 40 C.F.R. 264.151. Invariably the bank or insurance company, who issues the instrument, will request changes in the language. Do not accept changes because submitting instruments without the exact specified language is a violation. Do not rely on the regulator to promptly point out the deficiency with no penalty.

*Requirements of the instrument.* Meet them and maintain compliance. For example, a corporate self-guarantee requires reporting, certification and maintenance of certain financial criteria. Do not report information that does not meet the requirements and expect the regulator to let you know. Years may go by before a deficiency is noticed, meaning the violation may have existed for as long.

*Addresses.* Update addresses with the bank or insurance company and with the regulator. For example, a letter of credit as per 40 C.F.R. 263.151 may be terminated by the bank upon 120 days notice to the regulator and responsible party. If the bank has an old address for the regulator and/or responsible party, it can terminate the letter of credit and the regulator or responsible party would not know. In such a case, the penalty is assessed on the responsible party, not on the bank.

*Updates.* Often an order will require providing the regulator with updated, e.g., yearly, remediation cost estimates, and it may also require periodically updating the amount of financial assurance to be consistent with those estimates. Do not rely on the regulator to request the updated cost information.

*Surcharges.* Often there is a yearly surcharge payable to the regulator, as

well as fees to be paid to the bank or insurance company, to maintain financial assurance. Failure to pay the surcharge is a violation, and failure to pay the bank or insurance company fees can result in termination of the instrument and resulting penalties for failing to maintain it.

*Caps and deed notices.* NJDEP rules require as-builts for any engineering control (e.g., cap) to be submitted with the Remedial Action Report. Likewise, the deed notice must include as-builts for any engineering controls. If the site is being redeveloped, as-builts will not be available until after project completion. The deed notice must be approved by NJDEP prior to recording and must be timely recorded, and, within 45 days of such approval, a "filed" copy of the deed notice must be provided to NJDEP, municipal clerk, municipal and county health offices, each gas, electric, water, sewer and cable company that services the site, the Pinelands Commission if applicable and anyone else who requests a copy.

Engineering controls must be maintained and deed restrictions must be obeyed, and NJDEP requires a biennial certification in these respects. NJDEP must be notified of any breach of an engineering control, and there are specific procedures in the event of an emergency, for example when a utility company requires underground access for repairs. Compliance with these requirements to safely address an emergency in the presence of engineering controls can complicate and delay such responses, which should always be a consideration. If the property is conveyed, subsequent owners must understand and abide as well.

Increased attention is being paid to nonpermanent remedies, including associated financial assurance requirements. There is no need to amend financial assurance laws or regulations to discourage nonpermanent remedies. USEPA and USGAO have found that increased enforcement of existing laws and rules may be needed, and USEPA has designated financial assurance as an enforcement priority. Thus, those responsible for engineering controls, institutional controls, or financial assurance should make sure that they are in compliance. ■