

Key LSRP and Brownfield Legal Issues in New Jersey

COMPILED BY MILES Z. EPSTEIN
EDITOR, COMMERCE

ACCORDING TO THE CONFERENCE of Mayors, the business case for brownfield redevelopment includes increasing city tax bases, creating new employment, revitalizing neighborhoods and protecting the environment. *COMMERCE* asked some of New Jersey's top environmental lawyers to highlight some of the key legal issues relating to Licensed Site Remediation Professionals (LSRPs) and brownfields.



Cole Schotz P.C.

By Richard J. Ericsson, Esq.,
Member

Every day, our environmental attorneys work hand in hand with LSRPs and environmental consultants to solve issues that arise in every environmental project, regardless of size, saving time and project costs. This dynamic has become much more important as LSRPs have taken on the responsibility of acting more as regulator than consultant, but without the support of their own in-house counsel to help them interpret the often vague statutes, complex regulations and ever-changing guidance documents issued by the NJDEP. We recently strategized with an LSRP to interpret the state's complex remedial financial assurance obligations and convince NJDEP of our client's position, resulting in significant savings to the project. Our environmental lawyers also just worked with the LSRPs for both our client (the seller) and the buyer to develop successful arguments regarding the NJDEP's ambiguous guidance for remediation of



NJDEP Commissioner Bob Martin has been focused on supporting the LSRP program, and the evolution of state environmental rules and regulations has raised some legal questions.

petroleum hydrocarbons, saving a transaction and significantly reducing our client's costs. Every project warrants some type of knowledgeable advocacy on behalf of the client, which is welcomed by LSRPs who are still navigating through the unfamiliar seas of New Jersey's new site remediation program.



Connell Foley LLP

By Steve Barnett, Esq.,
Partner

We represented the buyer of an industrial property who objected to an NJDEP application form. Specifically, the application for an Industrial Site Recovery Act (ISRA) Remediation in Progress Waiver (RIPW) asks the applicant to certify that it will take over the lead case and post financial assurance if the lead case "falls out of compliance with the remediation schedule or is unable to maintain the required remediation funding source." This could cause repercussions, including additional requirements to satisfy investors, lenders, insurers and others involved in this and related transactions. Interestingly, neither ISRA nor NJDEP regulations contain this requirement. Additionally, the applicant/buyer has no way to know the lead case schedule, and the certification does not allow the lead case to cure any issue before the buyer must take over. ISRA sets forth four requirements: submission of a General Information Notice; certification that there has been no discharge during the applicant's ownership or operation or that any has been remediated; certification that a remediation funding



Day Pitney LLP

By Joshua J.
VandenHengel, Esq.,
Environmental Associate

Day Pitney recently helped a client and its LSRP obtain access to several neighboring properties to perform off-site vapor intrusion and groundwater sampling activities within the timeframes required by NJDEP regulations. The site under investigation was a former manufacturing facility surrounded by other commercial and industrial business establishments. In the past, the NJDEP would often issue cooperation orders to neighboring property owners if an off-site investigation was necessary to delineate the extent of contamination or its potential impact on surrounding properties. However, under the Site Remediation Reform Act, the supervision of a site's remediation has been delegated to the LSRP and the NJDEP is no longer in the business of compelling property owners to grant access to their properties. Essentially, the LSRP has stepped into the shoes of the NJDEP, but without the authority to compel access to off-site properties, which is often a critical component in a timely investigation of a site. After several unsuccessful attempts to negotiate

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access agreements with the neighboring property owners, Day Pitney filed an Order to Show Cause in New Jersey Superior Court arguing that, in the LSRP's professional opinion, access to these properties was essential for the client to satisfy its remediation obligations under the law and the NJDEP's vapor intrusion technical regulations. With this argument before the Court, access agreements were successfully negotiated with each property owner and the off-site investigation was completed in a timely manner.



Gibbons P.C.

*By Irvin M. Freilich, Esq.,
Leader, Environmental
Team, Director, Real
Property & Environmental
Department*

As Special Environmental Counsel for the creditors in a bankruptcy matter, we found ourselves in a difficult situation because the debtor had sold virtually all of its assets, except for a manufacturing facility in Union, New Jersey, which appeared to have limited value because the estimated cleanup costs were greater than the market value of the property. The property was going through the ISRA process at the time of the bankruptcy filing, but the debtor was unable to post the required financial assurance. Following unsuccessful attempts to sell the property, the bankruptcy was converted to a Chapter 7 liquidation. Before the conversion, we retained an investigator to obtain evidence regarding the prior property owner's historic operations and its discharge of contaminants at the property. We also identified counsel to pursue the prior owner (on a contingency fee basis) to recover that party's share of response costs. As a direct result of the litigation, the prior owner came up with a significant amount of money to contribute towards the remediation. With the infusion of capital, a brownfields developer came forward to purchase the site, and agreed to remediate and develop the property, to the satisfaction of the NJDEP and the debtor.



