2016 Update: LSRPs & SRRA *(v.2/1/16[1])*

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I. Introduction:

For most in the business of remediation in New Jersey, the requirements of "Site Remediation Reform Act" ("SRRA", enacted on May 7, 2009 as P.L. 2009, c.60), are the framework for their efforts. Everyone has a better appreciation of its scope and effect than they did even three years ago. LSRPs, PRCRs, Lawyers, DEP and the Board now move forward with higher confidence in SRRA's meaning and effect in all matters. But uncertainties, and sometimes confusion remain. Some continue to ignore, or dispute, SRRA's applicability and effect. And, it can be argued, DEP and the Board have left uncertain some critical questions.

SRRA was largely codified at N.J.S.A. 58:10C-1 et seq.; some sections were codified as parts of other laws (e.g., ISRA and the Spill Act). Governor Corzine also then issued an executive order (2009 No. 140; [http://www.nj.gov/infobank/circular/eojsc140.htm]; evidently still in effect under Governor Christie- see http://www.state.nj.us/infobank/circular/eoindex.htm) to govern the LSRP transition. DEP's initial implementation followed quickly including by promulgation of many guidance documents, forms and rules, some effective in and after November 2009. Major regulatory changes were proposed August 15, 2011 at 43 N.J.R. 1935(a) and adopted effective as of May 7, 2013. A courtesy copy of SRRA itself is available on the DEP website at http://www.state.nj.us/dep/srp/regs/statutes/srra.pdf and extensive and often-changing SRRA guidance can be found at http://www.nj.gov/dep/srp/guidance/ and SRRA forms at http://www.state.nj.us/dep/srp/srra/forms/. Changes in the SRRA program continued throughout 2015 and further changes are anticipated, although perhaps in two rounds- the first likely to be a wholesale re-adoption (allowing some discrepancies to continue) and the second a more thoughtful and detailed set of revisions (perhaps providing clarification, but also perhaps generating new points of confusion and uncertainty).

Permanently licensed "licensed site remediation professionals" ("LSRPs") can be identified as a group and individually. See http://datamine2.state.nj.us/DEP_OPRA/OpraMain/categories?category=SRRA and http://datamine2.state.nj.us/dep/DEP_OPRA/adv_search.html. The initial round of license renewals is underway (and some completed), as some initial licenses expired on July 9, 2015. See http://www.nj.gov/lsrpboard/board/licensure/renewal_application.html and http://www.nj.gov/lsrpboard/board/licensure/lsrp_license_renewal_application.pdf. The New Jersey Site Remediation Professional Licensing Board ("SRPLB" or "Board") is fully functioning. See http://www.nj.gov/lsrpboard/. It has met many times and its agenda and minutes are publicly available. See http://www.nj.gov/lsrpboard/meetings/. On many sites LSRPs do work faster than was possible when parties awaited the review and response of the New Jersey Department of Environmental Protection ("DEP"). There is growing evidence that, at least at some sites, SRRA and LSRPs can implement faster and arguably better remediations: whether they are also more cost-efficient is still being assessed. On the other hand, in our view considerable uncertainty remains, including on some basic but important questions, and things may not be progressing as well on complex or disputed sites. There is some evidence of increasing disputes between parties, LSRPs, and DEP. The full effect of SRRA will not be known until years from now; but for the moment SRRA and LSRPs appear here to stay.

Changes in the SRRA program in 2014 included:

- Increasing delays in, or absence of, DEP reviews, including of such filings requiring DEP review such as applications for remediation in progress waivers. For some clients and LSRPs this increases a general

[1] Prior Versions of this Article have been published and used for other seminars on LSRPs and SRRA.

feeling of unease as fear grows that when DEP review finally does occur, the odds of a full acceptance are low, and at complex sites the risk of serious disagreement is high.

● In January 2014 SRRA was amended (2013 A4543, P.L.2013, c.283.) and NJDEP published a process in February (see http://www.nj.gov/dep/srp/timeframe/extension.html) to allow PRCRs to apply no later than early March 2014 for an extension to the statutory deadline for completing the remedial investigation of the site by May 7, 2014. Much effort was expended by many PRCRs, their LSRPs and others to take advantage of this opportunity. Some chose to ignore the issue. Interestingly, although some missed the RI deadline, and as a result can be subjected to direct oversight, DEP did not update its 2009 guidance (see http://www.nj.gov/dep/srp/guidance/srra/direct_oversight.pdf) and instead relies on its interpretation of its rules as requiring automatic self-guided entry into the direct oversight program of DEP. See this Article § 3.8.2 below. Also, DEP has not "officially" clarified the position that the extension of the RI Deadline also extended deadlines for remediation.

● In March 2014 DEP announced guidance on "Capping of Inorganic and Semivolatile Contaminants for the Impact to Ground Water Pathway" See http://www.nj.gov/dep/srp/guidance/rs/igw_capping.pdf

● In May 2014 DEP published quick reference guides for soils RAPs (http://www.nj.gov/dep/srp/srra/training/matrix/quick_ref/rap_soil.pdf) and ground water RAPs (http://www.nj.gov/dep/srp/srra/training/matrix/quick_ref/rap_gw.pdf). DEP also reminded PRCRs of the obligation to seek RAPs by May 7, 2014 for prior remediations, as required by ARRCS at N.J.A.C. 7:26C-7.6(a) (with some recalcitrants or unreachables apparently not fulfilling this obligation by that date). It should be noted that many question the validity of DEP's assertion that all prior remediations involving deed notices, declarations of environmental restriction and CEAs, particularly those with NFAs (and therefore covenants not to sue), must so apply for RAPs (because legally (i) SRRA may not be retroactively applied and (ii) if it is sought to be retroactively applied by DEP, then such violates the covenant-not-to-sue and various constitutional protections to beneficiaries).

● In May 2014 DEP restored the use of tangible net worth as part of the test to qualify for self-guaranty as a RFS under N.J.A.C. 7:26C-5.8. This has created problems, and added to costs, for many who previously self-guaranteed their RFS obligations if their balance sheet was heavily weighted with intangible assets (such as good will).

● In June 2014 SRRA fees were adjusted. See at www.nj.gov/dep/srp/fees.

● In June 2014 DEP issued another variant on the RAO template, Appendix D of ARRCS, N.J.A.C. 7:26C (despite DEP's own rules that seemingly prevent such changes). (DEP previously recognized that the template does not address certain situations that may occur and has advised that, when appropriate, DEP will work to ensure that RAOs accurately reflect site-specific conditions and remedial actions.) Notices for several conditions, as well as a description of the Department's approval process for other RAO modifications, were posted on the Department's website at http://www.nj.gov/dep/srp/ on April 29, 2013. The new variant notice was developed to allow LSRPs to document that historically applied pesticides were not investigated as part of the remediation of a particular site involving historic farming uses.

● In July 2014, DEP announced the availability of new Technical Guidance on the capping of sites undergoing remediation. See http://www.nj.gov/dep/srp/guidance/srra/capping_remediation_sites.pdf.

● DEP announced, by its September 10, 2014 listserv blast e-mail, that its resources no longer permit substantial review by DEP of most PRCR or LSRP filings. Instead, most documents will only be administratively reviewed (e.g., for completeness) and substantive review will await issuance of the RAO. This announcement poses a range of issues for LSRPs, PRCRs and others. Increasing delays in, or absence of, DEP reviews, including of such filings requiring DEP review as applications for remediation in progress waivers, have increased a feeling of unease for some clients and LSRPs as fears grow that when DEP review finally does occur, the odds of a full acceptance are low, and at complex sites the risk of serious disagreement is high.

● DEP advised, by its September 17, 2014 listserv blast e-mail, that "At all times, an LSRP is required to be retained for a case that has a Deed Notice, Classification Exception Area, Soil Remedial Action Permit, and/or Ground Water Remedial Action Permit until the remedial action(s) is no longer needed to protect the public health and safety and the environment, and until all unrestricted use remediation standards are met." Arguably, this advice is in error legally, and may have other consequences for those who have covenants not to sue prior to its announcement. As a practical matter, few will defy DEP's view.

● In 2014 DEP announced that applications for RAPs must always be accompanied by a signed consent of the site owner. Later DEP rescinded that announcement in reliance instead on a notice to the owner (recognizing that in the case of a deed notice either that owner or a predecessor signed the deed notice and in the case of CEAs the consent of the real estate owner was not required, as DEP has always taken the view that the State owns the water).

● In October 2014 DEP provided guidance for those encountering contamination that is suspected to be unrelated to a known discharge undergoing remediation. http://nj.gov/dep/srp/guidance/#lsrp_eval_admin_guidance.

● Throughout 2014 a number of forms and instructions were changed and updated: this is likely to continue throughout 2015. As a reminder: DEP itself suggests that before filing a form, you check its website to see if the form has changed.

Changes in the SRRA program in 2015 and early 2016 included:

● In early January 2015, the Board proposed its regulations for public review and comment. See 1/5/2015 47 N.J.R. 45(a), proposed N.J.A.C. 7:26I (DEP Docket No. 10-14-1, Proposal No. PRN 2015-00) and http://www.nj.gov/lsrpboard/board/rules/lsrp_rule_proposal.pdf.

● DEP announced, by its January 26, 2015 listserv blast e-mail, that "Whether you are the person responsible for conducting the remediation or the licensed site remediation professional retained, all efforts should be made to prevent new discharges at your site and to maintain active remediation systems. Any discharges of hazardous substances are required to be reported to the NJDEP Hotline at 877-WARNDEP." If this is an effort by DEP to impose such duty upon LSRPs, instead of on the PRCR, it is, in our view, of questionable authority.

● However, more complicated is the advice in the same e-mail that: "Subsequent to the storm, all sites should be re-evaluated to determine: - New immediate environmental concern conditions (water, vapor, direct contact). Immediate actions should be taken to address any immediate environmental concerns identified as part of this response. - Changes to site conditions requiring a reexamination of your receptor evaluation to determine whether it still accurately represents potential impacts to receptors." We do not recall prior assertions by DEP of such obligations in advance of a blizzard, and we are not aware of any 2014-2015 regulatory or statutory change requiring or allowing such.

● In February 2015 DEP announced the availability of revised Technical Guidance for Ecological Evaluations. See http://nj.gov/dep/srp/guidance/srra/ecological_evaluation.pdf.

● In February 2015 DEP announced the availability of its Online "Pay a Paper Invoice found at http://www.nj.gov/dep/online/ under "Non-Registered Services." In March DEP clarified that the initial 1% RFS surcharge cannot be paid through the online service.

● In February 2015 DEP reminded those benefitting from the extension to the statutory requirement to complete the remedial investigation by May 7, 2014 of their obligations by reason of same. See http://www.state.nj.us/dep/srp/timeframe/extension_reminder.html (so as to avoid direct oversight under N.J.A.C. 7:26C-14.

● In March 2015 DEP advised of its webpage to assist PRCRs and their LSRPs in obtaining access to off-site locations for the purpose of evaluating potential receptors. See www.nj.gov/dep/srp/offsite/. This later was supplemented by a webpage directed to those from whom access is sought. See http://www.nj.gov/dep/srp/community/access.html.

● In March 2015 DEP announced the availability of revised Technical Guidance for IECs. See http://www.state.nj.us/dep/srp/guidance/srra/iec_guidance.pdf. The revised IEC Technical Guidance incorporates updates and changes based on the May 7, 2012 Technical Requirements (N.J.A.C. 7:26E). Major changes included a new section on monitoring requirements for Engineered Systems and instructions for the submission of the Annual Monitoring and Maintenance report for all IECs. There were also changes to the Geographic Information System (GIS) mapping procedures for both potable well and vapor intrusion IECs. IEC related forms and instructions also were updated. There is a new Monitoring and Maintenance IEC Checklist that should be submitted with the Annual Monitoring and Maintenance report.

● In this and later guidance, DEP advised that "These Technical Guidances may be used immediately upon issuance. However, the Department recognizes the challenge of using newly issued technical guidance when a remediation affected by the guidance may have already been conducted or is currently in progress. To provide for the reasonable implementation of new or revised technical guidance, the Department will allow a 6-month "phase-in" period between the date the technical guidance is issued and the time it should be used."

● In March 2015 DEP announced the availability of Technical Guidance for Site Investigation of Soil, Remedial Investigation of Soil, and Remedial Action Verification Sampling for Soil, fixing broken internet links and correcting regulatory citations. See http://www.state.nj.us/dep/srp/guidance/srra/soil_inv_si_ri_ra.pdf.

● In April 2015 DEP announced a major update to the SRRA Forms Page www.nj.gov/dep/srp/srra/forms). This included introduction of a "Cover/Certification Form" to eliminate redundancy when multiple remedial phase reports are submitted at the same time.

● In April 2015 DEP announced the availability of the "Remedial Investigation Report Online Service" (RIR Online Service), which allows filing of the RI Form and Report electronically. www.nj.gov/dep/srp/srra/forms/. Use of the RIR Online Service initially was not mandatory. Pursuant to ARRCS (N.J.A.C. 7:26C-1.6(c)), use of the RIR Online Service became mandatory 90 days after DEP published a notice in the New Jersey Register stating that the RIR Online Service is available. This occurred on January 4, 2016; so the requirement is effective April 3, 2016. See 48 N.J.R. 78(a)

● Training was provided for the CID and RIR Online Service in April 2014 and May 2015, which can be reviewed on the Department website at Online Services Handout and NJDEP Online Services and New Electronic Case Inventory Document Webinar. http://www.state.nj.us/dep/srp/srra/training/.

● In April 2015 DEP announced the availability of new Technical Guidance for Off-Site Source Ground Water Investigation. It allows the investigator to develop lines of evidence to support the determination that one or more contaminants are migrating onto a site from an off-site property. It describes the regulatory requirements outlined in N.J.A.C. 7:26E-3.9 and presents the administrative approach for notifying the Department and issuing a RAO to address the contamination. See http://www.nj.gov/dep/srp/guidance/srra/offsite_source_gw_investigation_guidance.pdf. See also N.J.S.A. 58:10B-12g.2.

● In May 2015 DEP announced the availability of the revised "Alternative and Clean fill Guidance for SRP Site (Dec 2011)," now entitled "Fill Material Guidance for SRP Sites." The major revisions included addition of a new section to address licensed quarry/mine material, and an expanded section on pre-approvals needed for excess fill volume. See http://www.nj.gov/dep/srp/guidance/srra/fill_protocol.pdf?version_3_0

● In June 2015 SRRA fees were adjusted. See at www.nj.gov/dep/srp/fees.

● In September 2015 DEP provided similar advice as before as to preparedness and reactions to an impending hurricane.

● In October 2015 DEP announced the availability of an updated Preliminary Assessment Technical Guidance, reflecting DEP's policy regarding a 6-month phase in for new/revised technical guidance, updated references, minor text changes to improve clarity, and correction of typographical errors. See http://www.nj.gov/dep/srp/guidance/srra/pa_soils_guidance.pdf.

● In October 2015 DEP announced the availability of the Landfills Investigation Technical Guidance to reflect DEP's policy regarding a 6-month phase in for new/revised technical guidance and an update to two e-mail addresses. See http://www.nj.gov/dep/srp/guidance/srra/landfill_guidance.pdf.

● In November 2015 DEP announced the availability of administrative guidance entitled "Investigating Impacts from Contaminated Sites to a Surface Water Body." This guidance clarifies and re-affirms current requirements related to investigating surface waters impacted by upland contaminated sites. "Pursuant to the Site Remediation and Waste Management Program (SRWMP) enabling legislation, rules and implementing guidance, current and historic contaminant migration from all sites must be characterized and delineated to the extent of that site's contamination. This applies to potential migration of contamination from upland sites to nearby or adjacent surface waters, including, but not limited to, heavily industrialized urban rivers that may have become contaminated by numerous point and non-point discharges, are part of an ongoing study, or are associated with a CERCLA National Priority List (NPL) site." See http://www.nj.gov/dep/srp/guidance/srra/inv_impacts_to_surface_water.pdf.

● In late November 2015 DEP announced that new interim ground water quality standards have been posted for 12 compounds. See http://www.nj.gov/dep/wms/bears/gwqs_interim_criteria_table.htm and http://www.nj.gov/dep/srp/regs/gwqs/srwmp_implementing_11-25-15_interim_gwqs.pdf. Notably "The new ground water remediation standard for 1,4-dioxane (0.4 ppb) is more than an order of magnitude lower than the old ground water remediation standard (10 ppb). Therefore, in accordance with the Brownfield and Contaminated Site Remediation Act… at N.J.S.A. 58:10B-12.j., for all active sites where 1,4-dioxane is a known or potential contaminant of concern, the use of the new ground water remediation standard is effective immediately upon posting to the Department website." See the prior document for further explication which, unfortunately, does not address the past or impending deadlines for completion of RI and the risk of direct oversight.

● In December 2015, DEP announced the availability of New Technical Guidance on Historically Applied Pesticides Sites Technical Guidance intended to provide a more streamlined approach to the identification, investigation, delineation and remediation of sites that may be impacted by Historically Applied Pesticides (HAP). See http://www.nj.gov/dep/srp/guidance/srra/hap_guidance.pdf.

● The Board adopted its regulations (N.J.A.C 7:26I), largely as proposed, effective on January 4, 2016. See http://www.nj.gov/lsrpboard/board/rules/. Filed: December 9, 2015, as R.2016 d.005, 48 N.J.R. 45(a).

● In January 2016 DEP announced the availability of administrative guidance entitled "Characterization of Contaminated Ground Water Discharge to Surface Water Technical Guidance", providing

tools and methods to characterize the ground water to surface water pathway . See http://www.nj.gov/dep/srp/guidance/srra/gw_discharge_to_sw_tech_guidance.pdf.

● In January 2016 DEP announced that the Known Contaminated Site New Jersey ("KCSNJ") reports (www.nj.gov/dep/srp/kcsnj/) available through the NJDEP's Data Miner have been updated to more accurately reflect the status of a contaminated site (i.e., Active, Pending, or Closed). Additionally, sites with remedial action permits are now included only in the active sites report.

● In January 2016 DEP provided similar advice as before as to preparedness and reactions to an impending snowstorm.

Those counseling clients on remediations still have to address most site areas of concern in a manner much as before, but without need (or ability) to delay for NJDEP review and approval of plans. They still have to educate clients and the clients' other advisors on environmental risks, requirements and processes, sometimes when those advisors have little to no prior experience or current understanding of New Jersey environmental procedures, costs and risks. For example, a buyer's plans for new construction at his new site may be adversely affected or delayed by ongoing or future remediation, particularly if site demolition discovers a surprise. A Seller's plans to retire comfortably with proceeds of sale, relying on a Buyer's assumption to avoid further dealings with DEP, may be confounded by new permit requirements. Counselors still will be asked by some to project costs and results with too little data: in some cases such guesstimates may be critical to client planning and may be properly hedged; in others such guesstimates will prove to be sources of considerable dispute and disappointment, hedged or not. Under SRRA such counselors face new procedures and forms, with the arguable benefit of substantial new guidance, and perhaps fewer rules, but with the risk of surprise damages and more changes to come. Perhaps more than before, however, consultants and LSRPs face the risk of conflict among themselves as clients and their lawyers seek advantage against prior owners and operators, neighbors and others, without as much influence of NJDEP itself, and with the threatened oversight of the Board. To best counsel clients, advisors need to understand and consider a range of concerns, most similar to before. Some examples:

● What are the client's goals? How much uncertainty and risk can the client tolerate?

● What is and is not known? Has the site been through NJDEP review before? When? What was the nature, extent and quality of prior work? What happened since?

● Is the site under client control? Is there ownership? Access? Who else has an interest? What are their goals?

● What are the planned or potential site uses? What is the schedule and risks of change? How long will the site be retained by the owner?

● Who is the client and its team? What do they know and not know? Are they sophisticated or novices? If there were predecessor experts or LSRPs are they friend or foe?

● Will this site cost more or less to assess, investigate and remediate under SRRA? Is there a budget or limit? How realistic is it and the projections on which it is based? Does the client have the resources to begin and finish? If not, what is the client's exit strategy? Sale? Bankruptcy? Is there a lender? What are the reserves? What are the contingency plans? Can ongoing responsibilities shift to another at a certain time or on a certain event? Can liabilities really stay with a particular person or entity "forever?" Is there insurance? Is the client eligible for grants or loans?

● Will the process take longer or less time than pre-SRRA? Are there deadlines under SRRA? What are they and can they be met? How much flexibility is there? What can be done to improve the schedule? What happens if deadlines are missed? Are the client's and LSRP's priorities the same?

● What about past and ongoing SRRA requirements and changes? Will standards for contaminants of concern likely change? By more than an order of magnitude? Will DEP guidance on topics of concern likely change (e.g., vapor intrusion? Pesticides? Ecological receptors? Schools? Day care facilities? Residential uses?)? Is there anything that can be done now or then to protect against such changes? Do the parties understand the risks of such?

● What is NJDEP's role post-SRRA? Can tough questions be resolved after consultation with NJDEP? Will NJDEP defer to the professional judgment of LSRPs or not? Will NJDEP help? Or will it threaten? What is the risk of direct oversight? What happens under direct oversight? What happens when NJDEP finally reviews everything?

● What is the role of prior owners, tenants, lenders, neighbors, municipalities and others in the remedial process? What about new owners, tenants, lenders, and neighbors? Are there any known or likely adversaries? What is their interest? What should be done about them?

● What happens if someone else is responsible for a problem? Can efforts proceed in parallel? In series? Cooperatively? Is litigation likely?

● As a practical matter do available legal protections provided by NJDEP or LSRP approvals matter less or more now than pre-SRRA? Does NJDEP believe in such protections? LSRPs? The Board? The Courts?

Those counseling clients on transactions and contracts (usually lawyers) still have to address environmental issues, also much as they have before. Arguably, the SRRA Act simply affects certain details of the discussion, the procedures to be addressed and certain terminology. But some changes in the details are likely. Some examples:

● What promises are being made between the parties about environmental issues? What actions are to be taken to proceed with the transaction? What are the parties' rights and responsibilities before and after the transaction?

