

The Innocent Purchaser Defense (and Offense) in the LSRP Era

New Jersey should look to Massachusetts for guidance on refining program

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As we pass the fifth anniversary of the Site Remediation Reform Act (SRRA), environmental professionals and members of the regulated community are assessing SRRA's cornerstone—the Licensed Site Remediation Professional (LSRP) program.

While generally considered a success, the program has flaws, some of which are significant. Recent statements from New Jersey Department of Environmental Protection (NJDEP) officials indicate that the department is currently evaluating possible amendments to SRRA that seek to improve the LSRP program. One area ripe for evaluation is the LSRP program's lack of transparency and the resulting impact on the "innocent purchaser" defense, which is available under both the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and New Jersey's Spill Compensation and Control Act (the Spill Act).

In this regard, NJDEP should look to the experience in Massachusetts, which has a similar "privatization" program, for ideas and guidance. In the meantime, case law has shown that, for private entities facing liability for merely owning contaminated property, the best defense is likely a good offense.

Under CERCLA Section 107(a) and relevant case law, current owners of contaminated property are subject to liability irrespective of when the relevant discharges occurred, while past owners are subject to liability only for discharge that occurred during their ownership period. *See* 42 U.S.C § 9607(a). With regard to the Spill Act, it was generally understood for many years that owners of contaminated property could be held liable under the Spill Act only if there were discharges during that person's ownership period. *See, e.g., New Jersey Dep't of Env'tl. Prot. v. Ventron*, 94 N.J. 473, 501 (1983).

Following amendments to the Spill Act in 1997 and 2001 and, more recently, the Appellate Division's decision in *New Jersey Schools Development Authority v. Marcantuone*, 428 N.J. Super. 546 (App. Div. 2012), it has become clear that, like CERCLA, current owners of contaminated property are subject to Spill Act liability regardless of when the relevant discharges occurred.

However, both CERCLA and the Spill Act provide a defense for "innocent purchasers" of contaminated property. Specifically, any person who owns real property on which there has been a discharge prior to the person's acquisition will not be held liable if the owner can establish that, at the time of the acquisition, despite having conducted "all appropriate inquiry," the owner did not know and had no reason to know that a hazardous substance had been discharged at the property. See N.J.S.A. 58:10-23.11g(d)(2),(5); 42 U.S.C. § 9607(b); 42 U.S.C. § 9601(35),(40). Under the Spill Act, for real property acquisitions after September 1993, "all appropriate inquiry" means "a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary[.]" CERCLA utilizes similar criteria but specifically incorporates recently amended Phase I guidance from ASTM International (formerly American Society for Testing and Materials). See 40 C.F.R. part 312 (incorporating ASTM-E-1527-13).

Prior to the LSRP program, to conduct a Phase I assessment and satisfy the "all appropriate inquiry" standard, a consultant or attorney acting on behalf of a prospective purchaser would submit an Open Public Records Act (OPRA) request to the NJDEP seeking environmental files relating to the property at issue. However, following the advent of the LSRP program, parties conducting an investigation or remediation were no longer required to continuously provide the NJDEP with all the relevant information—a LSRP is generally only required to submit reports when the "response action outcome" (RAO) is issued. This has caused concern among the regulated community (as well as real estate professionals) regarding how a purchaser can conduct the appropriate due diligence to satisfy the innocent purchaser defense and protect itself from potentially unknown environmental liabilities. This can be particularly problematic when the person responsible for conducting the remediation is not the seller of the property and thus has no incentive to release the information.

As many commentators have noted, one solution is to amend OPRA to allow limited public access to LSRP documents, restricted to preliminary assessments and other documents necessary to perform the "appropriate inquiry." See, e.g., 212 *N.J.L.J.* 414 (W. Beneduce, M. Judge). However, this has created concern among LSRPs—principal among them is the time, resources and potential liabilities associated with maintaining and providing public access to the relevant records, some which are arguably confidential.

