

SRRA: Are We Better Off Four Years Later?

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The New Jersey Legislature passed the Site Remediation Reform Act (SRRA), N.J.S.A. §58:10C-1 to 29 in May 2009. The SRRA established an affirmative obligation for responsible parties to remediate sites pursuant to regulatory and mandatory timeframes listed in the Administrative Requirements for the Remediation of Contaminated Sites (ARRCS), N.J.A.C. 7:26C. Following the phase-in period of the SRRA, which ended on May 7, 2012, a licensed site remediation professional (LSRP) must be retained for all sites. Now, clean-up activities for New Jersey sites must proceed under LSRP supervision. Four years later, it's time for a look back at the highlights of the law's benefits and the challenges facing the regulatory community since full implementation of the SRRA.

Highlights of SRRA

Under the law, once an LSRP determines that remediation of a case or discharge is complete, the LSRP issues to the person responsible for conducting remediation (PRCR) a "response action outcome" or RAO for the site. This document certifies that remediation has been completed in accordance with applicable NJDEP regulations and guidance. The former voluntary cleanup program, which utilized the "memorandum of agreement" no longer exists. The LSRP is required to oversee and certify efficacy of remediation activities under the Brownfield and Contaminated Site Remediation Act (N.J.S.A. §58:10B-1), the Industrial Site Recovery Act (N.J.A.C. 7:26B) and the New Jersey Spill Compensation and Control Act. Additionally, LSRPs must be used, under the New Jersey Water Pollution Control Act, if the remediation involves a regulated underground storage tank. Exceptions to the LSRP requirement apply only to persons conducting due diligence at a site, owners or operators conducting remediation of

discharges from unregulated heating oil tanks, and certain federal cases under the Resource Conservation Recovery Act, Comprehensive Environmental Response, Compensation and Liability Act, Department of Defense and Department of Energy.

Implementation of SRRA

A major milestone associated with the implementation of SRRA included the required completion of the remedial investigation (RI) by May 7, 2014, for all discharges and contaminated areas of concern (AOC) discovered prior to May 7, 1999. Due to overwhelming feedback from stakeholders and the regulatory community, the governor signed P.L.2013, c283 on Jan. 17, 2014, which granted an extension of the statutory requirement for completion of the remedial investigation until May 7, 2016 (based upon certain sets of criteria). According to the NJDEP, over 1,000 cases were granted the extension, and approximately 85 percent of the sites have completed the remedial investigation by the statutory timeframe to date.

In addition to the successful completion of the remedial investigation for the majority of cases initiated prior to 1999, another measurement of the program's success is reflected in the number of cases and discharges achieving regulatory closure. Through December 2015, LSRPs have issued over 7,000 RAOs and over 4,500 cases were closed (June 6, 2016, Southern New Jersey Chamber of Commerce Meeting).

Benefits of the SRRA

The enactment of the SRRA has provided many benefits to the PRCR and the community, including (but not limited to) the following:

The establishment of the Site Remediation Professional Licensing Board (SRPLB);

Reduced time of regulatory closure and costs to complete remediation; and

Focused direction and technical guidance from the NJDEP.

A summary of these benefits is provided below.

The SRPLB is comprised of 13 members, two of whom are government officials. The remaining are members of the public, including six LSRPs. As detailed on the SRPLB website, the SRPLB's mission is: "to establish licensing requirements for site remediation professionals and oversee the licensing and performance of site remediation professionals."

Benefits of establishing the SRPLB are twofold. First, the SRPLB acts as a regulatory entity to certify only the highest qualified individuals as practicing LSRPs. Secondly, the SRPLB acts to ensure that the qualified individuals maintain competency to carry out program objectives in the form of continuing education credit requirements. With an array of stakeholders comprising the SRPLB, decision processes are more transparent, and the risk of affinities to one stakeholder over another are reduced. Ultimately, the SRPLB provides the framework for practicing LSRPs to abide.

