



AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

Questions and Answers on New Jersey Site Remediation Reform Act

The following questions and answers are designed to provide summary information concerning the principal changes in the laws governing New Jersey's site remediation program (SRP) that will occur as a result of the passage of the New Jersey Site Remediation Reform Act (SRRA). The SRRA was passed by both houses of the New Jersey Legislature on March 16, 2009 and sent to the Governor for his signature.

- **What is a Licensed Site Remediation Professional (LSRP)?** - An LSRP is an individual who, based on education, training and experience requirements set out in the SRRA, is qualified and would be licensed by a newly created licensing board (or temporarily by NJDEP, until the board is up and running) to (1) certify all site remediation submissions to NJDEP and (2) certify that the remediation complies with all laws and regulations, and protects public health, safety and environment.
- **Who must use an LSRP?** - Subject to the SRRA phase-in period (see below), any person responsible for conducting a remediation, other than remediation of a discharge from an unregulated underground storage tank (UST) or non-corrective action work associated with a regulated UST, must hire an LSRP. Remediations of unregulated USTs may use either an SSE or an LSRP. Persons responsible for regulated USTs must use an LSRP for corrective action (other work on regulated USTs may be done by a SSE).
- **How will the LSRP certify that the remediation meets NJDEP standards?** - The LSRP will make this determination through the issuance of a "response action outcome" (RAO) upon completion of the remediation activities. RAOs, except in cases where no contamination is detected, must be submitted to NJDEP and may be audited, a process which NJDEP has three years to commence and no deadline to complete.
- **What standards will LSRPs apply?** - LSRP decisions must apply NJDEP's remediation standards, NJDEP's technical standards for site remediation and "available and appropriate technical guidelines . . . issued by the department." In the absence of NJDEP technical standards, or if the LSRP determines that the NJDEP guidelines are "not appropriate or necessary," the LSRP may use EPA or other states' guidance or other relevant and appropriate methods or practices.
- **When does the LSRP program go into effect?** - The LSRP provisions of the SRRA will be effective upon signature by the Governor, but its various features are phased in. The licensing board is allowed 18 months from the effective date of the new law to adopt its rules and regulations. Prior to that time, NJDEP is granted authority to establish a temporary licensing

program, a step that the department must take within 90 days of enactment. Remediations commenced before or within 180 days of the effective date are not required to be conducted by an LSRP except in certain circumstances involving NJDEP enforcement actions. By three-years following enactment, all remediations must comply with the statute regardless of when commenced.

- **Will NJDEP still issue no further action (NFA) letters and covenants not to sue?** –RAOs, for the most part, will replace NFA letters and covenants not to sue. The liability protection provided by the RAO for remediation was designed to be substantively the same as the NFA. In addition, RAOs are deemed, by operation of law, to constitute a covenant not to sue. RAOs do not affect liability for natural resource damages. In certain limited circumstances, such as the remediation of an unregulated UST by a certified subsurface evaluator (SSE) and remediations conducted during the LSRP phase-in period (see below), NJDEP will continue to issue NFAs.
- **Who will license LSRPs?** – A thirteen-member licensing board will be established to administer an LSRP examination, issue LSRP licenses and enforce a newly created LSRP code of conduct. As to the latter, the Board will have the authority to revoke and suspend licenses, issue orders, assess civil penalties up to \$20,000 per violation and petition the Attorney General to pursue criminal penalties for up to \$75,000 per violation and imprisonment. Pending the establishment of the licensing system, NJDEP will issue temporary licenses to qualified individuals (see above).
- **What information must LSRPs share with NJDEP?** - In addition to the usual report submissions, an LSRP will have an obligation to report certain discharges the LSRP discovers (see below), as well as a client’s deviation from a workplan or other report concerning the remediation developed by the LSRP. The LSRP will also be subject to document retention requirements.
- **Will LSRPs have independent release reporting obligations to NJDEP?** - Yes. If the LSRP identifies any discharge on the site besides a discharge resulting from historic fill, the LSRP must notify both the party responsible for the remediation as well as NJDEP. Notification also must be made immediately where the LSRP identifies a condition that the LSRP believes constitutes an “immediate environmental concern.”
- **How will NJDEP case oversight change?** - SRP cases will be divided into two tiers. For most cases, LSRP submittals to NJDEP under the Technical Requirements for Site Remediation will be subject to NJDEP “inspection,” an undefined though likely to be far lower level of scrutiny than a full review. For these sites, NJDEP has authority under the SRRA to conduct “additional review” of submissions by LSRPs beyond mere inspection in certain circumstances, and is required to perform additional review for certain sites of particular environmental or public interest (e.g., environmental priority sites, child care centers, environmental justice areas, and sites using State grants or loans). NJDEP is also required to review at least 10% of all documents submitted by LSRPs annually. For a second tier of select cases, NJDEP will provide direct oversight (see below) of LSRP submittals, much the same as it does now.
- **What cases will be subject to direct oversight by NJDEP?** – Direct NJDEP oversight will be mandatory for cases failing to meet the new mandatory deadlines or certain cases with a history of noncompliance or delay, and “may” be required by NJDEP for sites (1) with chromate contamination, (2) with multiple impacted sensitive natural resources, (3) where PCBs, mercury, arsenic or dioxin are impacting surface waters, or (4) that are given the highest priority ranking under New Jersey’s Spill Act.

