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# ENVIRONMENTAL LAW

# Due Diligence Is More Difficult Under N.J. Site Remediation and Reform Act

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In performing environmental due diligence before implementation of the New Jersey Site Remediation Reform Act (SRRA) on May 7, 2012, the environmental attorney or consultant would file an Open Public Records Act (OPRA) request to the New Jersey Department of Environmental Protection (NJDEP). Prior to SRRA, environmental consultants would periodically submit reports to the NJDEP and obtain feedback from the NJDEP. The ability to conduct OPRA reviews of the NJDEP files meant that private parties had access to all environmental information pertaining to a site which was then available, thereby making the due diligence process relatively seamless and straightforward.

By contrast, after SRRA, there is very little, if any, written feedback from the NJDEP during the cleanup process. Under SRRA, a "licensed site remediation professional" (LSRP) program was established to have licensed professionals oversee the remediation of contaminated properties with limited NJDEP involvement. While there are certain deadlines for submitting forms and reports to the NJDEP, under SRRA and NJDEP's regulations, there are significant time gaps. Generally, the LSRP is only obligated to forward reports to the NJDEP when the "response action outcome" (RAO) is issued. Thus, environmental due diligence became a more difficult task to perform post-SRRA because the information needed to conduct due diligence is less frequently available and not as regularly filed with the NJDEP.

This poses a significant dilemma for parties who need to perform environmental due diligence in a full and timely manner to develop information about property conditions, to allocate liability and to manage environmental risks. Under the liability schemes of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) at the federal level, and the Spill Compensation and Control Act (Spill Act) at the state level, a party acquiring potentially contaminated property risks becoming liable for the cleanup unless the acquiring party can show that it has complied with the "innocent purchaser" requirements in those statutes. These requirements obligate the acquiring party to conduct "all appropriate inquiry" into the environmental conditions of the property, which is another way of saying that due diligence to review all relevant documents and site conditions must be performed.

An environmental consultant will initially prepare a Phase I Environmental Site Assessment (federal) or a Preliminary Assessment Report (New Jersey). These reports include a review of past operations at the site, including any documents reflecting prior contamination. If those reports reveal information that contamination may exist on the property, then additional inquiry may be necessary. The type of information formerly contained in the NJDEP's site remediation files before SRRA, and which would now be contained in an LSRP's files, is invaluable to conducting due diligence.

If documents can only be obtained from the NJDEP but not an LSRP, the parties performing due diligence may not have complete information upon which to analyze the environmental condition of property at the time a transaction must be completed. If no reports are being submitted to the NJDEP over

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an extended period of time, professionals performing due diligence will be unable to accurately advise their clients about the condition of the property, unless the parties are willing to wait until those reports are released by an LSRP to the NJDEP, which may be unrealistic given the timing constraints of most transactions. How can a party be assured that an environmental due diligence has been adequately performed if the information necessary to complete the due diligence may be difficult (or even impossible) to obtain because it rests solely in the hands of an LSRP and not the NJDEP?

Contracting parties can always stipulate to the sharing of documents in their respective possession or control, including documents prepared by an LSRP hired by one of the parties. But not every due diligence will be satisfied by obtaining and reviewing environmental documents only in the possession or control of the parties themselves. Due diligence problems can also arise where the remediating parties are not the parties to the contract. This could occur where remediation at an adjacent property owned by another person becomes relevant to the environmental condition on the property for which a due diligence is being performed — either because contamination on that other site migrated to the due diligence property or vice versa. Another situation is where remediation is occurring on the same property for which the due diligence is being performed, but the remediating party is not in privity with the contracting parties — the remediating party is a prior owner of the property.