● What are the deliverables required for closing? After closing? Is an RAO necessary to close? What agreements will reflect the deal? Will they be recorded? Who sees which drafts when? Who makes filings? How will the parties communicate with each other?

● What is the schedule for performance? Pre-closing? For closing? Post-closing? How long must everyone wait for all work to be finished? For all contamination to be remediated? What happens if it takes too long? What if remediation takes decades (before or after closing)? Is there an escape clause, deadline or failsafe date? Must construction or demolition wait? Be coordinated?

● What are the procedures to be followed for due diligence, investigation and remediation? Does ISRA apply? What are the duties of the parties to cooperate? To give access? To sign things?

● What happens if due diligence finds something? Does Buyer tell Seller? Does Seller report? Is an LSRP retained?

● Is confidentiality relevant? Attorney-client privilege? Joint-defense? Conflicts? Who represents whom?

● What are the standards of performance for remediation required as part of the transaction? What is the quality of work to be done? Can Controls be used? Will a deed notice be allowed? What are the rules for remediations to restricted standards? What warranties for the work are being provided? By whom? For how long? Are there disclaimers? Who will be the LSRP? For whom does the LSRP work? Who can fire and hire LSRPs? Who is in charge of these decisions? In whose name will the work be performed? Disposal occur? Permits be issued? Who bears the long term responsibilities costs and obligations? If there are short-term costs and losses, who bears them?

● What are the assurances, guaranties, indemnifications and collateral being provided? Does insurance play a role?

● What are the contingencies affecting the results? What happens if contingencies are not met?

● When is there a breach? Is there a right to cure? What happens on breach? What recourse do the parties have against each other and third parties? What are the limits of liability? Is anyone being released? Are any claims being waived? Are there limitations on claims (No consequential damages? Time limits?) Is anyone giving indemnities? Are there caps, deductibles, exclusions, cost-sharings on specific issues, or in specific circumstances or periods? Are there guaranties? Personal? Limited in time or money? What happens if a key person dies? What happens if an entity becomes insolvent or bankrupt? What if site ownership changes? Or an explosion or fire occurs? Or condemnation? Or Buyer's new tenant has a discharge and denies liability? What can Seller's LSRP do if Seller needs an RAO to shift long-term responsibilities?

● Are there escrows? How much is deposited or placed? Can that amount increase or decrease? How? Who holds them? Who owns them? What are the conditions for release? Can any escrow also serve as a RFS or FA? How can they be used? Can they be used to pay for remediation? Are there time limits on their use? What if they are inadequate to their purpose? Does anyone have liability for erroneous projections if the escrow runs out?

● What if there are changes in standards or guidance before the RAO? What if there are changes after? What if the law changes? Who has to deal with them?

● Is an RAO or NFA Letter worth the paper it is printed on? Ever? Can the PRCR avoid all future liability? Any? Can a buyer be sure its site is clean? Does the client understand all it needs to understand? How does the advisor prove that the client understood?

● Is there a specific dispute resolution process? Or do the courts suffice? Can an LSRP be bound to an arbitration clause on issues within the LSRP's responsibility as a licensed professional?

● Are there concerns with third parties to be considered? Prior insurance? Claims against or of prior owners or operators, or neighbors? Effects on new owners and operators? What if there is to be a change in ownership or

operations or use or new construction? What if there are successive ISRA triggers before the initial case finishes? What if there are new discharges at the site?

Still, some new issues continue to exist under SRRA that many counselors must consider:

● When and where can the LSRP's right and obligation to provide independent professional judgment make a difference in remediation today? What exactly is such professional judgment?

● Can a purchaser, tenant or lender use a consultant who is an LSRP without that person filing the retention form with NJDEP? For anything? What are the limits on LSRP and non-LSRP roles? What can a non-LSRP do for a client without violating SRRA? Take samples? Inspect controls?

● How will cost estimates be prepared (particularly for remediation certifications, remedial action work plans under ISRA and remedial action permit financial assurances)? Who has to review and approve them? What happens if they are wrong? Can an LSRP be liable? To whom? Can estimates to clients for budgets vary from filings with the DEP for FA or RFS?

● If certain transactional events happen only upon issuance of a particular RAO (e.g., closing, termination of an indemnity or guaranty, release of an escrow), should there be a waiting period (30 days? 60 days? 3 years? More?) or some further contingency to the event (a change in DEP's status on Data Miner? Buyer's approval?)? Is there any safe period?

● Who will watch the LSRP employed by the one party for the protection of the other? Another LSRP? A lawyer? A consultant? No one? How much input can the other party and its consultant or LSRP have? Veto power? Can the LSRP in charge safely compromise or defer to another? How can technical disputes be resolved? If the watcher and the LSRP of record disagree what happens? Can the parties go to DEP or the Board? Arbitration? Can an arbitrator really force the LSRP retained for remediation to act differently than he or she proposes?

● Can the client trust the consultant and LSRP? Can the lawyer? Can any discussions between them occur confidentially? Which? How? If some can't then what can be done, if anything, to avoid loss of confidentiality and privilege? If the LSRP advises his client that his or her role as an unofficial consultant (say for due diligence or pre-foreclosure assessment), and does not file with NJDEP as LSRP, can any person or entity who may be a PRCR (perhaps because it is investigating a site?) safely avoid entanglement with DEP from what the LSRP says, finds or does? Is that LSRP to be trusted?

● Can the consultant and LSRP trust the client and counsel? Can any discussions between them occur confidentially? Which? How? If some can't what can be done? What should the consultant do if the client advises the LSRP to keep certain communications or documents confidential (such as an e-mail from counsel to client)? Does the LSRP need its own counsel? Who pays? What happens if there is a Board or DEP complaint against the LSRP in which the client has a keen interest? Can the client dictate how the LSRP responds? What if the PSRP, PRCR or counsel disagree on what should be done in that matter?

● How does the LSRP adjust his or her remedial plans and approvals to account for arguable client defenses, such as innocent purchaser, a prior NFA, or offsite sources? Who decides the viability of a client's or adversary's claimed defense: DEP? The LSRP? LSRP Counsel? PRCR? PRCR Counsel? The Board? A Court? When and how?

● What does the LSRP do if the client refuses to follow his or her recommendations?

● What should the contracts between LSRPs, consultants and their clients say differently than they do now? Does LSRP insurance play a role? How much insurance should there be? Should policies be reviewed by or for clients? What recourse do the parties have against each other and third parties? What are the limits of liability under the contract? Is anyone being released? Is any advance release of, or limit on, LSRP liability effective? Are any claims being waived? Are there limitations on claims? (No consequential damages? Time limits?) Is anyone giving indemnities? Are there caps, deductibles, exclusions, cost-sharings on specific issues, or in specific circumstances or periods? What contractual rights exist between the parties and the LSRP if the LSRP is wrong (or DEP or a third party asserts that the LSRP is wrong?) Does the LSRP get indemnified or paid if DEP audits the LSRP? A Board complaint is filed? Can a client indemnify an LSRP if there is a Board complaint? Is it clear that anything and everything in the LSRP's contract, if signed by the client, is to be enforced as valid? Are any provisions likely to be void or voidable as against public policy? Are there clauses that may be unethical for an LSRP to put in his or her contracts?

● Who can rely on what? Can the client, consultant and LSRP benefit from prior NJDEP decisions? Prior consultant work product? Other LSRP work? Who searches historical records? Does the client understand the risk of incomplete information? What about the next consultant, LSRP or owner? Is it valid to have a clause in an LSRP

contract that prohibits reliance on his or her work product by any other person or entity (presumably including the next site owner and the next LSRP)?

● Can there be a change in the LSRP under the deal papers? Under the client-consultant contract? When and how? Can a contract between Buyer and Seller force Buyer to assume cleanup and retain Seller's LSRP forever, regardless of cost? Can the client-consultant contract obligate the client to accept any consultant LSRP? If an LSRP needs to be replaced, who picks the replacement?

● What if the LSRP leaves his or her firm? Quits? Retires? Dies? Loses his or her license? What if the Board decides to suspend an LSRP, but tells no one for a couple of months, during which time clients engage that suspended LSRP to perform significant work, perhaps even to issue an RAO? Can DEP set the product aside? Can a replacement LSRP safely rely on his or her work? Who pays?

● What if there are changes in standards or guidance before the RAO? Should multiple RAOs be pursued to reduce the risk as to earlier RAOs from later changes?

● Who bears post-RAO obligations and responsibilities? (Inspections? Reporting? Operation, maintenance, repairs, replacement? Permits? Fees? Financial Assurances? New requirements?) What if NJDEP invents new obligations after the RAO (e.g., new fees, or different frequency of reports, or new monitoring requirements such as use of ground penetrating radar, HNUs, XRF or some new magic device or test or calculation to assess the integrity of a cap or the adequacy of protection of health, safety or the environment?])?

● However you deal with SRRA changes we identify today, what if the laws, rules or guidance change again? What if there are new recordings, permits, fees or obligations? When is the client ever done?

● How do the parties integrate their relative liabilities under multiple successive simple or complex transactions or events, perhaps with separate DEP cases and LSRPs? Does the party with the most conservative LSRP win or lose? Is the standard "musical chairs?" (The one standing when the tune stops is "it?")

● How should DEP, LSRP, Counsel and PRCR interact? Sometimes DEP communicates only with the LSRP. Other times only with the PRCR. How do the parties ensure that communications are promptly shared and all are protected against delays by any?

● What if site use changes? What if there is a school or day care center? What if there are going to be expansions? New equipment? New Processes? What if zoning changes?

● How often do changes of receptors need to be assessed?

● What happens if the Board or NJDEP attack the LSRP and his or her work product? Should the client be told? Can the client participate?

● What is the real risk of NJDEP review and audit? When does that risk as a practical matter go away?

The following article provides a limited, but sometimes detailed, overview of SRRA and related issues with particular focus on LSRPs and their roles and concerns. At the end we attempt to answer some questions asked since SRRA's adoption and provide our current views. We update this 2016 version of this article, and those questions, from prior versions to focus somewhat more on current issues and concerns. Along the way we make various observations for the readers' consideration and discussion. We organize several sections to be aimed at different groups of readers; sometimes that results in repetition. Occasionally we seek to be provocative in order to challenge the reader. We ask questions, as above, not to frustrate the reader, but to suggest that the reader himself or herself should be considering such issues as part of service as a professional to clients with clear needs, and as part of a team seeking to obtain the best possible result for the client and health, safety and the environment- a challenging task.

Use this outline with caution; it is not legal advice to anyone. Most questions are not answered. Clients differ, sites differ, DEP case managers differ and attorneys differ, as do LSRPs. Opinions expressed herein are not certain (and the authors reserve the right to take different positions on behalf of their clients on different matters). In many cases there are few certain "right ways" determinable in advance of action or dispute, although eventually Judges, juries, DEP and the Board may determine that there are specific right ways and wrong ways in each such case, usually in hindsight. Final approaches should be based on review of each situation's own facts, the specifics of the law, rules and guidance, consideration of uncertainties and possible future events, and formulation of an individual strategy after careful reflection and discussion with the client. Professionalism requires many factors be recognized, considered and addressed with clients; it does not require that everything be identified and fixed. Clients need to know their choices and risks. You need to account for your client's, and your own, risk tolerance. There is significant uncertainty. Some error is likely; perfection impossible. Risk and change are certain. Professionals are not automatically liable for error or mistakes. It is not malpractice to be wrong. Doctor's lose patients. Lawyer's advice proves wrong. LSRP's will make mistakes, as DEP did and does, as Judges and lawyers do.

II. Most Notable SRRA Changes from Remediation Pre-SRRA:

● **2.1 LSRPs.** Persons responsible for remediation ("PRCRs") (see this Article § 2.6) must use LSRPs for their sites requiring remediation (whether in every case still needs to be determined) but DEP's view is as stated above. (N.J.S.A. 58:10C-11: "…No person shall be, [or] act as, … a licensed site remediation professional unless that person has been issued a valid license…."; N.J.S.A. 58:10B-1.3b. "A person who initiates a remediation of a contaminated site at least 180 days after [SRRA] … shall: (1) hire a licensed site remediation professional to perform the remediation….") LSRPs are people not firms. PRCRs can and should talk to those individuals who may be or are selected to be its LSRP, not just candidate firms, before and after retention (although often PRCRs and their clients find themselves talking to non-LSRPs after LSRP retention, especially when exploring alternatives and beginning planning for alternative strategies, sometimes to limit the possibility of an adverse and binding LSRP reaction, relying on the familiarity with the LSRP of those non-LSRPs, or their ability to have hypothetical discussions with the LSRP, to accurately project for the PRCR and counsel the LSRP's likely reaction [often subject to verification prior to pursuit of the selected approach]). When possible, clients and their advisors should interview LSRP candidates before selection and ask the candidate the project's anticipated hard questions, if known or feared, in advance (for example: how do you feel about relying on DEP's prior no further action letter in this situation? Is or is not this situation likely to be eligible for a technical impracticability determination? Is the existing database sufficient for delineation? Is the prior VI study sufficient today? How much do you rely on modeling? Is the R1 complete? Can I meet all deadlines? Can this site be used for a child care facility? How do you feel about variances or deviations in this situation? My prior LSRP resigned, in part we think because of a disagreement on a specific topic: what do you think?). Be cautious in your selection: the best advice is to seek a good job (in DEP's eyes) as well as a good result (in the PRCR's eyes); a bad job with a good result could backfire (particularly as a PRCR's liability may continue even if an RAO issues). Evaluate if there is a sufficient match between client and professional, considering site status and issues, expectations and probabilities, schedule, budget and alternatives. Expect some variation in philosophy, experience, emphasis and approach among LSRPs: Judges, lawyers and DEP personnel are not alike, nor are doctors, engineers or accountants. Professional judgment can and will vary, properly so. Judicial appellate decisions, with honored and experienced jurists, often are made by split votes- no one accuses the dissenters of malpractice because they are not in the majority. Esteemed Judges sometimes have their decisions reversed. LSRPs, even within the same firm, will differ from each other. LSRPs can be expected to reflect the culture of their personal risk-tolerance, views and experiences as well as those of their firms, in general using similar practices and staffing as they have before to support their future efforts, likely comfortable in relying on their firm's past work, but likely less so with the past work of others. (This may be a special source of concern when changing LSRPs). Of course, with the growing experience under SRRA, and as DEP and Board audits and reviews provide evidence of DEP and Board priorities and concerns, many LSRPs are adjusting their behaviors, sometimes even revisiting seemingly completed matters (such as a pre-SRRA no further action letter they themselves sought and obtained for a client from DEP), based on that evidence. It does appear that many LSRPs are requiring more work on some issues today than was thought likely in 2009.

A wide range of contracts addressing environmental issues need special attention to address the different roles of LSRPs as professionals, both in comparison to the prior role of environmental consultants and the prior role of DEP itself. Although many contracts will remain essentially the same today as they were before, there are at least some differing expectations of and from LSRPs than under contracts with consulting firms. As one example, can (and should) the firm's or LSRP's contract limit the right of a new firm or new LSRP (third parties) to use and rely on their work? Can a new LSRP or firm clearly rely on the work of the prior LSRP or firm? Is the ability to rely relatively automatic, even if recourse against the prior firm and LSRP is limited or nonexistent? As another example, some PRCRs will have their LSRPs retire, get sick, die, and move to different firms before issuance of a RAO. What then happens? Will a replacement LSRP discard much or any of the prior work? Can the PRCR follow the LSRP elsewhere? What if the firm's contract with the LSRP contains a restrictive covenant? Can the original employing firm in essence force the PRCR to allow the firm to designate a replacement LSRP (because it is too expensive to do otherwise)? Should the contract require a minimum amount of professional errors and omissions insurance? Should more insurance be available at an added fee? Do not hesitate to discuss these concerns with both the LSRP and his or her firm and negotiate an acceptable result in advance. Similarly, if a contract for sale of real estate called for results (e.g., release of our escrow) that varied with DEP decisions, those contracts now have to be based on LSRP decisions (except, perhaps, if the matter comes under direct oversight). Of course, as with all issues, the cost of

vigorously and extensively addressing such issues may be cost-prohibitive for some clients: presumably clients and counsel will focus on the most important issues and accept the risks on clauses of less importance. How does counsel tell the difference? He or she discusses them with the client.

Consultants who are not LSRPs (such as out-of-state firms, perhaps well loved by particular clients) must ally themselves with an LSRP, at least to continue high level remedial work in New Jersey. Some LSRPs are comfortable working with such now (presumably in a role not dissimilar to lawyers serving as local New Jersey counsel to out-of-state firms guiding their clients). Yet the role of, and limits on, non-LSRP consultants and professionals under SRRA is unclear and remains to be determined. Indeed, the Board at its 1/2016 Rule Adoption Response ("Adoption Response") to Comment 63 said: "The Department, not the Board, regulates when a party must use an LSRP." (In our view, a surprising determination given the Board's extensive powers to regulate and license LSRPs). At present, given the limited number of LSRPs (some of whom may not seek to renew their licenses), and the nervousness of Seller counsel in allowing use of LSRPs for buyer due diligence, and even PRCRs and their counsel in discussing hard issues directly with LSRPs in the first instance, it seems likely that non-LSRPs will continue to have a substantial role. But can they do all they did before? Can out-of-state consultants, for example, conduct a precautionary vapor intrusion ("VI") sampling at a client's site in order to assess if there is any basis to be concerned? (There is reason to think not, and ample reason to argue that they may). Can firms with LSRPs, and the LSRPs themselves, be comfortable that what Non-LSRPs know and discuss will not be attributed to the LSRPs? Perhaps not.

Please recognize that some LSRPs, perhaps one of yours, are likely eventually to get in trouble with DEP and the Board, if not on your matters then on others, as has been the case with other licensed professionals with their oversight authority (e.g., accountants, engineers, lawyers and doctors). Some prior LSRPs failed to pass the Board's exam and are no longer interim licensed. http://www.nj.gov/lsrpboard/board/januaryexamresults.html. Some disciplinary actions have already occurred. See http://www.nj.gov/lsrpboard/board/prof_conduct/case_summaries.html. More can be expected. See N.J.A.C. 7:26I-7. In the future, how will any such event affect the LSRP's clients' sites and past work? What should the contract between client and LSRP firm say about this possibility? (For example, is it obvious that any disciplinary action should be deemed a default? Will every such action impact the PRCR's relationship with the targeted LSRP? But should each be disclosed? When?) What will you do if a decision of your LSRP on your site is challenged? Will you blame the LSRP or support him or her? Will you pay your LSRP to fight? Can you? How much should you and your counsel monitor the Board's reviews of your LSRPs?

● **2.2 LSRP Role.** In some senses, under SRRA LSRPs take the place of DEP as remediation case managers; but they are not the DEP. They cannot do all that DEP can do (for example, they cannot issue land use or remedial action permits; they cannot legally enforce the rules against others; they cannot issue NOVs, fines or directives). Work proposed and approved by an LSRP will be reported to DEP but can and should proceed without prior DEP approval in most cases. Contact with DEP will often still be needed or advisable (for example, to explore uncertainties or to reduce risks of enforcement), if DEP agrees to assist (which seems to be occurring less often [or at least less enthusiastically] as DEP resources become less available and DEPs "compliance assistance mode" of 2009-2012 fades away). As DEP still has the right to review and audit LSRP submissions, there will always be some risk to PRCRs and LSRPs that on review DEP may think differently, and/or require more, than the LSRP did: as a result some fear overly conservative decision making by LSRPs. Indeed, DEP threats against LSRPs are not uncommon, and the practice of DEP filing complaints against LSRPs to the Board seems aimed as much to other LSRPs as to the LSRP targeted by the complaint. Yet as experience accrues and LSRPs gain confidence, particularly in view of the stringent standards for DEP reversal of LSRPs' decision, many LSRPs have proven more sensible than expected, and in some cases less demanding than DEP at its worse, although others have experienced LSRPs revisiting both DEP prior decisions and even their own "to be sure." Experience supports the view that most LSRPs remain faithful to the goal of being as protective as DEP at its best while applying professional judgment to improve efficiency.

The relationship of an LSRP with his or her client will not be the same as the pre-SRRA relationship of a consultant and its client. Duties have changed under SRRA. An LSRP's highest priority is to protect public health and safety and the environment; it is not to bill efficiently or merely do when and as clients ask (but the LSRP who ignores client concerns will not keep many and in some cases may be in breach of both its contract and other duties under SRRA). The LSRP's duty is not to look the other way: in some instances he or she cannot and in others an

LSRP must look more carefully and completely than before. Importantly, while some level of confidentiality is due from an LSRP, and to be expected, there is no LSRP-Client privilege like the Attorney-Client privilege. It is likely that conversations between a client, client counsel and an advising consultant, that could once be asserted as privileged and confidential, now face added burdens against such assertion when the LSRP is involved. LSRPs are licensed to do a professional job and follow DEP rules and guidance (which guidance [found at www.nj.gov.dep/srp/srra/guidance], arguably is incorporated by reference through the ARRCS Rule at N.J.A.C. 7:26C-1.2 and elsewhere [such as at N.J.A.C. 7:26E-1.5(b)]). But post-SRRA legislation also arguably may reduce the scope and effect of such guidance. See N.J.S.A. 52:14B-3a. LSRPs have disclosure obligations: to clients; regarding work defects and deviations; re immediate environmental concerns ("IECs"); re discharges; re other LSRPs; and even regarding retention and dismissal. It is the self-reporting obligation that has lead most Seller counsel to deny buyers the right to use LSRPs for due diligence. It is also such concerns with LSRPs that has led to the developing practice of having initial (and sometimes even later and advanced) conversations with non-LSRP project managers and staff without direct LSRP participation (seemingly ratifying the choices of some consulting firms to have experienced staff who do not have LSRP licenses, and therefore having the ability to service those who want experienced New Jersey advisors without LSRP obligations). It is generally believed that it is harder for LSRPs (as SRRA decision-makers) to act as they once did, as mere advocates, to take or advance aggressive PRCR positions, especially if the PRCR prefers the decision without, or DEP denies or postpones, advance regulator consultation and advice for and resolution of tough issues (at least until post-RAO review). As to Non-LSRPs see §2.7 of this Article below. And it remains to be seen how LSRP's with legally aggressive clients (some of whom, in fact and under law, may be "bad actors") can safely continue work for such clients with minimal, if any, exposure when such clients end up with conflicts with or before DEP and others, especially as it appears DEP feels such LSRPs should not continue as the LSRP of record unless, by some means not clear to anyone, the LSRP forces the client to acquiesce in DEP's views (particularly if there is any evidence or concern of an IEC). While in general, and in the authors' views, resignation as LSRP may do a disservice to the client and the public interest, and should be discouraged, in some cases it may be warranted from any or all of the perspectives of DEP, the public interest and the LSRP him or herself. Environmental law is an arguably harsh but generally strict and joint and several liability scheme for most. There are few (not none) defenses to liability. Such a scheme can work unfairness in many cases in the effort to avoid foisting the costs of remediation on public taxpayers. But for some there may be relief from the unfairness in that there is likely legal (if not economically efficient or timely) recourse against others- those who may be the true responsible parties, at least if they exist and have resources to satisfy the obligation and the costs, delay and risks of pursuing them can be financed and delay in resolution tolerated. At least if the highest duty of an LSRP is to be met, sometimes the client must take certain steps to protect the public despite legal arguments (for example, installation of a mitigation system under protest despite defenses), and if the client will not, and people are actually at risk, the LSRP must consider how to meet his or her duties. Again, an LSRP facing such a dilemma should seek advice from others.

