

SRRA 2.0 – Some Steps Forward and a Few Back for the LSRP Program

After over two years of stakeholder meetings under the patient direction of the primary sponsors Senator Bob Smith and Assemblywoman Nancy Pinken and unanimous approval by the Legislature, on August 23, Governor Murphy signed the latest legislation regarding how sites are cleaned-up in New Jersey, P.L. 2019, c. 263 (the “Act”).

The adoption of the Site Remediation Reform Act (SRRA) in 2009 creating the Licensed Site Remediation Professional (LSRP) program was viewed as a “sea change” for remediation of contaminated sites in New Jersey. Over the past 10 years, the LSRP program has expedited the remediation of contaminated sites and the redevelopment of brownfield sites.

In contrast to SRRA, the Act, sometimes referred to as SRRA 2.0, involves relatively few substantive changes. Most of the provisions were developed based on stakeholder consensus. Many potentially innovative concepts were deferred to an unspecified date following a “don’t fix what isn’t broken” approach. However, a few changes will impact LSRPs and the remediation they oversee.

When an LSRP Must Be “Retained”

The most complex and impactful changes address when an LSRP must be “retained” and when a report of a “discharge” must be made. These changes will impact the use of LSRPs during due diligence and how LSRPs supervise or employ non-LSRPs.

Obligations of responsible parties and LSRPs are closely tied to the definition of “remediation.” An LSRP must be “retained” when any person “initiates a remediation.” N.J.S.A. 58:10B-1.3a. “Retained” is defined as an act “by or on behalf of the Person Responsible for Conducting Remediation [(PRCR)]” to either “perform, manage, or supervise remediation” or “to periodically review and evaluate a remediation performed by other persons.”



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The critical factor in determining whether activities are “remediation” is whether those activities are “to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants.” In turn, “contaminant/contamination” is defined in the context of a “discharge” which results in a “hazardous substance” or a “hazardous waste” onto “the land or waters of the State.” “Remediation” does not include payments for Natural Resource Damages. Absent a “known, suspected or threatened discharge” of a “contaminant,” activities, such as taking samples, is not “remediation” for which an LSRP must be “retained.”

N.J.S.A. 58:10C-11b was added, expressly precluding anyone from performing “remediation” unless managed by an LSRP. Further, two provisions to the LSRP “code of conduct,” N.J.S.A. 58:10C-16(aa)-(bb), were added prohibiting LSRPs from acting to:

- “facilitate, aid, assist, or cooperate” in “retaining or arranging for” a non-LSRP performing “remediation”; or
- “manage, supervise, perform, engage or participate in remediation” unless the DEP was notified that the LSRP was “retained” or the LSRP is working for another LSRP who was “retained.”

However, those prohibitions do not apply to “remediation” exempt under N.J.S.A. 58:10B-1.3d(1)-(3) from the requirement to “retain” an LSRP. In addition to the exemptions for remediation of unregulated heating oil tanks (e.g., residential heating oil tanks), and certain “due diligence” activities, a new N.J.S.A. 58:10B-1.3d(3) provides that an LSRP is not required when sampling or investigation is not:

- otherwise required by rule or law,
- conducted to obtain a Response Action Outcome; and
- to “investigate, clean up or respond to any known, suspected, or threatened discharge of contamination.”

When an LSRP Must Report a “Discharge”

The requirement that LSRPs report an “IEC,” N.J.A.C. 58:10C-16j, was revised to only apply when the LSRP “obtains specific knowledge” of an IEC, and notification is required to the PRCR only “if [the PRCR is] known to the [LSRP].” Reporting of “discharges” under N.J.S.A. 58:10C-16k applies to “any location on the site” even if the LSRP is retained on a “portion of a site” but does not apply to the discovery of “historic fill.”

Investigations by an owner or operator to confirm that a site is not “contaminated” (i.e., to satisfy a prospective lender or insurer) would not require an LSRP. However, if testing results reveal “known, suspected, or threatened” contamination, an LSRP would then need to be retained.

Similarly, an LSRP working for an entity that is not required to “retain” an LSRP does not have an obligation to report a “discharge” that does not result in an IEC. However, the LSRP would be required to report a “discharge” later if the entity that retained the LSRP becomes the owner or operator of a site.

Possible Pitfalls Relating to “Remediation” by Non-LSRPs

Given the new additions to the “code of conduct,” LSRPs that supervise consultants that are not LSRPs (including LSRPs that own firms with non-LSRPs) must be accurately aware that they may be violating the “code of conduct” if those non-LSRPs perform “remediation” without being overseen by an LSRP specifically “retained” for that “remediation.”

