

Environmental Law

Site Remediation Professionals Are Subject to New Liabilities

With great power comes great responsibility. — Voltaire

By Nicole B. Dory

On May 7, 2009, the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1, et seq., was signed into law and dramatically changed the approval process for remediating contaminated sites in New Jersey. Prior to SRRA, all remediation in the state occurred under the supervision of the New Jersey Department of Environmental Protection (NJDEP) and with NJDEP approval.

This year, on May 7, SRRA became fully effective and, with limited exceptions, all site remediation projects in the state must proceed under the supervision of a licensed site remediation professional (LSRP) rather than a NJDEP case manager. N.J.S.A. 58:10B-1.3. SRRA has effectively privatized the site remediation process in New Jersey and forever changed the relationships between environmental consultants and their clients. This new statutory framework has the potential to

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open LSRPs up to new-found liability.

NJDEP modeled the LSRP program after a similar program in Massachusetts. The program expedites site remediation in New Jersey under the supervision of LSRPs and addresses the significant backlog of cases that remained with NJDEP. LSRPs now oversee environmental investigations and must certify that remediation work is consistent with NJDEP requirements. NJDEP no longer will issue no-further-action letters. Instead, once remediation is complete, the LSRP determines whether a final approval, known as a “response action outcome” (RAO), is warranted. The LSRP must ensure that the remedy implemented is “protective of human health and the safety and of the environment.” N.J.S.A. 58:10C-22. However, the technical requirements for site remediation, N.J.A.C. 7:26E, et seq., and NJDEP’s guidance documents leave room for interpretation, so it is possible that the LSRP may make a determination that NJDEP ultimately disagrees with. The lack of an NJDEP stamp of approval can make property owners and interested parties feel uneasy because the LSRP’s work may be audited, and RAOs issued by an LSRP can be revoked by NJDEP within three years of issuance. N.J.S.A. 58:10C-25. Additionally, the LSRP must now wear two very different hats, one as the case manager and one as an environ-

mental consultant. This can create conflicts when the LSRP must consider its client and business interests, while at the same time remaining the environmental agent of NJDEP.

Like the Massachusetts program, SRRA also created a board, called the Site Remediation Professional Licensing Board (SRPL Board), as the governing body to oversee licensing, education and examination requirements of LSRPs, and also to audit and take disciplinary action against LSRPs. N.J.S.A. 58:10C-5. The board is still in its nascent stage, and the professional conduct committee of the board is still shaping its disciplinary procedures, which are similar to the procedures established by the board that oversees the Massachusetts Licensed Site Professionals (LSP) program. The disciplinary procedures are necessary because SRRA requires the SRPL Board and NJDEP to audit at least 10 percent of all LSRP submissions annually. N.J.S.A. 58:10C-24; N.J.S.A. 58:10C-21(f). The SRPL Board has the power to impose civil penalties, revoke licenses and even petition the attorney general to bring criminal action against a LSRP. N.J.S.A. 58:10C-17. Although the SRRA prohibits retaliatory actions against LSRPs for meeting their statutory obligations, including mandatory reporting requirements for the discovery of a discharge, N.J.S.A. 58:10C-26, with mandatory audits and the possibility of complaints filed with the SPPL Board there are enough opportunities to get in trouble with NJDEP, the board or a client to give an LSRP concern.

With all this potential for liability,

it is surprising that there have not been more disciplinary or civil actions against LSRPs. As of October, the SRPL Board had only three complaints listed on its website, <http://www.nj.gov/lrspboard>. Of those three cases, only one resulted in a penalty to the LSRP. The other two actions were dismissed, with only one of the two resulting in a warning to the LSRP.