A question that remains to be resolved is "who are entitled to benefit from and rely on the decisions of an LSRP?" A related question, but not the same, is "who is the LSRP's client?" SRRA itself and DEP's rules and guidance do not answer these issues as yet. The Board, in its Adoption Response to Comment 14, says: "The Board's use of the term "client" in its proposed new rules does not have a meaning specific to the proposed new rules; rather, the Board uses this term according to its common understanding. Whether a client has the legal status of a "person responsible for conducting the remediation" is not relevant for an understanding of the word "client" as the Board uses that term in the rules." Thus it appears that a client may not be a PRCR. Review of different LSRP contracts suggest there are differences in the opinions of different LSRPs themselves as to the answers to these questions. At its simplest, he or she who retains and/or pays for an LSRP may be the LSRP's client (or one of them). But we often see situations where the interrelationships of the parties to a remediation, or for a site subject to remediation, may be complex and thus the duties of the LSRP unclear. A remediation may potentially involve the interests of past, present and future counsel, owners and operators, remediating parties, sellers, buyers, investors, lenders, landlords, tenants, parent entities, officers, insurers, sureties, neighbors, other members of the public, out-of-state observers, past consulting firms, future LSRPs and consulting firms, municipalities, counties, DEP and more. Does SRRA permit an LSRP to contractually disclaim all duties to all but the person or entity (its client) who contracts with him or her? Some contracts purport to do so, prohibiting reliance by third parties, potentially including successor LSRPs and DEP, on their work product. But are such provisions reasonable or enforceable under SRRA? Or might such disclaimers be invalid or a breach of LSRP duties under SRRA, express or implied? Do such clauses further the achievement of the LSRP's highest goal? How much can a professional disclaim responsibility when many others (future owners, tenants, lenders, occupants or neighbors), are known, indeed arguably intended by law, to be

affected by his or her decisions? Perhaps the Board will eventually address this concern, at least to some extent. It seems likely that eventually an actual conflict will arise and be addressed in court. In the interim we must await future events to better assess these alternative resolutions to these issues. But at first review, it must be remembered that the LSRP is a relatively new class of professional with clear duties at least to clients, DEP, the public and potentially future LSRPs (who may need to rely on prior LSRP work-product). As some lawyers have found to their chagrin, a professional's duties rarely run only to he or she who pays the bills. And, as is often the case with other professionals, attempts to immunize oneself against liabilities and duties of a professional nature often fail, and sometimes backfire (perhaps suggesting to a Judge, jury, DEP or the Board, that the LSRP was more concerned with protecting himself or herself than with satisfying his or her obligations as LSRP). It may be that, as with lawyers, the LSRP should trust to his or her skills and malpractice insurance (hopefully of a type, with terms, coverages and amounts sufficient to meet the LSRP's needs), rather than contract protections in such circumstances, and others.

Finally LSRPs necessarily are obligated to make legally significant decisions, and decisions about how the law applies to the facts, despite that they are not licensed as lawyers. They must, at a minimum, read and apply regulations and guidance, consulting with DEP and counsel (perhaps their own; perhaps their client's) as advisable in cases of ambiguity. (As a cautionary note, there is a fair amount of evidence that LSRPs, at least in lawyers' views, left to their own devices, often misinterpret and misapply the law, sometimes in minor respects but sometimes in matters of real importance. For example, consultants and LSRPs continue to advise clients that clients can qualify for NJ innocent purchaser defense by performing an ASTM Phase I assessment and not a preliminary assessment- this is bad advice). Some limit must apply to the right of LSRP's to interpret client legal obligations (as they cannot practice law, not being licensed to do so). And we think it relevant to note that LSRPs, DEP and the Board are bound by the law, even if the law has some effect with which any of them disagree- like it or not, some owners have defenses to liability under the Spill Act (see N.J.S.A. 58:10-23.11gd); site owners are not liable for contamination migrating onto a site (see N.J.S.A. 58:10B-12g.2.); a prior no further action letter with covenant not to sue has effects that cannot be undone as to all merely by voiding it or determining it is factually erroneous (see N.J.S.A. 58:10-23.11gd.(2)(e)) The law provides otherwise. Nonetheless LSRPs must do their job, which necessarily is heavily entangled with complex statutory and regulatory requirements and DEP interpretations of same, which may or may not be right, but likely cannot be safely ignored by LSRPs. Thus the boundaries limiting what they should or shouldn't do, can and can't do, and the reasonableness of their consultation with and reliance on other professionals, such as their PRCR's counsel, or their own, and any protections that may provide, yet have to be determined, which most likely awaits judicial reviews and decisions. And how and when will such occur? As part of DEP and Board decisions? Perhaps. As part of DEP enforcement against PRCRs? Perhaps? As part of PRCRs' suits against any or all of DEP, the Board or LSRPs, perhaps to compel issuance of an RAO, to compel termination of an audit or complaint, or to seek reversal of a decision?

● **2.3 DEP/Board Role for LSRPs.** DEP will inspect all LSRP submissions as they arrive, not immediately but quickly; but presumably not all inspections are equal. Inspection may result in additional review. Additional review is required in certain instances (for example, if the site is ranked by DEP among the highest in priority in the Remedial Priority Scoring System ("RPS"), anticipated to be available soon [see http://www.state.nj.us/dep/srp/srra/rps/]). At least 10% of LSRP submissions are to be audited annually, as will be 10% of all LSRPs. See http://www.nj.gov/lsrpboard/board/audit/audit_process.html. DEP has three years (in certain instances, perhaps more) to audit a final LSRP response action outcome ("RAO") for a site. DEP shall invalidate a RAO if it is not protective; arguably if an RAO is protective it should not be invalidated (but DEP may have a more demanding view of what is protective than many others). Under Executive Order #140, DEP shall post on an internet site all audit findings. Is this yet occurring?

But as noted above, DEP announced in its 9/10/2014 listserv blast e-mail that DEP staff thereafter would be reviewing fewer submissions, except for administrative completeness, and hold off substantive review on many submissions until issuance and filing of the RAO. At that time, they feel, many intermediate issues and questions should be resolved and thus, they hope, their review more efficient and less intrusive, at least if LSRPs do their jobs. The risks posed to LSRPs and PRCRs, and others, from such delayed review are obvious. The reaction of some, particularly on risky or expensive choices, is to seek advance technical consultation with DEP and document the inquiry and the result. The reaction of others is to be more conservative than before. Few feel better about this change and only experience will show if DEP efficiency comes at the risk of increased risk and cost to PRCRs and LSRPs. And the risks to third parties (such as lenders, buyers, new residents of buildings built on sites ruled clean and children attending newly licensed child care facilities) may prove in hindsight unacceptable.

Of course, as the author of regulations and guidance, the auditor of LSRP decisions, the employer of support staff for the Board, and the sometimes complainant to the Board and as periodic plaintiff in court, DEP's role remains quite pervasive and dominant, and is likely to continue as such so long as it has the resources and determination to be so. Its role, without doubt, can make or break the success of the LSRP program as improving remediation in New Jersey. Indeed some fear the possible role of vociferous opponents of the LSRP program within DEP itself. Others fear the changes that may occur after the next gubernatorial change in New Jersey. For the moment, DEP management seems genuinely committed to making the program a success, but also seems inclined to hold LSRPs to high standards and generally continue to challenge LSRPs and PRCRs with its own view and judgments, despite the absence of similarly qualified and licensed experts among its staff. And some of its staff are less committed to LSRPs. Whether DEP's generally positive public attitude will survive the first major error, omission or fraud of an LSRP, or unaddressed threat to health or the environment, or even the election of a differently biased Governor, remains to be seen.

The Board's behaviors, having to date had to concentrate on organization, permanent licensing and rule preparation and adoption, and with a limited number of audits and complaints, cannot yet be accurately assessed for biases, approach or even for its role as a potential significant force for future success of the SRRA program. The new regulations provide limited insight. Published decisions on complaints add to this, but the notable delay in resolving several older complaints suggests the Board may be facing some more difficult issues and cases, with less confidence as to how to proceed. But truly innovative announcements and efforts are lacking, probably also in part due to limited time and resources, and some degree of caution as Board members watch how the behaviors and practices of LSRPs, PRCRs and DEP mature. Perhaps in an effort to be more proactive, as we suggest, hereafter the Board will consider adopting or providing:

◊ meaningful guidance on a wide range of issues faced by LSRPs (for example addressing relationships with PRCRs, with other professions [such as lawyers], with neighbors and with DEP), perhaps even providing safe harbors for LSRPs to follow, including for example how to respond to inquiries of LSRPs, other consultants or the public for copies of data or reports.

◊ Meaningful advice on the meaning of "professional judgment" and "safe harbors" for those who follow a particular process or approach, even if professional judgment proves wrong in hindsight.

◊ meaningful guidance on a wide range of issues faced by non-LSRPs (for example, what can they do and what can't they?).

◊ clarifications on ambiguities and contradictions, if and as created and maintained by DEP or the legislature, or evolving practices.

◊ a clearinghouse for recording and publication of relevant LSRP or DEP decisions and precedents (particularly if DEP itself declines to do so).

◊ advice when LSRPs, PRCRs, DEP or counsel are unsure of how to proceed (as in, for example, the United States Internal Revenue Service [http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/IRS-Procedures/Code,-Revenue-Procedures,-Regulations,-Letter-Rulings/Code,-Revenue-Procedures,-Regulations,-Letter-Rulings] and the US Securities Exchange Commission [http://www.sec.gov/answers/noaction.htm], and DEP itself did under ISRA with its 1984-2008 reviews of thousands of applications for letters of ISRA nonapplicability [http://www.nj.gov/dep/srp/isra/announce200804.htm], now foolishly abandoned as a tool for clarification).

◊ review and response to, and perhaps adoption, revision, or rejection of, position papers prepared in good faith by professional or trade associations on professional issues of concern to LSRPs and PRCRs.

◊ assistance as to when and how LSRPs can seek and rely on legal advice of licensed professionals (a/k/a lawyers).

◊ guidance on how and when preserving confidentiality of client information is and is not appropriate.

◊ limitations on the scope of LSRP contractual disclaimers and liability limitations, and restrictive covenants, at least to the extent at odds with the professional responsibilities of LSRPs.

◊ dispute resolution guidance or procedures when LSRPs differ with each other or DEP.

Unfortunately, there is little evidence that the Board yet has much interest in undertaking many, if any, of these tasks, at least in the short term. But the Board's newly proposed regulations do endeavor to provide limited guidance on a few known issues. See this Article § 3.3.4(C) below.

● **2.4 DEP/Board Role for PRCRs.** PRCRs are affected by how their LSRPs fare in audits, reviews and resolutions of formal complaints to the Board. Others will also be affected. If an LSRP is investigated by the Board then by statute all RAOs of that LSRP can be examined by DEP, perhaps even after expiration of the 3 year limit (at least in egregious circumstances). N.J.S.A. 58:10C-2. But other SRRA provisions may prove more important to PRCRs, the public and others in the regulated community. For example, under SRRA DEP was given the right to set presumptive remedies (and has, for example, for planned future residential use) and to set time periods for remediation. If remediation moves too slowly, or a site or PRCR meets (or fails) certain criteria (if a site is bad or important to DEP), DEP has the power under SRRA to exercise direct oversight of a PRCR's remediation of a site, obtaining simultaneous review of LSRP deliverables (at least to some extent), requiring the PRCR and LSRP to act as DEP specifies for the remediation, and requiring the PRCR to post cash to secure remediation. Under SRRA, PRCRs are subject to added review of DEP, both on their own account and as related to LSRPs. While to-date DEP seems reluctant to direct PRCRs or compel performance under SRRA and seems to be proceeding cautiously, these powers may eventually be wielded very differently than pursued by DEP today, particularly as DEP, politics and economics change periodically (for example, as one would expect upon the first major future outcry, certain to arise after the first identified major deviation by an LSRP and PRCR that misses a serious threat to health, safety or the environment). Importantly, DEP articulates that its rules for direct oversight should be considered by PRCRs and LSRPs, and presumably lawyers, as self executing. Yet it appears not many agree.

Many sites and their PRCRs have failed to act as DEP interprets SRRA (indeed as most interpret SRRA). For example, many known or suspected contaminated sites in DEP's view lack PRCRs who have retained LSRPs. Absent defenses, such PRCRs are in DEP's view in breach of SRRA. Yet as of the end of 2015, DEP has faced few of them in direct confrontation. Eventually DEP will face fully the world of PRCRs who have failed to proceed with remediation as SRRA seemingly requires, although perhaps it will do so using the RPS or some other prioritization, rather than pursuing blanket expensive, resource consuming and time consuming enforcement. Some effort in this regard began in 2013 by DEP enforcement against a limited number of PRCRs who failed to retain LSRPs for their sites by May 2012, and continued in 2014 and 2015 against PRCRs who failed to seek extensions of the RI deadline and yet also have not proved the RI for their sites to be complete. See http://datamine2.state.nj.us/DEP_OPRA/OpraMain/get_long_report? More enforcement is expected. See http://www.nj.gov/dep/srp/enforcement/. Obvious candidates for enforcement will be persons or entities who historically have advanced remediation in their cases very slowly or not at all, as well as those who have asserted defenses to Spill Act liability (a group that DEP has largely hesitated to engage with more than directives and threats), likely not having hired LSRPs, and now not even having the voluntary oversight program previously afforded by DEP under Memoranda of Agreements ("MOAs") (another prior program, abolished, but perhaps in our view worthy of revisitation so as to permit "voluntary" remediation without waiver of defenses, preserving defenses and claims to all concerned). Some will be persons or entities who have died, dissolved, filed in bankruptcy, disappeared or become hard to find: as hard as DEP may try, the odds of getting blood or money from such seem low. Some will be those without memories of connection to orphan sites (some likely difficult to find), funds (and therefore lacking interest or ability to act) or resources (and therefore lacking management, lawyers, LSRPs, or other professionals to analyze, advise or assist in satisfaction of their obligations), or at least those who claim such conditions. Some will be recalcitrant. Some will be defiant. Some will be bad actors or criminals. It remains to be seen what strategy, on what priorities, with what resources, and when, DEP will dedicate itself to addressing these sites and pursuing such persons or entities: for the moment DEP's approach appears fairly limited. The past is full of instances of DEP threatened or initiated enforcement (penalties, directives, liens, treble damages, treble damage assignments, NRD claims and suits), with fewer successes than DEP would like to have under its belt (although enough to intimidate poorly financed or weak opponents). However, historically DEP has stated that it will prioritize sites (and the legislature has long required such) and address the priority sites based on their assessed threats to health, safety and the environment within the limits of then available public funding and resources. Regrettably few sites have been so addressed by DEP to completion- possibly no more than ten per year since internal prioritization began. But the soon to be published (reportedly), but long delayed, RPS is intended, at least in part, to support future such DEP efforts. Absent extensive funding for public enforcement or remediation, undoubtedly new DEP strategies will be needed for such orphan, recalcitrant or defiant sites to be resolved, absent which DEP will face the reality that the threats of SRRA changed little at many such sites. The reality is and has been for many years that some comply with legal requirements without compulsion, others do so if and when they have the time, energy and resources to do so, others will do so to some extent only if and when threatened, and some will do as little as possible (perhaps as little as they can get away with), while others will do nothing, and a few will actively seek to

violate the law. Adding more words in laws, regulations, guidance, letters and complaints will not much change this mix. Other strategies are needed to get better than historical results.

● **2.5 DEP Roles for All.** While DEP has lost its traditional role of pre-work review and revision of proposed plans for investigation and remediation, and PRCR work is now to proceed under LSRP supervision without prior DEP involvement (see this Article § 2.6), DEP has gained through SRRA new rights to investigate, enter sites, and inspect and copy documents, all as pertinent to its oversight of LSRPs and their efforts. DEP also has the right to punish violations and violators of SRRA. These rights may not be limited to PRCRs or LSRPs or even sites under remediation, although efforts by DEP or the Board to go beyond those limits and clear jurisdiction may be strongly resisted, with some merit. Exercise by DEP of a number of its SRRA powers may pose serious legal issues beyond those relevant to remediation (for example as to the relevance of attorney-client privilege and the rights, roles and obligations of lawyers and other professionals, or at to the liabilities and obligations of non-LSRPs in conduction investigations, and the continued effects of prior DEP decisions and NFA Letters). DEP supports the Board in the exercise of its own powers and rights largely aimed at LSRPs and those who use them, but arguably also others.

Not surprisingly, to date there is little evidence of DEP using such powers in any way philosophically or substantively different from the past exercise of DEP enforcement authority.

● **2.6 Work.** In DEP's view, absent some defense to Spill Act liability SRRA now provides that PRCRs cannot legally sit back, ignore the need to remediate and wait for DEP directives, at least if there have been discharges within New Jersey for which they are responsible under applicable law. They must remediate, at least within the rules and time periods provided by SRRA and DEP. Since May 2012, and immediately in all new cases, PRCRs must be prepared to act without DEP approvals or oversight, relying on an LSRP to plan and direct with the required remediation, often with no or minimal advance consultation with DEP. See this Article §3.7.3.

Specifically, N.J.S.A. 58:10B-1.3 provides: "a. An owner or operator of an industrial establishment subject to the provisions of P.L.1983, c.330 (C.13:1K-6 et al.), the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the provisions of … [N.J.S.A.].58:10-23.11g…, or the owner or operator of an underground storage tank regulated pursuant to … [N.J.S.A. 58:10A-21 et seq…, that has discharged a hazardous substance, shall remediate the discharge of a hazardous substance. b. A person who initiates a remediation of a contaminated site at least 180 days after the date of enactment of [N.J.S.A.]…58:10C-1 et al…. shall: (1) hire a licensed site remediation professional to perform the remediation; (2) notify the department of the name and license information of the licensed site remediation professional who has been hired to perform the remediation; (3) conduct the remediation without the prior approval of the department, unless directed otherwise by the department; …."

This SRRA requirement already appears to have accelerated remediation, or at least investigation, at a number of existing sites, potentially at some increased cost to PRCRs and perhaps added uncertainty. But SRRA's requirements also may have delayed other work, at least in the case of PRCRs faced with multiple sites and conflicting demands on scarce resources, trying to meet impending deadlines (including for some the now extended May 2016 RI Deadline).

Some now ask whether status as a PRCR automatically results in full SRRA responsibility of each and every PRCR for an entire site for all periods until issuance of a final RAO? Is a PRCR of a site liable for all problems identified regardless of when the problem arose? Is a PRCR liable for all test results that come to its attention? As lawyers, it seems to us clearly not. We would argue, despite the absence of clear language supporting our view, that SRRA should not be interpreted, for example, that a person or entity voluntarily undertaking remediation (including investigation), now without the benefit of the voluntary remediation program and MOAs (such as a bank evaluating its foreclosure options, or a potential developer going beyond due diligence, or a corporate entity auditing compliance of one of its subsidiary's sites, or a landlord investigating a tenant, or a discharger cleaning up its own discharge finding a new AOC clearly the responsibility of a prior operator still remediating in ISRA, or that same operator still remediating in ISRA finding a new discharge by the new tenant), by those actions takes significant risk if it identifies or addresses known or suspected contamination without full compliance with SRRA. Indeed in many of the foregoing examples, is it a violation for the person or entity to conduct such investigation without using an LSRP? Without doubt, an actor ignoring (not remediating) actual or

suspected contamination on a site (particularly if a problem can be worsened by the passage of time, or if a problem poses an actual imminent and substantial threat to health, safety or the environment) faces real risk of DEP or third party enforcement and claims that such violates SRRA, even if it can articulate some defense to liability. And if the Actor wants to proceed using an LSRP, without admission of liability, how can it safely do so? And how far can the LSRP proceed and remain in compliance with his or her duties? DEP and some LSRPs may view an assertion of any defense to liability by an actor or site owner with skepticism, especially if used to avoid addressing known contamination at the site (at least absent very clear defenses). Indeed the right or obligation of an LSRP to consider the legal issue of the viability of an innocent purchaser defense, and perhaps other similar situations (such as the scope of a tenant's ISRA liability on a multi-tenanted site), is still uncertain (although perhaps at some sites critical). The ambiguities arising from such issues seems to deter some with arguable defenses to liability, even when known to NJDEP, from proceeding with remediation using LSRPs under SRRA.

