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Environmental Law Alert

June 18, 2010

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Opt In or Opt Out: When to Use an LSRP

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The Site Remediation Reform Act, more commonly known as “SRRA,” has brought wide-sweeping environmental reform to New Jersey. It enables the remediating party to hire a Licensed Site Remediation Professional (“LSRP”) to oversee and conduct the remediation of the contaminated site. In many instances, the LSRP will now stand in the shoes of the New Jersey Department of Environmental Protection (“NJDEP” or “Department”) and issue final approval of the remediation.

All cleanups commenced after November 4, 2009 will have to comply with SRRA and the remediating party must hire an LSRP to oversee the remediation. However, for cleanups commenced prior to November 4, 2009, SRRA has created uncertainty since the remediating party has the option of remaining under NJDEP’s traditional site remediation process or hiring an LSRP. In certain instances, the remediating party will have no choice but to remain under NJDEP’s direct oversight.¹ After May 7, 2012, all remediating parties will have to use an LSRP, even for cases remaining under NJDEP’s direct oversight.

The decision to hire an LSRP has serious consequences. The Department issues a No Further Action letter (“NFA”) when remediation is complete, while an LSRP will issue a Response Action Outcome (“RAO”). An NFA can be re-opened for failure to comply with its terms. It can also be re-opened if there are changes in remediation standards by more than an order of magnitude or if new contamination is found that was missed. An RAO can be re-opened under the same circumstances. But it is also subject to audit and being re-opened for a three year period and may be re-opened even after three years if the LSRP is disciplined or his/her license is revoked.

The LSRP has new reporting responsibilities. The LSRP must report discharges to NJDEP on properties where the LSRP is responsible for the cleanup and must report an immediate environmental concern (“IEC”), wherever the LSRP sees the IEC. An IEC is a condition that poses an immediate threat to the environment or to the public health and safety.² This will be of serious concern to many property owners. (cont’d →)

1. SRRA requires NJDEP to maintain and/or take direct oversight for the following sites and/or remediating parties: 1) the person responsible for the remediation has a history of remediation noncompliance including two enforcement actions within any five year period following enactment of SRRA (May 7, 2009); 2) the person responsible for the remediation has failed to meet a mandatory or expedited DEP timeframe (including extensions) or a schedule under an administrative consent order; or 3) the person responsible for the remediation has : a) failed, prior to the enactment of SRRA, to complete the remedial investigation of the entire site within 10 years after the discovery of the discharge, and b) failed to complete the remedial investigation within 5 years after enactment of SRRA. Pursuant to SRRA, NJDEP may elect to undertake direct oversight of a remediation where: 1) contamination at the site includes chromate waste; 2) NJDEP determines that more than one environmentally sensitive natural resource has been injured by contamination from the site; 3) the site has contributed to sediment contamination in a surface water body by PCBs, mercury, arsenic or dioxin; or 4) the site is in the highest priority category of the ranking system to be developed by NJDEP pursuant to SRRA. N.J.S.A. 58:10C-27 (2009).

2. IEC is defined as 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 contamination at the site of a 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. N.J.S.A. 58-10C-2 (2009).

One of the biggest questions posed to a remediating party is whether to “opt in” to the program by hiring an LSRP to oversee the remediation prior to the time when it becomes mandatory. The answer to this question involves a site specific analysis and is dependent on a variety of factors. Owners of contaminated property who are not involved with remediation may also be faced with the question of whether to allow an LSRP to conduct activities on their property.

To Opt In and Use an LSRP:

1. **Quick and Streamlined Cleanups**

Depending on the complexity of the cleanup of a site, a quick cleanup was not an option under the traditional site remediation program. Prior to SRRA, each environmental consultant’s submission had to be approved by the NJDEP before the next phase of the cleanup would start. It was not uncommon for the review process to take 2 - 3 years before receiving Department comments and/or approval. Some cleanups have taken several or more years to reach the Remedial Action stage with the end not yet in site.³

Under SRRA, a Remediating Party that has been conducting a cleanup under NJDEP supervision prior to November 4, 2009 has the opportunity of opting in to the program until May 7, 2012, when the LSRP program becomes mandatory. Opting in to the program may be beneficial if your site is early in the cleanup process and the Remediating Party has sufficient funds to pay for the cleanup. “Opting in” has been categorized by many at NJDEP as a means of expediting and streamlining the cleanup of sites and NJDEP has been encouraging many parties to opt in. For individuals looking to sell or develop their properties, “opting in” may be the only means of achieving this goal quickly and expeditiously.

2. **Flat and Fixed Rates for Oversight Costs**

Prior to SRRA, it would be common to receive oversight fees in the thousands to review one submission. Over the course of the cleanup, the oversight fees may be a substantial portion of the cleanup costs. Under SRRA, a person responsible for conducting the remediation pays an annual remediation fee to the Department. The annual fee can be as low as \$450.00 and as high as

\$9,500, depending on the contamination present, plus a fee of \$1,400 for each contaminated medium. See N.J.A.C. 7:26C-4.2(a)(2) for more detail. The Department has also issued a guidance document on annual fees. NJDEP, Fees / Oversight Costs – Guidance Document (2010).

This could represent a substantial savings for a remediating party presently under the traditional site remediation process where the oversight fees are not fixed and are assessed on an hourly basis.

To Opt Out and Continue with a Non-LSRP (For Now):

1. **Close to the End of the Remediation Process**

In uncertain times, the “we will wait and see” mentality takes hold of the decision making process. Some remediating parties hold a glimmer of hope that they are far along in the process and that they will receive a No Further Action letter before May 7, 2012. If the site has been undergoing cleanup for a significant amount of time and is close to completion, then the hiring of an LSRP may not be an option, especially if the current environmental consultant is not an LSRP. The hiring of an LSRP at the tail end of the remediation may be a very expensive proposition.

