



**COMPLIANCE WITH LAWS ISSUES IN COMMERCIAL  
LEASE TRANSACTIONS**

**- Lease Forms with Commentary -**

**-by-**

**Jack Fersko**

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### **Introduction**

Compliance with laws issues have always been an important part of the commercial lease negotiation process. In particular, negotiation focused on the division of responsibility for laws of general applicability as distinguished from laws specifically applicable to the particular tenant or its particular use, and compliance requiring capital expenses. The enactment of environmental laws and the resulting liabilities, however, have significantly impacted the practice of commercial real estate law generally and lease transactions in particular. For almost 100 years the industrial revolution spurred fantastic economic growth in New Jersey, producing what seemed to be a never-ending development of industrial sites that took advantage of New Jersey's proximity to New York and Philadelphia, the availability of coastal resources, railroads, and an ever-advancing transportation system. As industry grew, so too did the problems associated with pollution. Waste resulting from production processes was discarded with little thought for the impact it might have on human health and the environment. As a result, contaminated land, water, and air became the legacy to the industrial revolution in New Jersey, as it did throughout the United States. An awareness of these problems lead to the enactment of environmental laws imposing liability on both property owners and operators. Thus, very few, if any, commercial real estate lease transactions can be completed without a careful examination of the impact of environmental issues.

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Although leasing practitioners have experienced working with federal and state environmental laws and regulations for over thirty years now, environmental issues continue to present an array of road blocks to the successful completion of commercial lease transactions, particularly in the arena of urban areas. And new laws and regulations continue to be enacted and promulgated requiring a constant due diligence by real estate practitioners to remain abreast of the constantly changing environmental landscape. On May 7, 2009, Governor Corzine signed into law the Site Remediation Reform Act, N.J.S.A. 58:10C-1 *et seq.* (“SRRA”), which is having a wide ranging impact on the way contaminated sites are addressed in New Jersey. SRRA was part of a package of environmental legislation that also included amendments to the Industrial Site Recovery Act (“ISRA”), the New Jersey Spill Compensation and Control Act (the “Spill Act”), and the Brownfield and Contaminated Site Remediation Act (“BACSRA”), in order to conform these statutes to SRRA and accomplish related goals.

### **General Overview of the Law**

The following is a very general overview of the law imposing joint and several liability on owners and operators of real estate. It is intended to provide the leasing practitioner with a basic foundation of the law in order to evaluate the potential risks of a transaction.

Under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (“CERCLA”), the federal superfund law, the defenses to the strict, joint and several liability imposed upon the owner of a contaminated site are extremely limited. In its 1986 revisions to CERCLA, Congress created an innocent purchaser defense which is available to an owner who undertook all "appropriate inquiry" prior to acquiring property and did not know and had no reason to know of any discharges of hazardous substances at a contaminated site. Congress did not elaborate on what constituted all appropriate inquiry, resulting in a protracted rulemaking process which culminated with the issuance of a final rule on November 1, 2005 (the “Rule”). The Rule took effect on November 1, 2006. The text of the Rule is located at 40 CFR § 312. In sum, the Rule requires that an inquiry be conducted by a qualified environmental professional (as defined by the Rule) and include, among other elements, (1) interviews with past and present owners, operators, and occupants; (2) evaluations of historical sources of information; (3) searches for recorded environmental cleanup liens; (4) reviews of federal, tribal, state, and local government records; (5) visual inspections of the facility and of adjoining properties; (6) the degree of the obviousness of the contamination and the ability to detect the contamination by appropriate investigation; and (7) commonly known or reasonably ascertainable information about the property. In response to the issuance of the proposed Rule, in November 2005 ASTM International promulgated a new industry standard for the conduct of all appropriate inquiry investigations. The standard, codified ASTM E 1527-05,

has been approved by the EPA as being in conformance with the Rule. For the first time in eight years ASTM is examining changes to E 1527-05.

A similar analysis must be followed in order to meet the New Jersey Spill Act innocent purchaser protection established in 1993, which was modified on January 6, 1998 with the enactment of BACSRA.

While the federal and state innocent purchaser defenses protect those landowners who did not know and had no reason to know of the presence of hazardous substances at the time of purchase, as originally crafted they did not afford any protection to the landowner who is aware of such contamination prior to acquisition.

The Small Business Liability Relief and Brownfields Revitalization Act of 2002 (P.L. 107-118) (hereinafter referred to as “Brownfields Act”) extends the CERCLA innocent purchaser protection to a bona fide prospective purchaser (“BFP”). A BFP must acquire property following the passage of the Brownfields Act (January 11, 2002) and establish the following:

1. The contamination occurred prior to acquisition;
2. The buyer undertook all appropriate inquiry;
3. The buyer gave all legally required notices of the discovery of contamination;
4. The buyer provides access and cooperates with all parties to conduct a response action;
5. The buyer complies with all land use restrictions related to the cleanup; and
6. The buyer does not impede the effectiveness of any institutional controls established at the site.

There is a split in the courts over the definition of “disposal” for the purposes of determining when contamination results. The Ninth Circuit ruled that passive migration of contamination on property does not constitute “disposal” for purposes of CERCLA. Conversely, the Fourth Circuit has held that in the case of underground storage tanks, “active human conduct” was not required for there to be a disposal. Under this view, contamination could result after acquisition through no act of the purchaser, rendering the BFP defense unavailable to the purchaser.

The Brownfields Act also protects contiguous property owners or those who own property that is “similarly situated with respect to” contaminated property, as long as the parcels are owned by separate parties. The contiguous property owner is shielded from CERCLA liability for the presence of hazardous substances which migrate from that off-site source.

CERCLA does not define “similarly situated with respect to”. The EPA has taken the position that the property need not be located immediately adjacent to the contaminated property in order to receive this protection.

In order to qualify for the contiguous property owner defense many of the same conditions that apply to innocent purchasers must be satisfied. In addition, the owner must not have caused, contributed to or consented to the release. The property owner must also take reasonable steps to prevent and stop any release and prevent or limit human, environmental or natural resource exposure to any hazardous substance that migrated onto the property. If one fails to meet the conditions of a contiguous property owner defense, BFP protection may be available.

The Spill Act contains a similar defense to liability for any party who acquires property on which there has been a discharge of hazardous substances, which was discovered prior to acquisition. This is a defense to liability for cleanup costs and other damages to the state or any other person under the Spill Act or civil common law related to the contamination which was remediated prior to acquisition or after closing so long as a Remedial Action Workplan Approval was issued prior to closing. In order to qualify for this liability protection, the following conditions must be satisfied:

1. The property must have been acquired after the discharge of the hazardous substance;
2. The party acquiring the property did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or any other person in any way responsible for the hazardous substance;
3. The party gave notice to the NJDEP upon discovery of the discharge; and
4. The party (a) conducted appropriate pre-acquisition inquiry by completing a preliminary assessment and site investigation, (b) performed a cleanup prior to property acquisition, relied on a previously issued final remediation document, or, prior to the property acquisition, obtained the NJDEP approval of a Remedial Action Workplan and thereafter complied with the conditions of the Remedial Action Workplan and (c) established and maintained all engineering and institutional controls.

In the event that the property owner obtains knowledge of a discharge of a hazardous substance at the property during its period of ownership, and subsequently transfers ownership of the property without disclosing this information, the transferor is strictly liable for the cleanup and removal costs, and loses any liability defense.

In contrast to the federal BFP protection, the Spill Act requires that the new property owner undertake remediation of the discharge. However, if the new owner has

complied with the requirements set forth above, then the Spill Act provides the new owner with protection against liability for cleanup and removal costs or damages under state law to any person harmed by any hazardous substance discharged on the property prior to the acquisition and any migration off the property.

The Spill Act also contains a defense to liability for a party who discovers a discharge prior to acquisition, and conducts remediation after acquisition. This is a defense to liability for any cleanup costs or other damages pursuant to the Spill Act or any other law, including civil common law, to any person other than the state and federal government. In order to qualify for this liability protection, the following conditions must be satisfied:

1. The property must have been acquired after the discharge of the hazardous substance;
2. The party acquiring the property did not discharge the hazardous substance, is not in any way responsible for the hazardous substance, and is not a corporate successor to the discharger or any other person in any way responsible for the discharge;
3. Upon discovery, the person gave notice to the NJDEP of the existence of the discharge;
4. (a) Within thirty (30) days after acquisition of the property, the new owner began cleanup activities, pursuant to an oversight document executed by the NJDEP prior to acquisition, or (b) for property acquired after May 7, 2009, the party provides written notice of acquisition to the NJDEP before or on the date of acquisition and the party remediates the property with an LSRP and (c) the NJDEP is satisfied that the cleanup was completed in a timely and appropriate fashion; and
5. Within ten (10) days of acquisition the new owner agrees in writing to provide the state with access for remediation and any related activities.