Consider that under SRRA an innocent owner may report pre-existing contamination, but assert a defense to liability, and then face the absence of DEP response. While waiting for the response that likely never comes, can it hire an LSRP for a new discharge or condition and ask the LSRP to issue an RAO that relies, in whole or in part, on the status of a party as an innocent purchaser? If it elects to do so can it do so for the entire site, but exclude as a matter of law the AOCs for which it has a defense, properly assessing that only the two issues exist- the newer discharge which it has fully remediated and the prior discharge for which it has a defense? Did DEP ever issue a NFA to any site based on such logic despite the existence of an unresolved issue? (We believe it did). If so, than arguably the LSRP should have the same power in issuing RAOs. But if an LSRP does so, what will DEP or the Board do or say? And when? It remains to be seen what LSRPs can or will do in such cases, and what DEP or the Board will do in response. Clearly some LSRPs will be reluctant to face DEP and Board review of an RAO based on such a defense (assuming the LSRP can find a way to issue such an RAO using DEP's template language; and if it cannot and DEP refuses to vary the template, what recourse is there before DEP enforcement? Does the innocent owner have to wait forever without an RAO? Can the PRCR seek judicial relief?). Will a growing backlog of sites affected by such issues force DEP, the Courts or the legislature to face and resolve them, as in the past they often have not?

Is it clear that mere suspicions require LSRP retention, reporting or work? What if the suspicion might result in finding an IEC? Also, does every owner or operator without an innocent purchaser defense for preexisting conditions (maybe because the owner did not perform a preliminary assessment or maybe because it fully remediated the only real issues it then saw, only to have new DEP policies cast doubt on the quality and reliability of a prior FRD) have an affirmative duty to sample and assess its site, merely because its site, under such new policies, may have an issue (or suspicion of an issue) not previously investigated (such as historic pesticide use, or mapping of the site as having historic fill)? And if, as we think, they do not (at least outside of ISRA), how much of a suspicion of an actual discharge must be investigated (only a sample result? What about olfactory or visual evidence? What about rumors, employee speculation, newspaper reports or documents? What about the results of an investigation conducted by another on an adjacent property? Or an investigation conducted by a non-LSRP, perhaps without full compliance with NJDEP technical guidance?)? And if a non-liable party elects voluntarily to conduct some work, must it use an LSRP? And whether it does or does not use an LSRP, does it become liable as a PRCR to finish what it starts, arguably having waived defenses? On everything? Or can it limit the scope of the LSRP retention and its duties and allege it is not really investigating under SRRA? Conversely, if a prior owner is in fact conducting remediation and there is a new discharge by an unrelated party, but of hazardous substances also formerly used by the original owner, who has what burden to separate the consequences of the separate discharge? What are the respective parties' LSRPs duties? What if they disagree? Is DEP's position that all are liable? If so is that position correct? How do the conflicting LSRPs protect themselves and their clients? How do lawyers protect their clients?

Importantly, there is no mechanism in SRRA, or at DEP, by which the legal or factual issues associated with an assertion of non-liability can be tested (or even preserved) except perhaps only if solely based on technical conclusions or later assertion in and against DEP enforcement actions, such as for fines or treble damages. There is no method, using NJDEP's website alone, to fully and clearly reserve defenses while proceeding with some work using LSRPs (but would a mailed letter so explaining and reserving defenses be effective to protect the client and LSRP against later DEP or Board criticism?). This may be unfair, but differs little from the position of a pre-SRRA DEP directive recipient disputing liability as a discharger: such a recipient can return to DEP a good faith defense letter as its defense (and thereby possibly avoid exposure for treble damages, but remain exposed for other liability)

(except that before SRRA such a Person could enter the voluntary cleanup program, and now cannot). But DEP believes it need not reply to such a letter, then or perhaps ever (although contrary arguments can be made, if only as a constitutional matter of fundamental fairness and due process), and arguably some risk to DEP of allowing time to pass with such assertions unaddressed. See e.g., NJDEP v. Dimant, 418 N.J. Super. 530 (App. Div. 2011) (holding that NJDEP did not carry its burden to demonstrate that defendant had some connection to the damages caused by the PCE contamination, or had added to any contamination already caused by past operation, which burden was even harder to meet given the passage of time and interim site changes). Maybe we need new legislation and a special environmental appeals or adjudicatory or arbitration process. At least we need, in our view, some MOA-like process.

Of course owners and operators are not the only persons or entities who need be concerned with being identified as a PRCR. For example, is a construction contractor removing dirt for excavation/construction purposes, and then after waste classification of the excavated dirt disposing of it or recycling it as contaminated and not clean materials, a PRCR? Is his principal? Is such activity "remediation?" Does the contractor (or his principal) have to use an LSRP for such work? Arguably not. The obligation to properly classify and dispose of wastes does not arise exclusively in the context of remediation and should not itself, in our view, be considered remediation. Similarly the excavation of a hole for construction, and the removal of dirt or sand from that hole, are not remediation. If something is not such remediation, even if similar to remediation, then clearly an LSRP should not be needed for such work. But does the conduct of preliminary soils work for construction, and the discovery of the presence of contamination in materials itself, then or later result in the need for remediation requiring thereafter an LSRP for someone who is thereby a PRCR (the owner, perhaps)? Does the excavation for construction then have to cease or run the risk of being ruled remediation (or, perhaps worse, converting the contractor into both a PRCR and Spill Act discharger?) Does it matter if the excavation and discovery involve a well-known area of historic fill (or agricultural or pesticide use)? Does it matter if it is a newly discovered, previously unsuspected, AOC? Certainly DEP can be expected to take aggressive positions, as they have in the past, on the existence of a discharge upon the discovery of conditions and the reportability of such condition, at least if not fully and properly remediated. Generally, post-SRRA, DEP seems likely to assert that such condition is the source of an obligation on someone (perhaps all) as PRCR to fully remediate such condition as a new case under SRRA. But some owners, operators and contractors (and their lawyers and consultants) are sure to disagree. For example, the lawful application of hazardous substances to earth (fertilizer, pesticide, macadam, pain) is, in our view, not itself a discharge (and we are not aware of a case clearly holding otherwise). As best we are aware, DEP has not yet held that the Department of Transportation and its contractors, or municipalities or parking authorities, or developers, are discharging hazardous substances subject to the Spill Act when they construct, repair or replace a road or parking lot (an activity using significant volumes and concentrations of multiple hazardous substances). DEP has not yet held (likely because it cannot) that landscapers are discharging hazardous substances subject to the Spill Act (or creating areas of historic or other fill) when they fertilize a lawn or spray trees against insects or apply bags of vermiculite, mulch, gravel or the like to a residential lawn. So we and others would argue that the lawful and inevitable consequences of such uses should not serve as a basis for DEP asserting the affected owners and contractors have a legal obligation to remediate using LSRPs.

Does all soil sampling, for example, (other than for non-owner non-discharger "all appropriate inquiry" site investigations [exempt under N.J.S.A. 58:10B-1.3.d.(2)]) require use of an LSRP? Does precautionary sampling? Where has DEP advised the regulated community of such (as the Board says DEP must). A conservative approach (and perhaps if strictly construed, the approach required by SRRA's text itself) would be that all assessment or investigation of a condition is remediation and all remediation requires use of an LSRP unless it fits within the one express exemption. A more reasoned approach (particularly as DEP itself rarely strictly construes SRRA's and other statutes' text) can conclude (or argue) that many activities are not remediation (defined by SRRA as "all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants…"). Consider, for example, whether, despite DEP views articulated in 2014, does an owner or operator required to inspect an engineering control for its biennial certification need to use an LSRP for the inspection and reporting (i.e., is mere inspection remediation)? Does an owner or operator planning new construction, requiring disruption of an underlying closed landfill, need to use an LSRP for the work and reporting? Certainly based on the current forms available on DEP's website, and DEP's 2014 announcements, it appears so: but perhaps the better policy argument and conclusion is otherwise (walking a surface to see if there has been a disturbance or crack in a control is not remediation, and, in our view, should be able to be so certified by a consultant who is not an LSRP, while we believe discovery of a breach may require remediation and therefore an LSRP to assess that. If a company is loading a truck, and three drums containing a hazardous substance spill and

break open within a loading dock, and a small amount of the spilled substance reaches the grass adjacent to the dock, does the operator have to hire an LSRP to remediate either or both the loading dock or the adjacent grass area? Or can it promptly throw speedy dry on the material and dig out a circle of dirt so that all visibly contaminated materials is removed and classify and dispose of the dirt properly, calling it a day? See http://www.state.nj.us/dep/srp/srra/training/matrix/misc/2_exceptions.pdf. Absent a clear exemption the conservative approach for a PRCR, and those counseling the PRCR, would be to hire an LSRP, even though there might be some who would argue even against this fact pattern constituted a Spill Act discharge requiring reporting to DEP or remediation.

But even in cases of clearly known and significant contamination, is it so clear as to when a person or entity is liable under New Jersey Law to conduct remediation? How will such mixed issues of fact and law be decided (By the LSRP? By the PRCR? By a lawyer? By DEP? By a court? By a lawyer's written opinion? By a defense letter to DEP? In a suit? In a defense to enforcement?) Does the LSRP have the license, power, skill or authority to decide the issues of liability and defenses necessary to such issues? Can the LSRP assess different areas of concern differently? A conservative approach for an LSRP, although certainly unfair, would be to assume that everyone defined in the statute or rules as such is a PRCR until and unless determined otherwise by NJDEP or a court (neither of which determinations are likely to be either fully considered or available at all in the short term, or perhaps even in the long term, as DEP priorities, however determined, may divert DEP resources to far more significant issues and sites). Indeed some LSRPs may elect to pursue an all or nothing approach, finding it personally safer to so proceed. A more reasoned approach can conclude that many persons are not obligated as PRCRs (for example allowing an LSRP to listen to the same arguments and make the same decisions DEP could previously, perhaps relying on reasoned opinions of the PRCRs or its own counsel: but can the LSRP issue a RAO based on same? Or must the site and PRCR stay in limbo, having issued an RAO on all other issues, awaiting judicial review, exposed to excessive fines and penalties for having the audacity to do nothing, and potentially missing all deadlines, with the LSRP exposed to criticism for failing to compel its PRCR client into compliance as NJDEP requires?). Consider: if an owner conducted a preliminary assessment and did not find an AOC requiring investigation, thereafter buying the site as an innocent purchaser, but later offsite sampling for a lender at an adjacent site finds a plume migrating from the 1st purchased site to the 2nd borrower site, is the innocent owner of the 1st permitted to conduct investigation and remediation and obtain an RAO based in part on its status as an innocent purchaser? Is it required to act without regard to its defense?

● **2.7 Non-LSRPs.** The long-term role of consultants who are not LSRPs is unclear. Some feel that market and regulatory forces will require that most non-LSRPs eventually must become LSRPs, that non-LSRPs may be viewed as a lesser variety of consultant, LSRPs being the "Gold Standard" of professional quality. Can only LSRPs conduct or supervise sampling? (The Board decided to skip an opportunity to so provide in its Rule Adoption, stating that it was for DEP to determine when LSRPs must be retained). If a non-LSRP discloses that it is not an LSRP and conducts sampling (other than for due diligence on a purchase) without LSRP overview, is he or she in breach of SRRA because he or she is acting as an LSRP without being licensed?

Competitive forces may put the non-LSRP at such a disadvantage that they are destined for extinction, some believe. However, for the moment it appears that non-LSRPs will have useful roles into the foreseeable future, if only because 600 +/- LSRPs lack enough time and energy to serve as project managers on all the known sites at this time.

Many Sellers, for example, nervous with how the independent duties of LSRPs may hurt them, are prohibiting by contract (sometimes in access agreements, sometimes in sale contracts) potential Buyers from using LSRPs for pre-purchase due diligence. Although the Board's new rule proposal endeavors to clarify that LSRPs can be retained for non-PRCR due diligence and have lessened responsibilities (for example to report discharges), it is equally clear that use of an LSRP in non-DEP situations exposes the client to the possibility of that LSRP independently and without warning reporting something to DEP (most notably IECs). For now it is clear that non-LSRPs have a role to fill in providing lower priced services, in serving as the eyes and hands of LSRPs, and in acting as significant parts of the project team, resources, sounding boards and/or advocates (for example, on issues or matters where there is a fear or perception that the LSRP may not fulfill client interests or when use of an LSRP is not required). It remains to be seen, however, how well, if at all, the consulting firm's non-LSRPs, other advisors (including, perhaps, other consultants who are LSRPs, not acting as such on all matters, but retained for second opinions), the PRCR itself and PRCR legal counsel can serve effectively as advocates before the LSRP himself or

herself. Likely the answer will vary LSRP to LSRP, and firm to firm. Certainly there are many complex legal issues as to which the LSRP might benefit from good legal advice, perhaps even in the face of absent, conflicting or contrary DEP and NJ Division of Law decisions or advocacy. The best client advocates will seek to find solutions that achieve client goals, comply with legal and technical requirements, and follow procedures that well protect the LSRP in the event of later DEP or third party attacks. However, whatever the current role and market forces, it is likely that as time passes actual experiences of PRCRs, Board and DEP with LSRPs, including the results of DEP and Board audits, complaints to the Board, judicial review of same, the frequency of errors-in-fact and the success of malpractice and other claims against LSRPs, will alter the position of LSRPs and non-LSRPs, perhaps dramatically. For example, current behaviors and perceptions will change if it is ever determined that any and all knowledge held by any or all non-LSRPs in the same firm as the site's LSRP (for example in conversations with the PRCR's counsel, sought to be preserved, to the extent possible, as confidential [for example, perhaps in defense of a toxic tort suit by neighbors]) is automatically attributed to the LSRP even if not actually conveyed to him or her.

But also of interest will be whether and how non-LSRPs can safely counsel or advise a PRCR who fails to remediate as DEP seems to require, or chooses to remediate even if there is no obligation to do so, without facing DEP claims that such non-LSRP and PRCR proceeded in violation of SRRA. If the risk of attack on an LSRP is high due to facts and circumstances of a site or PRCR, presumably many LSRPs will not be willing to advise such PRCRs- can non-LSRPs fill the void? Do non-LSRPs, particularly if stationed in New Jersey (those outside of New Jersey presumably having a better chance of arguing that DEP and the Board have no jurisdiction over them), have risk of being accused of a violation of law if they assist a PRCR proceed with remediation (perhaps by mere sampling), or accept their PRCR's failure to remediate, without an LSRP, or to otherwise violate SRRA? Is that advisor "aiding" or "abetting" the violation? What about the lawyer for that PRCR? How does SRRA change the role of in-house technical experts or out-of-state consultants who are not LSRPs? (Consider: Can an in house person advise an out-of-state corporation, with a presence in New Jersey, on a New Jersey legal question without being a NJ licensed lawyer?) These issues need to be faced in real life before much guidance can be given, but caution seems appropriate. Legal and other advice as to good faith defenses and options may be critical to PRCRs (and their LSRPs and non-LSRP consultants). Indeed even consultation with an LSRP may help. But in such cases: will they be able to get the advice they need, or will there be too much risk or uncertainty for anyone to advise them?

Eventually it seems likely DEP and/or the Board will accuse some non-LSRP of some such violation, although perhaps only in the most egregious of circumstances. If you are in such a situation, care, thought and good legal advice is appropriate.

● **2.8 Key Terms Have Changed; Contracts must change.** Existing and future contracts need revisions to address new SRRA processes and terms, although in some cases perhaps minimally. The role of LSRPs must be addressed (and, if possible, multiple LSRPs avoided or at least a hierarchy or dispute resolution technique created: consider, if landlord is finishing ISRA compliance with its own LSRP, should the lease really require the tenant on a new trigger to get its own LSRP?). RAOs are the new goal of remediations but new contracts may call for FRDs (which include RAOs) instead of NFA Letters. Remediation certifications will be filed to close ISRA subject transactions, with RFS posted in amounts possibly determined by default or LSRP opinions. Buyers or Lenders may insist on more oversight and participation of approved Seller LSRPs in the fear that DEP will provide less oversight. Parties may impose their own rules and require their own oversight of remediation out of concern that someone else's LSRP, and DEP's distanced review, will not suffice to protect their own interests. The post RAO issuance audit review three-year-period needs to be considered and addressed in contracts. When should closings occur? When should escrows be released? When should indemnities or guaranties expire? When should releases of liability take effect? There may be problems translating pre-SRRA contract language (and deliverables) into the new SRRA processes and terms, particularly if there are points of contention between the parties, perhaps unrelated to remediation (although good faith should permit practical solutions in many cases). New SRRA processes and demands need to be addressed (such as RAPs and FA for same). How will long term liabilities and obligations for restricted remediations be addressed, shared or shifted (biennial certifications; permit fees; FA)? Is a former owner really the right entity to manage such issues, as DEP seems to feel? New contracts also should allow for future changes of law and procedure (perhaps, by stating some principles from which future results can be calculated or derived).

● **2.9 Program Changes Continue.** Like it or not SRRA changes still continue hereafter as long as SRRA itself exists. Throughout 2014 & 2015 there were many, and sometimes substantive, changes to NJDEP forms,

guidance and standards. See e.g., http://www.state.nj.us/dep/srp/guidance/. See http://www.nj.gov/dep/wms/bears/gwqs_interim_criteria_table.htm. NJDEP has formed committees considering further changes. New legislation can be expected eventually (at least correcting errors, and perhaps addressing complaints of DEP, the regulated community and the environmentalists on various issues, but not likely in an election year. New problems and solutions will be considered by PRCRs, LSRPs and DEP. New enforcement against violators, actual and alleged, will occur. What you think you know today, may differ hereafter. Are these likely to be changes to the central tenets of SRRA? Not in our view. For example, it seems quite unlikely that LSRPs will be eliminated, even if several significant LSRP errors are found by DEP, the Board or third parties. However, important provisions may change. And even minor changes may have important consequences for particular PRCRs and their sites. While changes can be monitored, rarely can they be fully predicted. Nonetheless it is imperative that the prospect of future change be recognized and addressed, if possible, within reasonable limits, in planning, work and contracts. For example, early in the SRRA program financial assurances for remedial action permits were often set at a low $30,000 (and at many sites this is still the amount): but in negotiating with respect to financial assurances is it wise to assume that such amount will continue to be acceptable hereafter as often as before, unless that amount results from a true calculation of future costs (as opposed to a customary practice or assumption), over a 30 year period? Also, future cleanup standards are unlikely to be static: what is clean today may not be clean in ten years. Absent some major change in science, policy or law, it seems relatively unlikely that standards will become more liberal (less stringent; better for PRCRs) and more likely they will become more conservative (more stringent; worse for PRCRs) Historic fill issues may prove more troubling hereafter than they have been to date, as may pesticide concerns. The debate about clean fill, and native mined gravel with natural concentrations of certain hazardous substances, is ongoing, and even a short term result accepting native materials as "clean enough" may be reversed by DEP or LSRPs in the future, exposing hundreds of sites, maybe more, to reassessment and remediation of filled areas. Sites thought clean with prior NFAs or RAOs examined under more stringent guidance may discover old problems not able to be addressed on discovery as they were previously (because owners and operators may change and have different views, uses may change, access agreements may expire, liable parties may have died or dissolved). New issues and concerns may arise (twenty years ago vapor intrusion, historic fill, pesticides and NRD were less often discussed; what will arise hereafter?). So, in view of the chance of material and adverse changes, parties should consider negotiating in advance who bears what risks to remediate and address such changes under later rules (silence likely results in conflict; but silence may be the simplest solution today). As a practical matter, more often than not the then current owner, if solvent, and the original polluter, if existing, will bear higher levels of risk than interim liable parties or tenants.

● **2.10 Forms & Electronic Filings**. With some statutory support (see e.g., N.J.S.A. 58:10C-14, -20 and N.J.S.A. 58:10-23.16), DEP has embraced, and requires, completion and submission of a multitude of forms, increasingly to be submitted exclusively on-line. These forms and practices may pose increasing problems for LSRPs, PRCRs and their advisors, if only in situations not meeting DEP's conceptual model for remediation or DEP's choice of questions and possible responses in those forms. Obviously LSRPs and PRCRs (and their lawyers) must be familiar with those forms and their instructions. And in most cases they can and should prepare and submit those forms properly, being attentive not only to the exposure of the LSRP and PRCR, but also of each human Person asked to sign and certify the responses. Misuse, errors, failures to complete the forms, and failures to follow proper instructions may be dangerous, will create problems, perhaps on DEP or Board review or audit (rescission of approvals, fines, censure, license termination), potentially in other contexts (Contract or malpractice claims? Toxic tort or stigma damage claims? Future remediations? Criminal exposure?). Potential issues or concerns arise: (i) if the form calls for a simple "yes or no", "black or white", or "check 1, 2 or 3" solution when none are fully appropriate, or some other situation exists (for example, another lawyer recently observed that the LSRP retention form, filed online, identifies the "client" as a "responsible person" [a legal term of art], and permits identification of no other status [such as PRCR; lender; innocent owner], which required identification simply may be untrue as a matter of client intent, fact and law); (ii) an explanation is appropriate but the form does not allow for such (particularly if filed on-line; the practice of marking up mailed forms does not work on-line, in some cases at-all), (iii) a legal principle is relevant but the form does not allow for assertion of same (a defense; a non-waiver or reservation; a caveat; an explanation). So what to do? Perhaps: (1) if the form allows attachment of a PDF that can be created and attached, (2) a note can be entered in a text box (or address box or in an attachment or explanation) that refers the reader to a separate document or statement, or explains an objection to an earlier statement, (3) a separate letter or e-mail can be sent (by e-mail, certified mail, overnight, telecopy) explaining the issue (but then the correction also has to be included in every later filing referencing the original- such as a disk of documents supporting the final RAO). But DEP sometimes says it will not accept same (see, for example, the instructions for

the 2014 2-year RI Extension form) and DEP itself may not officially include same in the formal DEP file (in our view with liability of DEP for the consequences). In our view DEP runs serious risks in refusing to accept, review, or file actual information submitted to it. It also runs a risk by forcing all submissions to fit one size, an approach not likely to obtain sympathetic judicial review. In our view if the submitter has a valid good faith reason for submitting different information than DEP wants to accept, and tries, the refusal of DEP to accept, process or review same should not be held against the submitter in any way, and should be held against DEP for refusing to face facts. We believe both the United States and New Jersey Constitutions require this result. We believe there is a reasonable prospect that most Judges would agree with this. Government by computer-input-restrictions may be convenient for DEP but it also is, in our view, arbitrary, capricious and unreasonable. LSRPs may have protection of health, safety and the environment as a priority, but DEP must have constitutional values, such as fundamental fairness and due process, as its values. DEP rarely considers this, but it is a central part of our government.

