




SRRA PRACTICAL CONSIDERATIONS

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CHANGES IN TERMINOLOGY

- OLD - Remediation Agreement
- NEW - Remediation Certification
 - If PA/SI completed, submit:
 - ✓ cost estimate certified by LSRP
 - ✓ original remediation funding source
 - If PA/SI not completed, submit:
 - ✓ remediation funding source in default amount
- No DEP approval required

VOLUNTARY CLEANUPS

- A Thing Of The Past
- No More Memoranda Of Agreement – Must Investigate and Remediate In Compliance with Mandatory Time Frames adopted by DEP
- Affirmative Obligation

Phase I & Phase II Environmental Site Assessments

- Prior law - reporting obligation only for responsible parties
- Only exception was UST regulations – imposed reporting obligation on licensed UST contractor
- LSRP has a statutory obligation to report to DEP
- Responsible Party now has an affirmative obligation to investigate and remediate

If you're not careful, that Phase 1 performed by your lender or your Buyer will cause you big headaches

Past Practice:

- Attorney retains consultant, consultant reports to attorney
- Attorney advises client without disclosing report

Now:

- If LSRP conducts Phase 1 or 2, immediate environmental concern. Must be reported by LSRP
- Do not use LSRP for Phase 1s or 2s

REPORTING REQUIREMENT

If a licensed site remediation professional obtains specific knowledge that a discharge has occurred on a contaminated site for which he is responsible, the licensed site remediation professional shall: (1) notify the person responsible for conducting the remediation of the existence of the discharge; and (2) notify the department of the discharge by calling the department's telephone hotline. P.L. 2009, ch. 60.

CONFIDENTIALITY

Past: Whatever your consultant learned was privileged against disclosure if done in the right way

Now: Limited by the SRRA

LSRP has reporting requirements in some circumstances

- Immediate Environmental Concern
- Discharge on site for which LSRP is responsible
- Deviation from remedial action work plan

Otherwise still entitled to confidentiality protection

Not automatic

Must place LSRP on notice, in writing, that information is confidential



FINANCING

Not required to be LSRP to conduct Phase 1

Lenders:

- Many borrowers may be leery of having LSRPs conduct Phase 1s
- Explain reporting requirements to customers and make certain that LSRP agrees that, since he is not being retained to perform any remediation, he has no obligation to report to DEP unless he identifies an IEC
- Otherwise make certain that environmental professional conducting Phase 1 is not LSRP - you may have an irate former customer when the LSRP reports a discharge

Borrowers:

- If there is any question about whether there may have been a discharge at your property, make certain that the consultant retained by the Lender is not an LSRP
- Insist that the LSRP sign a confidentiality agreement

MERGERS AND ACQUISITIONS

- Unless insider transaction, subject to Buyer's due diligence, including environmental investigation
- Similar issues that arise in connection with loans and Phase 1s
- Seller may be in better position to control whether LSRP conducts Phase 1 since it is a matter of contract negotiation
- Buyer's obligation is likely subject to financing contingency - still dealing with the Lender's Phase 1 requirements

- Different Issues Regarding Sale Of Property That Is Undergoing Or Has Completed Remediation
- Finality of Remedial Action – What Governs?
- Response Action Outcome – issued by LSRP to person conducting cleanup
- If ISRA transaction, must be transmitted to all parties, including lender
- No Further Action Letter still used in some limited circumstances
 - Unregulated Heating Oil Tanks
 - Existing Cases With DEP Oversight
 - Immediate Environmental Concern
- Will need to use new language in your contracts to deal with these changes

RAOS

Is my RAO final?

- DEP has three years to audit RAO
- May invalidate if deemed unprotective at any time
- General reopener under Spill Act for Change of Remediation Standards by Order of Magnitude
- Need contractual provision to protect the Buyer in the event that the RAO is subsequently invalidated

DUELING CONSULTANTS

- Vagueness in standards and requirements
 - i.e., Vapor intrusion guidelines
- Differences in professional judgment

**“Where there is no specific requirement provided by the technical standards for site remediation adopted by the department, and guidelines issued by the department are not appropriate or necessary, in the professional judgment of the licensed site remediation professional, to meet the remediation requirements . . . the licensed site remediation professional may use the following additional guidelines to make decisions regarding a remediation and shall set forth justification for such use, in the relevant submittal:
relevant guidance from the federal Environmental Protection Agency;
and
other relevant, applicable, and appropriate methods and practices that ensure the protection of the public health and safety and of the environment.” P.L. 2009, ch. 60.**

- Seller's LSRP, if sympathetic, may support conclusions that are borderline
- Buyer may choose to not rely upon Seller's LSRP and may retain own LSRP to review
- Buyer's LSRP may take issue with conclusions of Seller's LSRP
- Must address these potential issues in your contract

RELIANCE ON SELLER'S LSRP

Can I – YES

- RAO issued to Seller, but reasonable to foresee Buyer's reliance
- Deviation from professional standard
- Insurance

Should I – NO

- LSRPs are individual
- Limitations of Insurance
- Not new issues

ENGINEERING AND/OR INSTITUTIONAL CONTROLS

- Use Will Require Issuance by DEP of Site Remediation Permit
- Annual Fee
- Posting of Financial Assurance
- Exceptions:
 - Day Care
 - Small Business (<50 employees and does not acquire property for development)
- Existing Biennial certification cases will be converted to Remediation Action Permits
- By operation of law, each successive owner is responsible for maintaining- need contractual undertaking to alter this requirement between private parties.

REMEDIAL ACTION PERMITS

Soil

- Deed Notice
- Engineering Controls (cap)

Groundwater

- Natural Attenuation
- Pump & Treat

Will only be issued after initial monitoring confirms
“success”

RAO can only be issued after any applicable RAPs
have been issued

MANDATORY TIMEFRAMES

- Existing Administrative Consent Orders and Remediation Agreements are superseded by the Mandatory Timeframes
- CONSEQUENCE – miss a mandatory time frame and the case will be subjected to NJDEP oversight
- These are timeframes that are deemed inappropriate to exceed without valid reasons

EXISTING REMEDIATION PROJECTS

Should you opt into the LSRP program

Can you opt out?

Must Use LSRP if a New Case

New party assuming responsibility for cleanup is considered by DEP to be a new case

IMPORTANT: New party must meet the existing mandatory timeframes – the clock does not restart

Existing case if not completed by May, 2012



MUST WORK THROUGH DEP IF IMMEDIATE ENVIRONMENTAL CONCERN

Must work through DEP if:

- Two enforcement actions issued within any 5 year period after May, 2009
- Failure to meet mandatory remediation timeframe or expedited site specific timeframe
- Pre-existing cases if there is a failure to complete the remedial investigation within 10 years from inception and not later than May, 2014

OTHER CONSIDERATIONS

- Cannot have in-house LSRP
- No more Oversight Fees, but annual fee
- Annual fee due 9 months after first submittal or initiation of cleanup
- Same oversight program unless you opt into the LSRP program
- NFAs issued by DEP will not contain covenant not to sue
- New law signed by Governor Corzine on January 17, 2010
- LSRP does not have complete autonomy

QUESTIONS

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