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Licensing Board Proposes Rules for Site Remediation Professionals

The adoption of the Site Remediation Reform Act (SRRA) in 2009 created a sea change in how the remediation of contaminated sites is addressed in New Jersey. The core component of SRRA was the recognition of a new professional—the licensed site remediation professional (LSRP). LSRPs are vested with the responsibility and authority to supervise the remediation of most sites and to document the completion of remediation through the issuance of a response action outcome (RAO).

SRRA created the Site Remediation Professional Licensing Board to “oversee the licensing, continuing education, and professional conduct of [LSRPs].” Statement to Assembly Committee Substitute for A-2962. As provided for in SRRA, the board has recently proposed regulations governing the board’s functions. The board’s Jan. 5 rule proposal, 47 N.J.R. 45, was the product of years of work by the board, with significant outreach to stakeholders. Once adopted, the proposed rules will impact not only LSRPs but also the parties conducting remediation (known as “parties responsible for conducting remediation” or PRCRs) and the general public. This article highlights some of the more notable proposed regulations.

Some of the proposed rules clarify aspects of SRRA that were not precise. For example, the proposed rules add specificity to the statutory requirement that LSRPs retain records, [N.J.S.A. 58:10C-20](#), by mandating that the records be held for “a minimum of 10 years following the later of the following dates: the date that the LSRP submits a notification of dismissal to the Department; or the date that the LSRP issues his or her last area of concern specific or entire site RAO for the site.” Proposed [N.J.A.C. 7:26I-6.27](#).

Code of Conduct

A core aspect of SRRA is the 26-part “Code of Conduct,” [N.J.S.A. 58:10C-16\(a\)-\(z\)](#). The proposed rules largely track the statutory code of conduct. For example, proposed N.J.A.C. 26I-6.1 provides: “An LSRP’s highest priority in the performance of professional services shall be the protection of public health and safety and the environment.”



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The proposed rules, however, do not provide guidance as to how LSRPs are to balance the “primary” responsibility to protect conflicts with the LSRP’s many other professional and contractual responsibilities. Absent such guidance, PRCRs must be prepared to address instances when an LSRP relies on proposed N.J.A.C. 26I-6.1 as a basis for superseding other obligations, including contractual agreements between the PRCR and the LSRP.

Other examples of when the proposed rules do not clarify potentially vague mandates include:

- How to access when LSRPs must comply with the mandate of proposed [N.J.A.C. 7:26I-6.8\(b\) and \(c\)](#), which require the LSRP notify the PRCR and the department “when in [the LSRP’s] professional judgment based on site history any one or more applicable regulatory time frames ... [or] applicable mandatory or expedited site-specific time frames referenced in proposed N.J.A.C. 7:26C-3 is unlikely to be met.” The proposed rules are silent as to how an LSRP is to identify the point at which a time frame becomes “unlikely to be met”;
- Whether notice of an immediate environmental concern (IEC) must be given under proposed N.J.A.C. 7:26I-9 if the department had previously been notified of the IEC;
- The extent to which the LSRP, and not the PRCR, would be required to produce documents to the public under [N.J.A.C. 7:26I-6.19](#), which requires the production of: information that is required to be provided to the public pursuant to [N.J.A.C. 7:26C-1.7](#); information that has been submitted to the department; and “ any additional information that is important for the public to know in order to protect their health and safety” (emphasis added). The proposed rules do not clarify what information is “important for the public to know”;
- Whether an LSRP should first consult with the LSRP’s client before reporting to DEP under proposed [N.J.A.C. 7:26I-6.11](#) and 6.13 when the “LSRP learns of a client’s action or decision that results in a deviation from the remedial action work plan or other report concerning the remediation,” or the LSRP learns of information subsequent to the completion of a report, “which would result in a report with material differences from the report submitted.” Complicating the issue further, the proposed rules extend these notification requirements to the period after the LSRP is no longer retained, see proposed [N.J.A.C. 7:26I-6.22](#); and
- The requirement under proposed [N.J.A.C. 7:26I-6.18\(b\)\(1\) and \(3\)](#) to inform clients of “each regulatory, mandatory, and expedited site-specific time frame that the LSRP can reasonably ascertain for each contaminated site for which the client has hired the LSRP, ... and the penalties and consequences set forth in applicable statutes and regulations, if [those] time frames ... are not met” (emphasis added). It is reasonable to expect that LSRPs may be significantly challenged in taking on the analysis of the scope of “penalties and consequences” set forth in the myriad of “statutes and regulations” that can be implicated if deadlines are not met.