III. Key Details- A Reference and Discussion:

- **3.1 The Definitions:** See Attachment A.

- **3.2 Temporary License Program:**

■ 3.2.1 DEP previously licensed as LSRPs, on a temporary basis, to hundreds of persons meeting certain minimum requirements. (N.J.S.A. 58:10C-12; P.L.2009, c.60 §12). With the completion of the required exams and related processes, no temporarily licensed LSRPs continued as such after the end of February 2013.

■ 3.2.2 Some concern has been expressed as to the decisions of previously temporarily licensed LSRPs who did not obtain permanent licenses. For example, are their decisions valid and binding? Two perspectives must be considered. Certainly the decisions of those with temporary licenses are legally valid if made during the period of their license. However, as to the substantive correctness of their decisions, it remains to be seen how other LSRPs and DEP treat those all those decisions. Unfortunately, NJDEP felt it necessary to invalidate three RAOs issued by temporarily licensed LSRPs who did not become permanently licensed in time to correct the deficiencies of concern to NJDEP with those RAOs.

- **3.3 The Board:**

■ 3.3.1 The Site Remediation Professional Licensing Board ("Board") consists of 13 members (at least it has 13 members exclusive of resignations): the DEP Commissioner, the State Geologist, 6 LSRPs, 3 environmental group representatives (1 of whom must be an LSRP), 1 business group representative and 1 academic; the 11 public members are appointed by the Governor with the advice and consent of the NJ Senate. Initial Board members have staggered terms; eventually each member's term will be for 4 years. (N.J.S.A. 58:10C-3.b.; P.L.2009, c.60 §3.b.) It appears that those whose terms expire are continuing to serve pending appointment of their replacements. The current Board members are identified at http://www.nj.gov/lsrpboard/board/resumes.html.

■ 3.3.2 The Board is in DEP but not of it. It is supported by DEP staff. (N.J.S.A. 58:10C-3.a. & e.; P.L.2009, c.60 §3.a. & e.). A majority of the Board is a quorum; an absolute majority of the Board is required to act (posing potential enforcement issues if the Board is not fully populated or conflicts lead Board members not to participate). (N.J.S.A. 58:10C-4; P.L.2009, c.60 §4).

■ 3.3.3 The Board has various powers and responsibilities with respect to LSRPs. These include: reviewing, granting and denying licensure applications; administering and evaluating exams; establishing continuing education requirements; approving and providing education courses; establishing and collecting fees; adopting and administering professional standards; making information lists of LSRPs available on a website; and providing information about the program, including decisions on complaints, suspicions and revocations. (N.J.S.A. 58:10C-5; P.L.2009, c.60 §5). It also investigates complaints, imposes discipline, and can suspend or revoke licenses (N.J.S.A. 58:10C-8; P.L.2009, c.60 §8). The Board has adopted by-laws. See http://www.nj.gov/lsrpboard/board/bylaws.pdf (which address a minimum of 12 meetings per year, open meetings, conflicts of interests and standing committees). The Board rules and regulations must ensure that LSRP RAOs are consistent with Law(s) concerning remediation and protect public health and safety and the environment. (N.J.S.A. 58:10C-6; P.L.2009, c.60 §6). The 2015 proposed Board Rules have been adopted, largely as proposed. See N.J.A.C. 7:26I (including General Provisions,

Definitions, Licensure, Fees, Continuing Education, Auditing, Professional Conduct, Disciplinary Proceedings,, Adjudicatory Proceedings, Prohibition of Retaliatory Acts and Disciplinary Proceedings and Penalties). We would interpret the Board's powers and authority to provide similar authority as that of DEP for the Board to issue guidance to LSRPs and others concerned with the LSRP program; for the moment it appears the Board has not had the time, energy or inclination to issue such guidance. We believe there are a number of topics on which Board Guidance would be useful. See this Article § 2.3 above.

■ 3.3.4 The permanent LSRP licensing program has certain features:

◊ 3.3.4(A) Standards for education, training and experience. (N.J.S.A. 58:10C-7.b.; P.L.2009, c.60 §7.b.).

◊ 3.3.4(B) Candidates are required to pass required exams. (N.J.S.A. 58:10C-7.b.; P.L.2009, c.60 §7.b.).

○ Note: Statistics on the difficulty of the exams are not published on the board's website. Obviously they were difficult enough that not everyone passed, and some failed repeatedly. This is not unusual for professional exams.

○ It is not expected that 2015 rounds of exams will be easier.

○ N.J.A.C. 7:26I-2.8 requires that an examination candidate shall certify that he or she has read and agrees to abide by a Board LSRP Licensing Examination Candidate Agreement. Violation of the LSRP Licensing Examination Candidate Agreement is grounds for disciplinary action.

◊ 3.3.4(C) Standards for professional conduct were required to be developed. (N.J.S.A. 58:10C-7.b.; P.L.2009, c.60 §7.b.). See also detailed discussion of the statutory version at this Article §3.4.2 below. By way of comparison the Massachusetts Board's Rules of Professional Conduct are at 309 CMR 4.00 *et seq*. Recently adopted N.J.A.C. 7:26I-6 contains the Board's Rules of Professional Conduct for LSRPs (largely based on N.J.S.A. 58:10C-16, 58:10C-14, 58:10C-20, 58:10C-21.d, 58:10C-21.e, and 58:10C-24). See discussion at this Article §3.4.2 below..

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○ N.J.A.C. 7:26I-6.15: An LSRP shall cooperate in an investigation by the Board or the Department. The duties detailed in this rule include: "(b) An LSRP shall… [as] prescribe[d]…, provide all information the Board or the Department requests including, but not limited to: 1. The LSRP's compliance with the SRRA…, 2. A description of and the status of any remediation the LSRP has participated in including, but not limited to: i. Investigative and remedial activities completed to date; ii. Investigative and remedial activities required or planned to be completed in the future; iii. The LSRP's role in the remediation; iv. Any other person's role in the remediation; v. Each natural resource or environmental media included in the investigation or remediation; vi. Data and information collected or available concerning the remediation; vii. A projection of the cost for investigative and remediation activities required or planned to be completed in the future; and viii. Any information that an LSRP may have that any person has violated (c) below. (c) In response to a Board or Department investigation an LSRP shall not: 1. Knowingly make a false statement of material fact; 2. Fail to disclose a fact necessary to correct a material misunderstanding known by the LSRP to have arisen in the matter; 3. Knowingly and materially falsify, tamper with, alter, conceal, or destroy any data, documents, records, remedial systems, or monitoring devices that are relevant to the investigation, without obtaining the prior approval of the Department; or 4. Knowingly allow or tolerate any employee, agent, or contractor of the LSRP to engage in any of the foregoing activities."

○ N.J.A.C. 7:26I-6.16: An LSRP can be jointly responsible for a violation committed by another LSRP whose work he supervises or reviews (in particular if he knows of the violation and fails to take reasonable steps to avoid or mitigate the violation).

○ N.J.A.C. 7:26I-6.17: "An LSRP shall comply with all conditions the Board imposes as a result of a license suspension, revocation, or other Board disciplinary proceeding."

○ N.J.A.C. 7:26I-6.18: "An LSRP shall inform a client or prospective client of any relevant and material assumptions, limitations, or qualifications underlying their communication by promptly providing the client or prospective client with written documentation of these assumptions, limitations, or qualifications." An LSRP must also advise of timeframes and deadlines, the LSRP's performance in relationship to same, and the consequences and penalties for failure to meet same.

- In Board Adoption Response to Comment 69 the Board stated: "The SRRA addresses only the professional responsibilities of LSRPs, not contract or payment terms. Therefore, contract

or payment terms are not covered by this section of the proposed new rules, only assumptions, limitations, or qualifications involving the work of the LSRP."

- In Board Adoption Response to Comment 70 the Board stated: "N.J.A.C. 7:26I-6.18(b)3 is not intended to direct LSRPs to provide legal advice, but simply to inform clients of the provisions in applicable statutes and regulations that will be triggered if timeframes are not met. This is information that an LSRP should know and he or she is responsible for sharing that knowledge with the person responsible for conducting the remediation. This can be particularly helpful to those clients of an LSRP who have not retained counsel that might otherwise advise the client, in a general way, of the potential enforcement consequences of the client's non-compliance with the applicable regulatory, mandatory, and expedited site specific timeframes in the Department's rules."

○ N.J.A.C. 7:26I-6.19: An LSRP has responsibility for public communications when the PRCR designates the LSRP as the point of contact for the public pursuant to N.J.A.C. 7:26C-1.7(o). In such case the LSRP shall provide: "1. Information that is required … pursuant to N.J.A.C. 7:26C-1.7; 2. Information that has been submitted to the Department; and 3. Any additional information that is important for the public to know in order to protect their health and safety." Also "(c) An LSRP shall not communicate to the public information that he or she knows is false, inaccurate, misleading, or incomplete. An LSRP shall be deemed to have provided incomplete information when he or she withholds information that is encompassed within …[the rule] above. (d) The client confidentiality requirements of N.J.A.C. 7:26I-6.12 apply to this section."

- Should an LSRP honor a third party request by providing copies, in any form, of materials filed with DEP or other regulators? At the LSRP's or client's expense? We would argue that referring an inquirer to pursue OPRA sources should suffice. We also think that a blanket request to the LSRP for all documents should always be so addressed. And the LSRP should never be required to provide documents to the inquirer if either the PRCR has no such obligation or DEP itself would have no such obligation (such as documents prepared for or in anticipation of litigation). In any event, in our view the Board should provide specific guidance on these and related issues and not await a complaint to decide how LSRPs should respond. Further, if the Board determines that the LSRP should provide specifically requested documents in his or her possession, we believe it is reasonable for the LSRP to require that the inquirer pre-pay reasonable costs for providing same rather than require his or her client to bear that cost.

- The Board's adoption (at Response to Comment 5) clarifies that "The person responsible for conducting the remediation may choose not to designate the LSRP as the point of contact, in which case N.J.A.C. 7:26I-6.19(a) would not come into effect."

- Does the existence of litigation, or threat of litigation, or the source of communications (an adverse party's lawyer) affect the nature and extent of an LSRP's duties to address or respond to communications in such contexts or from such sources?

○ N.J.A.C. 7:26I-6.28: An LSRP shall cooperate with DEP audits and reviews "of the remediation of a contaminated site pursuant to N.J.S.A. 58:10C-21." Such is to occur by the date DEP specifies. In our view if DEP acts unreasonably under all the facts and circumstances, this obligation cannot be strictly construed against the LSRP.

◊ 3.3.4(D) Each applicant is required to provide three reference letters as part of an application for a license. (N.J.S.A. 58:10C-7.b.; P.L.2009, c.60 §7.b.). Under the Board rules, one must be from an LSRP (creating a further impediment to entry for some applicants), another from an employer, current or past. See N.J.A.C. 7:26I-2.5(a)(4). As always, an LSRP candidate should be careful from whom he or she seeks references. Bad references could be fatal; even a neutral reference could be a problem.

○ Is there any reason to be concerned that it will now be harder for out-of-state or small firm or solo practitioners to become NJ LSRPs? If so, is this an unreasonable restraint of interstate commerce violative of the United States Constitution? Is that the Board's intent? Is it what the legislature intended?

◊ 3.3.4(E) The Board sets application forms and fees (including annual). (N.J.S.A. 58:10C-7.b.; P.L.2009, c.60 §7.b.).

◊ 3.3.4(F) Executive Order #140 provided that as soon as the Board could begin work, it shall promulgate rules insulating an LSRP's professional judgment from economic pressures to the maximum extent practicable. N.J.A.C. 7:26I-6.23 is the result.

■ 3.3.5 Permanent licenses are for 3 years. They are for individuals, not entities. They are not transferable. (N.J.S.A. 58:10C-10; P.L.2009, c.60 §10). No Person can say he or she is an LSRP without a license. (N.J.S.A. 58:10C-11; P.L.2009, c.60 §11).

◊ 3.3.5(A) Consulting firms employing those who are LSRPs have already had to reconsider some of their past practices for employees who are LSRPs. How will the firm handle its clients who use a particular person as their LSRP when that employee's employment terminates? What do the law and the rules require? (As to records, see this Article § 3.3.4 discussion of N.J.A.C. 7:26I-6.27 above)

○ Who will tell the client, when and how? Note that the LSRP may have duties to do so quickly. Can the LSRP tell the client when he or she is going? Must he or she? Can the firm still proceed with the work and service the client? Can the firm simply have one of its other LSRPs file a new retention form? (likely not; but it may depend on the firm's contract terms). What rights does the client have?

○ What are the LSRP's duties and liabilities? Can the LSRP take the client files with him or her? (Under N.J.A.C. 7:26I-6.27 apparently the LSRP cannot be denied the right to maintain his or her own file [except, perhaps, if the LSRP's decision to do so is itself violative of other principles]). Must the LSRP do so? Can the firm or client prevent this? Limit this? If the record stays behind with a prior employer, how does the LSRP protect his or her own interests? Can the LSRP demand copies years after his or her departure and termination of his or her retention? Can the firm demand copies years from the LSRP prior to or after his or her departure? Does the client have any say? Can the LSRP demand access to the entire file? Even privileged and confidential materials separately maintained? E-mails?

○ Can the firm impose and enforce a restrictive covenant against a former employee LSRP against competition with the firm? Against using records, knowledge, clients or employees to the detriment of the firm? (By way of comparison, restrictive covenants against lawyers are unethical and unenforceable. But not so against engineers and Doctors.) We believe firms have done so. Can the firm require compensation for clients taken by an LSRP to a competing firm for the lost revenues? (As we believe many accounting firms provide.)

○ Can the PRCR obtain extensions of time for remediation due to changes in the LSRP or the LSRP firm, voluntary or involuntary? Delays may be expected by the need to find and replace the expertise and knowledge of the prior LSRP, more so if that experience or expertise is notable or extensive. Further the more complex the file and the site, the longer it will take the new LSRP and team to get up to speed. We believe extensions must be allowed in most such cases, and in the absence of same, DEP enforcement would be unfair, arbitrary and capricious. Further a contrary view increases the risk of bad decisions and error, not only costing clients more but reducing protection to health, safety and the environment, potentially making the search for a replacement LSRP more difficult. In such cases, advance consultation with DEP may be appropriate.

■ 3.3.6 Enforcement.

◊ 3.3.6(A) When the Board, on the basis of available information, finds that a person violated SRRA, or knowingly has made any false statement, representation, or certification in any documents or information required to be submitted to the Board or DEP, the Board can act as follows (N.J.S.A. 58:10C-17.a.(1); P.L.2009, c.60 §17.a.(1)):

○ It can suspend or revoke an LSRP license or otherwise penalize the LSRP under N.J.S.A. 58:10C-17.b.

-See the Board's unreported decision, referenced in the minutes of a Board meeting of November 2, 2015 with respect to Complaint 001-2014, available at http://www.nj.gov/lsrpboard/meetings/20151102_minutes.pdf, in which the Board concluded that an unnamed LSRP violated multiple requirements, resulting in imposition of $12,000 in fines and a suspension.

-- Note: Apparently neither the particular LSRP nor any of his or her clients have been notified of this decision. Consider the issue of adverse effects on clients arising from interim decisions of the LSRP on matters of concern for its clients.

○ It can sue under N.J.S.A. 58:10C-17.c. for appropriate relief, including an injunction and/or costs of investigation and/or litigation.

- "At its August 5, 2013 meeting, the Board authorized the New Jersey Attorney General, Division of Law to pursue a temporary restraining order, monetary penalties and all other appropriate relief in Superior Court against Edward Korab of Thorndale, Pennsylvania. The Board is alleging that

Edward Korab who is not an LSRP, represented himself as such in submissions to the Department of Environmental Protection." See http://www.nj.gov/lsrpboard/board/prof_conduct/case_summaries.html.

○ It can issue an order under N.J.S.A. 58:10C-17.d.: (a) specifying the violation; (b) citing the improper act or omission; (c) requiring compliance; and (d) giving notice of a right to a hearing.

○ It can seek a civil penalty under N.J.S.A. 58:10C-17.e. from any person who violates SRRA, or any rule, regulation, code of conduct, or order adopted or issued pursuant thereto, or who fails to pay a civil penalty or civil administrative penalty in full, upon order of a court, to a civil penalty not to exceed $10,000 for a first violation and not more than $20,000 for every subsequent violation, collectible with costs in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (N.J.S.A. 2A:58-10 et seq.).

-See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/20121121_summary0411.pdf in which the Board concluded that the LSRP violated the provision of the Code of Conduct that requires submittal of a Notice of Retention by a client as an LSRP (N.J.S.A. 58:10C-16d). The Board therefore cited the LSRP for this violation and assessed a penalty against him of $1,000 and reserved the right to require further training.

-See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/20121003_summary2.pdf in which the Board concluded that "the LSRP failed to ensure that the contaminated soil was managed and disposed of in accordance with all applicable rules and regulations regarding the proper disposal of hazardous waste. Accordingly, the Board issued a Notice of Reprimand and a $500 penalty against the LSRP for violating sections 16 a. and b. of the Site Remediation Reform Act Code of Conduct (N.J.S.A. 58:10C-16), which requires every LSRP to hold the protection of public health and the environment as his or her highest priority, and to exercise reasonable care and diligence in the practice of site remediation." (which decision was later challenged and settled by the Board withdrawing only the determination under N.J.S.A. 58:10C-16.b.)

○ It can impose a civil administrative penalty under N.J.S.A. 58:10C-17.f of not more than $10,000 for a first violation and not more than $20,000 for every subsequent violation of the provisions of SRRA) or any rule, regulation, code of conduct, or order after notice (a) identifying the violation; (b) citing the improper act or omission; (c) state the basis for the amount of penalties; and (d) giving notice of a right to a hearing. The Board may assess the costs of any investigation incurred by the Board, and any other State agency, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty.

- Note: Thus the Board can seek to recover DEP and other agency costs of investigation of violations.

○ It can ask the attorney general to bring a criminal action under N.J.S.A. 58:10C-17.a.(2) (which provides that an LSRP who purposely, knowingly, or recklessly violates a provision of SRRA, including making a false statement, representation, or certification, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method, IC or EC, shall be guilty, upon conviction, of a crime of the third degree and shall be subject to a fine of not less than $5,000 nor more than $75,000 per day of violation, or by imprisonment, or both).

○ Note: The powers of the Board arguably are not limited to apply solely to LSRPs, although non-LSRP targets are likely to argue otherwise. N.J.S.A. 58:10C-17 authorizes the Board to act against persons who violate SRRA (which hypothetically could include PRCRs, other persons and entities, non-LSRP consultants and even DEP itself and its personnel). Such an interpretation arguably should deter violations of SRRA. However, it may be rare that the Board will even consider acting against those not licensed by it. See also N.J.A.C. 7:26I-7.3 (which allows any person [including DEP] to file a complaint against any person, not just LSRPs, concerning alleged SRRA violations). See also N.J.S.A. 58:10C-6.a(3) Even if it chooses to act against non-LSRPs is it obvious what SRRA duties can be breached by non-LSRPs as to which the Board can and should assert jurisdiction?

○ Note: The Board at Adoption Response to Comment 81 says: "The Board… does not agree that the SRRA limits the Board's authority to LSRPs."

○ Note: Any person faced with the possibility of a Board, DEP or Attorney General investigation or enforcement should consult with counsel at the earliest possible moment. He or she should consider his or her contractual rights obligations as well (for example, should he or she give prompt notice to his or her client, other PRCRs and counsel?), particularly under contacts, by-laws and insurance policies.

○ Note: While the language does not appear limited to matters within the direct purview of the Board, the Board likely should construe its powers as more limited than the plain words may suggest (and if it does not, a court may so construe SRRA). For example, it may be a violation of SRRA for a PRCR to fail

to pursue remediation actively, or fail to meet mandatory remediation deadlines; however, this situation, and others, would appear to be a violation better left to DEP and the courts as the violation may have little to do with the role of an LSRP and the Board. Certainly an LSRP cannot force his or her client to spend money to remediate (although complaints have been filed against LSRPs that seem to suggest otherwise). While one can imagine circumstance where blame for missing deadlines may fall solely or primarily on an LSRP, we suspect in more instances either the fault will be no one's or will primarily be allocable to the PRCR or others (including as to older complex cases, potentially DEP itself).

○ Note: Obviously the Board can decline to act.

- See e.g. http://www.nj.gov/lsrpboard/board/prof_conduct/20120625_summary3.pdf, http://www.nj.gov/lsrpboard/board/prof_conduct/20121120_summary0112.pdf, http://www.nj.gov/lsrpboard/board/prof_conduct/003A-2012_summary.pdf. http://www.nj.gov/lsrpboard/board/prof_conduct/005CaseSummaryWeb.pdf, http://www.nj.gov/lsrpboard/board/prof_conduct/007-2013shortsummaryforpostingredacted.pdf, and http://www.nj.gov/lsrpboard/board/prof_conduct/006-2013shortsummaryforpostingredacted%20%282%29.pdf (including a discussion of the inability to hold an LSRP responsible for the methods of installing borings used by another company) and http://www.nj.gov/lsrpboard/board/prof_conduct/002-2014summaryforWeb%28Redacted%29.pdf and http://www.nj.gov/lsrpboard/board/prof_conduct/002-2015_summary.pdf (finding that an LSRP did not violate his highest priority by failing to assess IEC issues in that access to the target site had not been obtained).