This provision does not relieve the new owner of liability for: (1) a discharge that occurs after acquisition; (2) any negligent actions that aggravate or contribute to the harm; (3) failure to maintain the institutional or engineering controls or otherwise comply with the provisions of a final remediation document or Remedial Action Workplan; (4) cleanup and removal of hazardous substances that may have been discharged on the property or migrated from the property; and (5) failure to comply in the future with any laws or regulations.

Similar to the federal Brownfields Act's protection with respect to contiguous property owners, BACSRA provides that a property owner will not be required to investigate or remediate contamination coming onto the site from a property that is owned and operated by another party, unless the property owner is in any way responsible for the off-site discharge. BACSRA also provides that a property owner

is not responsible to remediate groundwater contamination to a concentration lower than the level migrating onto the property from off-site.

Until now, except for discharges from regulated underground storage tanks, the obligation to report a discharge of contamination to NJDEP has generally been limited to the property owner and operator, and the party responsible for the discharged hazardous substance. Consultants and other third parties generally were not obligated to report. SRRA creates independent reporting obligations for the LSRP.

If the LSRP obtains specific knowledge of a discharge on a contaminated site for which he or she is responsible, then the LSRP must notify the person responsible for conducting the remediation and notify NJDEP. If the LSRP identifies a condition that in his or her professional judgment is an immediate environmental concern (“IEC”), then the LSRP must immediately advise the person responsible for conducting the remediation (e.g. a seller) and immediately notify NJDEP even if it pertains to a site for which the LSRP is not responsible. An IEC is defined as a condition at a contaminated site where there is contamination to a potable well at or above the groundwater remediation standards, contamination of an occupied or confined space that produces a toxic or harmful atmosphere to humans or physical damage to essential underground services, contamination that could result in acute human health exposure, or any other immediate threat to the environment or to public health and safety.

As a result of this new reporting obligation, a landlord that plans to permit a prospective tenant to undertake an on-site investigation, must determine if it will permit the prospective tenant to use an LSRP in connection with that investigation – particularly where a landlord is intending to impose a confidentiality requirement in connection with that investigation.

Traditionally, real estate transactions were consummated on an “As-Is” basis. As such, upon a closing of title for example, responsibility for the real property transferred to the buyer. In the early stages of the development of environmental law, sellers and landlords took refuge in the “As-Is” provision of the agreement, arguing that the doctrine of *caveat emptor* protected such party from claims involving environmental contamination. In the environmental arena, however, real property sold or leased on an “As Is” basis will not preclude a claim brought under CERCLA, state statutes such as the Spill Act, or traditional common law doctrines such as fraud, misrepresentation, negligence, nuisance, strict liability, and trespass. The courts early on held that an “As Is” clause will not enable a party to shift liability by claiming *caveat emptor*. An “As Is” clause will merely protect a party from a claim of breach of warranty, but will not bar relief in a Spill Act or CERCLA action. Further, the sophistication of the parties cannot be used to convert an “As-Is” clause into a contractual reallocation of CERCLA or Spill Act liability.

Although the courts have generally been reluctant to impose liability upon a buyer or a tenant for pre-existing environmental contamination based exclusively upon an “As Is” clause, the courts will enforce a contract as written. Consequently, while neither the Spill Act nor CERCLA permit private parties to shift Spill Act and CERCLA liability from one private party to another vis-à-vis the government, as between themselves, they may contractually reallocate Spill Act and CERCLA liability. In order to preclude recovery against a seller or a landlord under CERCLA or the Spill Act, there must be an express provision allocating the risk between the parties, and a clear and intended waiver or release of the right to bring the particular claim in the future.

### **Response Action Outcome**

Upon completion of a remediation, NJDEP will no longer issue a No Further Action Letter and Covenant Not to Sue. Instead, the LSRP will issue a Response Action Outcome (“RAO”) to the person responsible for conducting the remediation.

Upon issuance of the RAO, the person responsible for conducting the remediation shall be deemed, by operation of law, to have received a covenant not to sue for the area of concern that was remediated (or for the entire real property, if the appropriate investigation was performed). The covenant not to sue releases the following parties from all civil liability to the State to perform any additional remediation, or to pay compensation for natural resource damages: (1) the person who undertook the remediation (unless the person is liable for cleanup and removal costs under the Spill Act, and has no defense to liability); (2) all successors in property ownership; and (3) all lessees who operate at the property. The covenant not to sue does not apply to discharges that occur after the issuance of the RAO, nor does it relieve any person from the obligation to comply with



future laws. Unless new information comes to light or the credibility of the LSRP has come under scrutiny, NJDEP only has 3 years in which to audit an RAO.

The clauses set forth below, and the comments to them, are intended to focus the attention of the leasing practitioner on the respective interests of landlords and tenants, and the dilemmas faced by each in commercial leasing transactions.

## **I. Definitions**

A. **Contaminants.** "Contaminants" means any regulated substance, toxic substance, hazardous substance, hazardous waste, pollution, pollutant or contaminant, as defined or referred to in the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq.; the Brownfield and Contaminated Site Remediation Act, N.J.S.A. 58:10B-1 et seq.; the New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq.; the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. (the "Spill Act"); the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq.; the Hazardous Substances Discharge: Reports and Notices Act, N.J.S.A. 13:1K-15 et seq.; the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq.; the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §6901 et seq.; the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §9601 et seq. ("CERCLA"); the Water Pollution and Control Act, 33 U.S.C. §1251 et seq.; the "Tank Laws" as defined below; together with any amendments thereto, regulations promulgated thereunder and all substitutions thereof, as well as words of similar purport or meaning referred to in any other federal, state, county or municipal environmental statute, ordinance, code, rule or regulation, including, without limitation, radon, asbestos, polychlorinated biphenyls, urea formaldehyde and petroleum products and petroleum based derivatives. Where a statute, ordinance, code, rule or regulation defines any of these terms more broadly than another, the broader definition shall apply.

B. **Discharge.** "Discharge" shall mean the releasing, spilling, leaking, leaching, disposing, pumping, pouring, emitting, emptying, treating or dumping of Contaminants at, into, onto or migrating from or onto the Premises or the Property, of which the Premises is a part, (including, without limitation, the soil, surface water, subsurface water or groundwater) or the threat thereof, regardless of whether the result of an intentional or unintentional action or omission.

C. **Engineering Control.** "Engineering Control" shall have the meaning ascribed to such term under N.J.S.A. 58:10B-1 and the regulations promulgated thereunder.

D. **Environmental Documents.** "Environmental Documents" shall mean all environmental documentation in the possession or under the control of [identify the party] or their representatives (including, without limitation, any LSRP retained by [identify the party]) concerning the Property or its environs, including, without limitation, all sampling plans, cleanup plans, preliminary assessment plans and reports, site investigation plans and reports, remedial investigation plans and reports, remedial action plans and reports, or the equivalent, sampling results, sampling result reports, data, diagrams, charts, maps, analyses, conclusions, quality assurance/quality control documentation, correspondence to or from the NJDEP or any other Governmental Authority, submissions to the NJDEP or any other Governmental Authority and directives, orders, notices of deficiency, approvals and disapprovals issued by the NJDEP or any other Governmental Authority.

E. **Governmental Authority.** "Governmental Authority" shall mean the federal, state, county or municipal government, or any department, agency, bureau or other similar type

body obtaining authority therefrom, or created pursuant to any Laws, and shall also include an LSRP.

F. **Institutional Control.** “Institutional Control” shall have the meaning ascribed to such term under N.J.S.A. N.J.S.A. 58:10B-1 and the regulations promulgated thereunder.

G. **ISRA.** "ISRA" shall mean the Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq., the regulations promulgated thereunder and any amending and successor legislation and regulations.

H. **LSRP.** “LSRP” means a licensed site remediation professional as defined in the Site Remediation Reform Act, N.J.S.A. 58:10C-2, and the regulations promulgated thereunder.

I. **Law or Laws.** "Law" or "Laws" shall mean each and every applicable federal, state, county or municipal statute, ordinance, rule, regulation, order, code, directive or requirement, currently or hereafter existing, together with all successor statutes, ordinances, rules, regulations, orders, codes, directives or requirements, of any Governmental Authority, including, without limitation, Laws in any way related to Contaminants, and the common law.

J. **NJDEP.** "NJDEP" shall mean the New Jersey Department of Environmental Protection or its successor.

K. **Notices.** "Notice" or "Notices" shall mean, in addition to its ordinary meaning, any communication of any nature, whether in the form of correspondence, memoranda, orders, notices of deficiency, directives or otherwise.