Other aspects of the Code of Conduct are the subject of the proposed rules with added nuances and supplemental requirements. A prime example is proposed [N.J.A.C. 7:26I-6.10](#), governing the reporting discharges other than IECs. Under SRRA, the statutory Code of Conduct distinguished between reporting of IECs under N.J.S.A. 58:10-16(j) and reporting by the LSRP “on a contaminated site for which he is responsible” if that LSRP “obtains specific knowledge that a discharge has occurred [on that site]” under N.J.S.A. 58:10-16(k). Proposed [N.J.A.C. 7:26I-6.10](#) provides:

- (a) If an LSRP obtains specific knowledge that a previously unreported discharge, other than of historic fill, has occurred on a contaminated site for which he or she is responsible, the LSRP shall:

1. Immediately notify the person responsible for conducting the remediation of the discharge and of that person's duty to notify the Department of the discharge;
 2. Immediately notify the Department of the discharge by calling the Department's telephone hotline at 1-877-WARNDEP; and
 3. Immediately notify any other LSRP that is working on the contaminated site of the discharge.
- (b) An LSRP is considered to be responsible for a contaminated site if he or she has been hired by a person responsible for conducting the remediation at that site.

However, as proposed, the responsibility for reporting a non-IEC discharge does extend to an LSRP if:

- (c) ... an LSRP has been hired by any person who:
1. Does not own the contaminated site;
 2. Conducts a preliminary assessment or site investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property as provided in [N.J.S.A. 58:10-23.11g](#); and
 3. Has not discharged a hazardous substance at the site or is not in any way responsible for a hazardous substance discharged at the site pursuant to [N.J.S.A. 58:10-23.11g](#).

The provisions of proposed [N.J.A.C. 7:26I-6.10\(c\)](#), are intended to address situations in which the LSRP is performing "due diligence." The proposed rule does clarify that LSRPs performing "due diligence" are not required to report a previously unreported discharge. However, the concept of "due diligence" is constrained under the proposed rules to conducting a "preliminary assessment" or a "site investigation" for the purpose of "conducting all appropriate inquiry." This constrained concept of "due diligence" ignores that "due diligence" is not always conducted as a "preliminary assessment" or a "site investigation." Further, as proposed, the constrained definition of "due diligence" would never occur. "All appropriate inquiry," a term of art defined under federal law, see [40 CFR §312.20](#), required use of a Phase I/Phase II Environmental Site Assessment methodology and not a "preliminary assessment" or "site investigation." Hence, it is not possible to have either a "preliminary assessment" or "site investigation" performed for the purpose of conducting "all appropriate inquiry."

Enforcement

Under the proposed [N.J.A.C. 7:26I-7.3\(a\)](#), a complaint can be filed by "any person ... alleging that a person has: violated the SRRA or any rule, regulation, or order adopted or issued pursuant thereto; or knowingly made any false statement, representation, or certification in any document or information submitted to the Board or the Department." Interestingly, the proposed rule does not limit complaints against LSRPs and appears to extend the potential claimed violations to a PRCR's compliance with SRRA. It is questionable that such an extension is authorized under SRRA.

Complaints can and have been filed by DEP. No regulatory restraints have been placed on when the DEP can initiate a complaint. LSRPs and PRCRs should be prepared for the possibility that DEP staff could use the threat of a complaint to the board in the context of requiring action by the LSRP.

The proposed rules mandate that non-LSRPs, cooperate with board audits and inquiries. See, proposed [N.J.A.C. 7:26I-5.6 and 7.5](#).

Under the proposed rules there is no mechanism for notifying any of the PRCRs that have or had retained the LSRP that is the subject of a complaint until disciplinary action is taken against the LSRP. PRCRs should consider requiring disclosure of any pending complaints. Absent a contractual obligation, the PRCR would not learn of a pending complaint. Further, under proposed N.J.A.C. 7:26I-7.5d, the board can elect not to inform the LSRP that is the target of a complaint if “the Complaint Review Team determines that the investigation of the complaint could be undermined by notifying the subject of the complaint.”

The proposed rules incorporate the current practice of establishing a compliance review team (CRT) as a subset of the board to investigate potentially meritorious complaints. Under proposed [N.J.A.C. 7:26I-7.5\(e\) and \(g\)](#), the CRT can go beyond the specifics of a complaint.

The proposed rules also include broad powers delegated to the CRT including: authorizing the CRT to subpoena information and inspect sites, proposed [N.J.A.C. 7:26I-7.5](#); requiring the production of samples and lab results, proposed N.J.A.C. 7:26I-7.9b; and the recovery of costs incurred by other agencies, proposed [N.J.A.C. 7:26I-7.9, c1](#). SRRRA does not expressly provide for the use of the CRT, the power of either the board or the CRT to issue subpoenas, requiring the production of samples or recovery of costs incurred by other agencies (such as the DEP). See [N.J.S.A. 58:10C-18\(a\)](#).

The proposed rules will complete the regulatory framework of the changes instituted under SRRRA. Practitioners involved in working with LSRPs should pay careful attention to the rules when adopted.