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Retention of Licensed Site Remediation Professionals Under the Site Remediation Reform Act

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Enactment of the Site Remediation Reform Act ("SRRA") in May 2009 (codified mainly at N.J.S.A. 58:10-C) effected a "sea change" in New Jersey site remediation. The object of this article is to explain why this new statute will require close attention to the retention agreement between the "person responsible for conducting the remediation" ("PRCR") and a newly created class of state licensees called "Licensed Site Remediation Professionals" ("LSRPs"), and suggests some issues which should be addressed in such an agreement.

Until the passage of the SRRA, most remedial measures had to await New Jersey Department of Environmental Protection ("DEP") final approval. This caused a build-up of existing cases. Prospects for reducing that backlog were minimal. The SRRA seeks to alter that calculus. First, the SRRA creates an affirmative duty to remediate hazardous material discharges without awaiting DEP approval. Second, it substitutes LSRPs (environmental professionals who meet specific experience, educational and, ultimately, examination criteria) for DEP in most cases. Under the SRRA the LSRP, rather than DEP, will make remedial decisions and issue the final remediation approval document, now called a "Response Action Outcome" ("RAO"). Persons initiating remediation after November 4, 2009, must retain an LSRP and, with some exceptions, those cases extant before then must transition to an LSRP by May 2012.

Those seeking in-depth information on the SRRA, and the plethora of interim regulations, guidances, and forms it has spawned are referred to the DEP's website.

Before the SRRA, DEP often took substantial time to review and approve each step in a remediation, that approval could be relied upon as final in virtually all instances. Thus, DEP served as a control on the completeness of environmental consultants' work and provided assurance of finality. This DEP "safety net" has now largely disappeared. In its place, the DEP, and a newly constituted board which will license and oversee LSRPs, have the retrospective ability to audit and investigate an LSRP's work and, as to the DEP, ultimately to modify or invalidate an LSRP's decisions, including RAOs. DEP will not review most documents until after the RAO is filed. It then has up to three years to audit the RAO, or longer in some circumstances. N.J.S.A. 58:10C-25. Obviously, this places a premium on proper LSRP performance in the first instance, and the PRCR's counsel must make sure that remediation is performed correctly from a legal standpoint.

Also, the LSRP's status is at least somewhat independent; under the SRRA, LSRPs answer to a "higher authority." They are charged with the protection of the public health, safety and the environment. N.J.S.A. 58:10C-14.22.

In these circumstances, it is imperative to prequalify consultants who are now LSRPs to ensure that they will perform appropriately. LSRP performance after retention must also be monitored to ensure SRRA compliance. Some believe that hiring two LSRPs, one to perform work and the other to monitor that work, will be necessary. In most cases, however, clients will probably decline to hire multiple consultants for a single site, and may rely on counsel and the terms of their contracts with LSRPs to assure performance.

In light of the foregoing, the following areas deserve careful scrutiny with

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respect to contracts with LSRPs. This is written from the viewpoint of PRCR counsel, but LSRP counsel will probably have concerns regarding the same issues.

Scope/Price: While the "scope" of work of environmental consultants, including LSRPs, may often expand as work progresses, there are ways to at least regulate such growth contractually. On sites that have already been characterized (e.g., where a complete remedial investigation, has already occurred), the scope of LSRP services to be rendered may be limited to a known or probable remedy (DEP regulations provide or will provide "presumptive remedies" in many instances). In matters where the LSRP is to conduct all phases of a remediation starting with investigation, it may be beneficial to segment the LSRP's work so that there is some opportunity to obtain another LSRP for successive phases of remediation. LSRPs have new obligations to report discharges, variances from law, and similar matters directly to the DEP (see, generally, 58:10C-16). If such unforeseen matters occur, such as if there is an "immediate environmental concern" ("IEC"), the DEP prescribes a series of immediate actions required of the PRCR. In some cases, it may be possible to plan for potential IEC occurrences and provide a preliminary scope of work for response to them in the contract.

