

New Jersey Law Journal

VOL. CXCVIII - NO.13 - INDEX 1067

DECEMBER 28, 2009

ESTABLISHED 1878

IN PRACTICE

ENVIRONMENTAL LAW

The Licensed Site Remediation Professional: Friend or Foe?

No longer a company's advocate in dealing with NJDEP

BY SUSANNE PETICOLAS

November 3 marked the launching of the Licensed Site Remediation Professional ("LSRP") program in earnest. On that date, all new remediation projects in New Jersey must be performed under the supervision of an LSRP, a new type of environmental professional mandated by the Site Remediation and Reform Act ("SRRA"). L. 2009, c. 60, Sections 1-29 (codified at N.J.S.A. 58:10C-1 to -29).

The Legislature enacted the SRRA to address serious problems in the New Jersey Department of Environmental Protection's ("NJDEP") site remediation program, which had a staggering backlog of some 20,000 pending clean-up cases and was widely considered to be broken. Budgetary constraints made it unrealistic for NJDEP to hire substantial numbers of additional case managers, so the Legislature sought to solve the problem with a system that uses private (and privately paid) independent consultants to oversee and approve remediation work, loosely patterned on Massachusetts' program of

Peticolas is a director in the real property and environmental department of Gibbons in Newark.

licensed site professionals. During the political haggling among various stakeholders leading up to passage of the SRRA, some environmentalists warned that placing the responsibility for approval of a clean up in the hands of a consultant paid by the party responsible for the clean up was tantamount to "putting the fox in charge of the henhouse." In their view, no one but a governmental employee could be trusted to supervise and approve a clean up.

New Jersey lawmakers took these concerns to heart and the resulting statutory scheme places so many restrictions and obligations on the LSRP that it is no longer the feared fox, but instead an environmental watchdog whose primary professional obligations are to the public health and environment, not the party that engages him or her. (The LSRP must be an individual, as opposed to a firm or other organization. N.J.S.A. 58:10C-2.) The change (in most cases, see N.J.S.A. 58:10C-27) from NJDEP oversight to private oversight will both significantly alter the way clean ups are conducted in New Jersey and fundamentally change the relationship between the responsible party and the consultant it retains to advise it and guide it through the clean-up

process.

In the past, an environmental consultant frequently filled the role of the responsible party's "face" with the agency. At the same time, the consultant operated as a trusted advisor. Companies relied on their environmental consultant to assess the issues and provide them with their best advice as to what was required by the technical regulations, what the case manager would likely require, and what was a realistic position to take. Frequently, the consultant was the company's environmental advocate. Although no cases in New Jersey squarely held that an environmental consultant owed a fiduciary duty to his or her client, it was at least arguable that this was the case. *Cf. Interactive Logistics Inc. v. Answerthink, Inc.*, 2001 WL 1825982 (D.N.J. Dec. 18, 2001).

The constraints imposed by the statute on LSRPs make it virtually impossible for responsible parties to have anything approaching the same sort of relationship with their environmental consultants. These constraints include a licensing requirement, enforced and administered by an independent board, backed up with the risk of license revocation, fines, penalties and possible imprisonment for violations, as well as auditing by NJDEP. N.J.S.A. 58:10C-3 to -11, -17. Moreover, all of the LSRP's submissions are required to be posted on-line, thereby subjected to scrutiny by environmental watchdogs, interested neighbors and potential plaintiffs. L. 2009, c. 60, Section 39 (amending N.J.S.A. 58:10-23.16).

The LSRP must be an individual licensed pursuant to requirements estab-

lished by a thirteen-member Site Remediation Professional Licensing Board, comprised of the Commissioner of NJDEP, the State Geologist, six LSRPs, three members of environmental protection groups, one business person and one academic who are knowledgeable about issues involving responding to discharges of hazardous substances. N.J.S.A. 58:10C-3. The board not only licenses the LSRPs, but will adopt and administer standards for professional conduct, investigate complaints, impose discipline, and maintain lists of LSRP's in good standing and suspended professionals. N.J.S.A. 58:10C-3 to -6.

The LSRP's activities are subject to regulatory guidelines, ongoing scrutiny and statutory performance standards. The LSRPs "highest priority in the performance of professional services shall be the protection of public health and safety and the environment." N.J.S.A. 58:10C-16.a. LSRPs must exercise ordinary care and diligence and apply the knowledge and skill ordinarily exercised by LSRPs. They are prohibited from providing professional services outside their area of professional competency, absent the technical assistance of a professional with the requisite skills and knowledge. NJSA 58:10C-16.b, -16.c. LSRPs must notify NJDEP when they are hired and when (and if) they are fired. N.J.S.A. 58:10C-16.d.