Another benefit to the enactment of SRRRA is increased efficacy in remedial efforts. NJDEP pre-approval of work plans for the majority of cases and discharges is no longer required. As a result, investigation and remediation activities are able to continue without delay. The burden of pre-approval has been placed on the LSRP to ensure activities are being conducted pursuant to NJDEP regulations and guidance with the highest priority of protection of health and safety and the environment in mind (C.58:10C-16 "Protection of public health, safety, environment highest priority").

The ability of the case or discharge to navigate through the investigation and remediation activities without NJDEP pre-approval reduces the amount of time to complete remediation; therefore, total costs to obtain regulatory closure are reduced for the PRCR. An added benefit to expedited case closure includes reducing potential receptor impact times as identification and addressing times are reduced. Historically, pre-SRRRA, every step of the investigation required approval and comment from the NJDEP, leading to potentially substantial delays in the remedial efforts of the PRCR.

Finally, administrative demands for each and every case on the NJDEP are significantly reduced. As this responsibility has been transferred to the LSRP as the first line of regulatory defense and approval for remedial efforts, the NJDEP is no longer in a bottleneck administratively. The NJDEP representatives are able to focus their efforts on the overall larger goals for each site and provide timely guidance to LSRPs, counsel and PRCR for each individual scenario (generally within 24 hours). Although guidance may be provided by technical resources at the NJDEP, it is the ultimate responsibility of the LSRP, counsel, and PRCR to ensure that their cases are being conducted in accordance with pertinent guidance and regulations. In addition to providing guidance on a site-specific basis, the NJDEP can hone its attention toward cases and discharges that are out of compliance and are negatively impacting the environment. In many cases, out-of-compliance sites are underutilized (i.e., vacant); however, when attention is refocused, they can be turned into properties with potentially significant economic, social and/or environmental benefits to the community.

Challenges of the SRRRA

While there are benefits being realized thanks to the enactment of the SRRRA, any new program has its share of challenges. Some of these challenges include:

Resolution of LSRP disputes;

Difference in professional judgment and standard of care between LSRPs; and

The inherent conflict between LSRP and PRCR.

A summary of these challenges is provided below.

Currently, no binding mechanism to deal with disputes between adverse LSRPs and/or PRCRs exists. For example, prior to the enactment of the SRRA, if there was a dispute between two separate PRCRs (e.g., determining liability of potential commingled plumes), the NJDEP would review the case and determine allocation between the PRCRs. Based on the current status of the program, disputed cases and discharges would need to be litigated to determine allocation and responsibilities.

With over 600 LSRPs actively practicing in New Jersey and the SRRA in its early stages of implementation, another challenge is the difference in LSRPs' professional judgment and the standard of care. Over time, it is expected that precedents will evolve to further define the standard of care in which LSRPs must practice. Ultimately, the LSRP needs to certify and ensure the protection of public health and safety and the environment (58:10C-16); however, until a more hard-line structure is developed guiding the professional judgment criteria, LSRPs, PRCRs and counsel will continue to tread lightly and act collaboratively to discuss options for remedial implementation.

One final challenge associated with the SRRA enactment is the inherent conflict between the LSRP and the PRCR. While a LSRP's primary focus

is to ensure that the contaminated site is remediated pursuant to applicable regulations and guidance, a PRCR may have alternative top priorities. Prior to the SRRA, the consultant would conduct an investigation, discuss the results of the investigation with the client and counsel, and present the results with recommendation to the regulator (NJDEP). The LSRP now acts as the "de-facto" regulator, and the PRCR may feel that her best interests are not taken into account. In certain instances, specifically with challenging and complicated cases, the PRCR employs counsel and, if necessary, a third-party LSRP to review the progress of the remediation to ensure it meets regulatory requirements, and that the PRCR's best interest is taken into account.

In closing, the SRRA's success will be measured by the number of cases obtaining regulatory closure, which ultimately ensure protection of human health, safety and the environment. Over 4,500 cases have achieved regulatory closure in the short amount of time since enactment of the SRRA, indicating the preliminary success of the program. With LSRPs bound by a strict code of conduct and regulated by the SRPLB, only the highest qualified individuals are practicing in this field. Only time will tell the full extent of the SRRA's enactment success in the protection of human health, safety and the environment; however, the last four years show a strong movement in the right direction.



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