○ Note: The Board also feels it can act in lesser ways. For example, it can issue warnings or letters of reprimand.

-See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/20120625_summary1.pdf in which the Board warned the LSRP against misstatements concerning the need of a homeowner to use an LSRP and the absence of NFA Letters in such cases, requiring that marketing materials be corrected to avoid misstatements.

-See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/004DEP2013_summary.pdf in which the Board reprimanded an LSRP for discussing a question on the LSRP licensing exam in violation of a non-disclosure agreement. For a copy of the letter of reprimand see http://www.nj.gov/lsrpboard/board/prof_conduct/RaskinLOR.pdf

-See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/001-2013shortsummaryforWeb%28Redacted%29.pdf in which the Board warned an LSRP that, even if it is the PRCR's duty to timely conduct VI sampling, "LSRPs must be vigilant in informing the person responsible for conducting the remediation of applicable timeframes, as well as the consequences and penalties set forth in the relevant statutes and regulations if the timeframes are not achieved".

○ The Board may also pursue a civil action in court seeking penalties and an injunction

- See http://www.nj.gov/lsrpboard/board/prof_conduct/KorabOrder.pdf (a Court order imposing a $250 penalty and enjoining an unlicensed individual from holding himself out as an LSRP).

○ Detailed Board rules have been adopted at 7:26I-7.

- N.J.A.C. 7:26I-7.3 "(a) Any person may file a complaint with the Board alleging that a person has: 1. Violated the SRRA or any rule, regulation, or order adopted or issued pursuant thereto; or 2. Knowingly made any false statement, representation, or certification in any document or information submitted to the Board or the Department." The process begins using the Board's form at www.nj.gov/lsrpboard.

-- It is established that this includes DEP.

- N.J.A.C. 7:26I-7.4: In general, the complaint process appears to function, in some respects, on a "blind" basis. The Board refers the matter to the Professional Conduct Committee who can refer the matter to a Complaint Review Team. The person subject of the complaint is notified of the complaint and asked to make a response. Clearly, each target should seek legal assistance immediately. Thereafter the rights and process of investigation are extensive. On completion of the investigation the Complaint Review Team prepares and submits a report to the Professional Conduct Committee with the identities of the subject of the complaint and the complainant redacted, which shall contain the following information: 1. A summary of the complaint; 2. An opinion as to the validity of the complaint; 3. A statement of the Complaint Review Team's findings of fact; 4. A statement of the Complaint Review Team's findings with respect to any violation(s); and 5. A recommendation, if applicable, as to the type of disciplinary action along with a basis for this recommendation. The Professional Conduct Committee shall review the findings and recommendations of the Complaint Review Team and present the Complaint Review Team's report and its own recommendation to the Board in executive session. In the executive session the Professional Conduct Committee shall not disclose to the Board the identity of the complainant and the subject of the complaint. The Board then reviews the findings and recommendations of the Complaint Review Team and Professional Conduct Committee in executive session. The Board can: "1. Refer the

complaint back to the Professional Conduct Committee for further investigation of specific issues; 2. Determine that no violation has been identified; or 3. Determine that the subject of the complaint has committed one or more violations…, or has knowingly made one or more false statements, representations, or certifications ….[T]he Board may exercise any of the remedies provided by the SRRA or this chapter." The identities of the subject of the complaint and complainant shall remain confidential until the Board makes its determination at which time a summary of the complaint and its disposition shall be made available on the Board website at www.nj.gov/lsrpboard and those involved are informed. At that point if the disposition is that there was a violation and there is a penalty the person so found to have violated will likely be advised of a right to a hearing. N.J.A.C. 7:26I-8 thereafter likely applies and the Board can conduct an adjudicatory hearing, if requested and as provided.

- The concept of a blind/redacted discussion poses interesting questions of proper management of conflicts by members of the Board. Must a Board member of a consulting firm also employing the target of a complaint recuse himself? Must a Board member previously employing the target of a complaint, or previously a partner or shareholder in the same firm, recuse himself? Does the Board staff decide this for the Board Member in advance? Does exclusion of a Board member damage the idea of a blind discussion and review? Must a DEP employee serving on the Board recuse herself if the complainant is also employed by DEP? How is the requirement of a quorum affected?

- In Board Adoption Response to Comment 87 the Board states: "The Board does not specify… whether or not it will publish the names of the complainant and subject of the complaint in the summary of the disposition of a complaint on the Board website. While the Board has established a practice of not publishing these names when the Board dismisses a complaint or makes a finding of no violation, the Board believes that there are circumstances that may warrant an exception to this practice. In order to allow the Board the flexibility to determine, in specific circumstances, whether it should publish names, the Board declines to revise the proposed new rules…."

○ What should a target LSRP and his or her firm do upon receipt of notice of the investigation of a complaint or the imposition of some sanction?

- Retention of counsel is highly advisable.
- As is notice to carriers.
- Notice to clients may be required by relevant contracts or by the facts and circumstances of the matter. Silence may be problematic. But confidentiality of the proceedings should be maintained.
- Dismissal or resignation of the LSRP may be problematic.
- An application for renewal of the target LSRP license may require care to avoid misrepresentations in the application but preservation of confidentiality.
- Adverse determinations should be immediately challenged, if only to preserve flexibility for settlement options.

◊ 3.3.6(B) The Board and DEP can enter, at reasonable times and manner, any known or suspected site or location for the purpose of investigating, sampling, inspecting, or copying any records, condition, equipment, practice, or property relating SRRA activities. They shall seek a warrant upon denial of permission to enter. If they do not wish to provide prior notice to the inspection or entry, a court may issue a warrant upon a showing that the entry is necessary to verify compliance with SRRA. (N.J.S.A. 58:10C-18.a.; P.L.2009, c.60 §18.a.). Where necessary to ascertain facts relevant to, or not available at, a location, any person shall, upon request of any officer, employee, or duly authorized representative of the Board or DEP, furnish information relating to SRRA activities, and permit access to, and to copy, all records relating to same. (N.J.S.A. 58:10C-18.b.; P.L.2009, c.60 §18.b.). Provisions addressing confidentiality or privileges are not included here.

○ Note: It is not clear what limits apply to the kinds of sites the Board can enter. In general the government cannot enter any place it wants at any time without a warrant, just cause and/or a regulatory basis that itself is justifiable. Our constitutions regulate warrantless searches. Can the Board enter any site under remediation? A site the subject of a complaint that there is an IEC, allegedly improperly addressed by an LSRP, to assess if an IEC does exist (for example, to assess if there is any chronic exposure in fact)? A neighboring site? An LSRP's home? An LSRP's accountant's office? An LSRP's doctor's office? An LSRP's lawyer's office? A PRCR's or client's corporate headquarters? A PRCR's or client's lawyer's office? The restaurant where the lawyers of the PRCR, LSRP, site owner and site tenant all met, or hereafter meet, to discuss the site remediation, DEP demands, threats of litigation, litigation strategies or the complaint? A neighboring site inspected by the LSRP? The offices of the internet server on which the LSRPs audit client's computerized data is maintained? Hypotheticals aside, realistically, what will be the most likely targets for entry? (Sites or locations of PRCRs, LSRPs,

contamination, or relevant records or operations subject to regulation). Are all fair game? The Board can be expected eventually to seek access to such sites, if only to inspect or seize records. But are there any limits to this Board power? Yes. But most likely reason will govern (and if not judicial intervention will be more likely possible and available).

○ Note: Let's talk about lawyers. Do these powers permit the Board to enter a law firm and inspect records of actual or suspected LSRP or non-LSRP or PRCR or attorney: actions; drafts; reports on site conditions, projects or plans; research; memos; bills; meeting or call notes; e-mails; contracts; or other matters, even if privileged? Perhaps there are circumstances in which the Board could obtain a warrant for such an entry. Those circumstances more likely will involve accusations of collusion between the lawyer and the LSRP or PRCR, allegedly acting consciously together to violate SRRA: but even with such allegations there may be legitimate issues both of SRRA's interpretation and effect and the separate protection of attorney-client privilege requiring judicial intervention. One would hope that the Board would seek to intrude on such separate interests only rarely, if ever. But if ever the Board does so, one would expect a lawyer to resist any such efforts directed against him or her, vigorously and at least force a court to consider claims of privilege, or seek client consent or waiver of that privilege, before turning over privileged information. Are lawyer's clients entitled to less? Don't lawyers have separate ethical and professional duties to do so? Is not the practice of law constitutionally regulated by the Supreme Court and not the legislature (or DEP or Board)? Will not the courts expect that its licensed professionals zealously protect the confidentiality of client information subject to attorney-client privileges? Still, one day such a demand seems likely to happen. Unfortunately the ARRCS Rule at N.J.A.C. 7:26C-2.5(a) and the Board's new rules at N.J.A.C. 7:26I-6.27 expressly requires PRCR preservation of attorney papers "that relate in any way to the contamination at the site" (seemingly thereby asserting jurisdiction over attorney papers without regard to attorney-client and work-product privileges). The rules allow that DEP and the Board can demand to see same, at least to the extent the PRCR does not assert privilege "except that no claim of confidentiality or privilege may be asserted with respect to any data related to site conditions, sampling or monitoring". This suggests the possibility of a future confrontation between PRCRs and their counsel and DEP, and perhaps the Board.

◊ Note: It is usually ruled that delivery of documents or records subject to a stated reservation of a right to assert privilege does not preserve the privilege sought to be preserved. If DEP or the Board seek legitimately privileged and confidential materials, likely excluding sampling data, client and counsel should seek judicial protection. Counsel to PRCRs may need to educate clients in advance so that the privilege is not inadvertently waived.

◊ 3.3.6(C) If the Board or DEP believes that any person has made fraudulent representations to them, or has destroyed or concealed evidence relating to SRRA, they may seize any records, equipment, property, or other evidence associated with these. (N.J.S.A. 58:10C-18.c.; P.L.2009, c.60 §18.c.).

○ Note: Similar privilege issues arise as previously discussed.

○ In the4 face of such accusations can a non-target LSRP safely continue to associate with the accused?

◊ 3.3.6(D) If the Board finds a violation it may issue an order to a person causing or contributing (or likely to contribute) to the violation, requiring the production or analysis of samples, records, or imposing such restraints on or requiring such action. The Board shall cause notice of each order, and of the results of proceedings, to be given to the DEP in order to enable DEP to implement any Law(s). (N.J.S.A. 58:10C-18.d.; P.L.2009, c.60 §18.d.). See also N.J.A.C. 7:26I-7.

◊ 3.3.6(E) Should the Board initiate enforcement, even in response to DEP or third party complaint, in every case when an LSRP fails to induce its client to full compliance? Is such the LSRP's fault? No. Indeed, we think the Board would do well to clarify for LSRPs, DEP and PRCRs that the LSRP cannot be held responsible for client breaches if he or she has timely passed along DEP requirements to a PRCR. It is the PRCR decisions, indecision, delays, lack of resources, interpretations or disagreements that prevent the LSRP from meeting DEP demands. LSRPs we know are worried about such circumstances; we suspect at least one complaint to the Board involves such issues. We believe DEP cannot and should not expect LSRPs to act when their PRCRs will not allow or pay them to act. That then raises the issue of when the PRCR's actions or omissions rise to a level that requires an LSRP to resign, if ever. We do not believe that it serves any legitimate goal of the LSRP or the Board to compel early resignation by an LSRP leaving the PRCR without a licensed advisor who can and should advocate compliance. Other solutions can be found.

- ○ The Board itself, however, seems to disagree. See Board Adoption Response to Comment 51, discussed above at this Article § 3.4.2(D).

■ 3.3.7 The Board shall audit annually the submissions and conduct of at least 10 percent of the total number of LSRPs. An LSRP and PRCR shall cooperate with the Board in any audit and shall provide any information requested for an audit. (N.J.S.A. 58:10C-24; P.L.2009, c.60 §24.). See also N.J.A.C. 7:26I-5

◊ Note: As there are now about 600 LSRPs this would mean that 60+ of them should be audited each year. A number of audits have been successfully concluded. This audit provision does not require audits of 10% of all submissions of all LSRPs.

◊ Some observations:

○ The identity of those being audited is not disclosed.

○ Audits of LSRPs other than Board members are conducted by an Audit Review Team for each month consisting of two or more Board members (self certified to be free of conflicts), including at least one Board member who is not an LSRP and at least one Board member who is an LSRP.

○ The audit begins with a notice for the audited LSRP to complete a questionnaire (see www.nj.gov/lsrpboard,) and submit it within 30 days.

○ The audit review team can seek information from DEP and others.

○ The audit review team reviews submissions and conduct to: "1. Evaluate the LSRP's compliance with the SRRA and any rule, regulation, or order adopted or issued pursuant thereto; and 2. Determine that the LSRP has not knowingly made any false statement, representation, or certification in any document or information submitted to the Board or the Department." N.J.A.C. 7:26I-5.4(i).

○ The audit review team reports to the audit committee which in turn reports to the Board. A recommendation of further investigation of deficiencies may result in a referral to the Board's Professional Conduct Committee, which shall convene a Complaint Review Team to commence an investigation pursuant to N.J.A.C. 7:26I-7.5.

○ There will be at least 24 months after a successful audit of an LSRP before the next audit of that LSRP.

◊ Note: The consequences of a poor audit on a prior transaction or remediation are not clear, absent reversal of a decision of the LSRP.

◊ Note: The Board reported completion of about 96 audits as of the date this article was in preparation (2/1/2014). See http://www.nj.gov/lsrpboard/board/audit/audit_results.html.

■ 3.3.8 DEP may recommend to the Board that an investigation of an LSRP be conducted based upon the result of a DEP audit or a document review. (N.J.S.A. 58:10C-23; P.L.2009, c.60 §23.)

◊ This option differs from the right of DEP to file a complaint.

■ 3.3.9 Other notable provisions of the Board's rule proposal include the following.

◊ N.J.A.C. 7:26I-1.3:" 'Promptly' means by the date by which the Board or the Department requests a response or, if no such date is given, as soon as possible, not to exceed seven days."

○ Why is seven days a reasonable period within which to require a response? Are there circumstances (such as an illness or vacation; time period, breadth or complexity of the request or issues) that may justify a longer period? The Board considers an objection to this definition at its Adoption Response to Comment 13, in our view unhelpfully, and adopts this period as the default period.

● 3.4 LSRP Role & Responsibilities:

■ 3.4.1 It appears that SRRA intends that LSRPs must be used by PRCRs for New Jersey remediations of any known, suspected, or threatened discharges of contaminants, at least in most cases. (N.J.S.A. 58:10B-1.3; P.L.2009, c.60, §30). The LSRP shall certify as part of its preparation and submission of reports to DEP that "the work was performed, … [the LSRP] managed, supervised, or performed the work that is the basis of the submission, and the work and submitted documents are consistent with all applicable remediation requirements adopted by… [DEP]." (N.J.S.A. 58:10C-14.a.; P.L.2009, c.60 §14.a.). The LSRP also shall certify electronic submissions and attest that "no other person is authorized or able to use any password, encryption method or electronic signature provided to…" the LSRP by the Board or DEP. (N.J.S.A. 58:10C-14.b.; P.L.2009, c.60 §14.b.). See also N.J.A.C. 7:26E-1.6(a)(2).

◊ When required to use an LSRP, the PRCR also shall certify all documents submitted to DEP by the LSRP (N.J.S.A. 58:10C-14.a.; P.L.2009, c.60 §14.a.). See also N.J.A.C. 7:26E-1.6.

◊ Note: Is it clear, as used here, when a PRCR initiates remediation and therefore is obligated to use an LSRP? The definition of remediation (N.J.S.A. 58:10C-2) includes "…necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action…." Perhaps there are steps that involve investigation or cleanup that are not needed to address areas exceeding standards. Consider, for example: construction in areas subject to EC or IC (if a disturbance of the EC and IC is involved, it appears in 2015 that DEP is sure that an LSRP should be involved: but if a municipality repairs a subsurface sewer line in a deed restricted area without LSRP involvement, whose violation is it?)? Consider construction in areas of historic fill? Work in areas affected by migration of offsite contaminants onto a site (does the so-called defense to liability mean that such work cannot be remediation by a PRCR requiring use of an LSRP)? Work (including sampling) by or for banks evaluating loans or foreclosure (is such a purchaser conducting all appropriate inquiry)? Work by easement holders (not owners of the real estate proper)? Work by government bodies (considering street construction, tax foreclosure, site redevelopment, or property condemnation)? Compliance or pre-sale investigations (for example, to assess if a berm on a hazardous waste storage area has been compromised or if a former orchard area to house new construction has pesticide contamination, or whether a downspout allowed accumulation of contaminants, or whether a sewer line leak, real or suspected, left contamination)? What if an affiliated entity, but not a site owner, conducts the investigation? Given the breadth of the language, absent clear guidance otherwise by DEP, a decision not to use LSRPs for most of the foregoing may pose risks, although we suspect that in most cases, absent prior evidence of a discharge, if data shows a discharge, it is reported and an LSRP is retained for further work, the risk of enforcement by DEP will be low, at least under current priorities.

○ N.J.S.A. 58:10C-2 provides: "'Contamination' or 'contaminant' means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c.141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c.99 (C.13:1E-38), or pollutant as defined pursuant to section 3 of P.L.1977, c.74 (C.58:10A-3)." Thus the requirement for use of LSRPs is not limited to remediation of discharges of hazardous substances or hazardous wastes: it extends to remediations of pollutants.

○ The definition of discharge includes releases into land or waters. N.J.S.A. 58:10C-2. So remediation of a discharge into a river should require use of an LSRP.

○ Note: It is not clear to us if and when a non-LSRP can conduct an investigation arguably falling within the definition of "remediation" and when it cannot. Consider: is a non-LSRP in violation of SRRA if it samples for vapor intrusion? What if a potential IEC is identified? Arguments can be made that sampling of known discharges (outside of a buyer's or the like's due diligence/all appropriate inquiry) should ordinarily require use of an LSRP. But counter-arguments (potentially weak in view of the definitions) can also be made that if either there is no known discharge being investigated or the person or entity conducting the investigation is not before then a PRCR (as it arguably should not be viewed as becoming one simply by sampling), use of an LSRP is not mandated. There may be other arguments and other similar circumstances. In this regard consider: the Board at its Adoption Response to Comment 63 said: "The Department, not the Board, regulates when a party must use an LSRP." We are not aware of any clear statement by the DEP, or the Board, as yet as to the existence of a breach of SRRA by the conduct of remediation by non-LSRPs (particularly in the face of instances of remediation by non-LSRPs known to both DEP and the Board). But do not be surprised by a future statement of position by DEP that the rules and statutes as now written are clear enough.

○ Note: It may be advisable that if a person learns of an environmental problem or condition and files a document or a report with DEP by reason of same, the filing or report should explain any basis under which the filer believes it or its client is not liable as a PRCR for remediation of the discovered problems (and if a non-LSRP conducted the work, why that was appropriate). This might be, for example, because the filer is (i) an LSRP complying with its duties, (ii) a person seeking to preserve innocent purchaser defenses, or (iii) a stranger to the property, including a neighbor, a potential buyer or a potential lender. Other arguments may be possible.

○ Previously, LSRPs and PRCRs have been comfortable in using DEP forms and marking them up, or adding to them, where and as necessary to correct errors, omissions, add supplements and explanations, and make their use more true, accurate and complete. As DEP increases its use of true electronic forms and deliverables, filed only through the gateway, usually without ability to include an attachment or make alterations, it remains to be seen whether this practice will be possible, or continue, cease, be encouraged or discouraged, and how such changes, or their absence, will increase the stress presented by use of electronic websites and deliverables, particularly if the form provides limited or inadequate choices, denies the ability to explain, and

sometimes is simply wrong. It is to be hoped that at least individual explanations and supplementary submissions will and must be allowed and tolerated, as experience has shown that DEP has not in fact yet been able to address every possibility in its forms. Further the inability to provide such may result in submissions that are inaccurate and incomplete through no fault of the submitter and arguably solely at the fault of DEP (and therefore in our view with limited to no liability on the filer dealing with a defective form imposed on the filer). In our view all forms should permit the inclusion of electronic attachments, without which we are prepared to argue in court, as a matter of law, constitutional requirement and equity, that the forms are essentially contracts of adhesions and unenforceable to the extent they impermissibly deny the ability to provide supplementary or explanatory materials, rendering the certification null, void, and unenforceable. In general, if a form is believed to be so inaccurate, we recommend that the submitting LSRP or PRCR should consider sending a clarifying separate statement (if possible notating the fact of the separate submission somewhere in the electronically submitted form [e.g., in any text field that allows the notation, even if irrelevant to the issue] to refer to that separate filing) in the belief that DEP cannot properly ignore information that comes into its possession in other ways, even if it in fact does, or fails to file same, or even discards same, and that eventually the courts will rule that the use of an electronic gateway, while convenient, cannot be such as to permit NJDEP to force LSRPs or PRCRs to deliver inaccurate or incomplete information and then punish those so forced for errors and omissions resulting from the absence of viable alternatives. At a minimum constitutional principles (e.g., fundamental fairness and due process), in our view, require more of our government (e.g., DEP).

○ Note: Updated PA guidance, relevant to the all appropriate inquiry and innocent purchaser defenses, is available at http://www.nj.gov/dep/srp/guidance/srra/pa_soils_guidance.pdf.