- **What are the consequences of direct oversight?** - For direct oversight cleanups, NJDEP will “review” (as opposed to “inspect”) and approve or deny all documents submitted by the LSRP, and select the remedial action based on a feasibility study prepared by the LSRP. The party responsible for the remediation will be required to establish a remediation trust fund to cover remediation costs for all sites subject to direct NJDEP oversight and must also prepare a public participation plan subject to NJDEP approval.
- **Will the available range of remedial actions change?** – Yes. Unrestricted use remedial actions, presumptive remedies to be established by NJDEP or alternative remedies shown to be as protective as presumptive remedies must be employed in all sites involving an area of concern where there is (1) new residential construction, (2) construction involving a sensitive population (e.g., education, childcare) or (3) a proposed change in the use of the site to a use involving these uses. Residential construction and proposed uses involving sensitive populations are also prohibited on landfills in certain cases. NJDEP may also require removal or treatment if contaminated material poses an acute hazard upon engineering control failure.
- **How will remediation timeframes be affected?** - NJDEP must establish mandatory timeframes for each phase of the remediation (e.g., preliminary assessment, site investigation etc.), certain interim measures and “any other activities deemed necessary by the Department.” There are no similar timeframes applicable to decisions or actions of NJDEP.
- **How will monitoring and maintenance of non-permanent remedies be affected?** - NJDEP is granted authority to establish a permitting system for operation, maintenance and biennial certification of institutional and engineering control remedial actions. The department may also require permittees under this system to maintain insurance, financial assurance or another financial instrument to guarantee that funding is available to operate, maintain and inspect engineering controls.
- **Would the statute of limitations (SOL) for natural resource damage claims change?** Under the SRRA, natural resource damage claims must be brought by the state within five and a half years of the completion of the *remedial action* for all media at the entire site. This provision will extend the SOL at many prolonged cleanups because, under current law, natural resource damage claims must be brought within five and a half years of the *remedial investigation* completion. The change will not affect claims for which the SOL has already run.

The information contained in this Q&A is not intended as legal advice and should not be acted upon without individual legal counsel. For additional information on the legal issues raised by the SRRA, please contact any of the following attorneys at the e-mails below or at 484-430-5700:

Bruce Katcher - bkatcher@mgkflaw.com
 Jonathan Spergel – jspergel@mgkflaw.com
 Nicole Moshang – nmoshang@mgkflaw.com

Christopher Ball – cball@mgkflaw.com
 Matthew Sullivan- msullivan@mgkflaw.com

For additional information on the technical issues raised by the SRRA, please contact either of the following technical consultants:

Darryl Borrelli – dborrelli@mgkflaw.com

Michael Nines – mnines@mgkflaw.com