The LSRP must certify all documents submitted to NJDEP relating to the remediation, including the certification of the work that was performed and that it is consistent with all applicable remediation requirements adopted by the department. NJSA 58:10C-14. All documents submitted by the LSRP must be inspected by NJDEP upon submission. N.J.S.A. 58:10C-21.a. The department has the discretion to perform additional review under certain circumstances, N.J.S.A. 58:10C-21.c, and must perform additional review if (1) the contamination at the site poses a significant detrimental impact on public health and safety or the environment; (2) the contamination may affect a licensed child-care center, school or other sensitive population; (3) the site is located in a "low income community of color" with a higher density of contaminated sites and permitted discharges; or (4) state grants or loans are being used to remediate the contamination. N.J.S.A. 58:10C-21.b. Decisions

relating to remediation must meet health risk and environmental, remediation and other standards. N.J.S.A. 58:10C-14. Remediations will be subject to mandatory timeframes and expedited site-specific timeframes for certain sites, N.J.S.A. 58:10C-28, and to presumptive remedies as adopted by NJDEP. N.J.S.A. 58:10C-14.c (2) (c). Ultimately, the LSRP will issue a Remediation Action Outcome ("RAO") after determining that the site has been remediated in compliance with all applicable laws protective of public health and safety and the environment. N.J.S.A. 58:10C-14.d. By operation of law, the remediating party is deemed to receive a covenant not to sue from NJDEP upon issuance of the RAO. L. 2009, c. 60, § 31 (codified at N.J.S.A. 58:10B-13.2. But the RAO is subject to NJDEP audit for three years, which may be extended under certain circumstances. N.J.S.A. 58:10C-25. Within the first two years of the adoption of the law, NJDEP must audit at least 10 percent of all documents submitted by LSRPs, and this audited material must include at least one review of case documents submitted by every LSRP. N.J.S.A. 58:10C-24; Executive Order No. 140 (May 7, 2009).

Under certain circumstances, NJDEP will maintain oversight responsibility for the site and select the final remedy. Direct oversight by the department is mandated under three conditions: (1) the remediating party has a history of noncompliance, including the issuance of at least two enforcement actions during any five-year period after the date of enactment; (2) the remediating party has failed to meet a mandatory remediation timeframe or expedited site-specific timeframe adopted by the department; and (3) the remediation party has failed to complete the remedial investigation within 10 years of the discovery of a discharge prior to the enactment of SRRA or within five years after the date of the enactment. N.J.S.A. 58:10C-27.a. The department also has the discretion to conduct direct oversight where the contamination includes chromate chemical production waste, there is more than one environmentally sensitive natural resource injured by contamination, the site has contributed to sediment contamination of PBCs, mercury, arsenic or dioxin, or the site is ranked by the department as requiring the highest priority. N.J.S.A. 58:10C-27.b. NJDEP has

issued guidance on when it may exercise its discretion to conduct direct oversight.

In addition to having the board and NJDEP looking over their shoulders, the LSRP has an independent statutory obligation to notify NJDEP, as well as the remediating party, of any condition that is an immediate environmental concern and also of any discharge that has occurred on the property under his or her supervision. N.J.S.A. 58:10C-16.j, -16.k. The LSRP must also notify NJDEP in writing upon learning of an action or decision by a client that results in a deviation from a remedial action work plan or other report. N.J.S.A. 58:10C-16.l Although the statute preserves the client's right to confidentiality, this right is trumped by these statutory notification obligations. N.J.S.A. 58:10C-16.m.

It will be a challenge for responsible parties to modify their working relationship with the LSRP. They will have to circumscribe their strategic discussions with the LSRP, and will no longer be able to place the same sort of reliance they placed on such consultants in the past. Instead, they will have to view the LSRP as an extension of NJDEP, assessing the conditions and implementing predetermined remedial actions in predetermined timeframes required by the technical regulations and guidance issued by the DEP. The SRRA seems to envision the ideal LSRP as simply a competent technician hewing closely to the regulations and guidance. While this may result in swifter and more predictable remediation, it could deter creative thinking and solutions to environmental problems. Companies with particularly complex sites, and the sufficient financial resources, may find themselves relying more on their in-house environmental personnel, or hiring additional professionals to provide advice in a non-LSRP capacity.

Clearly, the LSRP will no longer be a company's advocate in dealing with NJDEP. Indeed, given the regulatory constraints, licensing concerns and auditing, the LSRP will likely be inclined to err on the side of conservatism to avoid second guessing by NJDEP and the general public. The LSRP program may bring swifter cleanups, but they are unlikely to be more economical. ■