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COMMENTARY

It's Unwise, Unlawful To End Exemption For Minor Hazardous-Substance Uses

By Daniel Schmutter

The New Jersey Department of Environmental Protection has proposed adoption of a new regulation that would effectively eliminate a longstanding investigation and cleanup exemption for minor uses of hazardous substances.

The agency's proposed elimination of the "de minimis quantity exemption" under certain circumstances is unsupported by any underlying legislation, and may inadvertently damage certain small businesses throughout the state.

In 1983, New Jersey made history by becoming the first state to impose transaction-triggered regulations regarding the investigation and cleanup of industrial properties by enacting the Environmental Cleanup Responsibility Act, ECRA. The requirement under ECRA to investigate and clean up an industrial site was triggered by, among other events, the sale of a business or a cessation of its operations. The requirement was and still is independent of whether that business actually caused contamination in the first place.

For years, ECRA was criticized for being overly harsh and for impeding the state's ability to attract new business. And so, a decade later, the New Jersey Legislature passed a major reform to supplant ECRA, the Industrial Site Recovery Act, ISRA.

An important change under ISRA was the establishment of a formal exemption procedure for businesses that are technically considered "industrial" but that use little in the way of hazardous substances in their day-to-day operations. Businesses able to show a "de minimis" quantity of hazardous substance use or storage (such as routine cleaning materials) were now potentially exempt from ISRA's costly requirements for investigating and cleaning up contaminated property due to a transaction-triggered event.

Since 1993, the exemption has proven to be important for small businesses that may have technically fallen within the scope of ISRA, but because of the exemption were not compelled to proceed through costly ISRA environmental audits and cleanups, potentially triggered by as little as a bottle of bleach in a bathroom storage closet. The exemption was a fair and sensible means to protect certain businesses from an otherwise inequitable result and, accordingly, it would seem unlikely that anyone would want to turn the clock back to pre-ISRA days.

Still, last November, as part of a package of interim regulations ostensibly promulgated pursuant to the Site Remediation Reform Act, SRRA, the DEP implemented a rule (not subject to public comment) that eliminated the exemption for any property known to be contaminated, no matter by whom, and no matter whether the wrongdoer predated the current owner or operator.

In May of this year, the DEP moved to make this new regulation permanent, even though it is not authorized by SRRA, ISRA or any other existing legislation. In so doing, the agency has potentially placed owners and operators of many small industrial businesses in jeopardy. Consider, for example, a small industrial business with no history of spilling hazardous substances. Under the new regulation, if contamination from a prior operator were found at the property, an ISRA trigger would mean that the current business would now be obligated to assume the expense of cleaning up what could be massive contamination.

From an economic standpoint, although New Jersey can still lay claim to a substantial number of manufacturing jobs, the fact remains that ISRA-subject industry sectors such as plastics and rubber manufacturing and printing and paper manufacturing have suffered a steady decline in employment in recent years. Hundreds of companies remaining in New Jersey are potentially subject to ISRA, and for those businesses that would qualify for the exemption when facing an ISRA-triggering event, the DEP's proposed regulation could have a devastating impact. The proposed rule change would upset the Legislature's balanc-

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ing of equities in this scenario by imposing a set of regulations the Legislature has not authorized.

In difficult economic times such as these, it is unwise to create public policy that both runs contrary to existing legislation and makes it more difficult to attract businesses to New Jersey. Regulating outside the scope of agency authority is incorrect under the law, but in this instance it is also unwise economics. ■