LSRPs must certify that all the work was completed in accordance with the regulations and is protective of the environment. For most LSRPs, the only way they can certify that the work has been done in accordance with the regulations is to review each and every document that was done in the remediation process prior to the LSRP coming on board even if the previous submissions were approved by the NJDEP. This may represent a substantial amount of time and money. Following this review, the LSRP may decide that more testing is required or a different remediation is called for, which will further delay the process and add to the cost. In addition, the LSRP will be required to report to NJDEP if a new discharge or an IEC is discovered.

For these parties, it may make sense to opt out of the LSRP program, at least for now. A party currently undergoing a remediation does not need to file any paperwork to opt out of the program. This party opts out by continuing the remediation and not “opting in.” If they are fortunate, they will receive their No Further Action letter in time.

³ At the time SRRA was enacted in May 2009, NJDEP had a backlog of approximately 19,000 cases.

However, if they have not received a No Further Action letter by May 7, 2012, they will have to retain an LSRP.

1. Contribution Action

If a site will be the subject of a future contribution action, then there exists some uncertainty as to the recovery of remediation costs. Pursuant to the Spill Compensation and Control Act, any person, including a discharger, who “cleans up and removes a discharge of a hazardous substance has a right of contribution against all other dischargers and persons in any way responsible...who are liable for the *cost of the cleanup and removal.*” N.J.S.A. 58:10-23.11f(a)(2) (emphasis added).

Cleanup and removal costs are defined as,

All direct costs associated with a discharge, and those indirect costs that may be imposed by the department pursuant to section 1 of P.L.2002, c.37 associated with a discharge, incurred by the State or its political subdivisions or their agents or any person with written approval from the department in the: (1) removal or attempted removal of hazardous substances, or (2) taking of reasonable measures to prevent or mitigate damage to the public health, safety, or welfare, including, but not limited to, public and private property, shorelines, beaches, surface waters, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources.... N.J.S.A. 58:10-23.11b (emphasis added).

Prior to SRRA, a potential plaintiff seeking contribution could conduct the remediation in accordance with the Technical Regulations and Case Manager oversight and have some certainty that the cleanup and removal costs were approved in accordance with the statute. Under SRRA, this whole process has been abolished. A contribution plaintiff using an LSRP can no longer seek Department approval and the current version of the Administrative Requirements to Remediate Contaminated Sites (“AARCS”) is devoid of any alternative mechanism to obtain written approval from the Department in accordance with the above referenced statute.

Currently, there is a question if a party conducting a remediation under SRRA can seek contribution from another discharger. Therefore, if the potential plaintiff currently has an on-going case with a Case Manager and thinks that it may want to seek contribution, it may not want to opt in to the LSRP program.

Other Choices

If the remediating party is involved in a property transaction where financing is required, it may find that its lender is leery of an LSRP, particularly in the early days of the program. The lender may want NJDEP approval of the remediation for purposes of lending money. For due diligence purposes, however, the lender may prefer an LSRP. The remediating party may face similar considerations if an insurer is involved. Therefore, the remediating party should check with its lender or insurer before opting into the LSRP program.

The possibility of an RAO being re-opened will be a serious concern to many remediating parties. Not all LSRPs are equal and the property owner should select the LSRP carefully. Now that the LSRP Board has been established, LSRPs will begin to have permanent licenses and there will be disciplinary proceedings against some LSRPs. Over time, it should be possible to track the performance of LSRPs to see how often their RAOs are overturned. In the short-term, remediating parties will have to rely on the experience and reputation of the LSRP and protect themselves through the agreements when they retain the LSRP and insurance, where available.

Even if a party is not presently remediating a site, it may have to make a determination whether or not to engage an LSRP. If a property is being sold, the buyer will want to undertake due diligence before making a decision whether to acquire the site. Since LSRPs have statutory reporting requirements, many sellers will not want an LSRP at the site. Buyers, on the other hand, may want to use an LSRP, especially if they will be undertaking the remediation so that they do not have to pay for the site sampling twice. Buyers may also want to use an LSRP to maximize the possibility of being an “innocent purchaser.” This choice will be a matter of negotiation between the parties. Beware, however, that if an LSRP is used, the statutory reporting requirements will override any confidentiality agreement between the parties.

Parties engaged in litigation or going before a Planning Board or Zoning Board will have to choose whether to hire an LSRP or a non-LSRP as their expert witness. All things being equal, it may turn

out that a licensed professional will have more credibility as an expert witness or carry more weight in court or with the Board than a non-LSRP.

Remediating parties who suspect that they have off-site contamination may find themselves engaged in disputes with their neighbors if the remediating party seeks access for an LSRP to sample the neighbor's property. Many neighbors will object to allowing an LSRP on their site for fear that the presence of an LSRP will trigger reporting obligations if the LSRP observes an IEC on their property. If the neighbor refuses access, this will likely end up in court. This will become an increasing problem as parties opt in and after May 7, 2012, when all parties, even those who remain in direct oversight, must use an LSRP.

In conclusion, choosing to "opt in" or "opt out" of the LSRP program involves a thorough analysis of site conditions and the risks and benefits involved. Soon enough parties undergoing a remediation that "opts out" of the LSRP program

will have no other option than to become part of the program after May 7, 2012. Even parties who are not undergoing remediation in the traditional sense may be faced with the Hobson's choice of whether or not to hire an LSRP.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Fredi L. Pearlmutter at fpearlmutter@lindabury.com or Monica Perez at mperez@lindabury.com of the Environmental Group.

Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision.

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