L. **Premises.** “Premises” shall mean \_\_\_\_\_.

M. **Property.** “Property” shall mean the real property commonly known and designated as \_\_\_\_\_, together with all improvements thereon.

N. **RAO.** “RAO” shall mean a response action outcome as defined under N.J.S.A. N.J.S.A. 58:10B-1 and the regulations promulgated thereunder.

O. **Remediation.** “Remediation” shall have the meaning ascribed to such term under N.J.S.A. 13:1K-8 and N.J.S.A. 58:10B-1 and the regulations promulgated thereunder.

P. **Tank Laws.** "Tank Laws" shall mean the New Jersey Underground Storage of Hazardous Substances Act, N.J.S.A. 58:10A-21 et seq., and the federal underground storage tank law, (Subtitle I of the Resource Conservation and Recovery Act, as amended), 42 U.S.C. §6901 et seq., together with any amendments thereto, regulations promulgated thereunder and all substitutions thereof, and any successor legislation and regulations.

Q. **Tenant's Representatives.** "Tenant's Representatives" shall mean any shareholder, officer, director, member, partner, employee, agent, licensee, invitee, guest, assignee or sublessee of Tenant, or any other third party other than Landlord.

R. **Underground Storage Tanks.** "Underground Storage Tanks" shall have the meaning ascribed to such term under the Tank Laws, as well as unregulated underground storage tanks used to store Contaminants, and shall include, without limitation, the "monitoring system", the "leak detection system", the "discharge detection system" and the "tank system" associated with the Underground Storage Tanks, as those terms are defined by the Tank Laws.

## Comments to Article I

The definition section set forth above is intended to ensure against possible ambiguities by applying very broad, all-inclusive definitions to the defined terms. When applied to the clauses that follow the definition section, the broadly defined terms will better enable a landlord or tenant to assign liability. The definitions may require modification in the event the property is a multi-tenant facility.

It is important to note that the definition of "Laws" includes future laws, as well as common law. The inclusion of a reference to future laws will preclude an argument that newly enacted laws, such as ISRA, were never within the contemplation of the parties, and therefore are, or are not a particular party's responsibility.

The definitions also address the SRRA, and its establishment of a Licensed Site Remediation Professional ("LSRP") program, in which the LSRPs conduct the cleanup, determine whether such cleanups have been effective, and issue the final sign-off document, an RAO. In some important respects the LSRP performs functions that were formerly within the exclusive purview of NJDEP, although NJDEP may inspect and, under certain circumstances, review documents submitted by the LSRP.

SRRA creates a licensing board to establish LSRP standards. The LSRP must comply with the requirements of SRRA, and the board has the power to suspend or revoke an LSRP's license, or impose other penalties.

Pursuant to SRRA, as of November 3, 2009 any person who began the remediation of a contaminated site had to hire an LSRP. Additionally, by May 7, 2012, all pre-existing remediation cases that were being overseen by NJDEP had to be transferred to an LSRP. Also, SRRA provides that, under most circumstances, an LSRP is not required for the performance of pre-acquisition environmental due diligence.

## **II. Landlord's General Compliance with Laws Clause**

Tenant shall, at Tenant's own expense, promptly comply with: (a) all Laws, foreseen or unforeseen, ordinary as well as extraordinary, applicable to the Premises, Tenant, Tenant's use of or operations at the Premises, or all of the them; (b) the requirements of any regulatory insurance body; and (c) the requirements of any insurance carrier insuring the Premises; regardless of whether compliance (x) necessitates structural changes or improvements; (y) interference with Tenant's use and enjoyment of the Premises; or (z) results from any condition, event or circumstance existing prior to or after the commencement of the lease. Tenant acknowledges examining the Premises, and the Property, of which the Premises is a part, prior to the Commencement Date and accepts the Premises, and the Property, of which the Premises is a part, "as is", and enters into this lease without any representations or warranties on the part of the Landlord as to the condition of the Premises, the Building or the Property. The Tenant release the Landlord, its shareholders, officers, directors, partners, members, employees and agents from all claims, liabilities, losses, damages, and costs, and covenants not to sue the Landlord with respect to the environmental condition of the Premises, the Building and/or the Property regardless of whether the claim now exists or is hereafter enacted or promulgated.

## **Comments to Article II**

This clause is best suited for a single-tenant industrial facility since it imposes broad responsibility upon a tenant to comply with all laws, requirements of regulatory insurance bodies and requirements of insurance carriers, which are applicable not only to the tenant and the tenant's use of the property, but to the property in general. Employing an "as is" concept with respect to the lease transaction, the tenant's compliance obligation attaches even if the condition requiring compliance pre-existed the lease commencement date and even if compliance requires structural changes or improvements. Depending upon the length of the lease, a tenant may legitimately argue that structural improvements should be amortized over the length of the lease, so that the tenant's percentage of responsibility decreases as the lease approaches its end.

If a tenant is going to be held responsible for structural changes and improvements, it is imperative that there is consistency between the maintenance and repair clause and the compliance with laws clause.

### **III. Tenant's General Compliance with Laws Clause**

(a) Tenant shall, at Tenant's own expense, comply with all Laws now existing, so long as such laws are applicable by reason of Tenant's use of and operations at the Premises and are not Laws of general applicability, and provided that compliance with such Laws shall not obligate Tenant to undertake any structural changes or improvements to the Premises. In all other respects, Landlord shall, at Landlord's own expense, promptly comply with all Laws applicable to the Premises and the Property, regardless of whether compliance necessitates structural changes or improvements.

(b) Tenant shall have the right to contest, by appropriate legal proceedings, in the name of Tenant or Landlord, the validity or applicability of any Law with which Tenant is obligated hereunder to comply, and Landlord shall, at no cost to Tenant, cooperate with Tenant in connection with such contest, including, without limitation, signing such affidavits and certifications as may be requested by Tenant and giving testimony at depositions, hearings or trials with respect to such contest.

(c) Prior to the commencement of this lease, Landlord shall, at Landlord's expense, obtain and deliver to Tenant a certificate of occupancy for the Premises, or any other certificate as required by Law.



### **Comments to Article III**

This clause limits the tenant's compliance obligation to those laws that are applicable by reason of the tenant's particular use of and operations at the property. The Landlord is assigned liability for compliance with all other laws.

In addition, the landlord has the responsibility of delivering to the tenant a certificate of occupancy or other such certificate as may be required by law, prior to commencement of the lease. In this manner, the tenant has a certain comfort level that the property complies with local ordinances and that the tenant's use of the property is a permitted use.

This clause also provides the tenant with the opportunity to contest the validity or applicability of a law. When providing such a right, the landlord should impose upon the tenant certain requirements: namely, that the contest will not result in a lien against the property, will not result in civil or criminal liability on the landlord's part, and will not cause landlord to be in violation of its mortgage. In addition, the tenant must be obligated to prosecute the contest diligently and keep the landlord apprised of the status of the contest. The landlord should have the right to preclude a contest if the tenant is in default under the lease or the property will suffer injury or other waste if the compliance activities are postponed.

If the property is a multi-tenant facility, then the tenant should also consider modifying the clause to impose upon landlord responsibility for other tenants' non-compliance with laws.

#### **IV. Landlord's Environmental Compliance Clause**

A. **ISRA Compliance.** Tenant shall, at Tenant's own expense, comply with ISRA. Tenant shall, at Tenant's own expense, make all submissions to, provide all information to, and comply with all requirements of the NJDEP. Tenant's obligations under this subparagraph A shall arise if there is a closing of operations, a transfer of ownership or operations, or a change in ownership at or affecting the Premises or the Property, of which the Premises is a part, pursuant to ISRA, whether triggered by Landlord or Tenant. Provided this lease is not previously cancelled or terminated by either party or by operation of law, Tenant shall commence its submission to the NJDEP in anticipation of the end of the lease term, no later than six (6) months prior to the expiration of the lease term. Should Tenant's operations at the Premises be outside of those industrial operations covered by ISRA, Tenant shall, at Tenant's own expense, provide to Landlord an affidavit (the "ISRA Affidavit") from Tenant's members, partners, or officers, as the case may be, upon which Landlord may rely, that shall be in form and substance satisfactory to Landlord, which shall establish that ISRA does not apply to Tenant's operations.

B. **Information to Landlord.** At no expense to Landlord, Tenant shall promptly provide all information requested by Landlord, an LSRP or NJDEP for preparation of an ISRA Affidavit, *de minimis* quantity exemption, limited conveyance application or other submission made, if any, by Landlord, and shall promptly sign such affidavits and submissions when requested by Landlord, an LSRP or NJDEP. The foregoing shall not impose on Landlord any obligation to make any submission not otherwise expressly required pursuant to this lease.

