

## EXPERT ANALYSIS

### Retention of Licensed Site Remediation Professionals in New Jersey (Revisited)

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In May 2009, New Jersey enacted the Site Remediation Reform Act.<sup>1</sup> The SRRA radically transformed the state's environmental remediation regime. Prior to its passage, principal remediation documents and many remedial activities required the specific prior approval of the New Jersey Department of Environmental Protection.

Given the number of contaminated sites and environmentally related transactions and installations (such as underground storage tanks) in the state, the prior statutory mandate upon the DEP to "command and control" most environmental cleanup led to a seemingly insurmountable backlog of largely unexamined cases. This backlog created delays in remedial action and completion. The SRRA sought to eliminate this predicament by privatizing most remediation, placing remedial determinations in the hands of a newly created class of licensees called licensed site remediation professionals, or LSRPs.

The purpose of this commentary is to alert non-New Jersey and non-environmental practitioners of some of the novel issues raised by the SRRA in connection with the retention of LSRPs. The thumbnail sketch of the SRRA below is not intended to be more than an overview. It is highly recommended that counsel familiarize themselves with the statute, and related DEP regulations and guidance, when assisting clients in retaining LSRPs. The DEP website ([www.state.nj.us/dep](http://www.state.nj.us/dep)) is an excellent starting point.

The SRRA prescribed a three-year phase-in period that extended through the end of May 2012. By that time, all "persons responsible for conducting remediation," or PRCRs, were required to hire an LSRP to comply with the Industrial Site Recovery Act<sup>2</sup> or otherwise remediate discharges of hazardous substances. PRCRs include:

- Owners or operators of sites subject to the ISRA.
- Any discharger of hazardous substances.
- Persons "in any way responsible" for a hazardous substance discharge under the New Jersey Spill Act.<sup>3</sup>
- Owners of underground tanks that have discharged a hazardous substance.

Environmental professionals with the requisite experience and educational credentials can become LSRPs by passing a licensing examination. There are currently about 500 duly licensed LSRPs.

Under the SRRA, the LSRP — and not the DEP — issues the final remediation approval document, which is now called a response action outcome, or RAO. However, the DEP, along with a statutorily created board that licenses and oversees LSRPs, can audit and investigate an LSRP's work and

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determinations. Moreover, the DEP may ultimately modify or invalidate an LSRP's decisions, including decisions regarding RAOs.

The DEP generally has three years after an RAO's issuance to complete an audit. In some circumstances, the three-year period may be extended.<sup>4</sup> In the four years since the statute's inception, the DEP has invalidated only three RAOs (all because the issuer was unlicensed as an LSRP). However, it continues to maintain its review authority and has, in many more instances, convinced an LSRP to withdraw or modify an RAO.

Given LSRPs' responsibilities and power, their professional conduct is regulated by law. Their first obligation is not to their clients; rather, it is to protect public health, safety and the environment.<sup>5</sup> For example, an LSRP who has taken over responsibility for remediation of a site from another LSRP has a prescribed amount of time to correct all deficiencies in previously filed documents as identified by the DEP. An LSRP cannot certify a document submitted to the DEP unless it has managed, supervised or performed the work that forms the basis of that submission.<sup>6</sup> Also, an LSRP may complete the work of another LSRP only if it independently concludes that the work is reliable based on its review of all documents and a site visit.<sup>7</sup>

As stated above, the SRRA required all owners of sites undergoing remediation to retain LSRPs by May 2012. This commentary will focus on the most common situations that call for LSRP retention. LSRP retention is required, for example, when a prior LSRP's services are terminated, when the ISRA is triggered on a site that has not undergone remediation or that has only been partially remediated, or when a past discharge of hazardous substances is newly discovered.

In sum, clients who are required to retain LSRPs — and their counsel — are in the somewhat peculiar position of negotiating a contract to retain the services of one who is required both to complete (or at least supervise) the environmental remediation and to finally approve it. This duality presents issues that do not commonly arise when an environmental professional is more typically retained.

