

Environmental Law

The New Dynamic of Site Remediation in N.J.

Be aware of the exact nature of the role of the LSRP

By Jeffrey M. Casaletto and Edward A. Hogan

On May 7, 2012, with the promulgation of the “final” rules administering the new site remediation program, New Jersey introduced the next phase in the process for remediating contaminated sites. Under these rules, persons responsible for conducting remediation must retain a Licensed Site Remediation Professional (LSRP). This person has the authority pursuant to the New Jersey Site Remediation Reform Act (SRRA) to oversee and, ultimately, sign off on the completion of a cleanup by issuing a Response Action Outcome. This new site remediation program and the advent of a new player, the LSRP, demand that counsel reassess, and carefully select, the team it assembles for completing site remediation projects.

To understand the role the LSRP plays in the new program, we must under-

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stand the responsibilities of the players in the “old” site remediation program. Prior to SRRA, the client team might have included a principal of the entity performing the site remediation, an attorney and the specialty players — an environmental consultant and an environmental attorney as co-counsel. On the other side of the table was the New Jersey Department of Environmental Protection (DEP) with a case manager, a geologist, a technical coordinator and, in a complex site remediation matter, a deputy attorney general.

The client team advocated the most favorable position and approach for the client, taking into account the client’s interests and goals. This team also served to keep the DEP in check with respect to the decisions, comments and approvals the department issued throughout the client’s site remediation process. In particular, the environmental attorney and the environmental consultant worked together to advance a clean-up plan on behalf of the client, and challenged the department when it went astray.

The design of the old site remediation program required that the attorney and the environmental consultant coordinate and cooperate to best advocate the client’s interests. Rarely was there a clear distinction between these players as to which was applying case law, technical rules and regulations, statutes and guidance documents to advance the client’s site remedia-

tion plan. This blurred line was never an issue since these players were working on the same team to achieve the same goals.

Enter SRRA, which replaced and redefined the players and their roles in performing site remediation by creating the LSRP. At first glance, the LSRP role might not appear to be any different from the role of the environmental consultant in the old site remediation program. Upon closer examination, however, nothing could be further from the truth. The LSRP is not an advocate of or for the client’s interest. This new dynamic means counsel should be concerned that the client’s site remediation matter is appropriately staffed.

Except in very limited circumstances, the DEP is now absent from the site remediation process and decision making. Without this traditional government approval process that once made the department the arbiter of site remediation issues, the client no longer has the ability to obtain the comfort that comes with government sign-off on a completed site remediation matter. Can the LSRP fill this void? While the LSRP issues the Response Action Outcome (which, by law, automatically comes with a Covenant Not to Sue), the LSRP does not possess the benefit the department did in issuing the No Further Action letter. That is, there is a presumption that an administrative agency accurately interprets and applies its rules in issuing an approval. This presumption does not exist for the LSRP. Moreover, the LSRP issues the Response Action Outcome at the risk of his or her own professional license, and at the risk of personal liability, whereas the DEP enjoys

sovereign immunity for any errors it may have made in issuing an approval.

In the new site remediation program, the LSRP operates with significantly different professional risks burdening its decision making. This professional must obtain a license, and the loss of the license could result in the loss of the professional's livelihood. Moreover, the LSRP is subject to the oversight of two entities: the department, which can audit and overturn any Response Action Outcome issued by the LSRP; and the LSRP Board, which has the authority to review the conduct of the LSRP. Under these conditions, LSRPs would be expected to be cautious and conservative. For these reasons, LSRPs are in a difficult position with their clients.

As much as the LSRP might be the very same individual a client has turned to in the past for the role of the environmental consultant, now, as the LSRP, this person must adhere to a code of conduct set forth in the SRRA. The LSRP's "highest priority in the performance of professional services shall be the protection of public health and safety and the environment." N.J.S.A.

58:10C-16.a. The SRRA does not require the LSRP to place any priority on, or to even consider, the client's interests when overseeing, directing or performing the clean-up activities as the LSRP. Therefore, by law, the LSRP is not the client's advocate.

Comparing the LSRP code of conduct with the Rules of Professional Conduct governing the conduct of the client's environmental attorney reveals how different the role of the LSRP is in the new site remediation program. An environmental attorney must "abide by a client's decisions concerning the scope and objectives of representation" and "shall consult with the client about the means to pursue them." R.P.C. 1.2(a). In addition, "except as permitted by [the Rules of Professional Conduct], a lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent." R.P.C. 1.8. In short, the environmental attorney's role is to do exactly what the LSRP cannot do — advocate with the client's interest as the

highest priority.

Counsel's options to address these concerns range from the onerous task of learning all the new environmental rules and the application of these rules, to the more practical solution of retaining a skilled environmental co-counsel or an environmental consultant separate from the LSRP. The more complicated the site remediation matter, the more a team similar to the old program may be necessary. That is, retaining an environmental co-counsel and an environmental consultant, not just one or the other, may be necessary to manage the scope of the site remediation issues and to properly represent the client's interests.

Ultimately, the lesson for counsel in the early stages of this new site remediation program is this: Do not think the LSRP is the only necessary player for your client's site remediation matter. A properly staffed team is necessary to keep the LSRP in check, to assure the client's interest are being represented appropriately in the site remediation program and to assure proper application of the law to the facts. ■