Golub Isabel & Cervino, PC

*By Daniele Cervino, Esq.,
Partner*

Property buyers typically prefer to use LSRPs to perform pre-acquisition due diligence because of their unique credentials. Sellers, however, tend to avoid LSRPs because of their heightened reporting obligations. These competing interests can both be satisfied via a provision of the SRRA that allows an LSRP to conduct due diligence without being subject to reporting obligations with one limited exception. The key to ensuring that this will work for both parties is two-fold: (1) limit the LSRPs retention to the perform-



The principal issues for LSRPs include administrative process and regulatory framework; general technical principles and concepts; information gathering; general site remediation; and case and site closure.

ance of a Preliminary Assessment and Site Investigation (warning: once the investigation moves into a remedial investigation, it is no longer subject to the confidentiality privilege); and (2) make sure that the LSRP confirms in writing its understanding that the limited scope of work falls within the confidentiality privilege of the rule. (LSRPs vary in their interpretations of the rule, so this issue must be discussed in advance and clearly addressed in retention agreement.) In most cases, and absent the discovery of an immediate environmental condition which must be reported in any event, this practice permits an LSRP to perform the work in a manner that satisfies the buyer, subject to built-in confidentiality protections required by the

seller. The most conservative approach is to bar any involvement of an LSRP in any aspect of the due diligence, including supervision of staff or reporting.



LeClairRyan

*By Dorothy M. Laguzza,
Esq., Partner*

At LeClairRyan, we have been successful in using the New Jersey Brownfield and Contaminated Site Remediation Act (the "Brownfield Act") to keep remediation projects on schedule and under budget. Specifically, one of our clients is performing remediation on properties it no longer owns. Often, the new owners of these properties threaten to withhold access as a way to create leverage and force our client to pay additional money or perform remediation activities that are above and beyond what is required by law and NJDEP regulations. Failure to maintain access to a property could potentially cause the client to run afoul of its remediation obligations and be subject to penalties by the NJDEP. We have used the Brownfield Act as a weapon to go to court, on an emergent basis, and obtain an order permitting continued access to the property and prohibiting the owner from interfering with that access. It is public policy in New Jersey to "promote efficient and timely cleanups, and to eliminate any unnecessary financial burden of remediating contaminated sites." By keeping brownfield projects on schedule, we have minimized potential exposure to our clients, maintained goodwill with the NJDEP and benefitted the citizens of New Jersey by furthering this public policy.



NPZ Law Group

*By David H. Nachman, Esq.,
Managing Attorney*

The immigration and nationality lawyers and attorneys at the NPZ Law Group continue to assist environmental engineering firms and environmental professionals to obtain work visas. Recently, NPZ was enlisted to assist with the acquisition of a New York-based environmental engi-

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neering firm by a large New Jersey environmental consulting firm. After a review of the academic and experiential skill sets of the numerous environmental workers, it appeared that some would not be able to transfer their work visas to the New Jersey firm. Many of the engineers had E-1 visas and, following the merger, the E-1 visa status of the organization would have lapsed. Also, while many of the engineers would have been able to secure H-1B work visas as professional and specialty occupation workers (the work visa of choice for many engineers), the April 1st filing date was still several months away, and the October 1st start date was even further away. The immigration lawyers at NPZ implemented an “out-of-the-box” visa option for many of the staff to secure their services as engineers in the New Jersey firm. Ultimately, the important environmental cleanup projects that were being undertaken by the staff of the organization went uninterrupted.



Riker Danzig Scherer Hyland & Perretti LLP

By Steven T. Senior, Esq., Partner

Riker Danzig excels at assisting brownfield redevelopers, mediating parties and LSRPs in resolving thorny problems arising under the Site Remediation Reform Act (SRRA). Since the inception of the LSRP program, many Riker clients have faced “square peg, round hole” challenges due to gaps in the SRRA legislation, LSRP oversight of older or unique cases and the regulatory forms created by the NJDEP. For example, for the redeveloper of a unique brownfield project with essential pre-SRRA remediation plans and approval, our firm worked successfully with the LSRP and the NJDEP to harmonize new SRRA requirements to the project in an advantageous and cost-effective manner—including requirements for remediation timeframes, funding sources and financial assurance



Old industrial tracts, abandoned gas stations, vacant warehouses and even residential properties sit abandoned, gated off with danger signs warning of hazards and contamination.

and remedial action permits. We have also advised clients on a number of brownfield redevelopment transactions that required careful structuring of LSRP involvement, resolving disputes among LSRPs, and allocating new SRRA permit and financial responsibilities. In cost recovery litigation, we took on new issues created by the LSRP program, particularly affecting the expert and fact witness testimony and its review by the court. Finally, as a result of our knowledge of the SRRA, we have successfully represented LSRPs in licensing and disciplinary matters. ■



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Thomas Edison State College's President Honored by the NJLM



TESC President Dr. George Pruitt (far left) and fellow awardee, Dr. James W. Hughes, dean of Rutgers University's Bloustein School of Planning & Public Policy, accepted the 2014 NJLM Distinguished Public Service Award from League President and Stone Harbor Mayor Suzanne M. Walters during the association's Annual Delegates Luncheon on Nov. 20, 2014, in Atlantic City, New Jersey. *Photo by Hal Brown*

Thomas Edison State College President Dr. George A. Pruitt was selected by the New Jersey State League of Municipalities (NJLM) to receive the association's 14th annual Distinguished Public Service Award.

In a study of presidential leadership funded by the Exxon Education Foundation, Dr. Pruitt was identified as one of the most effective college presidents in the United States, and has served in an advisory capacity to five secretaries of education under three U.S. presidents.

“Dr. Pruitt's focus on improving access and retention for scores of adults returning to earn college degrees has been exemplary,” says NJLM Executive Director William G. Dressel Jr. “The League was pleased to honor someone whose commitment to higher education serves as such an important driver of our state's prosperity.” ■