In Case No. 001-2011, a homeowner complained that the LSRP charged excessive fees and failed to exercise reasonable care in the disposal of waste oil from an underground heating oil tank. The SRPL Board found no evidence to support the allegation that the waste oil was not properly disposed of, but found that it was an error to advise the homeowner that an LSRP was needed for the work. The case was dismissed by the board with a warning to the LSRP to immediately correct his proposals to reflect that homeowners with underground heating oil tanks are exempt from the requirements to retain an LSRP. Notably, the SRPL Board declined to determine whether the amount of the fees charged were reasonable because SRRA does not authorize the board to regulate fees charged by LSRPs.

In Case No. 002-2011, a complaint was filed against the LSRP of record for a school construction project, alleging that the LSRP failed to properly manage hazardous waste from the school site, resulting in the disposal of hazardous waste at a landfill that was not authorized to accept the material. The board issued a "notice of reprimand and civil and administrative penalty assessment" (NOCAPA) to the LSRP for violating N.J.S.A. 58:10C16a and N.J.S.A. 58:10C-16b. The LSRP appealed, claiming that, pursuant to his contract with his client, he was responsible only for the collection of soil samples, not waste characterization or the selection of

a disposal site. The board and the LSRP agreed to settle the matter by allowing the NOCAPA to stand with a \$500 penalty. The board withdrew its finding that the LSRP violated N.J.S.A. 58:10C-16b, but found that, notwithstanding the terms of the contract with his client, the LSRP violated N.J.S.A. 58:10C16a, which ensures that the "LSRP's highest priority in the performance of professional services shall be the protection of public health and safety and the environment."

In Case No. 003-2011, a resident submitted a complaint to the board, claiming that the LSRP violated reporting, retention, public health and safety, and public outreach requirements related to posting signs for the remediation of lead in soils for a proposed residential development. The case was dismissed with no warning or admonition to the LSRP. Importantly, the board found that although the LSRP's firm was hired by a prospective purchaser for the development site, he was not retained as the LSRP of record for the site until 10 months after the lead contamination was discovered. Thus, the LSRP was not responsible for public outreach at the time and, further, the conditions did not constitute an immediate environmental concern that would require notification to NJDEP.

In New Jersey, there have not been any reported cases of civil actions filed against LSRPs, but a few cases have been filed against LSPs in the Massachusetts program. Of note is *Peck v. Arcudi Oil Co.*, 27 Mass. L. Rep. 32 (Mass. Super. Ct. 2010), which raised the issue of whether a LSP can be liable for contribution claims brought by a third party. In that case, a homeowner brought claims against an environmental contractor alleging that its work was performed in a substandard manner, and the contractor, in turn, brought a

third-party contribution claim against the LSP. The court granted the LSP's motion to dismiss. The court found that LSPs "are licensed, quasi-governmental workers whose role is to advise and guide the cleanup efforts of Responsible Parties." The court further noted that, although the contractor was responsible for post-contamination reconstruction, the LSP was hired to conduct an assessment of waste on the property. As such, the contractor's complaint failed to establish any basis for imposing a duty on the LSP for the contractor's reconstruction activities. The Massachusetts case law is interesting because it may be precedential for New Jersey courts, given that the LSRP program is largely modeled after the Massachusetts program. Although LSPs have not been expressly afforded the immunity protections given to public employees, in *Peck*, on Massachusetts court dismissed a contribution claim brought against an LSP, finding that LSPs are "quasi-governmental workers."

It is possible that New Jersey may follow Massachusetts courts and offer LSRPs some protections from liability by finding them to be quasi-governmental workers. Based on recent statements from NJDEP, however, it is not likely that LSRPs will be totally immune from liability or protected by Title 59. In response to questions from the Senate Budget and Appropriations Committee, NJDEP noted that SRRA does not change the fact that, historically, environmental consultants "have always been liable for the quality of their work," and that negligence on the part of an LSRP "could result in the LSRP assuming liability as a Spill Act discharger." Thus, it appears that, as far as NJDEP is concerned, SRRA has given LSRPs the powers of a NJDEP case manager with none of the protections afforded to government workers. ■