An obvious solution to this problem would be to make certain LSRP records subject to OPRA before submission to the NJDEP. Unfortunately, last year, the New Jersey Attorney General's Office issued an informal opinion that LSRPs are not "public agencies" under OPRA and, therefore, are not subject to the public records maintenance and disclosure requirements of that statute. The attorney general's informal opinion stated that documents prepared by an LSRP are not "government records" under OPRA, until submitted to the NJDEP. This determination exacerbates the due diligence problems discussed above because the time constraints to complete due diligence cannot depend on when an LSRP decides to issue an RAO, or when a remediation deadline arises. If the attorney general's informal opinion continues, it may have severe liability consequences for parties trying to comply with their "all appropriate inquiry" obligations under the CERCLA and Spill Act "innocent purchaser" defenses.

The preferred solution for this problem is for the Legislature to amend OPRA to explicitly provide that contracting parties needing LSRP records to perform due diligence shall have access to those records for such purposes before submission to the NJDEP. A legislative fix makes sense because this OPRA amendment could be tailored to the specific issue of due diligence. The amendment could take into account the "all appropriate inquiry" standards under CERCLA and the Spill Act, and any concerns about portions of LSRP records. Protections could be built into the legislation to address issues like draft reports and data that have not yet gone through a quality assurance/quality control review. Legislation could also address the question of responsibility for paying the costs of producing and copying LSRP documents, and protection from unnecessary disclosure of confidential documents. The legislation might also specify that the unavailability of any such documents via an OPRA request does not render an otherwise appropriate "innocent purchaser" due diligence invalid under the Spill Act.

Under the case of *Fair Share Housing Center v. N.J. State League of Municipalities*, 207 N.J. 489 (Aug. 23, 2011), the Supreme Court reversed the Appellate Division and held that the N.J. State League of Municipalities is a "public agency" within the meaning of OPRA and, thus, its files are "public records" subject to disclosure under OPRA. The court noted that the terms "public agency" were broadly defined in OPRA (N.J.S.A. 47:1A-1.1) as:

> [A]ny of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.

Accordingly, the court held that under OPRA, a "public agency" included an "instrumentality … created by a … combination of political subdivisions," such as the League of Municipalities.

Using a similar analysis, a court could hold that an LSRP is "any office, board, bureau or commission within or created by the legislative branch" and, therefore, LSRPs are "public agencies" whose records are "public records" subject to disclosure under OPRA. Such a determination might find support in SRRA. Under Section 16 of SRRA, an LSRP's highest priority in the performance of professional services is the protection of public health and safety and the environment. Thus, the LSRP's main duty is to act for the benefit of the state and its citizens, and the LSRP is being asked to carry out essential functions for the protection of human health and the environment. Accordingly, SRRA has arguably established the LSRP as a de facto public agency with its records subject to disclosure under OPRA.

Section 20 of SRRA requires LSRPs to maintain and preserve all data, documents and information concerning remediation activities at each site they have worked on, including but not limited to reports and contractual documents, raw sampling and monitoring data. LSRPs are required to submit those records to the NJDEP when RAOs are filed. Based

on these provisions, the Legislature has recognized the importance of these documents and the necessity in making them public records. There is little additional burden on LSRPs to be subject to OPRA since Section 20 of SRRA mandates LSRPs to maintain and preserve all such documents.

With regard to production and copying costs, the OPRA fee structure can easily be corrected by the Legislature to allow LSRPs to charge for OPRA production. Requesting parties should pay LSRPs for their reasonable costs. This seems logical in context of an inquiry necessary to establish the "innocent purchaser" defense, because the cost of eventual cleanup liability would exceed any production and copying costs.

While we can understand that LSRPs may not want to become the primary OPRA responder for properties undergoing remediation, given how the Legislature has set up the LSRP program, it seems there may be no other choice. Transparency in site remediation is critical to the effective functioning of the state's transference of cleanup oversight to LSRPs. Parties attempting to conduct "all appropriate inquiry" under CERCLA or the Spill Act may find themselves subject to substantial environmental liability if they are denied timely access to documents needed to complete that analysis. Therefore, clarification for finding LSRPs subject to OPRA should either be provided by the judicial system or, better yet, through carefully crafted amendatory legislation.■