

Using an LSRP for Environmental Due Diligence



By now, most in the New Jersey commercial real estate community have heard of the recently enacted Site Remediation Reform Act (“SRRA”) and have become somewhat familiar with the oversight role of licensed site remediation professionals (“LSRPs”). You may have even noticed some of the familiar environmental consultants touting their new LSRP credentials. However, be careful of assuming that you must hire an LSRP to help you with your next real estate transaction.

An LSRP, by definition, is an expert in the field of environmental remediation having at least 8 years of professional experience, including not less than 5000 hours of relevant professional experience in New Jersey. Although there are some exceptions (e.g. high risk sites, brownfield redevelopment, etc.), LSRPs are permitted to approve site remediation work and upon completion, to issue a final written sign-off on cleanups (i.e. a Response Action Outcome). However, along with the impressive list of credentials and responsibilities comes an important, and to some worrisome, independent obligation to notify the New Jersey Department of Environmental Protection (“NJDEP”) of both i) regulated discharges identified on sites that the LSRP is directly overseeing, and ii) immediate environmental concerns as defined by SRRA on any site, not just those under the direct supervision of the LSRP. This is a departure from the prior reporting obligations that only required responsible parties, including property owners, to report confirmed discharges, except in cases of leaking underground storage tanks where “any person who has knowledge” of a discharge has a duty to report. And, perhaps most importantly, under SRRA once a discharge is reported there are mandatory time frames to complete the various stages of Site Investigation and Remediation Investigation and, eventually remediation.

The perceived risk associated with the reporting of contamination discovered during due diligence is causing some sellers to limit access to their properties to only non-LSRP consultants for due diligence. Under SRRA, the use of a non-LSRP to conduct all-appropriate inquiries (i.e. a Preliminary Assessment and Site Investigation) prior to purchasing a property is permissible. However, using a non-LSRP does not absolve the seller from the obligation to report known discharges nor does it change the reporting obligation for discharges from underground storage tanks.

SRRA will minimize the administrative and timing headaches that have historically plagued the remediation process. The increased efficiency expected from the LSRP program will expedite cleanups and better serve property owners, developers and communities burdened by contaminated properties. As the commercial real estate community transitions to the privatization of the remediation process, both sellers and purchasers should have knowledgeable legal counsel negotiating their contracts and coordinating the due diligence investigations to ensure that the parties are comfortable with the process and the roles of the LSRP and non-LSRP consultants.