In light of the foregoing, the following areas deserve the careful attention of counsel in helping clients to "vet" LSRPs and in drafting contracts with them. These suggestions derive from the viewpoint of PRCR counsel, but LSRP counsel will probably have similar concerns — albeit from a different perspective.

#### VETTING AND SCOPE OF WORK

Often, a site in need of an LSRP has already been partially remediated (in the form of intensive investigation, actual remediation or both) by a prior environmental consultant. In such cases, it is critical to determine whether, and to what extent, prospective LSRP candidates will accept such prior work. This question should be asked and answered before the LSRP is hired.

Currently, there is some debate within the LSRP community as to the extent to which such former work can be relied upon to support the preparation of a final RAO. The predominant LSRP view seems to be that it depends upon the LSRP's view of the quality of the prior environmental professional and the work product produced by that professional. The prevailing view further includes the notion that it is a best practice to "look behind" such prior work — at least to a limited extent — even in areas that have been "closed" under the DEP's aegis.

The only way to determine how much LSRP candidates can or will rely on such prior work is to provide that work product to them and obtain their response before they are retained. The correct balance between a successor LSRP's reliance on the prior work of another and the need to duplicate prior efforts will differ in each individual situation, but the subject should be addressed before the LSRP is retained.

The LSRP candidates (more than one is preferable) should be asked to propose a scope of work based upon the tasks to be completed. Counsel can then review the proposal to ensure that it comports with the pertinent requisites of environmental law (which in New Jersey are

quite prescriptive). In this manner, the client, counsel and the LSRP can ensure that their views regarding applicable requirements coincide from the outset.

Where the LSRP is to perform the work in phases (such as a remedial investigation leading to a remedial action), the scope of work should be written so there is some opportunity to obtain another LSRP in subsequent phases. The scope should be as detailed as possible. However, as environmental counsel knows, the unexpected can happen at contaminated sites. In such cases, especially if there is an “immediate environmental concern” as defined by DEP regulations, the agency prescribes a series of steps that must be taken quickly. IECs are common enough to warrant contractual language that sets out a preliminary plan to address them should they occur.

### LSRP CONTRACTING ENTITY AND STAFFING

Many clients and counsel have ongoing relationships with environmental consultants and engineering firms on a national or regional basis. Most such firms doing business in New Jersey have designated individuals within their organizations as LSRPs. While smaller firms are almost always comprised of some form of business entity, LSRPs are licensed individually. Therefore, any contract between a client and an environmental consulting or engineering firm by whom the LSRP is employed must include the designated LSRP individually. The LSRP should sign the contract, which should clearly state that he or she is being retained as an LSRP.

The contract should be conditioned upon the LSRP’s continued employment by the company as well as the LSRP’s continued licensure. The LSRP should further acknowledge that it is his or her obligation to sign and certify all documents to be submitted to the DEP in connection with the work. Also, the contract should provide for specific and adequate staffing, with no substitutes permitted without client consent and at agreed-upon rates.

### RESPONSE ACTION OUTCOME DOCUMENT

The DEP provides templates for RAO documents and, to the extent possible, requires that the LSRP advise the client of any limitations (such as restricted use), assumptions or qualifications identified by the LSRP, as required by the SRRRA.<sup>8</sup> Any such limitations, assumptions or qualifications in the RAO agreed upon or necessary should be specifically described in the retention agreement. In this regard, counsel should ascertain at the outset whether the imposition of any such conditions will nonetheless result in an RAO that meets the client’s needs.

### INDEMNITY, INSURANCE AND RELATED LSRP WAIVERS

Clearly, the foundation of the SRRRA’s privatization program is the willingness and ability of LSRPs to stand behind their work. It is surprising, then, that many — perhaps the majority — of LSRPs have standard contracts that limit their liability to a specific (usually low) amount or to some multiple of the amount paid in fees for the contracted work. Given the public policy concerns expressed in the statute, the enforceability of these liability limitations is somewhat dubious. However, they should be resisted nonetheless.

In addition, LSRPs are almost invariably well-insured (or at least should be), so that the provision of appropriate errors and omissions, comprehensive general liability, pollution liability and other insurance, as well as the usage of the proceeds of that insurance as a financial “backstop” to the LSRP’s performance via appropriate indemnities, should be included in any LSRP retention agreement.

