

HANDLING A CONTAMINATED PROPERTY WITH AN LSRP (LICENSED SITE REMEDIATION PROFESSIONAL)

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BACKGROUND - SRRA

The Site Remediation Reform Act (SRRA) ushered in a new era of site remediation in the State of New Jersey. Prior to SRRA's passage, the New Jersey Department of Environmental Protection (NJDEP) oversaw the clean-up of contaminated properties. NJDEP Case Managers formerly conducted the remediation programs at contaminated properties and as many acknowledge, such resulted in a backlog of open sites within the Department. However, in May 2009, when the New Jersey legislature passed SRRA, the landscape of remediation changed drastically and for the better (of course, depending on who you ask).

Now, the remediation of contaminated property in New Jersey falls under the purview of privatized Licensed Site Remediation Professionals (LSRPs) hired by the responsible party/ies. LSRPs, not NJDEP Case Managers, conduct, oversee, and approve site remediation programs under SRRA. Instead of no-further-action letters from the NJDEP, LSRPs assume the lead for site closure and issue Response Action Outcomes (RAO). While many view this approach as a more streamlined and efficient way to conduct site remediation in the State, some view the LSRPs' role in the complex relationship between the NJDEP and responsible parties as troublesome.

Nevertheless, under SRRA's phased approach, as of May 7, 2012, all persons, corporations, and the like remediating property in New Jersey must use an LSRP, even if remediation already commenced. N.J.S.A. § 58:10B-1.3(c)(3). SRRA greatly expanded the value and responsibility of environmental professionals in the State, essentially requiring an LSRP to be involved in all remedial activities, including those under the State's Brownfield and Contaminated Site Remediation Act (N.J.S.A. § 58:10B-1, et seq.), the Spill Compensation and Control Act (N.J.S.A. 58:10-23.11, et seq.), the Industrial Site Recovery Act (N.J.S.A. § 13:1k-6, et seq.), and the Water Pollution Control Act (N.J.S.A. § 58:10A-1, et seq.).

In so doing, SRRA has established a fiduciary relationship between the NJDEP and LSRPs. As a result, LSRPs must carefully balance their obligations to their client (or responsible party/ies), the NJDEP, and the citizens and environment of New Jersey.

LSRPS' LEGAL RESPONSIBILITIES UNDER SRRA AND SPECIFICALLY, § 58:10C-16(L)

Under SRRA, and generally speaking, an LSRP is legally responsible for doing what is best for the human and natural environments. Specifically, SRRA requires an LSRP to prioritize protecting "public health and safety and the environment." N.J.S.A. § 58:10C-16(a). SRRA also mandates an LSRP "exercise reasonable care and diligence, and [] apply the knowledge and skill ordinarily exercised by [LSRPs] in good standing practicing in the State." N.J.S.A. § 58:10C-16(b). Interestingly, SRRA expressly prohibits "any ownership interest, compensation, or promise of continued employment" from affecting his or her obligations to protecting the State's public and environment. N.J.S.A. § 58:10C-16(z).

With respect to N.J.S.A. § 58:10C-16(l), an LSRP is obligated to report a client's deviation from a Remedial Action Workplan (RAW) or other report. Once an LSRP has been contracted to conduct a remedial investigation, he or she drafts a RAW that, among other important pieces, identifies the contaminants present and proposes a scope of work to bring the site into compliance with current state remedial standards. Therein, the RAW may propose certain controls the client may themselves implement and/or oversee. Presumably, such a deviation could represent something very minor and unintentional, or it could extend to a systematic or deliberate attempt to circumvent such controls. Regardless, under § 58:10C-16(l), the LSRP must report this to both the NJDEP and client.

Expectedly, reporting a deviation, as minor as it may be, will cause tension in the LSRP-client relationship. But, and it must be stressed, in adhering to the primary maxim of the LSRP's code of conduct, it his or her obligation to make this disclosure.

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Protecting the public and environment of the State outranks a client's desires and as the plain language of this section indicates, there is simply no room for interpretation.

LSRPS' RESPONSIBILITIES TO THEIR CLIENT

As mentioned, LSRPs are hired by persons and corporations alike to conduct remedial activities statewide. The NJDEP has no involvement in the selection of LSRPs. However, the NJDEP does retain an active role in a site's clean-up, and SRRA dictates LSRPs' continued cooperation in disclosing site records and information.

For example, under N.J.S.A. § 58:10C-16(i), SRRA imposes upon LSRPs an affirmative obligation to disclose to NJDEP "[a]ny facts, data, information, qualifications, or limitations known by the [LSRP] that are not supportive of the conclusions reached in the document [submitted to the NJDEP,]" while § 58:10C-16(k) requires an LSRP to forward information pertaining to a discharge at the subject site. Further, an LSRP must cooperate with an NJDEP investigation by "furnishing ... any information ... deem[ed] necessary." N.J.S.A. § 58:10C-16(q). SRRA even requires an LSRP to notify the NJDEP of anything so required after the LSRP's contract or work with the client ends. N.J.S.A. § 58:10C-16(w).

Such disclosure requirements expectedly run afoul of a client's claim for confidentiality. In industry, when products and processes provide competitive advantages, businesses big and small assert confidentiality in almost all walks of business-life. SRRA provides very little insight as to how to resolve issues with confidentiality and disclosure. In fact, SRRA only gives a client-employer the opportunity to file a complaint with the Site Remediation Professional Licensing Board, although SRRA expressly protects LSRPs from retaliatory actions in § 58:10C-26. Therein, SRRA outlines the statutory protections afforded to LSRPs who duly disclose information to the NJDEP, refuse to participate in what the LSRP deems to be illegal conduct, etc.

It is recommended that, in order for an LSRP to comply with his or her obligations to the NJDEP, the client, and the State's human and natural environments, he or she exert the highest level of diligence and honesty. Plainly put, under SRRA, the LSRP "answers" to the NJDEP; but the LSRP is paid by the client. Thus, before accepting a project, as financially lucrative as it may be, an LSRP should identify and communicate his exact role with to the client and his obligations thereunder to the NJDEP. It should therefore, come as no surprise to the client-employer when an LSRP must put his license before the interests of the client and client-confidentiality.

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