New Jersey Law Journal

VOL. 208 - NO 9 MONDAY, JUNE 4, 2012 ESTABLISHED 1878

Real Estate Title Insurance & Construction Law

Practical Considerations in Real Estate Transactions in Light of SRRA

BY DOUGLAS EILENDER AND JOANNA SLUSARZ

In an effort to expedite the remediation of more than 20,000 contaminated sites, New Jersey passed the Site Remediation and Reform Act (SRRA) on May 7, 2009. SRRA transferred the responsibility of overseeing most cleanups in the state from the New Jersey Department of Environmental Protection (NJDEP) to licensed private environmental consultants called Licensed Site Remediation Professionals (LSRPs). LSRPs now perform the environmental cleanups and have the authority to stand in NJDEP's shoes and sign off on the cases they oversee. Among many other changes, SRRA enhanced the affirmative obligation of responsible parties to timely remediate contaminated sites.

The LSRP program became fully effective on May 7, at which time all existing NJDEP matters should have been transitioned into the new program. Although that critical date has now passed, SRRA will influence nearly every real estate transaction going forward. Real estate attorneys must be aware of SRRA's implications on their practice and on their clients' obligations with respect to their properties.

Drafting or Modifying Documents

As with any comprehensive piece of legislation, SRRA is teeming with specific terminology, with each term ascribed its own definition as it pertains under SRRA. When drafting new agreements or modifying existing ones, real estate practitioners should conform them to SRRA. Typical contracts require a party to address environmental issues to the satisfaction of NJDEP. Although NJDEP still monitors the remediation and must provide approvals in certain circumstances, in most instances, an LSRP must approve the work that was done, and the contract should be modified to provide for both the LSRP's and NJDEP's approval.

Further, NJDEP will no longer issue a No Further Action Letter (NFA) for the majority of cases (NFAs are still issued for unregulated heating oil tanks). Instead, LSRPs will issue a Response Action Outcome (RAO) to certify completion of the investigation and cleanup of a contaminated site in accordance with New Jersey regulations. Each LSRP's work product, including its ultimate issuance of an RAO, may be audited by the LSRP Board for three years from the date the LSRP issues an RAO. It is estimated that NJDEP will audit about 10 to 20 percent of RAOs filed each year, usually those submitted in connection with remediation of projects that are more complex, use alternate methods, vary from the regulations or involve child care centers/schools. Technically, an RAO will be considered final only at the conclusion of this three-year period. Afterwards, NJDEP is generally prohibited from auditing an RAO, unless: 1) undiscovered contamination is found on a site for which an RAO has been issued; 2) the LSRP Board

Eilender is a member of Cole Schotz Meisel Forman & Leonard in Hackensack. His practice emphasizes all aspects of environmental law, including transactional, regulatory, land use and litigation matters. Slusarz is an associate in the firm's real estate department.

Reprinted with permission from the JUNE 4, 2012 edition of *New Jersey Law Journal*. © 2012 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited.

conducts an investigation of the LSRP who issued the RAO; or 3) the license of the LSRP who issued the RAO has been suspended or revoked by the board.

Therefore, real estate agreements should clearly identify the party charged with overseeing and paying for the clean-up, define the proper closure document that will be issued (RAO or NFA), and account for the time period during which an LSRP's work product and/or RAO may be audited or invalidated. In addition, the documents should address who will pay for additional work or any other costs arising from an audit or a rescinded RAO. The parties also must consider the three-year audit period when negotiating the scope and duration of any contractual indemnity and possibly allocate the risk by obtaining environmental insurance to cover the "gap period."

Permitting

SRRA also created regimented permitting obligations for cases where residually impacted soil and groundwater may remain on-site through the implementation of an engineering control, such as concrete or an asphalt cap, or an institutional control, such as a deed notice for soil or classification exception area (CEA) for groundwater. The responsible party wishing to leave the residually impacted soil or groundwater in place through the use of these controls must obtain a Remedial Action Permit for Soils (i.e., Deed Notice) and/or a Remedial Action Permit for Groundwater (i.e., CEA or treatment system). In order for the remediating party to qualify for a remedial action permit for soil, the engineering control must be in place and the deed notice must be recorded in the title records. For the remediating party to qualify for a natural attenuation groundwater permit, the LSRP must collect at least eight rounds of quarterly groundwater samples that demonstrate a decreasing trend in contaminant levels. Lastly, if a party is seeking a remedial action permit for groundwater for an active groundwater treatment system, the system must be operational and functional for at least one year.