[C. **Septic System.** Tenant acknowledges that the Premises is connected to an on-site septic tank and leach field, referred to here as the "Septic System". Tenant shall only discharge sanitary waste into the Septic System.]

D. **Tenant Audit.** Landlord shall have the right, from time to time, during the lease term, and upon the expiration of the lease term, to require that Tenant hire, and in such event, Tenant shall at Tenant's own expense hire, an LSRP satisfactory to Landlord to undertake sampling at the Premises sufficient to determine whether Contaminants have been Discharged during the lease term. **[Tenant's sampling shall also establish the integrity of all Underground Storage Tanks at the Premises.]**

E. **Landlord Audit.** Tenant shall permit Landlord and Landlord's agents, representatives and employees, including, without limitation, legal counsel and environmental consultants and engineers (including without limitation, an LSRP), access to the Premises, from time to time, during the lease term, for purposes of conducting an environmental assessment, inspection and sampling, during regular business hours, or during other hours either by agreement of the parties or in the event of an emergency. Tenant shall not restrict access to any part of the Premises, and shall not impose any conditions to access. Landlord shall use reasonable efforts to avoid unreasonably interfering with Tenant's use of the Premises, and upon completion of Landlord's assessment, investigation and sampling, shall, to the extent reasonably practicable, repair and restore the affected areas of the Premises from any material damage caused by the assessment, investigation and sampling.

F. **Tenant Remediation.** Should the assessment, investigation or sampling performed pursuant to subparagraphs (D) or (E) above, or any other assessment, investigation or sampling, reveal the existence of: (x) a Discharge of Contaminants; [or (y) a Discharge of other than sanitary waste to the Septic System]; then, in addition to being in default under this lease and Landlord having all rights available to Landlord under this lease and by Law by reason of such default, Tenant shall, at Tenant's own expense, promptly, diligently and in a continuous manner, undertake all action required by Landlord and any Governmental Authority, including, without limitation, promptly: (1) retaining an LSRP reasonably satisfactory to Landlord, (2) preparing and submitting to the appropriate Governmental Authority, all required assessment, investigation, sampling and remedial action plans and reports, and other documents; (3) implementing, to the satisfaction of Landlord and the appropriate Governmental Authority, including, without limitation, the LSRP, the approved assessment, investigation, sampling and remedial action plans and reports in accordance with all Laws; (4) removing from the Premises all such Contaminants to the satisfaction of Landlord and the appropriate Governmental Authority, including, without limitation, the LSRP; (5) establishing a remediation funding source, which funding source shall be satisfactory to Landlord and the appropriate Governmental Authority, including, without limitation, the LSRP; (6) paying all filing and oversight fees of the NJDEP; (7) addressing all required natural resource restoration and satisfying all natural resource damage claims; and (8) obtaining and delivering to Landlord an RAO.

G. **Nature of Tenant's Remediation.** Notwithstanding anything to the contrary set forth in this paragraph, in no event shall Tenant's remedial action involve Engineering Controls or Institutional Controls, including, without limitation, capping, fencing or other physical barrier or a deed notice, or institutional control notice pursuant to N.J.S.A. 58:10B-13, and notwithstanding the requirements or approvals of the NJDEP or any other Governmental Authority's requirements or approval, Tenant's remedial action shall meet the most stringent published remediation standards for soil, surface water, groundwater, drinking water and indoor air.

H. **Tenant's Restoration.** Promptly upon completion of all required investigatory and remedial activities, Tenant shall, at Tenant's own expense, restore the affected areas of the Premises from any damage or condition caused by the remedial work, including, without limitation, closing, pursuant to Law, any wells or piezometers installed by or on behalf of Tenant at the Premises.

I. **Hold-over Tenancy.** If prior to the expiration or earlier termination of the lease term, Tenant: (1) fails to obtain from the NJDEP or an LSRP, as the case may be, and deliver to Landlord, either (a) the ISRA Affidavit, (b) a de minimis quantity exemption, (c) an RAO, pursuant to ISRA (the "ISRA Clearance"); or (2) fails to remediate all Contaminants pursuant to subparagraph (F) above, and deliver to Landlord an RAO, (the "Environmental Clearance"); then upon the expiration or earlier termination of the lease term, Landlord shall have the option either to consider the lease as having ended or to treat Tenant as a hold-over tenant in possession of the Premises. If Landlord considers the lease as having ended, then Tenant shall nevertheless be obligated to promptly obtain and deliver to Landlord the ISRA Clearance or the Environmental Clearance, as the case may be, and otherwise fulfill all of the obligations of Tenant set forth in this paragraph. If Landlord treats Tenant as a hold-over tenant in possession of the Premises, then Tenant shall pay, monthly to Landlord, double the regular and additional monthly rent which Tenant would otherwise have paid under the lease, until such time as Tenant delivers to Landlord the ISRA

Clearance or the Environmental Clearance, as the case may be, and otherwise fulfills its obligations to Landlord under this paragraph, and during the holdover period, all of the terms of this lease shall remain in full force and effect.

J. **Tenant's Operations at the Premises.** Tenant represents and warrants to Landlord that Tenant shall use the Premises for \_\_\_\_\_ and no other purpose, which operation has the following North American Industry Classification System ("NAICS") number as defined by the NAICS Manual published by the Federal Executive Office, Office of the President, Office of Management and Budget, which is used by the NJDEP in determining applicability to ISRA: \_\_\_\_\_. Tenant's use of the Premises shall be restricted to the use and NAICS classification set forth above, unless Tenant obtains Landlord's prior written consent to a change in the use, which consent may be granted or withheld by Landlord, in Landlord's sole and absolute discretion. Annexed as Schedule \_\_\_ is an affidavit of an officer of Tenant ("Officer's Affidavit"), setting forth Tenant's NAICS number and a detailed description of the operations and processes Tenant shall undertake at the Premises, organized in the form of a narrative report, including, without limitation, a description and quantification of Contaminants to be used, generated, manufactured, refined, transported, treated, stored, handled or disposed of at the Premises. Following commencement of the lease term, Tenant shall notify Landlord promptly by way of a supplemental Officer's Affidavit as to any intended change in Tenant's operations, NAICS number or use, generation, manufacture, refinement, transportation, treatment, storage, handling or disposal of Contaminants; however, Tenant's supplying Landlord with such supplemental affidavit shall not be deemed a waiver by Landlord of Tenant's default under this lease or a consent by Landlord to such change and in no event shall Tenant effect such change without Landlord's prior written consent, which consent may be granted or withheld by Landlord, in Landlord's sole and absolute discretion.

K. **Permits.** Tenant shall not commence or alter any operations at the Premises prior to: (1) obtaining all operating and discharge permits, registrations, licenses, certificates and approvals from all Governmental Authorities required pursuant to Laws, including, without limitation, air pollution control permits and water pollution discharge elimination system permits from the NJDEP; and (2) delivering a copy of each permit, registration, license, certificate and approval to Landlord, together with a copy of the application upon which such permit, registration, license, certificate and approval was based.

L. **Environmental Questionnaire.** Contemporaneously with the signing and delivery of this lease, and thereafter, annually on the anniversary date of the commencement of the lease term, Tenant shall complete, execute and deliver to Landlord an environmental questionnaire which shall be in the form and shall contain such terms and provisions, as Landlord may, from time to time, submit to Tenant. In the event Tenant's response to the environmental questionnaire indicates, in Landlord's determination, a potential environmental issue, then Tenant shall, at Tenant's own expense, undertake in accordance with Law, all environmental assessment, investigation, sampling and remediation as Landlord deems appropriate.

M. **Environmental Documents.** During the term of this lease and subsequently, promptly upon receipt by Tenant or Tenant's consultants, LSRP or counsel, Tenant shall deliver to Landlord all Environmental Documents concerning or generated by or on behalf of Tenant, whether currently or hereafter existing. Tenant shall make its LSRP and consultants reasonably available to Landlord, at no cost to Landlord, to discuss any or all Environmental Documents. Landlord shall have the right to review in draft any and all Environmental Documents prepared by or on behalf of Tenant.

N. **Attendance at Meetings.** Tenant shall notify Landlord in advance of all meetings scheduled between Tenant or Tenant's representatives and NJDEP or any other Governmental Authority pertaining to the Premises, and Landlord and Landlord's agents, representatives and employees, including, without limitation, legal counsel and environmental consultants and engineers, shall have the right, without the obligation, to attend and participate in all such meetings.

