

Real Estate Title Insurance & *Construction Law*

Your Property Might Not Be As Clean as You May Think

Site Remediation Reform Act
imposes a new affirmative duty to
remediate

By Steven Barnett

The Site Remediation Reform Act (SRRA), a new law governing when and how properties are to be investigated and cleaned up, it is not coming down the pike but instead is here and in effect now. It was enacted May 7, 2009, and the New Jersey Department of Environmental Protection (NJDEP) promulgated rules which were effective November 7, 2009.

SRRA and NJDEP's implementing rules affect properties which previously may have been considered "clean." Some projects which previously could be built without NJDEP oversight now require clean-up

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oversight. Owners, operators, landlords, tenants, developers, construction contractors and lenders are impacted. Contracts, leases, access agreements, deeds, easements, insurance policies and other legal documents should be reviewed and modified appropriately. This article advises on steps to address the new requirements with a focus on properties which previously would not have required reporting or NJDEP clean-up oversight.

Anyone who "initiates remediation" after November 7, 2009, must notify NJDEP, retain a Licensed Site Remediation Professional (LSRP) to perform the remediation, and comply with mandatory timeframes. Remediation is broadly defined to include "all necessary actions to investigate and cleanup or respond to any known, suspected, or threatened discharge of contaminants." All remediation cases existing before November 7, 2009, must have a LSRP within three years, i.e., May 7, 2012. LSRPs are private consultants who have received a license from the state and are subject to a code of conduct and disciplinary action by a state board, much like a doctor, attorney or engineer. LSRPs will assume many of

the clean-up oversight and approval responsibilities formerly performed by NJDEP, including issuance of a No Further Action determination which is now known as a Response Action Outcome (RAO) when issued by a LSRP. LSRPs are individuals, not firms, and NJDEP's Web site already lists more than 200 individuals who have temporary LSRP licenses. Appointments to the LSRP board are by the governor, and the constitution of the board awaits commencement of Governor Christie's new administration.

In addition and importantly, SRRA provides for the first time what is being called "an affirmative duty to remediate." Previously, responsible parties were liable up to three times clean-up costs, but there was no explicit statutory directive to remediate. But, SRRA Section 30 now provides that a person in any way responsible for a hazardous substance "shall remediate the discharge of a hazardous substance." As a result, NJDEP has eliminated its voluntary remediation program, which was previously routinely invoked by entering into a Memorandum of Agreement (MOA). The MOA could be terminated, thereby relieving the remediating party from further obligations. NJDEP has indicated that developers voluntarily remediating properties are subject to the new duty to remediate with no more protection than any other entity conducting remediation. MOA's and

consent orders are no longer available to obtain NJDEP approval of "voluntary" clean-ups; instead NJDEP will simply issue orders to remediate, including proposed penalties when it deems appropriate.

SRRA is modeled after existing licensed remediation professional programs in Massachusetts and in Connecticut. However, in Massachusetts, requirements to notify of a new case and retain a Licensed Site Professional (LSP) are based on releases of reportable quantities or other specific criteria, whereas the trigger in New Jersey is the comparatively vague standard of "initiating remediation." Despite the reportable quantity threshold, the practice in Massachusetts is to have a LSP on the project team for urban construction projects from the start and throughout due to environmental issues routinely encountered, including historic fill, and this may be an example for New Jersey urban construction projects to follow. In New Jersey, NJDEP has indicated that construction in historic fill is deemed to be remediation requiring a LSRP under the new rules. NJDEP has further indicated that the mere presence of historic fill, without construction, triggers the new statutory affirmative duty to remediate.

Exemptions in New Jersey are specific and narrow. SRRA provides that the duty to remediate and obligation to retain a LSRP do not apply to: (a) discharges from unregulated heating oil tanks and (b) persons conducting environmental due diligence who do not own a site and have not discharged at the site. NJDEP's implementing rules provide an additional exemption for emergency response activities. Unless notified otherwise by NJDEP, a LSRP is not needed for a petroleum surface spill of less than 100 gallons that does not reach the waters of the State of New Jersey; a discharge that results from a passenger motor vehicle accident; or a discharge that NJDEP refers to its Bureau of Emergency Response, to the New Jersey Office of Emergency Management or to a County Environmental Health Agency. Besides these exemptions, anyone "initiating remediation" must retain LSRP.

