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The Impact of Site Remediation Reform on Real Estate

What are LSRPs, why should we care, and how do we adjust our thinking?

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The Site Remediation Reform Act of 2009 (SRRA) altered the statutory framework governing the remediation of contaminated sites. A major shift engendered by the SRRA involves the use of "licensed site remediation professionals."

The Legislature's focus in enacting the SRRA was to streamline the process that in many instances resulted in remediation projects that dragged on without resolution. The new process provides greater predictability in the timing and cost of remediation. However, the new process also adds new issues that must be faced by parties and counsel engaged in real estate transactions.

LSRPs. The SRRA created a new professional — the individual licensed site remediation professional (LSRP). LSRPs are licensed and governed by a new Site Remediation Licensed Professional Board (the Board). LSRPs are empowered to approve remediation projects without specific authorization by the New Jersey Department of Environmental Protection (DEP). DEP's role is generally limited to reviewing and, as warranted, auditing, submissions made by LSRPs. Remediation continues forward under an LSRP's submission even if an audit is conducted by DEP or by the Board. DEP involvement is only needed in isolated circumstances, such as when an alternative remediation standard is needed, when certain soil reuse approvals are required or when a specific DEP permit approval is needed (i.e., under regulations governing freshwater wetlands, air pollution equipment operation or treatment works).

When an LSRP is required. All new cases require the retention of an LSRP. N.J.A.C. 7:26C-2.3(c). New cases include any matter not before DEP as of Nov. 4, 2010, or when the remediation is taken over by a new party (e.g., a new owner). N.J.A.C. 7:26-2(b)1. As of May 2012, all cases, including existing cases with DEP case managers, will require an LSRP regardless of how long the matter has been before DEP. Up until May 2012, existing cases can petition to opt in to the LSRP program.

RAOs replace NFAs. The "no further action" determination (NFA) will no longer be the cornerstone of finality for remediation. LSRPs do not issue NFAs. LSRPs issue "response action outcomes" (RAOs). Beginning in May 2012, DEP will be issuing NFAs only for certain unregulated heating oil tank cases. The Legislature intended that "the same liability protection [be provided] to recipients of Response Action Outcomes as ... provided ... to recipients of a No Further Action determination." Assembly Environment and Solid Waste Committee Statement for A2962, Feb. 26, 2009. The issuance of an RAO by an LSRP confers

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a "covenant not to sue" from the State of New Jersey. N.J.S.A. 10B-13.2.

The Code of Conduct. LSRPs are bound by an extensive code of conduct and subject to discipline by the Board for violations thereof. N.J.S.A. 58:10C-16(a)-(z). The code requires that the LSRP's "highest priority ... shall be the protection of public health and safety and the environment." N.J.S.A. 58:10C-16(a). Hence, in some instances, LSRPs will be required to act regardless of the LSRPs contract with the entity that retained them. An example is the LSRP's obligation to report certain extreme risks to human health known as "immediate environmental concerns." N.J.S.A. 58:10C-16(j). Data showing contamination above standard in a drinking water well is an example of such an immediate concern.

RPs and PRCRs. In some instances, the SRRA broadens the scope of parties without current liability for the remediation of contamination. Beyond the liability for responsible parties (RPs) pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the Comprehensive Environmental Response Compensation and Liability Act (also known as CERCLA or Superfund), 42 U.S.C. §9601 et seq., and similar statutes, under SRRA the party retaining an LSRP becomes a "person responsible for the conducting the remediation" (PRCR). Even when the PRCR is not an RP, a PRCR can be liable for inadequacies in the conduct of the remediation.

The use of an LSRP raises a series of issues, including the following three.

LSRPs, reporting and due diligence

Once an owner of real property in New Jersey obtains knowledge of contamination on that property, reporting and remediation obligations are generally triggered. See N.J.S.A. 58:10B-1.3; N.J.A.C. 7:1E-5.2 and 5.3; *In re Adoption of N.J.A.C. 7:1E*, 255 N.J. Super. 469 (App. Div. 1992). As a result, in many real estate transactions, property owners require that information obtained by prospective purchasers or tenants be kept confidential, including from the property owner. Since LSRPs have reporting obligations by virtue of their licensure, LSRPs cannot keep such information confidential in all instances without risking their license.

After the passage of the SRRA, the initial reaction among most property owners has been to preclude the use of an LSRP as part of due diligence investigations even if the property owner believes their site is "clean." Many consultant firms have taken measures to "screen" their LSRPs from due diligence work.

However, there is substantial value to prospective purchasers and tenants in having an LSRP conduct due diligence. LSRPs can provide cost and time estimates for a remediation project that the same LSRP will approve. It is far more likely that an LSRP will be in a position to give a prospective purchaser or tenant a predictable cost and timeframe for remediation if he or she can be involved at the earliest possible juncture. Hence, prospective purchasers and tenants will want to use the services of an LSRP as early as possible, and preferably during some or all of the due diligence period.

Who retains the LSRP and how LSRPs are selected

While there are no limits on the number of consultants that can work on a single site, the current process only allows for one "LSRP of record." If multiple parties in a transaction intend to retain their own LSRP, an agreement needs to be reached as to which individual will be the LSRP of record.

Frequently, each party in a real estate transaction has a significant interest in the selection of the LSRP and in who contracts with the LSRP. Parties with existing liability RPs clearly rely on the continued validity of RAOs to evidence that they have met their responsibility to remediate. Developers (and redevelopers) need to rely on the RAO to document that the site has been rendered "protective of human health and the environment" and suitable for their proposed use. When a transaction involves financing, it is important to consider whether the financing party needs to approve the selection of an LSRP. Any party not directly retaining the LSRP of record, but relying on that LSRP's work product, needs to consider obtaining some level of contractual privity with the LSRP.

The process for selecting the LSRP of record needs to address each party's particularized interests. Frequently, LSRP selection involves one party proposing a list of LSRPs for approval by the other party or parties. The right to replace the LSRP also needs to be detailed, particularly for remediation projects that will extend over a long period of time.

The LSRP of record may be retained by any party so long as that party can provide access to the site for the LSRP and DEP. N.J.A.C. 7:26C-2.4. While the current process contemplates a single entity's retaining the LSRP, there is no prohibition on parties agreeing amongst themselves on how "control" over the LSRP will be allocated, as well as how the LSRP will paid. Overall, control of the LSRP is limited by the mandates imposed on LSRPs under the SRRA's Code of Conduct.

Retention of an LSRP by "innocent" parties (non-RPs)

As noted above, the party retaining the LSRP becomes a PRCR. The fact that the new PRCR designation is verbally similar to the RP designation will no doubt engender confusion. Even when a PRCR is not an RP, the PRCR is responsible for compliance with DEP's administrative and technical requirements. N.J.A.C. 7:26C and 7:26E. A non-RP that withdraws as a PRCR should be free of any continuing obligations once the PRCR ceases to continue remediation. However, an "innocent" PRCR can become an RP to the extent that the PRCR's actions or inactions result in new discharges or exacerbate a prior discharge.

Notwithstanding the fact that a non-RP's risk profile increases when becoming a PRCR, non-RPs may choose to do so, particularly when the timing of the issuance of the RAO or the type of remedial approach are critical to the non-RP's interests. A classic example is redevelopment of a site with cap (an "engineering control" under the SRRA) for residential or mixed use. The redeveloper commonly requires tight control over when the RAO is issued as well as the nature of the capping elements. In such instances, a non-RP should consider becoming a PRCR. ■