O. **Liens.** Tenant shall promptly notify Landlord of any liens threatened or attached against the Premises pursuant to the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq., the regulations promulgated thereunder, and any amending or successor legislation or regulations, or any other Laws. In the event that such a lien is filed against the Premises as a result of the actions or omissions of Tenant or a Tenant's Representative, then Tenant shall be deemed in default under this lease and, in addition to Landlord having all rights available to Landlord under this lease and by Law by reason of such default, Tenant shall, at Tenant's own expense, within thirty (30) days from the date that the lien is filed against the Premises, and in any event prior to the date any Governmental Authority commences proceedings to execute on the lien, either: (1) pay the claim and remove the lien from the Premises; or (2) deliver to Landlord either (a) a bond in an amount and with a surety satisfactory to Landlord in Landlord's sole and absolute discretion, or (b) a cash deposit in the amount of the lien, plus any interest that may accrue thereon. The foregoing shall not constitute a consent or agreement by Landlord to permit such a lien to attach to the Premises, nor shall the foregoing be deemed a waiver by Landlord of a default by Tenant under this lease.

P. **Landlord's Consent for Tenant's Investigation.** In no event shall Tenant, nor anyone on Tenant's behalf, undertake any environmental assessment, investigation, sampling or remediation of the Premises without prior written notice to, and the prior written consent of, Landlord. In the event Landlord consents to an environmental assessment, investigation, sampling or remediation, then prior to undertaking any assessment, investigation, sampling or remediation, Tenant shall, or shall cause Tenant's engineers and consultants, as the case may be, to provide

Landlord with a protocol outlining in detail the nature, scope and location of all assessment, investigation, sampling or remediation to be undertaken, and shall receive Landlord's written consent to such assessment, investigation, sampling and remediation. Landlord and Landlord's consultants, engineers and representatives shall have the right, without the obligation, to be present during such assessment, investigation, sampling or remediation, and shall have the right, at no expense to Landlord, to split all samples taken by Tenant or Tenant's consultants or engineers and Tenant shall provide Landlord with sufficient advance notice in order to ensure Landlord shall be able to exercise its right to be present and split samples. Tenant shall promptly provide to Landlord, at Tenant's cost and expense, the results of all samples collected at or about the Premises and/or the Property.

Q. **Landlord's Right to Perform Tenant's Obligations.** Notwithstanding anything to the contrary set forth in this lease, in the event, pursuant to this lease, Tenant is required to undertake any assessment, investigation, sampling or remediation with respect to the Premises, then, at Landlord's discretion, Landlord shall have the right, without the obligation, from time to time, during such sampling, assessment, investigation or remediation activities, to perform such sampling, assessment, investigation or remediation activities at Tenant's expense, and all sums incurred by Landlord shall be paid by Tenant, as additional rent, upon demand.

R. **Indemnity.** Tenant shall indemnify, defend with counsel satisfactory to Landlord and hold harmless Landlord, and Landlord's **[officers, directors, shareholders, members, partners,]** employees, agents and personal or legal representatives from and against any and all claims, liabilities, losses, damages, penalties and costs, foreseen or unforeseen, including, without limitation, counsel, engineering and other professional and expert fees, which an indemnified party may incur, resulting directly or indirectly, wholly or partly as a consequence of Tenant's actions or omissions with regard to Tenant's obligations under this paragraph.

S. **Survival.** This paragraph shall survive the expiration or earlier termination of this lease. Tenant's failure to abide by the terms of this paragraph shall be restrainable, or enforceable, as the case may be, by injunction.

[T. **Condition Precedent.** As a condition precedent to Tenant's right to sublet the Premises in whole or in part, or to assign this lease, Tenant shall, at Tenant's own expense, first comply with ISRA and fulfill all of Tenant's environmental obligations under this paragraph which arise upon termination of Tenant's lease term. If this condition shall not be satisfied, then notwithstanding anything to the contrary set forth in this lease, Landlord shall have the right to withhold consent to, or revoke any prior consent given to a sublease or assignment.]

U. **Interpretation.** The obligations imposed upon Tenant under subparagraphs (A) through (T) above are in addition to and are not intended to limit, but to expand upon, the obligations imposed upon Tenant under paragraph **[insert number of the general compliance with laws paragraph]** .

## Comments to Article IV

The Industrial Site Recovery Act focused New Jersey's lawyers' attention on the need to protect their landlord and tenant clients from potential environmental liability.

ISRA utilizes the North American Industry Classification System ("NAICS") to group industries and determine which are subject to ISRA. The NAICS classification numbers are published by the Executive Office of the President, Office of Management and Budget ("OMB"). OMB first published NAICS numbers in 1997. Prior to that year, OMB published the Standard Industrial Classification system ("SIC"). With the introduction of NAICS, OMB sought to create a classification system that better reflected the structure of the modern economy. Consequently, New Jersey had to restructure ISRA to utilize NAICS codes rather than those of the SIC. The subject NAICS codes are now codified at N.J.A.C. 7:26B.

ISRA entitles a landlord and a tenant to petition the NJDEP to first compel the party responsible pursuant to the provisions of the lease to comply with ISRA. If the lease provisions are clear, the NJDEP will first turn to the party responsible under the lease for compliance. Consequently, a clearly drafted lease provision is essential.

This broad landlord clause places responsibility upon a tenant to comply with all ISRA as well as other environmental requirements pertaining to the property, and in the case of ISRA, the tenant is obligated to comply regardless of whether the landlord's or the tenant's actions trigger ISRA.

The clause requires that the tenant commence compliance with ISRA at least six (6) months prior to the expiration of the lease term. If the tenant's operation is outside of those operations covered by ISRA, the clause requires that the tenant deliver an affidavit to confirm that its operations are not covered by ISRA. It is recommended that the landlord require that the tenant deliver an affidavit similar to the affidavit previously submitted in order to obtain a Letter of Non-Applicability from the NJDEP when the NJDEP was still issuing Letters of Non-Applicability.

This clause obligates the tenant, during the lease term, and upon expiration of the lease term, to perform an audit of the property to determine whether there has been a discharge of a hazardous substance or hazardous waste and to establish the integrity of any underground storage tanks on the property. The clause also provides the landlord with a right to undertake an audit of the property. If the landlord's or the tenant's audit reveals that a discharge occurred, or if any other environmental evaluation of the property reveals that a discharge occurred, during the lease term, then the clause obligates the tenant to undertake all remediation. In this respect, the clause prohibits the tenant from undertaking any remediation by way of engineering or institutional controls, regardless of whether such controls are approved by the

NJDEP or an LSRP, and obligates the tenant to remediate to the most stringent standards applicable.

First, it is important to definitively remove any notion that the tenant will have a right to impose any engineering or institutional controls in order to avoid court-imposed engineering or institutional controls. See E.I. du Pont de Nemours v. State, 283 N.J. Super 331 (App. Div. 1995); compare with Dean Witter Services Company, Inc. v. Colpro, Inc., Docket No. HUD-L-5317-94 (unpublished opinion, decided December 27, 1994 by Judge Maurice J. Gallipoli).

Second, BACSRA permits concentrations of contaminants to remain in soil and groundwater above the applicable cleanup standards under certain circumstances. The contaminants that remain at the real property above the cleanup standards are subject to engineering and institutional controls in order to prevent exposure. The institutional control used to address soil contamination is known as a Deed Notice. The Deed Notice requires that a certification be submitted to NJDEP every two years confirming that the engineering control continues to be properly maintained and continues to be protective of public health, safety, and the environment. The institutional control used to address groundwater contamination is known as a Classification Exception Area. As with the Deed Notice, a certification must be submitted to NJDEP every two years. Additionally, within 120 days after the projected expiration of the CEA, at least two rounds of groundwater samples must be collected to confirm that the contaminants have dissipated as predicted or to determine whether any additional actions may be required. *N.J.A.C. 7:26E-8.6*. Pursuant to SRRA, any parties responsible for an engineering or institutional control shall be required to obtain a remedial action permit from NJDEP and parties responsible for an engineering control will be required to post a financial assurance to guarantee that funds are available to operate, monitor and inspect the engineering control. The preparation of an Inspection and Maintenance Plan, which is to be used as a guide for properly maintaining any engineering control shall also be required. Thus a landlord has an interest in avoiding this continuing responsibility by restricting a tenant's use of engineering and institutional controls.

In the event the property is a multi-tenant facility, then the tenant should seek to limit the tenant's liability to those actions or omissions of the tenant or the tenant's representatives.

The tenant's representatives should be broadly defined to include, as applicable, all shareholders, officers, directors, members, partners, employees, agents, licensees, assignees, sublessees, guests and invitees of the tenant.

