

Beware of Dirty Dirt: New Jersey Enacts Stringent Licensing Requirements for Soil and Recycle Fill Providers; Providers of Soil and Fill Recycling Services Must Register with the DEP by April 20, 2020 for a Temporary License

Client Alert

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Nearly a decade has passed since the New Jersey State Commission of Investigation (SCI) first reported on soil and fill providers circumventing New Jersey state laws restricting the use of recycled soil and fill materials. As a result of the SCI's ongoing investigations, Governor Phil Murphy, on January 21, 2020, signed new legislation (S1683) requiring persons or business concerns engaged in the provision of "soil and fill recycling services" to secure licenses from the New Jersey Department of Environmental Protection (DEP).

Builders, developers and homeowners that are involved in the removal of soil and debris, or are the recipients of soil and fill materials, need to be careful to ensure that they do not engage unlicensed contractors or otherwise run afoul of the new law, which is targeted at the prevention of unlawful dumping of contaminated soil and debris, often referred to as "dirty dirt." The law expands New Jersey's long-standing A-901 solid waste licensing law by imposing new registration, licensing, and extensive background check requirements on all persons or businesses providing "soil and fill recycling services."

State Commission of Investigation Reports Regarding "Dirty Dirt" Practices

The new law has its origin in a 2011 SCI report finding that the unlawful dumping of contaminated soil and debris under the façade of recycled materials was widespread. The SCI issued subsequent reports in 2017 and 2019 setting forth details of various unlawful "dirty dirt" dumping schemes perpetuated throughout the state, in some instances with the tacit involvement of property owners and in other instances where dishonest dirty dirt brokers fraudulently mis-represented the origin, composition and destination of fill and soil being transported.

The SCI's 2017 report, captioned "The Corrupt Recycling of Contaminated Soil and Debris," concluded that despite successful efforts by the state to root out unscrupulous elements from the solid waste industry, "the industry remains vulnerable to subversion because recycling was never included in the A-901 licensing and

regulatory framework." The 2017 report cautioned that the participants in dirty dirt schemes "profit from a dangerous commerce in contaminated materials covertly dumped by the truckload into a chaos of inappropriate and unregulated venues that, as a consequence, have been rendered serious environmental and public-health threats."

In its June 2019 follow-up report captioned, "DIRTY DIRT II: Bogus Recycling of Tainted Soil and Debris," the SCI again emphasized that its investigations revealed "significant loopholes in the oversight and regulation of Class B recycling that have enabled unscrupulous "dirt brokers" and others to pose as legitimate recyclers" thereby escaping "licensing requirements and basic background checks like those required for individuals engaged in solid waste operations."

Scope of the Dirty Dirt Law

Under the new law, any business concern that does not already have an A-901 license and engages in, or otherwise provides, "soil and fill recycling services" is required to register with the DEP and to obtain an A-901 license. A "business concern" is broadly defined to include any form of commercial organization. An employee of a business concern that provides soil and fill recycling services would not need to obtain his own license. The employee's work would be covered by the license obtained by the business concern. Similarly, an individual who is a sole proprietor or partner in an unincorporated business would have to get an A-901 license for the business but would not need a license in his individual capacity. Also, while governmental entities do not constitute a "business concern," persons or entities doing work on behalf of governmental entities are business concerns subject to the licensing requirements.

The law defines "soil and fill recycling services" as the collection, transportation, processing, brokering, storage, purchase, sale or disposition of soil and fill recyclable material. "Soil and fill recycling services materials" is defined as "non-putrescible aggregate substitutes," such as "broken or crushed brick, block, concrete, or other similar manufactured materials; soil or soil that may contain aggregate substitute or other debris or material, generated from land clearing, excavation, demolition, or redevelopment activities that would otherwise be managed as solid waste, and that may be returned to the economic mainstream in the form of raw materials for further processing or for use as fill material."

"Soil and fill recyclable materials" does not include: (1) Class A recyclable material; (2) Class B recyclable material, that is shipped to a Class B recycling center approved by the DEP for receipt, storage, processing, or transfer; (3) beneficial use material for which the generator has obtained prior approval from the DEP to transport to an approved and designated destination, and (4) virgin quarry products including, but not limited to, rock, stone, gravel, sand, clay and other mined products.

Significantly, the definition of soil does not exclude certified clean fill - unless that material is mined virgin quarry product. As a result, the transport, sale, purchase, disposition involving certified clean fill will likely require registration and licensure.

The amendment to A-901 provides deadlines for complying with the new registration and licensing requirements. All businesses or persons engaged in providing soil and fill recycling services must register with the DEP by **April 20, 2020**, to obtain a temporary license. The DEP will issue a temporary registration, no later than 90 days after

the submission of a registration application. By **October 17, 2020**, soil and fill recycling service providers must submit a comprehensive registration application seeking a permanent license. The new law prohibits a person or business from participating in the provision of soil and fill recycling services without a timely registration approval or a license.