The remedial action permit is broadly inclusive as many parties are obligated to comply with it. *See* N.J.S.A. 7:26C-7.2. The permit also requires that the engineering control be monitored and a certification be submitted to NJDEP on a biennial basis. Significantly, the remediating party will remain a co-permitee for the life of the engineering and institutional controls; property owners who are not the remediating party must notify NJDEP of any changes in ownership, the new property owner must agree to sign on as a co-permitee before the former owner is removed from the permit, and any financial assurance (discussed below) established by the prior owner will not be released until a new one is in place. The timing of permit issuance and future permit obligations require agreement among the parties contemplating any real estate transaction and the documents must reflect that understanding.

Financial Assurance

A hotly contested component of SRRA is the requirement that financial assurance be posted whenever a remedial action permit includes an engineering control. The LSRP will determine the amount of the financial assurance by evaluating the amount of funds needed to maintain the engineering control as long as the control is needed. If it is indeterminate, such as an asphalt cap, NJDEP allows the LSRP to utilize a 30-year period in their calculation taking into consideration the present value of money, maintenance of the cap, reporting and NJDEP fees. The financial assurance can be provided through a remediation trust fund, an environmental insurance policy, a line of credit or a letter of credit. Parties contemplating any real estate transaction must consider the financial assurance requirements at the outset and the documents must evidence their agreement.

Consultant-Client Relationship

SRRA has also altered the relationship between a property owner and its environmental consultant. An LSRP's main role is no longer being an advocate for its client, as it now "must hold protection of public health and safety and the environment as its highest priority." To ensure an LSRP fulfills this obligation, SRRA requires that the cleanups LSRPs oversee meet the regulations and binds them to a strict code of ethics, a violation of which could result in fines, loss of their license or even criminal penalties.

LSRPs also have a heightened obligation to report to NJDEP any evidence of discharges, deviations by the client from an approved remedial action work plan, subsequently discovered inaccuracies in remediation reports and any condition of an immediate environmental concern, which includes contamination of potable wells, vapor intrusion concerns and conditions resulting in possible acute health risks. Therefore, the LSRP's loyalty to its client extends only as far as SRRA permits. Although it remains unclear whether LSRPs are agents of NJDEP, the LSRP has an affirmative duty to report the above conditions to NJDEP despite the consequences to the property owner. These whistleblower-type obligations can strain LSRPs' relationships with their clients.

In addition, the LSRP's professional services agreement should make clear that the LSRP will endorse its RAO for at least the three-year audit period and remedy any deficiencies in its work. Additionally, recent case law suggests that the professional services agreement should also tie in the LSRP's liability limits to the insurance requirements and require that both survive during that three-year period.

Due Diligence Restraints

It is no longer practicable for parties to enter into contractual arrangements which prohibit a prospective buyer/tenant from disclosing contamination discovered during its due diligence to the owner, while providing the prospective buyer/tenant the ability to terminate the deal for any reason or no reason. This scenario spared the owner from being obligated to remediate its property, having "no knowledge" of the contamination. Under SRRA, however, such a contractual obligation is overridden by the LSRP's statutory duty to report IECs. Therefore, to avoid the risk of losing the real estate deal and incurring an unexpected obligation to remediate, the owner should prohibit the prospective buyer/tenant conducting due diligence from utilizing the services of an LSRP.

On the other hand, hiring an LSRP to perform due diligence benefits the prospective buyer/tenant because it ensures that the owner is required to remediate the property if any issues are discovered and offers the prospective buyer/tenant more bargaining power in the negotiation should it decide to go forward with the transaction.

SRRA has created many hot-button issues that will be vigorously negotiated in various real estate transactions. Real estate contracts should be revisited to account for the numerous issues that arise due to SRRA, and environmental services agreements must also be updated to reflect SRRA's provisions. Real estate attorneys, and others, must stay abreast of the developing case law in order to serve their clients' evolving needs under SRRA. ■