

The Practical Aspects of Reporting An Environmental Spill

By Stephen E. Fauer

January 17, 2013

www.asksa.com

732-469-8888



Periodically I get a call from someone who admits that a spill occurred on a property but that nothing was done about it when it actually happened. It's not unusual; after all, sometimes it's just easier to ignore a problem than deal with it at the time. (Note: The NJDEP refers to "incidents" not spills. Spills are merely one form of incident and henceforth in this essay I will use the word "incident". Incident is defined below.)

This article briefly addresses what the law requires and more important, from a consultant's point of view, the practical aspects of dealing with incidents. What should you do immediately upon discovering an incident? What should you do if after ignoring an incident you wish to the address it now? And what should a prospective purchaser of a property (commercial, industrial, or residential) do prior to closing on a deal?

Note: While this essay contains some legal information, nothing contained herein is intended to represent legal advice. Readers must seek the advice of their own attorneys for definitive interpretations how this information pertains to their particular situations.

The Law

Every state has laws regarding how and when to report an environmental incident. Penalties may be imposed for failure to report an incident. In New Jersey, this is contained within N.J.S.A. 58:10-23.11: Spill Compensation and Control Act" (henceforth referred to as the "Spill Act"). The mere act of discovering an incident triggers an affirmative (i.e., mandatory) obligation to report.

What Constitutes An Incident?

What is a reportable incident? A reportable incident is the release into soil, surface water, or ground water of a hazardous substance. A hazardous substance is any of a large variety of petroleum compounds or chemicals cited on various lists published by the Federal Environmental Protection Agency (EPA). An incident can be either the result of an immediate release or it can be the mere discovery of an impact. And it can involve any amount of a

hazardous substance. Literally the minutest amount of a substance can trigger an incident and a reporting obligation.

When does an incident occur? For some people an incident conjures an image of a 55-gallon drum of “dimethyl-death” getting impaled by the tine of a forklift at a chemical company. Other people think of a vehicular accident involving a tank truck filled with gasoline, while others may think of a leaking petroleum-filled underground storage tank. ESA has seen many construction projects, for example, grind to a halt when an unforeseen hazardous substance is unearthed while excavating. Each of these is good examples of reportable incidents. But an incident can be far more subtle. For example, what if your consultant took a soil sample from your property that revealed concentrations of a hazardous substance above actionable levels; is that a reportable incident? Yes, indeed.

Interestingly, most incidents that involve a building’s interior are not reportable. For example two common substances, mold and radon, are not reportable under the Spill Act because neither meets the definition of a reportable substance within the Spill Act. But what if a 55-gallon drum containing a noxious, hazardous (and reportable) substance spills within a building? As long as this noxious and hazardous substance does not impact the soil or groundwater, it is not a reportable spill under the Spill Act.

Who Is Responsible to Report and Address An Incident?

Literally anyone who lives or works in New Jersey is obligated to report a spill. In short this includes all owners, operators, AND homeowners. This affirmative obligation to report and remediate incidents is stated within the Site Remediation Reform Act (SRRA), as follows. Specifically, “An owner or operator of an industrial establishment subject to the provisions of P.L.1983, c.330 (C.13:1K-6 *et al.*), the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the provisions of subsection c. of section 8 of P.L.1976, c.141 (C.58:10-23.11g), or the owner or operator of an underground storage tank regulated pursuant to the provisions of P.L.1986, c.102 (C.58:10A-21 *et seq.*), that has discharged a hazardous substance, shall remediate the discharge of a hazardous substance.”

Incidents should be called into the NJDEP Spill Hotline (1-877-WARNDEP, or 1-877-927-6337). This line is staffed 24/7 and they receive close to 50,000 telephone calls each year. After an incident is reported to the NJDEP (or in other states), in most cases, the state does nothing other than to issue the caller a spill incident number. This is because the incident does not require any immediate state attention or involvement. Furthermore your affirmative obligation to act exists via law. The state will respond with personnel if they believe the spill is an imminent threat to the environment or people on a larger or more impactful scale. If you are unsure of how to call the spill hotline, ask your environmental consultant for their advice on what to say when placing the call. Alternatively you can simply ask your consultant to place the

call on your behalf. The state is always assuaged when they think a consultant is on the case from its inception.