The scope should be precise and specific, with each task delineated and understood in advance. A contract which says that its scope is "all work necessary to produce an RAO" is insufficient. If the LSRP is to provide an RAO, the scope of that work must fit both prevailing law, the circumstances of the site and if applicable, agreed-upon contours of the RAO specified in any related business transaction. The LSRP should warrant that the services to be provided will be sufficient to produce an RAO of the type desired. The precise parameters and language of the RAO desired should be agreed upon, in advance, in the contract to the extent praticable. In all events, the contract should provide for specific staffing (with no substitutes without client consent) and agreed-upon rates. The LSRPs should agree to meet all DEP mandatory timeframes.

Note that the DEP is in the proces or revamping substantial portions of its site remediation regime, so any agreement should recognize and provide some flexibility for changes in such regulation.

Indemnity, Insurance and Related Provisions: A lynchpin of the entire LSRP program is the ability of LSRPs to stand behind their work, which includes the financial viability to do so. In my view, this means that the LSRP should be willing to indemnify and defend its client against any failures of its work, including any invalidation of the RAO, and against any DEP audit or investigation by the Board, as well as any fines and penalties, to the extent they are indemnifiable. The PRCR should be named an additional insured on the LSRP's insurance policies. Insurance should include CGL, professional liability and, to the extent available, one or more environmental policies. "Occurrence" rather than "claims made" policies should be specified, if available.

In light of the NJDEP's three-year "look-back" rule (N.J.S.A. 58:10C-25) to review RAOs, these indemnities (and accompanying warranties and insurance policies) must be drafted to survive any termination of the retention agreement.

Communication and Review: While there may not be time to review all communications between the LSRP and the DEP before they are made (such as, for example, where there is an IEC), other "deliverables" including, most critically, those which must be filed with DEP at the end of the remediation process should be reviewed by counsel prior to their submission, for compliance with law, and by the PRCR, for accuracy. The contract should provide an appropriate time period for this review.

Confidentiality: Given the ability of the Board and the DEP to investigate, it is questionable whether confidentiality provisions can be ultimately effectuated. The SRRA, however, does provide for confidentiality on the part of the LSRP if it is advised in writing that the cited material is confidential (N.J.S.A. 58:10C-16(m)). Any agreement should identify what confidential information is anticipated to be provided the LSRP and contain appropriate confidentiality provisions.

LSRP Contracting Entity: Most consultants are employed by firms, incoporated or have formed some sort of ties to a limited liability company. If, as often happens, your client is contracting with an environmental company, make sure that there are specific provisions as to the individual LSRP (e.g., that he or she will continue to be employed by the company, remained duly licensed, will complete and execute all forms properly, etc.). The LSRP should personally sign the contract, as well.

Cooperation: Most current consultant contracts have a "cooperation" clause which places the onus on the client to provide all relevant information and material. The problem with this is that the client may not have the expertise to determine what information is or is not relevant to the LSRP's inquiry. The contract should therefore contain appropriate caveats to any duty to cooperate on the part of the client, and place much of the onus for eliciting and interpreting information and interpreting it on the LSRP.

Termination: Note that persons are prohibited from taking retaliatory action against an LSRP in certain circumstances. (N.J.S.A. 58:10C-26). Also, LSRPs and/or the PRCR must notify the DEP if an LSRP is "released" by the PRCR. Since this is a wholly new regulatory regime, and it is uncertain what the future may hold, it is recommended that a fairly simple termination provision (including one which specifies that the LSRP can be terminated by the client "without cause") be included.

One of the initial postings on the DEP's website regarding the SRRA described this new program as a "New World Order" in large, bold, letters. At the bottom of that page, in much smaller print, appeared the phrase "Work in Progress." On balance, this sums up the current state of affairs. For this "new world order" to succeed, lawyers will have to play a large role, beginning with drafting appropriately inclusive and flexible retention agreements between their clients and LSRPs.■