◊ It appears that DEP recognizes the need of the LSRP to authorize some activities formerly subject to DEP prior review and approval as part of permit approval processes. For example, Freshwater General Permit 4 authorizes certain Hazardous site investigation and cleanup activities, previously dependent on DEP review and approval of those activities for remediation, but now modified to authorize "activities in freshwater wetlands, transition areas, and State open waters, which are undertaken by the Department or expressly approved pursuant to the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C", thereby arguably allowing an LSRP some power to approve work in wetlands. See N.J.A.C. 7:7A-5.4. Also the ground water discharge permit by rule for remediation and the exemption from need for a groundwater discharge permit for stormwater discharges where recharge would be inconsistent with DEP approved remedial action work plans now similarly references work under and in accordance with N.J.A.C. 26E or 7:26C. See N.J.A.C. 7:14A-7.5(a)(4) ("Discharges to ground water from activities associated with the installation, development and sampling of monitoring wells in accordance with a NJPDES permit or, for activities not included in a NJPDES permit, in accordance with the Technical Requirements for Site Remediation, including, but not limited to, the requirements of N.J.A.C. 7:26E-3.7(c)2 and 6.4(d)3") and N.J.A.C. 7:14A-7.4(a)5(ii).") It is to be hoped that more such revisions are made and interpreted hereafter to further allow the LSRP to expedite work for remediation.

○ In our view, though, we find it ironic that various other remedial decisions (such as for injections to treat contamination) and permits (such as RAPs and RIPWs) require DEP involvement, often slowing down remedial processes and business transactions. If LSRPs have the authority and skill to issue RAOs, it is difficult to understand why they cannot handle these and other matters. DEP should reconsider and expand the ability of LSRPs to act under such and similar programs and permits. This would expedite cleanups and reduce costs, with minimal risk.

■ 3.4.2 In providing remediation services SRRA and the new Board adoption of N.J.A.C. 7:26I specify a "Code of Conduct" to be followed by LSRPs:

◊ 3.4.2(A) An LSRP shall make decisions to meet: health risk and environmental standards under N.J.S.A. 58:10B-12, DEP remediation standards, and DOH indoor air standards under N.J.S.A. 52:27D-130.4 as applicable, and other standards under Law(s). (N.J.S.A. 58:10C-12.c.(1); P.L.2009, c.60 §14.c.(1)). Indeed, an LSRP's "highest priority shall be the protection of public health and safety and the environment." (N.J.S.A. 58:10C-16.a.; P.L.2009, c.60 §16.a.). See also N.J.A.C. 7:26I-6.2.

○ We note that it is not clear how this should be interpreted in the face of detailed and prescriptive DEP rules and guidance. For example, if an LSRP follows DEP vapor intrusion guidance and determines that there is no IEC, but others disagree or question his or her view, has the LSRP satisfied all his or her duties by complying with DEP rules and guidance? Or must he or she do more? We would argue that compliance with DEP rules and guidances satisfies the LSRP's duties unless, perhaps, there is clear and convincing evidence of an actual threat. We do not feel, for example, that mere allegations by others (such as neighbors;

municipalities; adverse parties, or non-LSRPs, without credible support assembled in a manner consistent with DEP rules and guidance, requires repetitive reexaminations of supportable LSRP conclusions. We admit, however, concern when dueling LSRPs disagree about IECs.)

○ Note: This statement of the LSRP's highest priority is likely to become the critical guideline for future behavior of LSRPs, PRCRs and their advisors, and changing past behaviors of consultants and PRCRs, as well as future assessment of deviations. It is to be expected that most complaints against LSRPs before the Board will claim a violation of this duty. In particular this high standard negates (or weakens) the use of many previously significant factors to consultants and others (such as PRCR's lawyers) as the highest priorities for remediation, at least for LSRPs. Consider how important the LSRP should rate the following, in the event of a conflict with this new SRRA stated priority: attorney-client or other privileges; trade secret, contractual or other confidentiality; costs, prices, rates, estimates, projections, budgets, account balances, costs or profit; vacations, holidays, weekends, timing or schedules; quality or uncertainty of or in data, processes or results; contract terms or conditions; client or PRCR or attorney or neighbor or municipal review, instructions or approvals; potential bankruptcy; or DEP guidance? But consider whether in every case it will be clear whether or not an LSRP has met or failed this duty, and if failed, what reasonably the LSRP should have done to meet the standard? Should he or she have: resigned? Notified the PRCR or other PRCR officials or the PRCR counsel or Board of Directors? Notified DEP? Notify the Board? Sue? Write e-mails, letters or memos? Pay for work himself or herself? And as to all the foregoing, when? In what order?

- Consider: is an LSRP's compliance with, or satisfaction, of the standards and procedures set forth in DEP rules and guidance automatically full and complete satisfaction of the LSRP's highest duty? Is it protection against third party (or DEP) claims that an LSRP has failed to meet its highest priority? We believe that there may be facts and circumstances that may require an LSRP to consider weak and unsupported suspicions or accusations of third parties, assuming they are credible, even if not based on work consistent with or meeting DEP requirements. In such facts and circumstances it may be that the LSRP cannot do nothing, even in the absence of a clear requirement under those rules or guidance to do anything or more. Conversely, we feel equally that mere third-party accusations and suspicions, particularly when provided by sources not credible, whether for technical reasons (e.g., the foundational work or data is missing or unreliable), or other reasons (the complainant is a known adversary of the LSRP's client, perhaps claiming damages and threatening litigation, and obviously seeking to manipulate the LSRP and PRCR into expensive work), may be relatively easily dismissed by the LSRP, no matter how strident or seemingly supported by some data or work (at least when not conducted by an LSRP or in accordance with DEP guidance and rules). In our view context counts.

○ Note that this duty may be equivalent to similar duties imposed on other licensed professionals, such as professional engineers ("PE"). A PE, for example, likely cannot rely on simple compliance with applicable building codes, even if reviewed by a government official, as sufficient to avoid the need to design added safeguards if the PE concludes that more is needed to protect those using the equipment or building so designed and used. However, there is no similar statutory or regulatory statement of a PE's highest priority in N.J.S.A. 45:1-1 et seq. or N.J.S.A. 45:8-1 et seq. as exists for LSRPs. The closest PE analog is that it is misconduct for a PE to "[d]isregard… the safety, health and welfare of the public in the performance of his or her professional duties: preparing or signing and sealing plans, surveys or specifications which are not of a safe design and/or not in conformity with accepted standards. If the client or employer insists on such conduct, the licensee shall notify the proper authorities and withdraw from further service on the project." See N.J.A.C. §13:40-3.5.

◊ 3.4.2(B) An LSRP shall meet DEP requirements. N.J.A.C. 7:26I-6.3: "An LSRP shall know and apply the applicable statutes, rules, regulations, and appropriate technical guidance concerning the remediation of contaminated sites…." "An LSRP shall apply any available and appropriate technical guidance concerning site remediation as issued by the Department." "An LSRP shall exercise reasonable care and diligence, and shall apply the knowledge and skill ordinarily exercised by LSRPs in good standing practicing in the State at the time the services are performed." "An LSRP shall not provide professional services outside his or her areas of professional competence, unless the LSRP has relied upon the technical assistance of another professional whom the LSRP has reasonably determined to be qualified by education, training, and experience."

○ These include technical standards for remediation; mandatory timeframes and expedited site specific timeframes under N.J.S.A. 58:10C-28; and presumptive remedies. (N.J.S.A. 58:10C-14.c.(2); P.L.2009, c.60 §14.c.(2)). See N.J.A.C. 7:26I-6.3. See also regulatory timeframes pursuant to N.J.A.C. 7:26C-3.2, mandatory remediation timeframes pursuant to N.J.A.C. 7:26C-3.3 and expedited site specific remediation timeframes pursuant to N.J.A.C. 7:26C-3.4, as extended pursuant to N.J.A.C. 7:26C-3.5. For DEP's summary of

deadlines see http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf. Does it make an LSRP obligated for other regulatory requirements (such as CAFRA or Wetlands)?

- We would expect over time that LSRPs will more often and more routinely seek and consider the advice of a range of experts with competencies and expertise beyond their own. For example, in considering various IEC issues it may be necessary or advisable to consult with both vapor intrusion specialists and toxicologists. (Absent such expert assistance, can an LSRP determine what advice to give a homeowner, either as a precaution or in response to an inquiry, about risk to the residents from a power outage during a storm resulting in cessation of the relevant fan and increasing CVOC concentrations, unless the advice given can be, as perhaps it can, for the residents to simply stay out of the affected portion of the house, or to leave a window open during any outage, or to leave the house immediately.)

- We also think this provision supports the practice of many PRCRs to split sites and AOCs among different LSRPs, each perhaps with his or her own expertise, experience and competence, each expected to issue his or her own RAO for the matters for which he or she is responsible. See also this Article §3.7.3(E).

- Note: It is unclear how the LSRP is responsible (and must act) to meet these requirements, including time periods, in all cases. Often circumstances will be outside his or her control. There are many circumstances where client or PRCR or third party behaviors and resources may be determinative of the approach and the results (including, for example, the payment by an insurer for such work: it is too glib to say, in our view, that an insured should proceed using its own resources, because such may prejudice recourse from an insurer or others). Contrary to seeming views of DEP and the Board otherwise, an LSRP cannot force the PRCR to act; an LSRP cannot trespass onto a site against an owner's objections; SRRA imposes no obligation on an LSRP to pay the PRCR's contractors in order to meet deadlines or correct deficiencies; an LSRP should not be seen as an insurer or guarantor of the remedial process or result, or even compliance, except for his or her own actions (and those supervised by the LSRP); an LSRP cannot make decisions for the client (such as whether to landfill, recycle or incinerate wastes). Presumably an LSRP is responsible to act so as to recommend approaches that can achieve the required results, when possible, and undertake his or her own efforts so as to improve the probabilities of success in doing so. An LSRP may be obligated to inform and advise its client, including as to DEP positions if known. But presumably an LSRP does not have to work at little or no pay, as lawyers sometimes must, in order to help satisfy these obligations. (Or do they? Under any circumstances? We do not yet know the limits of professional obligations of LSRPs, but nothing in the Board's proposed rules suggest that LSRPs are liable to subsidize work for their clients. If there is an IEC, does the answer change?). And if the client is, by its decisions, preventing an LSRP from satisfying one or more of these obligations, does the LSRP have to resign, as lawyers sometimes must? Can an LSRP narrow responsibility by working on a part of the Site (say an IEC) and not the balance? Can an LSRP have narrowed responsibility by having been retained for one AOC and not others? And if the LSRP does resign, can he or she or his or her firm, or both, continue to work for the PRCR with respect to the site in other capacities (or might such be seen as aiding and abetting a violation of law)? What about for the same PRCR at other sites? Conversely are there circumstances when he or she cannot resign, as lawyers sometimes cannot (e.g., if the LSRP is owed money but immediate work is needed to address an IEC?)? Can an LSRP stop work, but not resign? And if an LSRP has ceased work for a PRCR because of such concerns, thereafter can a new LSRP accept the position of working on that site when DEP requirements may not, or cannot, be able to be met? (and even if he or she can, will he or she do so? And if not, what has DEP gained other than another site not being remediated at all and an enforcement option that previously it has hesitated to use?) As a newborn profession, only time and experience will permit answers to many of these issues to become apparent.

- For a contrary view on the LSRP's duties to correct deficiencies see N.J.A.C. 7:26I-6.6 and the Board's Adoption Response to Comment 51, discussed at this Article §3.4.2(D).

○ There is already substantial available and appropriate DEP technical guidance. See http://www.state.nj.us/dep/srp/guidance/. More guidance arrives every year, and more is likely. SRRA provides that DEP is to allow interested parties the opportunity to participate in development and review of such guidance. (N.J.S.A. 58:10C-14.c.(3); P.L.2009, c.60 §14.c.(3)). DEP has done so and is doing so.

- Although DEP seems not to agree, we believe that post-SRRA legislation provides some limits on the promulgation of DEP guidance other than by formal rulemaking under the Administrative Procedures Act. See N.J.S.A. 52:14B-3a.c.: "A regulatory guidance document that has not been adopted as a rule…, shall not: (1) impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain; or (2) be used by the State agency as a substitute for the State or federal law or rule for enforcement purposes." This legislation expressly does

not limit DEP use of statutorily authorized technical manuals; but, in our view, it does apply to SRRA guidance documents. The effect of this legislation remains the same.

○ As noted, an LSRP shall "exercise reasonable care and diligence", applying "the knowledge and skill ordinarily exercised" by LSRPs (likely to be viewed as a highly qualified and experienced group). (N.J.S.A. 58:10C-16.b.; P.L.2009, c.60 §16.b. and N.J.A.C. 7:26I-6.3).

- Note: Is "reasonable care and diligence" different from "professional judgment?" We think so.

- Note: This, and other standards, do not require that every LSRP provide the care, diligence and judgment customarily applied by the very best of the profession, or even by any one or more LSRP members of the Board (such being a subjective standard). In our view the standard is objective- not any one or several particular LSRPs or group, but rather the hypothetical reasonably skilled and prudent LSRP.

◊ 3.4.2(C) N.J.A.C. 7:26I-6.4: An LSRP is not a PE. Of course, some LSRPs will be separately licensed as PEs.

◊ 3.4.2(D) N.J.A.C. 7:26I-6.6: "An LSRP shall, in accordance with timeframes the Department establishes, correct any deficiency the Department identifies and resubmit the document to the Department."

- Although it may be implicit, we believe this language should be construed to exclude from LSRP duties obligations to correct deficiencies of or by reason of actions or omissions of the PRCR/client which are not within the power or responsibility of the LSRP to correct. For example, this language should not obligate the PRCR to pay DEP fees, or pay for contractors to excavate materials or install a vapor mitigation system, or sue a neighbor for access. Only the PRCR is responsible for such.

- However, we note that the Board, faced with a similar comment, declined to make a change in its Adoption Response to Comment 51: "The SRRA identifies who has the responsibility to correct deficiencies within particular regulatory timeframes. N.J.S.A. 58:10C-16.e, which is the statutory basis for N.J.A.C. 7:26I-6.6, states: 'A licensed site remediation professional **and** the person responsible for conducting the remediation shall correct any deficiency the department identifies in a document submitted concerning a remediation. The deficiency shall be corrected in accordance with timeframes established by the department' (emphasis added). Thus it is clear that N.J.S.A. 58:10C-16.e requires both the LSRP and the person responsible for conducting the remediation to correct any deficiency the Department identifies." For that reason and to that extent we would argue the rule and statute to be invalid if applied in such an arbitrary, capricious and unreasonable manner (i.e., requiring the LSRP to correct a defect resulting from PRCR decisions and application of PRCR resources, or requiring the LSRP to expend personal resources notwithstanding the absence of PRCR resources for the LSRP to so proceed [for example in the event of PRCR recalcitrance or bankruptcy]). But in the face of such a decision can the LSRP safely continue as the PRCR's LSRP? Perhaps not.

◊ 3.4.2(E) N.J.A.C. 7:26I-6.7: An LSRP may complete work of prior LSRPs if he or she reviews all documentation on which he or she relies, conducts a site visit to observe current conditions and the status of observable work, and concludes he has enough information to complete the work and prepare related workplans and reports. An LSRP must correct all deficiencies in prior work, not just those identified by DEP, and not just those of a prior LSRP. An LSRP who "learns of material facts, data, or other information concerning any phase of the remediation… not disclosed in … [a submitted] report, shall promptly notify the LSRP's client and the Department in writing of those material facts, data, or other information and circumstances."

- Note: Does this duty (to correct deficiencies of all) impose on the LSRP a higher level of malpractice exposure and liability? Or is it simply a statement that an LSRP who learns of a deficiency cannot ignore it? Hopefully for LSRPs, the latter.

◊ 3.4.2(F) N.J.A.C. 7:26I-6.8: An LSRP shall exercise independent professional judgment and comply with SRRA. An LSRP shall notify the PRCR, in writing, and DEP, if a deadline is not likely to be met. An LSRP shall make a good faith and reasonable effort to identify and obtain the relevant and material facts, data, reports, and other information evidencing conditions at a contaminated site that are in the possession of the owner, DEP, or that are otherwise available, and identify and obtain whatever additional data and other information as the LSRP deems necessary. An LSRP shall disclose and explain in any document submitted to DEP any facts, data, information, qualifications, or limitations the LSRP knows that do not support the conclusions.

○ Note: In the Board's Adoption Response to Comment 56, the Board declined to provide any further definition or guidance as to what constitutes the exercise of independent professional judgment. We feel this was a missed opportunity of the Board to assist LSRPs and others understand what is required of LSRPs.

○ Note: The LSRP's duty to report such to DEP is another instance where the LSRP loyalties are not primarily to its client.

○ Note: The duty to exercise independent judgment is not clear as to the universe from whose different judgments the LSRP must be independent. Is it so clear that the judgments should be independent only of its client or PRCR, as we suspect DEP intends to read the provision? Might it also be a requirement to be independent of the Board, DEP and other LSRPs and consultants?

○ N.J.A.C. 7:26C-1.2 provides the hierarchy for LSRP decision making on remediation:

1. All applicable New Jersey statutes, including: i. The health risk and environmental standards under N.J.S.A. 58:10B-12; and ii. DOH indoor air standards pursuant to N.J.S.A. 52:27D-130.4;

2. All applicable New Jersey rules, including, i. the ARRCS Rule; ii. the Tech Rule; iii. Remediation Standards rules at N.J.A.C. 7:26D; and iv. Any other applicable standards adopted pursuant to law; and

3. Any available and appropriate DEP technical guidance concerning site remediation. See www.nj.gov/dep/srp/srra/guidance. When there is no specific DEP technical guidance or in the judgment of an LSRP DEP guidance is "inappropriate or unnecessary to meet the remediation requirements of law and rules, the LSRP may use the following additional guidance, provided that the person includes in the appropriate report a written rationale concerning, and justifies the use of the guidance or methods that were utilized: i. Any relevant USEPA or other state guidance; and ii. Any other relevant, applicable, and appropriate methods and practices to ensure the protection of the public health and safety, and of the environment.

○ The foregoing generally comports with SRRA. (N.J.S.A. 58:10C-14.c.(4); P.L.2009, c.60 §14.c.(4)). Presumably under the last source of N.J.A.C. 7:26C-1.2, the approaches of other professional organizations and groups, and perhaps even generally accepted professional practices in New Jersey, are potentially relevant.

- Note: Where DEP guidance exists, but is ambiguous, inconsistent or inconclusive, as experience suggests sometimes is the case, must, can or should the LSRP exercise professional judgment to deal with the uncertainty? Or can he or she simply do what DEP allows or requires, either without judgment or despite it? And regardless of power, how will the "average" LSRP (who may be an exceptional individual and consultant) act? How much thought will be given by each LSRP to acting to preserve his or her license and reputation against attack by DEP, the Board or others?

- Note the absence of any express place in the hierarchy for past DEP decisions (such as NFA Letters). We would argue (indeed in some cases it legally must be the case) that such automatically have either or both the force of applicable law or rules or constitute relevant technical guidance. Certainly they are not to be simply ignored or dismissed, simply because they are old or prior to SRRA: SRRA did not, and could not, so provide.

○ An LSRP "shall exercise independent professional judgment, comply with [SRRA], … make reasonable effort to identify and obtain the relevant and material facts, data, reports and other information evidencing conditions … that is in possession of the owner of the property, or that is otherwise available, and identify and obtain whatever additional data and other information as the… [LSRP] deems necessary." (N.J.S.A. 58:10C-16.i.; P.L.2009, c.60 §16.i. and N.J.A.C. 7:26I-6.8). Thus an LSRP is not entitled to rely solely on what he or she is told, even by the client or its lawyer..

○ An LSRP shall not provide professional services outside areas of professional competency unless relying on other qualified professionals (including not to function as a professional engineer unless so licensed) (N.J.S.A. 58:10C-16.c.; P.L.2009, c.60 §16.c. and N.J.A.C. 7:26I-6.3). See earlier comments on legal issues within the professional competence of licensed lawyers.

◊ 3.4.2(G) An LSRP shall disclose or report:

○ An LSRP shall explain in documents submitted to DEP, any facts, data, information, qualifications or limitations known by the LSRP that are not supportive of conclusions in the document. (N.J.S.A. 58:10C-16.i.; P.L.2009, c.60 §16.i. and N.J.A.C. 7:26I-6.8).

- Note: Does this obligation require the LSRP to know and provide information given to it or its staff in confidence by others? Or given hypothetically? Does it matter if the non-supportive information is from hostile third parties or is mere rumor or conjecture or accusation, unsupported, contradicted or speculative? What if it is inconsistent with prior information, collected more consistently with DEP requirements, or is otherwise believed or determined to be wrong or untrue? What if it was assembled by another party's consultant, and presented uncertified and without appropriate planning (e.g., to eliminate or document background issues), without all (or any) required documentation, and without LSRP supervision and involvement, perhaps in context apparently to complicate the effort by the PRCR and LSRP to proceed before DEP, or perhaps for litigation purposes prepared at the direction of counsel, or perhaps isolated from other client LSRPs by those conducting the work for that client? Further, given DEP's obligation to post reports on the internet (under Governor Corzine's order made on SRRA's approval), how will confidentiality of client information be maintained (by non-submittal? By submittal of redacted copies? By assertions of confidentiality?) The answer likely depends on all the facts and circumstances, but undoubtedly it will be more risky for an LSRP to safely withhold any arguably relevant information from DEP and the Board than perhaps has been the case to date in such and other circumstances before DEP. The clause addresses both data and information, for example: this may support an interpretation that SRRA imposes an obligation to deal with suspicions and subjective information as well as objective data.

- Note: Lawyers are already under similar duties. See RPC 3.3; RPC 4.1.