Broad Scope of the Law

With the broad language in the law as a starting point, DEP is currently developing regulations and guidance to provide more detail on the scope of businesses or persons it considers engaged in the provision of soil and recycling services and thus subject to the registration requirement. DEP's current guidance on its website provides that if a business is in doubt as to whether it must register, it should go ahead and register by April 20. The DEP views applicability of the legislation as a legal issue and is directing those making inquiries regarding its applicability to consult legal counsel if they are not inclined to register. In the interim, it is possible that interim guidance may be issued by DEP to limit the broad pool of registrants before they are required to submit A-901 applications.

While the DEP likely welcomes the adoption of the new law, the plain language in the law may simply have a broader scope of applicability than necessary and may subject unintended business concerns to the registration requirements. The DEP may have preferred more narrowly tailored legislation aligned with its 'Guard Your Backyard' initiative for municipalities. Under the "Guard Your Backyard" initiative, the DEP recommends that municipalities adopt a form of a municipal soil and fill ordinance directed at the local control of illegal dumping. The proposed form of ordinance would require a property owner to obtain a local permit for the importation of fill. Under the model ordinance, DEP recommends exclusions for (1) the import of fill for remediation or landfill closure activities; (2) minor filling associated with landscaping activities; (3) fill for septic installation and/or repair certified to be such by a licensed New Jersey engineer; or approved by the local health agency, and (4) virgin quarry products. Those exclusions - with the exception of virgin quarry products - are not found in the new law.

Rather, under the new law, any collection, transportation, processing, brokering, storage, purchase, sale or disposition of soil requires registration. There is no exclusion based upon quantities of material or the size of the operations. Therefore, the plain language of the legislation could be construed to encompass landscapers, those engaged in clean out work, garden centers, retail sellers of pre-packaged top soil or potting soil, a business with one truck removing broken up concrete from a residential project, etc. As a result, these small providers that are not the intended target of the legislation, will likely be required to register or cease the regulated activity until they are issued an A-901 license or excluded from doing so by DEP rulemaking or administrative action.

The new law also expands the applicability of the criminal and civil penalties in the A-901 law to persons or business concerns that violate the new licensing and disclosure requirements. The law specifically contemplates that the DEP will establish new rules and regulations setting for a penalties and violations schedule. Further, the law confers authority upon the DEP, local boards of health, and county health departments to conduct inspections of soil and fill recycling facilities to determine compliance with the requirements of the law. It is expected that the revised A-901 law will be vigorously enforced.

New Disclosure Requirements for All A-901 License Holders

In addition to requiring licensure for soil and fill recycling services, the new law expands the scope of the A-901 background disclosure requirements for all A-901 licensees, even ones that do not deal with soil or recycle fill, to expressly include sales persons, and consultants that are involved in the provision of solid waste and soil and fill recycling services as well as family members of owners, officers, directors or key employees if those family members are employed or otherwise engaged by the A-901 business. The definition of "consultant" excludes persons that hold a professional license from the State to perform soil and fill recycling functions. Thus, Licensed Site Remediation Professionals (LSRPs) and Professional Engineers should be considered exempt from the background disclosure requirements.


Expectations on Property Owners and Developers

While it is clear that business concerns engaged in the provision of soil and fill recycling services need to timely complete the registration and licensure process, it is less clear what is expected of property owners or developers that are required to deal with soil and fill providers. As of April 20, 2020, it would be prudent for any developer or property owner engaging the services of a business or individual to collect, transport, deliver, broker, acquire, sell or otherwise engage in the provision of "soil and fill recycling services" to request that the provider produce evidence of its registration with the DEP.

There is currently no indication that the new law, or any rulemaking emanating from the law, will impose any monitoring / record keeping / or manifest requirements, not otherwise required by law, upon property owners and developers. Rather, it is possible that the compliance obligations of the new law will remain exclusively with the licensed entities, based upon the premise that the newly licensed entities will have been thoroughly vetted and will have incentive to maintain their licenses in good standing.

Until the DEP addresses the issue of what compliance requirements, if any, will be imposed upon property owners or developers, property owners should be aware of the new law and apply common sense when engaging soil and fill suppliers and undertake reasonable efforts to confirm representations made regarding the origin and content of soil and fill recycling materials. Indeed, if the material provided by soil or recycle fill suppliers is contaminated, the property owner or developer is exposed to liability for the contamination even if the soil or recycle fill provider is licensed. Fortunately, the extension of the A-901 licensing requirement to soil or recycle fill businesses should substantially reduce the potential for unwittingly receiving contaminated soil.

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