

IN PRACTICE

ENVIRONMENTAL LAW

Don't Forget To Take a New Look at Your Environmental Service Agreements

BY MONICA PEREZ

On May 7, 2009, Gov. Corzine signed the Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., into law. SRRA authorized Licensed Site Remediation Professionals (LSRPs) to conduct environmental remediation with minimal or no New Jersey Department of Environmental Protection oversight as long as LSRPs and Remediating Parties conformed to their statutory obligations. Based on these obligations, Environmental Service Agreements ("ESAs") proposed by environmental consultants for remediation and due diligence projects need to be revisited. Attorneys representing parties to ESAs should now review the fine print in both existing and new ESAs to address the changes wrought by SRRA. This article addresses four major issues to be addressed as part of a competent review of an ESA. New issues are sure

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to arise as the implementation of SRRA progresses and interim regulations become final.

Mandatory Time Frames: SRRA obligates the NJDEP to impose mandatory timeframes for every stage of an environmental investigation and cleanup. Although SRRA establishes criteria for the granting of an extension in certain circumstances, it is unclear how the department will exercise its discretion in granting extensions needed due to the delay of a remediating party. Timing constraints should be addressed in the ESA to avoid the looming problem of department oversight.

Direct oversight means that all work and submissions to NJDEP are still to be undertaken by a LSRP; the NJDEP selects the remedial action for the site; financial assurances must be in the form of a Remediation Trust Fund ("RTF") funded in the amount estimated for the remedial action; any disbursements from the RTF must be approved in advance by the NJDEP; all submissions prepared by the LSRP concerning the remediation required by the department shall be provided simultaneously to the department and the person responsible for conducting the remediation; and the person responsible for conducting the remediation shall implement a public

participation plan to solicit public comment from the members of the surrounding community concerning the remediation of the site.

The RTF requirement under direct oversight imposes an additional burden on a remediating party that is undertaking a voluntary cleanup pursuant to the Spill Compensation and Control Act. Consistent with N.J.S.A. 58:10B-3.25, a person who voluntarily undertook a remediation pursuant to an existing memorandum of agreement, without the department's oversight, or who performs a remediation in an environmental opportunity zone is not required to establish an RTF. Additionally, the timing of the establishment of an RTF may be accelerated if the ISRA remediating party comes under direct oversight prior to the approval of a remedial action work plan assuming a remediation certification was not submitted to the department prior to the approval of the work plan.

Direct oversight is akin to purgatory under SRRA and is a situation to be avoided at all cost. Therefore, it is extremely important that mandatory timeframes are adhered to and are addressed in the ESA. A blanket exclusion of liability for not meeting mandatory timeframes should be stricken from any ESA. The language should be modified

to include liability exclusion only when the client has not furnished required information or has otherwise inhibited the environmental consultant's progression of work. Clear requirements for communication and approvals between the parties to avoid missing deadlines should also be contained in the ESA. Also, be mindful that a new LSRP may still have to adhere to timeframes imposed on the previous LSRP, including mandatory timeframes. Finally, addressing damages in the ESA is essential because ascertaining damages after the fact may be a difficult allocation issue as a practical matter.

Confidentiality: Pursuant to SRRA, a "LSRP's highest priority in the performance of professional services shall be the protection of public health and the environment." As a corollary to this priority, LSRPs are required to report a condition to the department that in his/her independent professional judgment may pose an Immediate Environmental Concerns ("IEC"). This provision in SRRA is problematic for clients retaining an environmental consultant to perform an environmental assessment to preserve an innocent purchaser defense. If your client is conducting an environmental assessment of property, then the client should be aware that a LSRP will have an independent duty to notify the NJDEP for any IEC discovered. N.J.S.A. 58:10C-16 defines an IEC as:

[A] condition at a contaminated site where there is (1) confirmed contamination in a well used for potable purposes at concentrations at or above the ground water remediation standards; (2) confirmed contamination that has migrated into an occupied or confined space producing a toxic or harmful atmosphere resulting in an unacceptable human health exposure, or producing an oxygen-deficient atmosphere, or resulting in demonstrated physical damage to essential underground services; (3) confirmed contami-

nation at the site of nature that either dermal contact, ingestion, or inhalation of the contamination could result in an acute human health exposure; or (4) any other condition that poses an immediate threat to the environment or to the public health and safety.

SRRA does not obligate a party to hire a LSRP to conduct an environmental assessment. If the client has expressed a concern for confidentiality, then language such as the prohibition of a LSRP to be used for environmental assessments should be added to the ESA.

Additionally, confidentiality clauses should be added for all ESAs regardless of the type of work that is being performed. See N.J.S.A. 58:10C-16, for the multitude of other LSRP notice requirements provided. Environmental consultants are still required to keep client's privileged information confidential absent a requirement under the law to breach the client's confidence. Therefore it is particularly important to have procedures in the ESA to provide notice and opportunity for review by the client when possible prior to notice by a LSRP to ensure that such notices are appropriate.

Another related confidentiality issue is the records retention requirement. SRRA requires the LSRP to maintain and preserve all data, documents, contracts and information concerning remediation activities at each contaminated site the LSRP has worked on. Three electronic copies of the records shall be submitted to the Department at the time the Response Action Outcome ("RAO") is filed with the department. Lawyers must be aware of preserving attorney-client and work-product privilege in communications with environmental consultants. ESAs should address this issue by giving the lawyer a right of review of all documents that are proposed to be sent to the NJDEP pursuant to this provision.

Insurance Requirements: Insurance requirements have always been a cornerstone of an ESA. Typically, a com-

petent review would include a review of insurance limits, certificate of insurance requirements and listing of additional insureds. This has not changed much except for the caveat of extending insurance requirements during the NJDEP audit period.

Pursuant to SRRA, the Department has three years to audit a RAO after the date the LSRP has filed the RAO except for three criteria to be addressed in the audit provision discussed below. Given that NJDEP has three years to audit an RAO, an ESA should extend errors and omissions insurance coverage for a minimum of three years after the issuance of an RAO in the event that the RAO is invalidated due to negligence by the LSRP. The ESA should contain a provision that certificates of insurance need to be issued every year after the issuance of the RAO for a minimum of three years to ensure compliance with the contractual agreement.

Audit Allocation of Risk: The department has three years to audit an RAO from the date the LSRP filed the RAO unless: (1) Undiscovered contamination is found on a site for which a response action outcome has been filed; or (2) the LSRP who issued the RAO has had his/her license suspended or revoked by the Site Remediation Professional Licensing Board established by SRRA; or (3) the board conducts an investigation of the LSRP.

Subsection (b) and (c) shows the importance of hiring the right LSRP for your project. The finality of your remediation is dependent on the competency of your LSRP. More importantly, if the LSRP is being audited, who will pay for the additional costs to defend an audit? This allocation of risk is subject to a variety of factors such as: the competency of your LSRP; the complexity of the project; and the pricing for the work being performed — just to name a few.

In conclusion, SRRA has made some substantial changes to the remediation process and it would be wise to revisit all your ESAs to ensure that you have addressed these new issues appropriately. ■