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The Business End of SRRA: The Effect on Transactions Involving Contaminated Property

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Hoping to break a 20,000-case log-jam of remediation projects pending before the New Jersey Department of Environmental Protection ("NJDEP"), Governor Corzine on May 7 signed into law a new, far-reaching measure that will transfer to specially licensed environmental consultants the task of overseeing most environmental remediation projects in the state of New Jersey. The law, known as the Site Remediation Reform Act, P.L. 2009, c.60 ("SRRA"), directs the NJDEP to establish a Licensed Site Remediation Professional ("LSRP") program that will license and audit consultants who will direct or oversee site remediation projects with no or minimal NJDEP oversight and then certify that the remediation was performed in compliance with applicable statutory and regulatory requirements. Use of an LSRP will be mandatory for most sites currently under NJDEP oversight and for the vast majority of new sites.

Among its most direct impacts, SRRA will: (1) fundamentally alter the relationship that remediating parties have with their consultants when performing a remediation under LSRP oversight; (2) create new reporting obligations that will apply to LSRPs irrespective of the nature of their involvement with a site; and (3) establish affirmative remediation obligations with mandatory timeframes for completing remediation milestones. While significant aspects of the LSRP program have yet to be designed in forthcoming regulations, it is clear that the sweeping changes mandated under SRRA will have far-reaching implications for transactions involving contaminated or potentially contaminated properties in New Jersey for years to come. This article analyzes some of the key issues that are likely to emerge in the transactional setting and provides practical suggestions for how to address them.

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For Whom Does the LSRP Toil?

Whereas under the pre-SRRA NJDEP oversight process, environmental consultants have played the role of an advocate for their clients in negotiating with the NJDEP regarding the scope of site cleanup measures, the new law contains several provisions designed to ensure that LSRPs act in a neutral capacity in performing or overseeing site remediation projects. For example, even though LSRPs' fees will be paid for by the party performing the site cleanup, SRRA seeks to enforce LSRPs' impartiality by providing for a range of possible sanctions — from loss of license to criminal penalties — if the LSRP fails to comply with applicable legal requirements or otherwise fails to ensure that the site is protective of human health and the environment. In addition, SRRA contains "anti-retaliation" provisions designed to prevent the LSRP from being influenced by the party retaining it to forgo any measures the LSRP reasonably determines are necessary for the protection of human health and the environment.

The changed relationship between an environmental consultant acting as an LSRP and its client — i.e., from advocate to quasi-regulator — will mean that parties who are contractually responsible for remediating sites will have less latitude than before in taking steps to minimize the costs associated with site remediation. Indeed, it is widely expected that remediation projects performed under LSRP oversight will be more conservative given the potential sanctions faced by the LSRP if the NJDEP disagrees with its decisions. It is unclear, though, whether and to what extent remediating parties will be able to advocate for a less-expensive remedial approach than that desired by the LSRP on a given project. While the NJDEP has said that anyone can bring a complaint to the LSRP licensing board, which is

to be established under SRRA, if they believe that an LSRP's decisions are not in compliance with legal requirements or are not sufficient to protect human health or the environment, there are no plans to provide a review forum for a remediating party's complaint that an LSRP has taken an overly conservative approach.

In view of these uncertainties, sellers should be wary of taking on remedial obligations without a reliable means of minimizing their exposure to unduly expensive remediation costs. Examples include setting financial caps on remedial obligations in contracts, or resorting to third-party risk transfer mechanisms, such as environmental insurance or guaranteed remediation contracts. At least until the NJDEP provides more guidance as to the scope of the LSRP's duties to its client in forthcoming regulations, remediating parties also should include a clause allowing for a neutral third-party arbitration procedure in their retention agreements with LSRPs giving the remediating party a means for challenging LSRP decisions that are demonstrably unreasonable, without running afoul of SRRA's anti-retaliatory provisions.

LSRP retention agreements also should contain the normal and customary contractual protections against the consequences of an environmental consultant's negligence (insurance minima, indemnities, etc.). In addition, LSRP retention agreements should incorporate protections for ensuring that the LSRP meet the new mandatory timeframes established under SRRA as well as remedies for the LSRP's failing to do so.

Response Action Outcomes vs. NFAs

At the conclusion of the remediation, the LSRP will issue what is known as a Response Action Outcome ("RAO"), which will take the place of the time-honored No Further Action Letter ("NFA"), but which is subject to audit and potential reversal for up to three years after it is issued. After three years, the NJDEP can reopen the RAO for any of the same reasons that it can currently reopen an NFA. Reopeners of NFAs have been a relatively rare occurrence in the past, so it may be reasonably expected that more RAOs will be reopened than NFAs – at least in the early years of the program. In addition, while a covenant not to sue ("CNS") is deemed to arise by operation of law upon the issuance of an RAO, it can be revoked if any conditions stated in the RAO, including maintenance of institutional controls, are not satisfied — as well as, presumably, if the RAO itself is reversed.

Given the uncertainties associated with an RAO's finality as compared with an NFA, it remains to be seen how RAOs issued by New Jersey LSRPs will be received by various stakeholders in transactions involving contaminated properties. However, at a minimum, purchasers and lenders should incorporate specific protections into their deal documents aimed at addressing the potential risks associated with an RAO being reversed and/or a CNS being revoked. Specific contractual protections also should be incorporated into the LSRP retaining agreement to address the risk that the NJDEP will overturn an RAO due to an LSRP's negligence.

LSRPs and Environmental Due Diligence

Property owners seeking to sell property that has not been adequately investigated to determine whether contamination actually exists also need to be cognizant of the role of LSRPs in performing a purchaser's environmental due diligence. Since under SRRA, LSRPs have an independent obligation to report any environmental conditions that rise to the level of an "immediate environmental concern" — i.e., a condition that presents a risk of imminent harm — sellers now face the risk that if the purchaser's due diligence is handled through an LSRP, the LSRP will immediately report certain environmental conditions it discovers at the seller's property to the NJDEP. Since SRRA also contains a new affirmative obligation for property owners to remediate any contamination that is above applicable cleanup criteria, any such report by an LSRP will effectively trigger an immediately enforceable clean-up obligation for the seller. If the contamination at issue is of such magnitude that it causes the purchaser to back out of the deal, the seller will find itself both without a deal and with a clean-up obligation it did not have before.

To avoid an adverse outcome associated with an LSRP disclosure, sellers of potentially contaminated property should include a requirement in their purchase agreements that any due diligence performed by the purchaser will not involve an LSRP. Moreover, at least until the NJDEP completes work on an ethical code of conduct for LSRPs as required under SRRA and clarifies whether an LSRP will be charged with the knowledge of other members of its firm who become aware of an immediate environmental concern, sellers also should require that purchasers use only environmental consulting firms that do not have LSRPs on staff. Since under SRRA sellers now have an affirmative obligation to remediate environmental contamination of which they are aware of (absent applicability of a defense to liability), they also should include a confidentiality obligation in their purchase agreements prohibiting disclosure of the purchaser's due diligence findings not only to the NJDEP and other third parties, but also to the seller itself, if the purchaser terminates during the due diligence period.

Conclusion

The sweeping scope of SRRA's changes have created in many ways a new paradigm that will alter the way in which parties in transactions involving contaminated or potentially contaminated property in New Jersey allocate risks of environmental liability in their private contractual arrangements. While the details of this ground-breaking legislation continue to be formulated through NJDEP rulemaking, parties involved in such transactions should carefully consider the ramifications that the new regime will have in triggering liability for site cleanups, and the cost and timing of such cleanups, so they can ensure that these risks are properly accounted for in their contracts. ■