Another option, which would resolve both the innocent purchaser problem and lead to greater public confidence in the LSRP program, is to implement an electronic submittal system similar to the one utilized in Massachusetts. New Jersey's LSRP program is very similar to, and was in fact modeled after, Massachusetts' successful Licensed Site Professional (LSP) program. Recognizing the need for transparency, the Massachusetts DEP (MassDEP) set up an online filing system known as eDEP, which allows LSPs to upload submittals electronically and makes the information publicly available through a searchable database. MassDEP also scanned all the prior reports into PDFs and made them available online. By comparison, LSRPs submit forms (and, on occasion, reports) to the NJDEP in hard copy, which is stored in the NJDEP's central file along with any pre-LSRP reports, and are available for review only upon written request (and payment of related fees).

One of the intended benefits of the LSRP program was to alleviate the NJDEP's burden under the traditional oversight paradigm for reviewing and maintaining the voluminous submittals for the more than 12,000 release sites in the state. By creating an electronic portal similar to Massachusetts' eDEP system, the NJDEP could require submittals more regularly (perhaps annually) without placing any additional burden on NJDEP's limited resources—it may in fact lessen that burden. This would create

both the transparency necessary to maintain public confidence in the LSRP program and allow prospective purchasers of contaminated property access to the information necessary to conduct the appropriate due diligence and satisfy the innocent purchaser defense.

In addition to an online repository similar to MassDEP's eDEP system, the NJDEP should consider advocating amendments to SRRA that will accommodate situations in which conducting "all appropriate inquiry" is impossible due an uncooperative LSRP or responsible party. Any of these ideas, however, will admittedly take time and, in the interim, property owners may have difficulty establishing all the elements of the innocent purchaser defense and potentially face joint and several liability for contamination they did not cause. For those owners, the best defense is likely a good offense.

Under the Spill Act and CERCLA, a contribution claim is generally considered to be several only, and liability is apportioned based upon "equitable factors as the court determines are appropriate." In the context of landowner liability, the question therefore arises as to how a court should equitably distribute liability among the property owner, who merely owns the property, and those parties who are responsible for actual discharges. In New Jersey, recent case law has shown that where a current owner is subject to joint and several liability despite the lack of discharges during its ownership period, the owner can avoid liability by filing contribution claims—even where the owner does not satisfy the elements of the innocent purchaser defense.

In *Allwood Investment Co. v. Jogam Corp.*, No. PAS-L-1847-10 (Law Div. Dec. 11, 2013), a property owner (Allwood) sued the dry cleaning business (Jogam) operating on Allwood's property after high levels of PCE were discovered in the subsurface. The parties filed cross-motions for summary judgment, each alleging that the other was liable under the Spill Act, and the court granted both. Allwood was deemed liable as the current owner of contaminated property, and Jogam was deemed responsible as a discharger. In allocating liability, the court held that the current property owner (Allwood) "is a passive landlord and no evidence was introduced that it caused or contributed to the PCE contamination[.]" Accordingly, "Allwood should not be allocated any Spill Act responsibility for the PCE contamination at its own property." The court held that the defendant dry cleaner was 100 percent responsible for the investigation and remediation of the property because it had failed to prove that any discharges had occurred prior to when it began operations (i.e., it did not present specific evidence of discharges by a prior dry cleaner).

By contrast, in the *Marcantuone* matter, the Appellate Division held that the current owners of a contaminated property, despite being "passive landlords," were liable for the entirety of the response costs (absent compliance with the innocent purchase defense) because the owners were unable to establish that other allegedly contributing parties were responsible for an actual discharge.

As the NJDEP and the environmental community endeavor to evaluate and address the LSRP program's weaknesses, it is important to keep in the mind that Massachusetts may have already found a sensible way to address the issue. In the area of information accessibility and the resulting impact on important statutory defenses, the NJDEP should take note of MassDEP's eDEP system and consider the benefits of establishing a similar electronic platform in New Jersey. In the meantime, any property owner facing environmental liabilities should not hesitate in pursuing potential contribution claims against any and all parties that may be a "discharger" or in "any way responsible" for a discharge. The equitable principles that guide a court's allocation of liability may have the same effect as the "innocent purchaser" defense but without the difficulties caused by the LSRP program. •