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Finding LSRP's Bottom Line

BY ERIC C. PETERSON

New Jersey enacted landmark legislation concerning environmental investigations and cleanups in May 2009 with the Site Remediation Reform Act (SRRRA), including its new Licensed Site Remediation Professional (LSRP) program. Under LSRP, New Jersey Department of Environmental Protection staffers will be replaced in on-site remediation projects, and oversight will now fall to third-party professionals to be trained and licensed by the state.

But even though the LSRP legislation is widely acknowledged as highly significant, it is hardly straightforward, and the program's true impact on development remains to be seen. And while there has been much discussion about the LSRP program's potential impact on real estate owners and developers, lenders are also affected by it—a fact that was acknowledged last November to an audience of bankers at a panel discussion co-sponsored by the law firm Riker Danzig Scherer Hyland Perretti and the New Jersey Bankers Association.

At the panel discussion, Jorge Berkowitz, director of environmental services at Langan Engineering and Environmental Services and a former NJDEP official, joked about "the traveling road show" that he and the other panelists had been participating throughout the state, explaining LSRP to the real estate industry.

Certainly the new environmental laws are "very important in the transaction side" because they "often drive the transaction," says Mark S. Rattner, who heads Riker Danzig's financial services practice, but there is also a substantial "learning curve" relating to LSRPs, especially for the lending community. "The big picture is that while much of the process has changed, there won't be much of a difference for the banks," Rattner said in addressing the bankers attending the panel discussion. "At least the process has been defined. There will still be troubled situations on the banking side, such as foreclosures, but everything else from that standpoint will be pretty much the same for you. Only the process itself is different."

Indeed, to address the larger issue of what the lending community needs to know and when, DEP is working with the New Jersey Bankers Association and the Bank of America to create a manual of sorts on the program. "The lending community is not really up to speed on the specifics of the program," concedes Peter Rand, vice president of KeyBank's real estate capital group. "They have not fully digested what it all means."

"First, we're educating our clients, specifically about the mandatory timeframes," says Barry Skoultchi, CEO and president of environmental and engineering firm the Whitman Companies, Inc., based in East Brunswick. "We've also started to educate the brokers, telling them to basically erase their memories from the past 20-plus years because they have to learn all of the new nomenclature and abbreviations. Next will be the banks. They are next on our hit list, and we will be reaching out to them shortly."

The general issues facing lenders regarding the new environmental legislation range from a simple lack of knowledge about how the LSRP program works, to having leaner staffing tied to the recession and not enough people to truly be on top of the issue. "I just found out about the new rules a few weeks ago," admits one banking official, who asked not to be identified. "We've been so wrapped up in issues tied to the recession and banking crisis, including the number of foreclosures."

And when it comes to complex changes brought about for lenders by the LSRP program, the list is long—and, says Senior, "a work in progress." He explains, "The regulations are in place and posted on DEP's website, but more are coming. There is more direction and more guidance coming in the future."

"It's important to incorporate the new language in real estate contracts and transactions," says Skoultchi. "It's amazing how many people we've found until recently still have letters of non-applicability in the contract language, even though they haven't been issued for several months. People have still had Memorandum of Agreements."

The new legislation shifts oversight responsibility to LSRPs, and gives "a lot of new authority to the DEP," says Irene Kropp, NJDEP's assistant commissioner for site remediation. "It is very important for everyone, including the lending community, to know about the changes, because they are coming fast and furious."

Foremost among the changes affected by LSRP legislation: NJDEP can disapprove site remedy selection for residential, schools, and childcare centers, and can approve presumptive remedies for "sensitive populations." And NJDEP will not permit single-family homes, childcare centers, or schools to be built on landfills, even as part of a mixed-use redevelopment.

Another major change, according to Kropp, is that "there will be no direct billing of fees for each phase [by NJDEP] under the LSRP program. There will be an annual fee based on the number of circumstances [involved with the site], with the fees ranging from \$450 to \$9,500 per year plus \$1,400 per additional contaminated media."

According to Skoultchi, it's even possible that banks will be required "under certain scenarios" to hire an LSRP. "If a bank is looking to lend money on a property and they're doing due diligence, it's probably not the right time for an LSRP," he says. "But if a bank is in the unfortunate position with a nonperforming property, they may want to work with an LSRP, who can do the work more quickly and put the property in a better position to make it more marketable."

Loan documents must be revised to reflect the changes in remediation, advises Steven T. Senior, counsel in Riker Danzig's Environmental Practice Group. And LSRPs may well become part of the due diligence process for any such project as well.

For Marilyn Greenberg, a partner in Riker Danzig's Environmental Practice Group, LSRP's time has come. "There had to be a new way of doing things," she says. "Among other things, besides the replacement of NJDEP staffers with LSRPs, No Further Action [NFA] letters will now be replaced by Response Action Outcomes (RAO) signed by licensed professionals. Remediation funding sources, including grants and loans and redevelopment agreements, will all be affected. NJDEP will continue to rank and prioritize contaminated sites." As far as bankers are concerned, she notes, "The

Yet despite the complexity of the new rules, not everyone on the lending side of development is daunted. Senior says he still finds that “there’s a lot of good in this [program],” and notes the logjam of 20,000 sites requiring remediation statewide. “Something had to be done and this really changes the way we do things,” he says. “The emphasis is on time—LSRPs can do this quickly and avoid DEP waiting time. Costs may go up or down, but there will be more predictability.”

“There was a program instituted a year or two ago for residential underground tanks, which were bogging down DEP,” Skoultchi notes. “It basically involves self-certifying your work and has been a success, and I believe LSRP will do the same. In fact, LSRP could be a model for other programs within DEP, especially those programs where there are inherent delays.”

“Everybody benefits from this program,” concurs Berkowitz. “That includes residents of New Jersey, DEP, the professionals, property owners, and lenders. But the subtleties and nuances have yet to be seen, and there is a need for lending institutions to understand and accept the process.”

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