SRRA provides that a LSRP's "highest priority" shall be "protection of public health and safety and the environment." SRRA provides that LSRPs must notify NJDEP within 15 days of being retained and within 15 days of being released; must report any discharge

on a site for which he is responsible; must report any "immediate environmental concern" regardless of whether it is on a site for which he is responsible and must report any deviation from, or facts which are inconsistent with, a remediation work plan or report, including any prior to his engagement. A LSRP may not be a salaried employee of a responsible party. LSRPs may not accept compensation from two or more persons whose interest are adverse without informed consent.

Importantly, NJDEP regulates responsible parties, whereas LSRPs will be regulated by the yet-to-be-constituted LSRP board. Due to timing issues, including transition between governors, it is likely there will not be a board until the spring of this year. In the meantime, without a board or board rules governing the conduct of LSRPs, there is an understandable hesitancy for some responsible parties to retain a LSRP and for some LSRPs to act in their LSRP capacity.

In the long run, as with most professional licensing boards, the board will likely attempt to limit its role to matters affecting LSRP practice and the protection of LSRP's clients, rather than getting involved in site remediation matters, which are NJDEP's purview, or private contract matters, which are better handled in court. Connecticut's State Board of Examiners of Environmental Professionals (LEP Board) declined in one instance to enforce the requirement that LEP's must maintain all data, documents and information relating to the remediation. SRRA has a similar data retention provision for LSRPs, and one could expect the board to not enforce it in instances perceived to be driven by a disgruntled responsible party seeking leverage against a LSRP in a contractual dispute. On a related note, SRRA requires LSRPs to submit all information, including technical records and contractual documents, to NJDEP in electronic format, and NJDEP has indicated that it will maintain those on computer servers for public access.

Contract documents between responsible parties and LSPs in Massachusetts and LEPs in Connecticut continued to follow standard time and materials format in most cases after initiation of those states' programs. There was not a significant shift of responsibility to the consultant to guarantee the effectiveness of the cleanup in the absence of sign-off by the state. In fact, LEPs in Connecticut are

not permitted to provide guarantees. SRRA provides that LSRPs shall not allow an ownership interest, compensation or promise of employment to affect services, and it is possible the Board will interpret this to exclude LSRPs from entering into guarantees or fixed price remediation contracts in New Jersey. Contracts, including standard terms and conditions, should be amended to recite the instances where a LSRP is required to notify and/or report to NJDEP.

SRRA provides that NJDEP shall invalidate a RAO if it is determined not to be protective or public health, safety or environment. This provision has no time limit. In a separate provision, SRRA provides that NJDEP shall not audit a RAO more than three (3) years after it was issued absent specified circumstances. In the event of invalidation of a RAO, the responsible party, not the LSRP, would be responsible to NJDEP for additional site remediation activities. A LSRP could face disciplinary action by the board, including loss of license and fines, but would not become a responsible party for site cleanup activities.

NJDEP has noted concerns from the banking and lending community regarding the lack of a state approval of RAOs and the potential for RAOs to be invalidated after issuance during the three-year audit period and/or after. NJDEP has declined, for now at least, to offer to approve or certify RAOs for a fee upon request. It should be remembered that NFAs were and are subject to reopeners and invalidation under given circumstances as well. The debate is ongoing whether RAOs will be more easily or frequently reopened or invalidated than NFAs. It does not appear that banking and lending practices and documents related to sites under remediation changed significantly in Massachusetts and Connecticut after their LSP and LEP programs, respectively, came into effect.

In summary, SRRA imposes a new affirmative duty to remediate. It also requires that a LSRP be retained when anyone "initiates remediation," and retention of a LSRP necessarily involves notification and reporting to NJDEP. Site owners, operators, landlords, tenants, developers, construction contractors and lenders should review their properties and projects, especially in urban areas, to determine if the new duty to remediate applies and if a LSRP should be brought on board. ■