Changes to Direct Oversight

The Act codifies exceptions to triggering Direct Oversight when a mandatory timeframe is missed due to an inability to gain off-site access despite “timely action” to pursue court ordered access under N.J.S.A. 58:10B-16, or when timely submissions were made for remediation subject to federal oversight.

The Act clarifies that, once triggered, Direct Oversight “shall run with the site, regardless of who owns the property.”

The Act authorizes the Department of Environmental Protection (DEP) to modify the impacts of “Direct Oversight” through an Administrative Consent Order (ACO) when:

- the PRCR demonstrates “financial hardship” due to the imposition of Direct Oversight;
- deadlines were missed due a public emergency declared by the governor or the president; or
- a prospective purchaser seeks relief from Direct Oversight, provided that the prospective purchaser: (a) did not cause the discharge contaminating the site; (b) previously owned or operated the contaminated site; or (c) is a “predecessor, successor, subsidiary, partner, shareholder, assign, trustee in bankruptcy, responsible corporate official, or court appointed receiver” of (a) or (b) above.

Finally, the Act authorizes DEP to reinstate any or all Direct Oversight requirements if the PRCR subsequently fails to comply with the modification ACO or other rules.

Other changes include:

- Affidavit of Merit. LSRPs were added to the list of professionals under N.J.S.A. 2A:53A-26 for which an “affidavit of merit” must be obtained before commencing a malpractice suit.
- IEC Definition. The definition was revised to specify that the impacts must be from “confirmed contamination” and includes impacts to indoor air for all “structures.” However, section 23 of the Act adds a provision that allows an LSRP to identify that no action is needed for an IEC in a structure that is “not occupied, will not be occupied and will be demolished.”
- Preservation of Records by LSRPs. LSRPs must preserve “data, documents and information” regarding “remediation” that the LSRP “prepared or relied upon,” and submit an electronic copy of those records to DEP when an RAO is issued.
- Surety Bonds. Surety Bonds from an entity that “is listed as an acceptable surety on federal bonds in US Treasury Department Circular 570” can be used as a Remediation Fund Source.
- Enforcement Actions in Municipal Court. DEP is authorized to seek enforcement in municipal court under the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-10 et seq.
- LSRPs for Remedial Action Permits. J.S.A. 58:10C-19 was revised to clarify that an LSRP must be retained for ongoing requirements of Remedial Action Permits.
- Revisions on Public Notification Process.
 - Public notification must now commence at the initiation of the remedial investigation phase rather than the remedial action phase as previously required.
 - DEP may adopt regulations that require public notification by mail and by signage, compared to the current option of either mail notice or posting of signage.
 - The PRCR is required to respond to written or email inquiries regarding “the status of the remediation” by either providing “information or documents that responsive to the public inquiry” or a “written summary status report” in a form to be adopted by rule.

- Update on LSRP Certification. LSRPs must certify that each submission is “true, accurate, and complete.” LSRPs are liable for knowingly making a false statement, not simply making a false statement.
- Experience Requirements for LSRP Licensure. The requisite experience of work in New Jersey was changed to any three years in the last five years, rather than all of the requisite experience in the past three years be in New Jersey.
- Cancellation of the Insurance Policies Used as a Remediation Funding Source. These can be revoked or terminated without DEP’s permission but only for non-payment of the premium after notifying the DEP and the policyholder by certified mail.
- Reducing Funding Sources. The Act codifies the process in DEP’s rules for reducing Remediation Funding Sources as work is completed.
- Green and Sustainable Practices. DEP is now required to “encourage the use of green and sustainable practices” for remediation provided those practices remain protective of human health and the environment.
- LSRP Disqualifying Acts. The Act clarifies that acts that would disqualify someone from being an LSRP are “crimes” (not “offenses”), or the revocation or surrendering of a “professional” license, not “any” license.
- Correcting Language Changes:
 - Added Remedial Action Workplans approved by LSRPs where prior language required DEP approval.
 - Removed references to “memorandum of agreement.”
 - Updated that brownfield redeveloper agreements are issued by the Economic Development Authority and the Commerce and Economic Growth Commission.

Overall, while many of the provisions of the Act will foster clean-ups, the revised language on “retention” and what is “remediation,” adds complexities that require careful attention to work at “contaminated” sites.