In addition, in light of the SRRRA’s three-year “look-back rule”<sup>9</sup> to review RAOs, such indemnities, warranties and supporting insurance should be extended for at least that period of time.

The author has recently seen LSRP “standard” contracts in which the LSRP sought to disclaim liability for “failing to meet DEP time frames.” Such provisions should be resisted. Instead, the LSRP should agree to meet all DEP-mandated time frames.

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## CLIENT PROVISION OF INFORMATION

Most LSRP retention agreements have “cooperation clauses.” These clauses require the client to provide all relevant information, and they condition the LSRP’s performance upon such provision. The problem is that many clients do not have the expertise to identify relevant information and rely upon the LSRPs to elicit it.

In addition, LSRPs are best equipped to perform certain due diligence tasks, such as interpreting DEP records. The retention contract should recite the LSRP’s obligation to conduct its own due diligence. Where the work of a prior environmental professional will be relevant to the LSRP’s task, a list of documents comprising such prior work should be provided by the client and attached to the agreement. This practice will prevent future misunderstandings.

## COMMUNICATION AND REVIEW

The retention contract should provide that all documents to be filed with the DEP by the LSRP and/or the client (who must certify their accuracy as well) must be provided in draft for review by the client and counsel. An appropriate time period to engage in such review, and to discuss any proposed changes, should also be specified in the contract. Note, however, that the LSRP may not accept changes that conflict with the LSRP’s independent, professional judgment.<sup>10</sup>

## CONFIDENTIALITY

In light of the pervasive powers of the LSRP licensing board and the DEP to investigate LSRPs and their work product, assuring the confidentiality of protected information appears difficult to effectuate. The SRRA does provide for confidentiality on the part of the LSRP if the LSRP is advised in writing that the subject material is confidential.<sup>11</sup> Thus, any agreement for retention that will involve the provision of confidential information (such as trade secrets) must identify such information and contain appropriate confidentiality provisions.

## TERMINATION

The SRRA prohibits any person from taking retaliatory action against an LSRP in certain circumstances,<sup>12</sup> and LSRPs must notify the DEP if an LSRP is released by the PRCR. In various talks given by DEP officials, the agency has indicated that terminating an LSRP may cause it to look at a particular site with greater scrutiny. In light of the uncertainties surrounding the issue of “cause” for LSRP termination, the author usually uses a simple termination provision that allows for termination by the client without cause and with fairly short notice.

So far, the LSRP program has been a success. However, it has not yet been judicially tested regarding the extent of an LSRP’s liability for certain acts or omissions. The statute provides only that the LSRP must “exercise reasonable care and diligence and shall apply the knowledge and skill ordinarily exercised by licensed site remediation professionals practicing in the state at the time the services are performed.” Exactly what that means will be determined by the courts. In light of the generality of this statutory language and the disparate facts and circumstances of each site, a specific and tailored LSRP retention contract (which will probably not be the “standard form” proffered initially by the LSRP) will best protect the interests of PRCR counsel and their clients.

## NOTES

<sup>1</sup> N.J. Stat. Ann. §§ 58:10B-1 and 58:10C-1.

<sup>2</sup> N.J. Stat. Ann. § 13:1K-6.

<sup>3</sup> N.J. Stat. Ann. § 58:10-23.11.

<sup>4</sup> N.J. Stat. Ann. § 58:10C-25.

<sup>5</sup> N.J. Stat. Ann. § 58:10C-16.

- <sup>6</sup> N.J. Stat. Ann. § 58:10C-14.
- <sup>7</sup> N.J. Stat. Ann. § 58:10C-12(f).
- <sup>8</sup> N.J. Stat. Ann. § 58:10C-16(t).
- <sup>9</sup> N.J. Stat. Ann. § 58:10C-26.
- <sup>10</sup> N.J. Stat. Ann. § 58:10C-16(i).
- <sup>11</sup> N.J. Stat. Ann. § 58:10C-16(n).
- <sup>12</sup> N.J. Stat. Ann. § 58:10C-26.



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