Given the common occurrence that investigations and remediations are not concluded by the time a tenant's lease term expires, the clause also gives the landlord the option of deeming the tenant a hold-over tenant.



A commercial or industrial landlord must, at the outset, make a decision as to how closely it will monitor a tenant's on-going operations. As the liabilities of landowners expand, it becomes increasingly important for a landlord to protect the environmental integrity of its investment. In this respect, the clause obligates the tenant to deliver to the landlord all environmental documents, as well as an affidavit and an environmental questionnaire at the commencement of the lease, and annually thereafter, in order for the landlord to be kept fully apprised of the tenant's operations at the property and their potential impact on the environmental integrity of the property. In addition, this information will enable the landlord to determine early on in the lease negotiation process, whether the tenant's operations are such that the landlord would prefer not to lease the property to the tenant.

The clause also obligates the tenant to inform the landlord of any meetings to be held with the NJDEP or other governmental authorities with respect to the property, in order to permit the landlord and the landlord's representatives to attend and participate in such meetings. Furthermore, the tenant is not allowed to undertake any environmental activities with respect to the property without first obtaining the landlord's prior written consent to those activities and without first providing the landlord with a protocol for the activities to be undertaken.

Finally, the clause provides for the tenant to indemnify the landlord for any claims or losses that may arise as a consequence of a default by the tenant under the lease, and that the indemnity survive the lease term. A failure by the tenant to abide by the terms of the lease are restrainable or enforceable, as the case may be, by injunction

## V. Tenant's Environmental Compliance Clause

A. **ISRA Compliance.** Tenant shall, at Tenant's own expense, comply with ISRA, but only in the event of a closing of Tenant's operations, a transfer of Tenant's operations, or a change in the ownership of Tenant. If ISRA compliance, or any other environmental compliance, becomes necessary at the Premises or the Property, of which the Premises is a part, due to any action or omission of Landlord, or any third party other than Tenant, including, without limitation, a trigger of ISRA compliance due to a change in ownership of the Property or a change in ownership of Landlord, then Landlord shall, at Landlord's own expense, promptly, diligently and in a continuous manner comply with ISRA. Notwithstanding anything to the contrary, and regardless of whether environmental compliance is triggered by Landlord or Tenant, Tenant shall only be responsible to investigate and remediate Contaminants at the Premises to the extent that the Contaminants were Discharged by Tenant, in the most cost effective manner possible under the circumstances, including, without limitation, through the use of Engineering Controls or Institutional Controls, and to pay the related filing fees and post the related remediation funding source until the issuance of an RAO. In all other respects, Landlord shall, at Landlord's own expense, and without unreasonably interfering with the on-going business operations of Tenant, promptly, diligently and in a continuous manner, assess, investigate, sample and remediate, pay all filing and oversight fees of the NJDEP, post the remediation funding source and take all other action required with respect to any Discharge of Contaminants, including, without limitation, with respect to any post-RAO obligations. If Landlord shall recover under any insurance policy for costs that Tenant is responsible for under this Lease, then Landlord shall promptly deliver such proceeds to Tenant.

B. **Information to Tenant.** At no expense to Tenant, Landlord shall promptly provide all information requested by Tenant or any Governmental Authority, including, without limitation, an LSRP, with respect to Tenant fulfilling Tenant's obligations under this paragraph, and shall promptly sign such affidavits, submissions, and other documents requested by Tenant or NJDEP, including, without limitation, a declaration of environmental restrictions or other institutional control notice.

C. **Burden of Proof.** In the event of a dispute between Landlord and Tenant with respect to liability for a Discharge of Contaminants, Landlord shall have the burden to prove that the Contaminants were Discharged by Tenant, and, failing to carry such burden, Landlord shall be responsible, at Landlord's own expense, and without unreasonably interfering with the on-going business operations of Tenant, to assess, investigate, sample and remediate such Contaminants, pay all filing fees, post the remediation funding source and take all other action required with respect to such Contaminants and environmental compliance.

D. **Landlord to Perform.** Unless Tenant is responsible for sixty (60%) percent or more of the Contaminants Discharged at the Premises, Landlord shall, at Landlord's own expense, but with the prior advice and consent of Tenant, which consent Tenant shall not unreasonably withhold, undertake all action required with respect to environmental compliance and shall bill Tenant for Tenant's proportionate share of the reasonable and necessary costs actually incurred by Landlord.

E. **Notice of Meetings.** Tenant shall be notified of all meetings by Landlord or Landlord's representatives, with any Governmental Authority and shall have the right to attend and participate in all such meetings.

F. **Environmental Documents.** Landlord shall deliver to Tenant all Environmental Documents which pertain to environmental compliance or the recovery or attempted recovery from an insurance carrier, or both, and to the extent applicable, shall submit such Environmental Documents to Tenant prior to submission to any Governmental Authority, for Tenant's review and comment.

G. **Indemnification by Tenant.** Tenant shall indemnify, defend with counsel satisfactory to Landlord and hold Landlord harmless from and against any and all claims, liabilities, losses, damages, penalties and costs, including, without limitation, reasonable counsel, engineering and other professional and expert fees which Landlord may incur, resulting directly from: (1) a Discharge of Contaminants at the Premises by Tenant; or (2) a breach by Tenant of Tenant's obligations under this paragraph; provided, however, that Landlord is able to establish by clear and convincing evidence that the Contaminants were Discharged by Tenant.

H. **Indemnification by Landlord.** Landlord shall indemnify, defend with counsel satisfactory to Tenant and hold Tenant harmless from and against any and all claims, liabilities, losses, damages, penalties and costs, including, without limitation, reasonable counsel, engineering and other professional and expert fees which Tenant may incur, resulting as a consequence of: (1) a Discharge of Contaminants at the Premises or the Property, of which the Premises is a part, as a result of the actions or omissions of Landlord or any third party other than Tenant; (2) a breach by Landlord of Landlord's obligations under this paragraph; or (3) a breach by Landlord of any representation or warranty made by Landlord in this lease.

I. **Survival.** This paragraph shall survive the expiration or earlier termination of this lease. Landlord's failure to abide by the terms of this paragraph shall be restrainable, or enforceable, as the case may be, by injunction.

J. **Interpretation.** The obligations imposed upon Landlord and Tenant under subparagraphs (A) through (I) above, are in addition to, and are not intended to limit, but to expand upon, the obligations imposed upon Landlord and Tenant under paragraph **[insert number of the general compliance with laws paragraph]**.

## Comments to Article V

A tenant should be careful to avoid responsibility for ISRA compliance or any other environmental compliance arising by reason of any prior operations at the property, operations at adjoining properties, or compliance triggered by the landlord or another tenant of the property.

This clause imposes upon a landlord all obligations with respect to environmental compliance, other than those obligations arising directly out of the tenant's actions or omissions. The clause requires the landlord to establish that the tenant discharged a contaminant on the property prior to liability attaching to the tenant, and then, the tenant's liability only extends to discharges by the tenant, which the tenant has the right to remediate in the most cost effective manner possible, including the right to use engineering and institutional controls.

## **VI. Landlord's Pre-Tenancy Due Diligence Clause**

A. **Access.** In the event Tenant enters upon the Premises in order to undertake any environmental due diligence with respect to the Premises, then Tenant shall, in addition to the provisions of subparagraphs (B) through (E) below: (1) perform all work, and cause its agents and consultants, as the case may be, to perform all work, in a good and workmanlike manner, and in accordance with all Laws; (2) pay for all work, and cause its agents and consultants, as the case may be, to pay for all work, free and clear of all construction liens and encumbrances; (3) perform all work, and cause its agents and consultants, as the case may be, to perform all work, in such a manner so as not to cause any damage to the Premises or injury to any person, property or the environment; and (4) promptly repair any damage caused by such entry and restore the Premises to the condition that existed prior to the entry. **[Note: Landlord must determine whether to allow the inspection of the Premises or broaden the right to the Property, in which event appropriate changes need to be made throughout this entire clause.]**

B. **Indemnity.** Tenant shall indemnify, defend with counsel satisfactory to Landlord and save Landlord, and Landlord's **[officers, directors, shareholders, members, partners,]** employees, agents and personal or legal representatives harmless from and against any and all claims, liabilities, losses, damages, penalties and costs, foreseen or unforeseen, including, without limitation, counsel, engineering and other professional and expert fees which an indemnified party may incur, resulting directly or indirectly, wholly or partly, as a consequence of: (1) the acts or omissions of Tenant, or Tenant's agents or consultants, occurring during or relating to any entry; or (2) any breach by Tenant, its agents or consultants, of any term, condition or covenant set forth in this paragraph. The provisions of this paragraph shall survive the expiration or earlier termination of this lease, as the case may be.