The Environmental Consultant's Perspective

I have long said that ESA is not the “enviro-police”. ESA’s job has always been to counsel clients by providing our best advice. However, not every client chooses to follow our advice. And historically ESA has not been obligated to report or enforce incidents with one exception. Because ESA is certified by NJDEP for subsurface closure and evaluation, if ESA is privy to an incident arising from a regulated underground storage tank we must advise our clients that if they do not report the incident, we will.

The obligation of a consultant to report incidents has increased slightly due to the SRRA. Licensed Site Remediation Professionals (LSRPs) have an affirmative responsibility to report anything that meets the definition of an Immediate Environmental Concern. An IEC is a condition at a contaminated site where people are exposed to contamination at levels that exceed applicable screening levels or standards. This is one of the reasons that you should NOT engage a LSRP unless and until you are certain of moving forward with a remedial project. This last piece of advice applies especially to people who are hoping to purchase a property: during the due diligence phase your consultant should not be a LSRP.

What should you do when buying a piece of property? This advice is for all those who purchase property, be it residential, industrial, or commercial. You must perform due diligence prior to closing! The nature and form of due diligence may certainly vary depending upon the nature of the property, but the end-result is nonetheless the same: are there potential areas of environmental concern that warrant further inquiry? If you close on the property and an unidentified incident should be found after closing, YOU become the responsible party! (Can you still sue the prior owner for failure to disclose? Sure. But who wants to engage in an otherwise preventable litigation?) And depending upon the nature of the incident your financial liability can easily run in the hundreds of thousands of dollars. Therefore the time to protect you from this preventable financial calamity is prior to closing!

What if you have known about an incident for many years on a property you already own but have taken no action? Technically you are in violation of the Spill Act and theoretically you are at risk for fines. NJDEP encourages the regulated community to voluntarily step forward and begin the remedial process. NJDEP does not ask as a matter of course, “When did you first learn of this incident?”

So aside from the obvious benefit of complying with the law, why should you address an incident proactively? The answer is part speculative, part tangible, and part strategic. Let’s deal with speculation first.

Prices for environmental services tend to escalate over time. Thus it is almost always true that prices to undertake environmental compliance services today are less expensive than they will be in the future. While exceptions do occur, this rule is fairly solid. In addition, today's dollars are worth more than tomorrow's dollars. So if you have the money, address your environmental incident now.

You may have insurance coverage that is, in part, contingent both upon properly reporting the incident in accordance with the law and with promptly reporting the incident to your insurance company. It happens that ESA is currently working with a homeowner who lost several hundred gallons of fuel oil from an aboveground storage tank sometime between March and October 2001. The incident was reported to NJDEP, but nothing was ever done. The homeowner did not file an insurance claim because she assumed this loss was not covered. Further, she was told—erroneously—that because there were no signs of petroleum (nothing was visible nor was there an odor) she had no problem. Ironically, even though her policy lacked a pollution rider, she may have had coverage because the oil impacted the shallow groundwater. The state owns groundwater, not us. Therefore groundwater impacts are considered third-party claims and are thus covered by many contemporaneous insurance policies. But she did not file the claim until 2012. The insurance company denied her coverage because of failure to report the claim in a timely fashion. At ESA's urging the client retained an environmental attorney who specializes in insurance claims. Efforts to get her coverage are still ongoing as of this date. But make no mistake: the likelihood of coverage would have been dramatically higher had she filed the claim 12 years ago!

On rare occasions a property owner may find that someone has “midnight-dumped” drums on their property. If this happens to you, here is EXACTLY what you should do. First, do not touch the drums. Nor should you have a consultant touch the drums. Second, call the state and report a dumping incident on your property. Tell the state that drums have been dumped on your property, you do not know what they contain, and you are concerned for the safety and welfare of your employees, family, and neighbors! The state will respond immediately and remove the drums at their own cost and expense. Furthermore, you should also notify your insurance carrier of the incident in case your policy covers such situations. As stated above regarding insurance, always assume that you have coverage.

Environmental laws are written to protect the environment for the benefit of all citizens. And so it is with the Spill Act. The state created a mechanism to address incidents and compel responsible parties to pay for the work. And as with all environmental topics, there is much more to be taken into consideration. Feel free to contact me at 732-469-8888 x201 with your questions or, if it makes more sense, call your attorney. But in any case, be well-informed!