C. **Conditions to Access.** Prior to any entry, Tenant shall:

(1) Furnish to Landlord and cause all of its agents and consultants that may enter upon the Property to furnish to Landlord, at least five (5) business days prior to any entry onto the Property, at Tenant's or Tenant's agent's or consultant's own cost or expense, as the case may be, and cause to be maintained and kept in effect at all times that any entry is made upon the Property, insurance against claims for personal injury (including death) and property damage, under a policy or policies of general public liability insurance of not less than Three Million (\$3,000,000) Dollars per occurrence with respect to bodily injury (including death), and Three Million (\$3,000,000) per occurrence for property damage, naming Landlord as an additional insured. Each policy shall provide that it cannot be cancelled without fifteen (15) days prior written notice to Landlord, and each policy shall be issued by a recognized responsible insurance company licensed to do business in the State of New Jersey.

(2) Furnish or shall cause to be furnished to Landlord, at least five (5) business days prior to any entry onto the Property, at Tenant's or Tenant's subcontractor's own cost and expense, and cause to be maintained and kept in effect at all times that any entry is made upon the Property, contractor's pollution liability insurance of not less than One Million (\$1,000,000) Dollars

per occurrence, naming Landlord as an additional insured, and providing coverage to Landlord for damages relating to any pollution or contamination of the Property, or its environs, as a result of Tenant's activities or the activities of Tenant's agents and consultants. The policy shall provide that it cannot be cancelled without fifteen (15) days prior written notice to Landlord and the policy shall be issued by a recognized responsible insurance company licensed to do business in the State of New Jersey.

(3) Provide notice, at least five (5) business days in advance of entering upon the Property, which notice shall set forth the date and time of entry, the identity of all persons and entities who shall enter upon the Property, the nature, location and extent of all work to be performed upon the Premises, a protocol outlining in detail the nature, scope and location of all invasive testing to be performed (which shall be subject to Landlord's written approval prior to implementation), and the estimated duration of the entry. Landlord and Landlord's consultants and engineers shall have the right, without the obligation, to be present during the entry, and shall have the right, without the obligation, at no cost or expense to Landlord, to split all samples taken by Tenant or Tenant's agents and consultants.

D. **Confidentiality.** Except as otherwise set forth in subparagraph E below, all environmental testing and investigation results, including, without limitation, all drilling, boring or other invasive testing information and results, and all documents generated with respect to or otherwise relating to any environmental testing and investigation, including, without limitation, all field notes (collectively, the "Documents and Information"), shall be kept confidential. If, for any reason, Tenant or Tenant's agents or consultants believe disclosure of the Documents and Information is required pursuant to Law, or pursuant to court or other administrative process, then Tenant shall give immediate written notice of such fact to Landlord and shall provide Landlord with the citation to the authority which Tenant believes imposes the disclosure requirement. Landlord shall have the right to interpose all objections that Landlord may have to the disclosure, and Tenant shall, at no cost to Landlord, reasonably cooperate with Landlord in connection with such objections, including, without limitation, giving testimony and signing affidavits, certifications or other documentation as may be required by Landlord, provided the information contained within the affidavits, certifications or other documentation is true and accurate. In no event shall Tenant retain an LSRP to perform or provide oversight with respect to any environmental investigation or testing. Tenant shall ensure that any environmental consultant retained by Tenant shall implement such measures as are necessary to ensure that any LSRP that may be employed in the same company as the environmental consultant retained by Tenant shall not review or be privy to any investigation or test results or any related Environmental Documents. Tenant shall secure and deliver to Landlord a statement from anyone acting on behalf of Tenant, including, without limitation, Tenant's agents and consultants, acknowledging the terms of this confidentiality agreement and agreeing to be bound by its terms. A copy of such statement, with an original signature, shall be delivered to Landlord prior to any entry upon the Property pursuant to this paragraph. The provisions of this subparagraph shall survive the expiration or earlier termination of this lease, as the case may be.

E. **Delivery of Documents to the Landlord.** If, but only if Landlord shall so request in writing, Tenant shall deliver promptly to Landlord, or shall cause its agents and consultants to deliver promptly to Landlord, a copy of the results of all environmental testing and investigation performed with respect to the Premises, and a copy of all Documents, all at no cost or expense to

Landlord. The provisions of this subparagraph shall survive the expiration or earlier termination of this lease, as the case may be.

## **Comments to Article VI**

This clause provides the landlord with the ability to control the tenant's pre-occupancy due diligence in order to ensure that such due diligence does not disrupt ongoing operations at the property or result in damage to the property. The clause obligates the tenant to inform the landlord, prior to any entry, of the nature and extent of the investigation that will be undertaken, the entities that will enter upon the property, and the duration of the entry. In addition, the tenant and the tenant's consultants are obligated to provide to the landlord, insurance to protect the landlord in the event any damage arises due to the entry, including, without limitation, environmental damage.

It is important, from the landlord's point of view, that if any environmentally sensitive conditions are discovered during the entry, that the tenant not disclose those findings to any third party, except to the extent that disclosure is required by law. Accordingly, the clause provides for continuing confidentiality by the tenant as well as the tenant's consultants. See also the General Overview of the Law above for a general discussion on the disclosure obligations of an LSRP.

Finally, the clause obligates the tenant to indemnify the landlord for any loss arising from the tenant's entry, and to deliver to the landlord a copy of all results from the tenant's investigation. However, the delivery obligation only arises if the landlord expressly requests a copy of the investigation results. Because contamination discovered may have resulted from the misdeeds of a prior tenant, a landlord does need to consider obtaining those results to ensure that it is able to pursue the responsible tenant while evidence is clear of the responsible party and while the responsible tenant remains a viable entity.



## **VII. Tenant's Pre-Tenancy Due Diligence Provisions**

A. **Environmental Documents.** Contemporaneously with the signing and delivery of this lease, and thereafter promptly upon receipt, Landlord shall deliver to Tenant all Environmental Documents in the possession or under the control of Landlord concerning: (1) the Property; (2) its environs; (3) all past operations at the Property; (4) environmental investigation, actions or claims commenced by any Governmental Authority or third party, concerning the Property; (5) predecessors in title; (6) current and former occupants of the Premises and the Property, of which the Premises is a part; or (7) all of the above.

B. **Access.** Tenant and Tenant's agents shall have the right, without the obligation, prior to the commencement of the lease term, to enter upon the Property for the purpose of inspecting the Property and performing testing at the Property, including, without limitation, soil sampling, borings and investigation, groundwater sampling and investigation, and engineering studies. Landlord shall notify Tenant of any dangerous condition on or with respect to the Property, including, without limitation, conditions which due to the nature of the sampling, borings or investigation to be performed by or on behalf of Tenant shall pose a dangerous condition to Tenant, its agents or representatives. Notwithstanding anything to the contrary, if Tenant determines, as a result of its investigation, its review of the Environmental Documents, or its review of other information provided to Tenant by Landlord or any third party, that the environmental condition of the Property is unsatisfactory to Tenant, in Tenant's sole and absolute discretion, then Tenant shall have the right to terminate this lease upon notice to Landlord, in which event neither party shall be under any further obligation to the other, with the exception that Landlord shall return to Tenant all money paid by Tenant to Landlord with respect to this lease.

C. **Representations and Warranties.** Landlord represents and warrants to Tenant that: (1) the Property is in full compliance with all Laws; (2) there has been no Discharge of Contaminants in violation of Laws; and (3) there are no Underground Storage Tanks in, on, at, under or about the Property.

D. **Baseline Study.** In the event Tenant undertakes an environmental investigation of the Property pursuant to subparagraph (B) above, then a copy of the report of the investigation shall be attached to this lease, and Landlord and Tenant acknowledge that such report shall be evidence of the environmental condition of the Property as of the commencement date of this lease. Landlord and Tenant further acknowledge that the results of the investigation shall not be evidence of all areas of environmental concern that may exist at the Property, but shall only be evidence of the conditions revealed in the report to be annexed.

## **Comments to Article VII**

This clause provides the tenant with the ability to undertake a pre-occupancy due diligence investigation of the property prior to commencement of the lease in order to evaluate whether the environmental condition of the property is such that the tenant should reconsider the transaction. Both the landlord and the tenant should give consideration to undertaking an investigation of the property prior to the commencement of the lease in order to establish a base-line evaluation of the environmental condition of the property.

It is important for a tenant to undertake a certain amount of due diligence prior to the commencement of a lease since the tenant, as an operator, can be held responsible for all environmental conditions that are found to exist on the property during the tenant's lease term.

The representations and warranties will enable the tenant to establish a base-line of the landlord's knowledge with respect to contamination at the property. Obviously, the landlord will have numerous concerns with respect to the representations and warranties and, if the landlord does agree to provide any, it will likely severely limit the scope of the representations and warranties.

### **VIII. Landlord's Tank Clause**

A. **Tanks.** Landlord represents and warrants that to Landlord's actual knowledge, without any investigation, there are \_\_\_\_\_ Underground Storage Tanks at the Premises (the "Tanks").

B. **As-Is.** Tenant accepts the Tanks "as is" and Landlord shall not be liable or bound in any manner by any verbal or written statements or representations relating to the Tanks, or their operation, condition, character or quality, or whether the Tanks are in compliance with the Tank Laws. Tenant releases Landlord, its shareholders, officers, directors, partners, members, employees, agents, successors and assigns from all claims, liabilities, losses, damages, and costs, and covenants not to sue any of the foregoing with respect to the Tanks and any Discharge from the Tanks.

C. **Owner and Operator.** Tenant shall comply with the Tank Laws. For purposes of the Tank Laws only, Tenant shall be deemed the "owner and operator" of the Tanks. However, this in no way shall be deemed to pass legal title to the Tanks from Landlord to Tenant. Tenant's obligations pursuant to this paragraph shall include, without limitation: (1) obtaining all permits for installation and maintenance of the Tanks, including, without limitation, annual registration and recertification; (2) payment of all registration and recertification fees; (3) posting of all required financial assurances; (4) installation, maintenance, repair or replacement, as the case may be, of all monitoring, retrofitting, secondary containment and corrosion controls; (5) maintenance of records and inventory controls; and (6) all reporting, investigation and Remediation required pursuant to the Tanks Laws; all at Tenant's own expense.

D. **Nature of Tenant's Remediation.** In the event of a Discharge of a Contaminant from the Tanks, then, in addition to being in default under this lease and Landlord having all rights available to Landlord under this lease, at law and in equity by reason of such default, Tenant shall, at Tenant's own expense, and in accordance with Law, promptly, diligently and in a continuous manner, (1) retain an LSRP or Subsurface Evaluator, as appropriate, (2) perform all investigation, monitoring and Remediation, including, without limitation, posting all remediation funding sources that may be required by Landlord or any Governmental Authority, (3) pay all filing and oversight fees of the NJDEP, (4) address all required natural resource restoration and satisfy all natural resource damage claims, and (5) obtain and deliver to Landlord an RAO. In no event shall Tenant's cleanup involve any Engineering Controls, including, without limitation, capping, fencing or other physical barrier or deed notice, or Institutional Controls, and notwithstanding the requirements or approvals of the NJDEP or any other Governmental Authority, Tenant's cleanup shall meet the most stringent published or unpublished remediation standards for soil, subsurface water, groundwater and drinking water.

E. **Attendance at Meetings.** Tenant shall notify Landlord in advance of all meetings scheduled between Tenant or Tenant's representatives and NJDEP or any other Governmental Authority with respect to the Tanks, and Landlord and Landlord's agents, representatives and employees, including, without limitation, legal counsel, and environmental consultants and engineers, shall have the right, without the obligation, to attend and participate in all such meetings.

F. **Environmental Documents.** During the term of this lease, and subsequently, promptly upon receipt by Tenant or Tenant's consultants or counsel, Tenant shall deliver to Landlord all Environmental Documents concerning or generated by or on behalf of Tenant with respect to the Tanks, whether currently or hereafter existing.

G. **No Installation of Tanks.** Tenant shall not install any Underground Storage Tank or aboveground tank at the Premises without the prior written consent of Landlord, which Landlord may grant or withhold in Landlord's sole and absolute discretion. Prior to the expiration or sooner termination of the lease term, Tenant shall, at Tenant's own expense, remove all Tanks installed at the Premises should Landlord so demand, and in so doing Tenant shall comply with all closure requirements of the Tank Laws.

H. **Indemnity.** Tenant shall indemnify, defend with counsel satisfactory to Landlord, and hold Landlord, and Landlord's [officers, directors, shareholders, members, partners,] employees, agents and personal or legal representatives harmless from and against any and all claims, liabilities, losses, damages, penalties and costs, foreseen or unforeseen, including, without limitation, counsel, engineering and other professional and expert fees, which an indemnified party may incur, resulting directly or indirectly, wholly or partly, as a consequence of Tenant's actions or omissions with regard to Tenant's obligations under this paragraph, or by reason of Landlord's ownership of the Property and the Tanks.

I. **Survival.** This paragraph shall survive the expiration or earlier termination of the lease. Tenant's failure to abide by the terms of this paragraph shall be restrainable, or enforceable, as the case may be, by injunction.

J. **Interpretation.** The obligations imposed upon Tenant under subparagraphs (A) through (I) above are in addition to and are not intended to limit, but to expand upon the obligations imposed upon Tenant under paragraphs [insert number of the general compliance with laws paragraph and the environmental compliance paragraph].

### **Comments to Article VIII**

This broad landlord's clause places the responsibility upon the tenant to comply with all tank law requirements. It also obligates the tenant to indemnify the landlord for any damages resulting from any release, discharge or leak of a regulated substance or hazardous substances. The indemnification obligation survives the expiration or earlier termination of the lease. The tenant is also prevented from installing any tanks on the property without obtaining the prior written consent of the landlord.

## **IX. Tenant's Tank Clause**

A. **Tanks.** Landlord represents and warrants that: (1) there are \_\_\_\_ Underground Storage Tanks at the Premises (the "Tanks"); (2) the Tanks have been registered pursuant to, and in accordance with, the requirements of the Tank Laws; (3) a copy of each registration and recertification thereof shall be delivered to Tenant by Landlord within five (5) days from the signing and delivery of this lease and, thereafter, promptly upon receipt; and (4) the Tanks are otherwise in compliance with all Tank Laws.

B. **Compliance with Tank Laws.** Landlord shall comply with the Tank Laws, including, without limitation: (1) obtaining all permits for installation and maintenance of the Tanks; (2) undertaking all registration and recertification of the Tanks; (3) paying all registration and recertification fees; (4) posting all required financial assurances; (5) installing, maintaining, repairing or replacing, as the case may be, all required monitoring, retrofitting, secondary containment and corrosion controls; (6) maintaining a record of inventory controls; (7) reporting, investigating and cleaning up any Discharge required pursuant to the Tank Laws, unless such cleanup is required as a result of the actions or omissions of Tenant; and (8) paying all filing and oversight fees of the NJDEP.

C. **Access.** Landlord shall have the right of reasonable access to the Premises as may be necessary to perform the foregoing obligations, so long as Landlord shall not unreasonably interfere with Tenant's on-going business operations at the Premises.

D. **Tenant Cooperation.** Tenant shall cooperate with Landlord by supplying to Landlord all information within Tenant's control, and promptly, upon request, executing such documents as Landlord may request Tenant to execute should the information contained in the documents be found by Tenant to be complete and accurate.

E. **Indemnity.** Landlord shall indemnify, defend with counsel satisfactory to Tenant, and hold Tenant, and Tenant's [officers, directors, shareholders, members, partners,] employees, agents and personal or legal representatives harmless from and against any and all, claims, liabilities, losses, damages, penalties and costs, foreseen or unforeseen, including without limitation, counsel, engineering and other professional and expert fees which an indemnified party may incur, resulting directly or indirectly, wholly or partly, as a consequence of Landlord's actions or omissions with regard to Landlord's obligations under this paragraph, or a breach by Landlord of Landlord's representations and warranties under this paragraph.

F. **Survival.** This paragraph shall survive the expiration or sooner termination of this lease. Landlord's failure to abide by the terms of this paragraph shall be restrainable, or enforceable, as the case may be, by injunction.

G. **Interpretation.** The obligations imposed upon Landlord under subparagraphs (A) through (F) above are in addition to and are not intended to limit, but to expand upon the obligations

imposed upon Landlord under paragraphs **[insert number of the general compliance with laws paragraph and the environmental compliance paragraph]**.

### **Comments to Article IX**

This clause imposes complete tank law responsibility upon the landlord. While definitive representations are provided, the tenant should give consideration to undertaking an inspection of the property prior to the commencement of the lease term and reserving a right to terminate the lease prior to its commencement upon the determination that there has been a release, discharge or leak of a regulated substance or hazardous substance from a tank.

The ability of the tenant to impose complete tank law responsibility upon the landlord will be greater in a multi-tenant situation than in a single-tenant occupancy, and where the tank is used to store heating oil rather than raw materials for the tenant's manufacturing processes or other tenant operations.