○ Issue: Should the existence of dueling (or differing or adversarial) LSRP views be expressly disclosed or addressed to or before DEP? Arguably yes. Consider N.J.A.C. 7:26I-6.13 discussed at this Article §3.3.4(C). What if one LSRP concludes that the difference seems to arise from materially different data or conclusions resulting from errors by the other LSRP. Must they still be identified and disclosed to DEP by the discovering LSRP? Perhaps not. But if to be disclosed, how? Is a footnote or the like sufficient? Or is disclosure to occur as if the information is fully valid, and then some other document filed to disprove it? How will dueling LSRPs and opinions be handled by DEP and the Board? If two or more adjacent or proximate sites and their LSRP's blame the adjacent source and, in the exercise of each separate professional judgment, each determines the other site as the source of site problems, issuing conflicting RAOs, how will the conflict be identified by or to DEP and resolved (especially as sometimes reasonable professional judgments can validly differ)? If one of the LSRPs learns of such a conflict, before or after his or her RAO, what must he or she do? If a future third LSRP, agreeing with one predecessor or neighbor LSRP but not another, learns of such conflict what should he or she do? Does it matter if the new LSRP is working on the same or a different site? And if anyone goes to DEP what should he or she say? What if DEP declines to rule between conflicting LSRPs: who will? Consider whether a Landlord and Tenant at a site each can hire an LSRP to protect its own interest: who is in charge of the site remediation? Can both be? If they differ in their approaches and views (for example as to whether a condition pre-exists and therefore some defense to liability attaches, or whether the discharge occurred during the tenant's operations or in fact arose thereafter, for which under the lease only the landlord is responsible), can one LSRP issue decisions based on such, and when and how will DEP get involved- only after the RAO? And if the Landlord files a Board complaint against the tenant LSRP, what should the Board do? Exercise its own judgment as to when the discharge occurred, who is responsible, and if the Tenant's LSRP was right? How does the Board have the ability to decide such? Does the Board want to make such technical decisions? We suggest not.

- What if different LSRPs reach contradictory or conflicting decisions but neither expressly identifies the contradiction or its source (perhaps unknown to both)? How will DEP identify that there is an issue? When? If it does will it endeavor to resolve the conflict? How? If the conflict is unidentified or unresolved for years then what results? Can a complaint be made to the Board when the conflict is found and consequences appear long after DEP audit rights expire? Does the passage of time somehow make both LSRP decisions right or uncorrectable? Unlikely.

- If in the exercise of due diligence a bank or a buyer identifies the conflict in LSRP decisions, or a new third party LSRP identifies the conflict, what happens? Does DEP have to be notified? What does protection of public health and the environment require? Will a buyer who buys despite the conflict qualify for an innocent purchaser defense?

- It is not yet evident how serious the issue of dueling LSRPs is or will be. Certainly we talk about it. And we have seen some evidence of the concerns from such circumstances both at sites in proximity to each other and sites with successive ISRA triggering events, particularly sites with decades of remedial effort. One could hope, if possible, that the PRCRs, if not the LSRPs, would endeavor to resolve such issues between them whenever possible, without confrontation and without DEP involvement, perhaps rationalizing the seeming discrepancy by finding common cause against others or in explanations minimizing the discrepancies.

(This may be more likely if DEP itself seems disinclined to referee such disputes, as the Board has already shown itself to be). We do not, however, yet have enough evidence of DEP's response to enable good predictions. And we are certain that this will not occur at many sites. Further, absent actual DEP response, or Board decisions and guidance, it seems certain that eventually the conflict will be identified and require resolution, hopefully not after many years intervening (or else some truly innocent party will become entangled in the results of the unresolved discrepancies).

○ N.J.A.C. 7:26I-6.9: An LSRP has a responsibility to report to DEP (and the PRCR) if "… an LSRP identifies a previously unreported condition at a contaminated site that in his or her independent professional judgment is…" an IEC.

- Note: The LSRP's duty to report such to DEP is another instance where the LSRP loyalties are not primarily to its client.

- Note: The Board in its Adoption Response to Comment 58 states: "If an LSRP that is not responsible for a site or area of concern identifies a previously unreported condition that the LSRP considers to be an immediate environmental concern, the LSRP shall immediately advise the person responsible for conducting the remediation and immediately notify the Department, pursuant to N.J.A.C. 7:26I-6.9."

○ N.J.A.C. 7:26I-6.10: If an LSRP obtains specific knowledge that a previously unreported discharge has occurred on a contaminated site for which he is responsible, the LSRP shall report it to the PRCR and the Department.

- Note that the Board did not adopt proposed N.J.A.C. 7:26I-6.10(b): "An LSRP is considered to be responsible for a contaminated site if he or she has been hired by a person responsible for conducting the remediation at that site." The Board made this decision in that "it is clear to the Board that subsections (b) and (c) [see next note] do not serve to clarify the meaning of "for which he or she is responsible."

- Similarly note that the Board did not adopt proposed N.J.A.C. 7:26I-6.10(c): "The provisions of this section shall not apply to an LSRP who has been hired by any person who: 1. Does not own the contaminated site; 2. Conducts a preliminary assessment or site investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property as provided in N.J.S.A. 58:10-23.11g; and 3. Has not discharged a hazardous substance at the site or is not in any way responsible for a hazardous substance discharged at the site pursuant to N.J.S.A. 58:10-23.11g."

- Note: Can those trying to evaluate the obligations of an LSRP read the non-adoption of these proposed rules as support for interpretations of the adopted rules, that the proposed rules were rejected as inconsistent with the adoption? Perhaps.

○ The LSRP shall promptly notify the client and DEP in writing of client actions or decisions which are deviations from a remedial action work plan or other report concerning the remediation. (N.J.S.A. 58:10C-16.l; P.L.2009, c.60 §16.l. and N.J.A.C. 7:26I-6.11). This does not appear to be expressly addressed in the current ARRCS Rule or Tech Rule. But it is addressed in the Board rules yet to be proposed and adopted.

- Note that the term "client" is undefined. An LSRP's client may or may not be the PRCR. Arguably actions or decisions of contractors or agents of the client acting on their own are not treated as actions or decisions of the client: it remains to be seen if this is a fair interpretation.

- Note: It seems odd that deviations from a report by the client require such prompt notification, but other deviations evidently do not. (For example, what if a site owner bound to an access agreement or provide access or sign a deed notice refuses to do so? What if a government entity rescinds or modifies a permit? What if a laboratory or waste hauler acts improperly?) Note though that later submissions likely need to address all deviations that affect the result or decision.

- Note: It also seems odd that strictly construed the language seems to mean that the report against which the deviation is measured must have been prepared by the LSRP. Deviations from other LSRP prepared reports, or even DEP approved reports, do not on the face of this clause have to be reported. However, this may be clarified differently by rule or practice, particularly in view of other provisions which do address similar issues.

○ The LSRP shall notify the client and DEP promptly in writing of the discovery of new material facts, data or information, after a report has been submitted to DEP, which would result in a materially different report than that submitted. (N.J.S.A. 58:10C-16.n.; P.L.2009, c.60 §16.n. and N.J.A.C. 7:26I-6.13) This does not appear to be expressly addressed in the current ARRCS Rule or Tech Rule.

- Note: While "promptly" is undefined in the statute, at present, as defined in N.J.A.C. 7:26I-1.2 it does not require immediate or 15 minute notice. However, we caution that some circumstances may dictate immediate, direct and focused disclosures, for example to prevent or mitigate harm from

any prior error or uncertainty, even if not required expressly by rule. New Jersey common law and equity often look at behaviors, especially of professionals with duties to the public, through the lenses of "reasonableness" and "good faith." in view of their highest duty, LSRPs should exercise care in being glib or nonchalant. But the new LSRP rule may support the view that in some circumstances seven days suffices. See N.J.A.C. 7:26I-1.3.

- Issue: Does this apply to newly identified conflicts or contradictions among dueling LSRPs? Perhaps.

◊ 3.4.2(H) Sometimes an LSRP is under a duty to maintain client confidentiality. N.J.A.C. 7:26I-6.12: "An LSRP shall not reveal information obtained in a professional capacity, except as may be authorized or required by law, without the prior consent of the client, if the client has notified the LSRP, in writing, that the information is confidential. The provisions of this section shall not apply to information that is in the public domain." (N.J.S.A. 58:10C-16.m.; P.L.2009, c.60 §16.m. Given DEP's obligation to post reports on the internet under Executive Order 2009 #140, there may need to be special steps taken to maintain client confidentiality.

○ Note: The exception "except as provided by law" may essentially limit protection of confidential information affecting environmental matters required for decision making under SRRA and DEP guidance and rules. It may be useful otherwise (for example, in requiring the LSRP to protect confidentiality of trade secrets, employee lists and information, patient information, attorney-client privileged information [such as trial strategies] and the like).

○ Note: Counsel and clients should consider how and when to instruct an LSRP and his or her staff that information provided by counsel for the client, or by the client itself, is to be so preserved as confidential (such as drafts, e-mails, strategy documents, litigation documents, business confidential materials and attorney client or work product privileged documents). Consider the effect of the following direction, inserted at the beginning of a confidential e-mail to an LSRP and his or her staff or at the beginning of a markup of a draft, and equivalent language inserted into a contract: "Note: Client Counsel and Client Review and Comments to and of this e-mail and report are attorney-client and work product privileged and confidential. The sender is an attorney authorized to act by and for his client to hereby advise the LSRP and her staff to maintain this e-mail, revised report and comments, and all copies, as such. See N.J.S.A. 58:10C-16.m & N.J.A.C. 7:26I-6.12." The exception (except as authorized or required by law) is likely to create conflicts in the future (for example, if a Board or DEP audit is conducted and the Board demands "all e-mails" from counsel): in the face of any such conflict the relevant counsel should be advised and given an opportunity to intervene and seek a protective order. So, as always, we recommend that if the LSRP and his or her staff does not need to know information for which confidentiality is important, the client and counsel should consider not tempting fate and to the extent feasible not provide such (but in some cases it will be impossible), at least in documentary form, if possible.

◊ 3.4.2(I) An LSRP shall use good business practices:

○ An LSRP shall not allow use of his or her name by a person, and not associate in a business venture with a person, if that person engages in fraudulent or dishonest business or professional practices regarding the responsibilities of an LSRP. (N.J.S.A. 58:10C-16.p.; P.L.2009, c.60 §16.p. and N.J.A.C. 7:26I-6.14)

- Note: there is no clear explanation of when and how this should be applied. Consider, for example, the possibility that a firm's employee is determined to have misbilled its client. If the firm settles the matter with the client, must that firm's LSRP's require the employee to be dismissed, or must they themselves leave the firm, so as to "disassociate?" And when must they do so? When the issue is identified? When suit is filed? When settlement occurs? When judgment is entered? While appeals are pending? What if the LSRP is not employed by the subject consulting firm but is engaged as an independent consultant for it: can the LSRP continue to provide services for clients of that firm, or must it cease all connections? What if the LSRP's client is accused of such wrongful conduct? What if the wrongful conduct happened in California? Iraq? Five years ago? What if it is identified the day before issuance of an RAO?

○ An LSRP shall inform his or her client or prospective client of any relevant and material assumptions, limitations, or qualifications underlying their communications; evidence of timely written documentation of this shall be deemed satisfactory. (N.J.S.A. 58:10C-16.t.; P.L.2009, c.60 §16.t. and N.J.A.C. 7:26I-6.18)

- Note: This obligation does not appear limited to, or even directed towards, the LSRP's environmental products submitted to DEP. It appears to be aimed at such things as contracts, budgets, projections, schedules and plans. The reference to written documentation, if and as a reference to a contract

for retention of the LSRP, is perhaps sensible. But to what other communications does this apply so that written evidence of such informing of the client is required? Does this require an LSRP, for example, to keep a written record of phone calls? The provision seems incomplete and unclear, as written.

○ An LSRP shall not state or imply, as an inducement or a threat to a client or prospective client, an ability to improperly influence a government agency or official. (N.J.S.A. 58:10C-16.u.; P.L.2009, c.60 §16.u. and N.J.A.C. 7:26I-6.20).

- Note: Lawyers are already under a similar restriction. See RPC 7.1(a)(2).

- Note: The limitation is on improper influences. Presumably some influence is and can be proper.

- Note: As written, the rule does not apply to third persons.

- Arguably the subjective standard in the rule (as to statements which in "the Board's opinion" create unjustified expectations of results) is inappropriate unless hereafter the Board publishes guidance allowing insight into more objective views by the Board. Instead, in our view, the rule should have referred to a reasonable person standard.

○ An LSRP shall, in any description of qualifications, experience, or ability to provide services, not knowingly (1) make a material misrepresentation of fact, (2) omit a fact when the omission results in a materially misleading description, or (3) make a statement that, in the opinion of the Board, is likely to create an unjustified expectation about LSRP's results, or state or imply that the LSRP may achieve results by means that violate Law(s) (N.J.S.A. 58:10C-16.v.; P.L.2009, c.60 §16.v. and N.J.A.C. 7:26I-6.21).

- Note: Lawyers are under a similar restriction. RPC 7.1(a).

- Must an LSRP disclose pending or prior complaints, audits and results? Even if unresolved and confidential? Even if on appeal? Even to the Board itself in an application for renewal?

◊ 3.4.2(J) An LSRP shall avoid conflicts of interest:

○ An LSRP shall not accept compensation, financial or otherwise, for professional services pertaining to a contaminated site from two or more persons whose interests are adverse or conflicting unless the circumstances are fully disclosed and agreed to by the clients. (N.J.S.A. 58:10C-16.x.; P.L.2009, c.60 §16.x. and N.J.A.C. 7:26I-6.23)

- Note: It has not been unusual for a consultant to work for, or having responsibilities to, multiple parties in remediating a site (buyer and seller; bank and borrower; landlord and tenant; a group of PRPs [potentially responsible parties]; insurer and insured), perhaps splitting its charges among them, sometimes formally as a group representation, sometimes informally. It has not been unusual to represent sequentially first a seller and then continue to work for the buyer after a sale. LSRPs will need to take more care in documenting these arrangements and disclosures hereafter. What must an LSRP do to assure that his or her client understands and consents if one LSRP is acting for multiple parties? (Owner? Operator? Insurer?) Hereafter, LSRP contracts may need to be more customized in multiple party representations.

- Note: Historically consulting and engineering firms have been somewhat unconcerned with conflict issues. We still see today consultants, engineers and surveyors within the same firm, sometimes even the same persons, working for two different parties with opposing interests at the same site, sometimes billing both for similar efforts. This is to be avoided scrupulously as to LSRP efforts. We suspect the Board will eventually express concern with other conflicts.

○ An LSRP shall not be a salaried employee of the PRCR, or any related entities, for which the LSRP is providing remediation services. (N.J.S.A. 58:10C-16.y.; P.L.2009, c.60 §16.y. and N.J.A.C. 7:26I-6.23)

- Note: The limitation to "salaried" employees suggests other business and/or employment relationships may not violate this provision. However, LSRPs need to be quite cautious to avoid problems with DEP and the Board and even non-salaried relationships with PRCRs may need to be carefully evaluated, and I suspect often rejected, to avoid license exposure. See N.J.S.A. 58:10C-16.z. Lawyers formerly (not now) were regulated in their behaviors by a prohibition against creating or maintaining an appearance of impropriety; now more specific and, perhaps less subjective, tests are used to restrain lawyers in their dealings with clients and third parties. Should LSRPs be more or less stringently restrained? More guidance from the Board is appropriate.

- Note: Why does this section use the term "remediation services" as opposed to "professional services" as elsewhere? See e.g., N.J.S.A. 58:10C-14.c. Are remediation services a subset

of professional services, or is it the other way around? Are there services that an LSRP can perform subject to noncompliance with these strictures? Or are they really identical. Certainly an LSRP must be very cautious before considering any relationship with a client or customer that involves such relationships or arrangements.

○ An LSRP shall not allow any ownership interest, compensation, or promise of continued employment, of the LSRP or any immediate family member, to affect his professional services. (N.J.S.A. 58:10C-16.z.; P.L.2009, c.60 §16.z. and N.J.A.C. 7:26I-6.23)

- Note: The clear restrictions here for other business and/or employment relationships not limited to salaried employment supports the view that the narrow restriction in c.60 §16.y for salaried employment was intended to be so narrow (because the legislature shows it was aware of other relationships).

- Note: These restrictions do not prohibit the relationship; they merely provide that the relationship can't affect (adversely) the professional services the LSRP renders.

■ 3.4.3 An LSRP must notify DEP of its retention by a PRCR within 15 days. (N.J.S.A. 58:10C-16.d.; P.L.2009, c.60 §16.d. and N.J.A.C. 7:26I-6.5).

◊ Note: The notice appears required for an LSRP officially engaged to act as such? A consultant who is an LSRP working as to a site, for example in support of pre-acquisition due diligence for a buyer, does not, it appears, have a duty to send a notice that it is an LSRP for such a site. But see discussion elsewhere as to the need of a PRCR to use an LSRP for a range of investigatory, construction or remedial purposes and consider the liability of an LSRP who acts for such purposes without submitting the required notice.

◊ Note: Is there an implied condition to this obligation that the LSRP retention has to be for a remediation the subject of SRRA? We believe so. Can an LSRP work out of state for a client without advising DEP? Yes. Can an LSRP work on a site in NJ as an ordinary consultant without serving as an LSRP retained as such for the site and without obligation to give notice to DEP. Probably. Does it matter if the services relate to remediation or not? (for example, what if assisting on wetlands or transition area delineation or letter of interpretation? As a trial expert? As an expert for a lawyer providing legal advice to such a client? As a reviewer of another LSRP's work or to provide a second opinion? For investigation with no suspicion of a discharge, for example for pre-construction and excavation soils waste classification?) Such services should be possible in our view without implicating retention as an LSRP. Unfortunately, if an LSRP works on sites for which the LSRP is not responsible thereafter his or her role and license may create thorny issues (for example, if the person licensed as an LSRP, but not working as such, finds him or herself faced with a conflict between client instructions and LSRP requirements [for example, as to an IEC, as to which both the Board and DEP have made it clear they feel the LSRP has reporting obligations], even if arguably not applicable to his or her role, or faced with remedial issues that should, now prospectively, be addressed differently than the client wants. Consider also, for example, what the informally retained LSRP is to do if his or her review identifies a flaw in the work of the LSRP being reviewed? Does the informally retained LSRP have a duty to deal with a suspected or actual IEC? How?). What if DEP or the Board later finds out an LSRP was involved in non-LSRP activities but disagrees as to the propriety of what the LSRP did in those roles? Do they have jurisdiction over non-LSRP activities? Can the LSRP be disciplined as an LSRP, even though not engaged as such? Lawyers, for example, are rarely excused from their professional responsibilities even when not representing clients (for example in their own personal dealings with third parties [e.g., buying or selling real property] lawyers are often held to higher duties than those with whom they deal, simply because either or both they are licensed professionals and regulated by the NJ Supreme Court; a lawyer who commits a fraud, even if in a capacity other than while acting as a lawyer, can be disbarred for such behavior [consider the differing issues before a reviewing court if a lawyer lies to a court before whom he or she appears, or knowingly writes a bad check to a vendor providing services to the lawyer's business, or lies to a buyer of the lawyer's personal winter vacation house in Florida.]) and can be disciplined for behaviors even if others cannot be.

◊ Note: It is now clear that a site can have multiple LSRP's working on it. A single PRCR can divide responsibilities for different AOCs and remediation among multiple LSRPs, perhaps because of differing expertise or experience or knowledge, perhaps because of budget issues, perhaps because of the liability of contributing parties or insurance, perhaps because of historical factors, perhaps because of successor owner or operator or landlord or tenant issues. It also appears that multiple PRCRs also can hire multiple different LSRPs to handle their separate AOCs and periods of liability (such as when a 2005 seller of a business [but real estate tenant] to a buyer uses one LSRP, and then when the 2005 buyer [real estate tenant] sells that business again to a new owner in 2010 and finally in 2015 the Landlord sells the real estate to a new real estate owner: all may have different LSRPs). But management and control issues are certainly more likely and there is a more likely risk of chaos in such events with multiple LSRPs, particularly if those LSRPs disagree about sources and remedial alternatives. Such

battles rarely have been fought in front of DEP (unless chaos was the goal). In such sites with divided LSRP responsibilities, what if the two (or more) LSRP decisions and approaches conflict (one example of the problem of dueling LSRPs)? Can the decisions of the LSRPs be challenged by anyone? Before whom? Can complaints be filed with the Board? Does the first to file with DEP or the Board have an advantage (or win)? Could multiple parties, for example, agree that they will proceed with a remediation as a group of LSRPs decide by majority vote? (Does management by committee of LSRPs meet each LSRP's duty of independent professional judgment?) Using arbitration? Would DEP or the Board be bound by such? Perhaps; but I would hesitate a great deal before pursuing management of site remediation by such a method. And, if there are multiple LSRPs collectively handling separate AOCs for the entire site, as determined by the PRCR, whose responsibility is it to ensure that the final RAO is in fact the one to close the case and, in combination with prior RAOs, address the entire site? The PRCR? DEP? The last LSRP? Where is there any guidance or rule that speaks to this?

◊ Note: This provision (requiring timely notice of retention) ties into the obligation of the PRCR to remediate a site. It ties into the obligation of the PRCR to meet required time frames. It ties into the obligation of the LSRP to give notice of his or her release from a retention. Together these create the tools for DEP to evaluate which PRCR is responsible for a site, in whole or in part, and whether the PRCR retaining one or more LSRPs is meeting its obligations to remediate. Presumably DEP will conclude that in the periods in which there is no LSRP, at least outside the authorized transition period, the PRCR is not complying with SRRA (unless it was exempt in that period). This may be forgivable for a range of reasons (for example the death of an LSRP), but eventually if a site has no RAO and no LSRP, has not obtained extensions, and enough time has passed, DEP knows it can exercise any of a wide range of powers to cause or conduct remediation to proceed. In fact, DEP now states that in some of these cases, without any notice, PRCRs may become automatically subject to direct oversight. Whether and how these will in fact work, given past DEP failures with ample resources and weapons in similar circumstances, remains to be seen. But once any LSRP has terminated or been terminated, does the LSRP have any liabilities for post-termination events? Probably very few (e.g., making reports and correcting deficiencies as SRRA requires even after termination).

■ 3.4.4 An LSRP must notify DEP of its release from responsibility for a remediation, before issuance of a RAO, within 15 days (N.J.S.A. 58:10C-16.d.; P.L.2009, c.60 §16.d. and N.J.A.C. 7:26I-6.5). This includes both a dismissal and a resignation.

◊ It remains to be seen how various other events, which alter the relationship of an LSRP to a PRCR and/or to remediation of a site, eventually will be addressed. Consider: termination of an LSRP's employment by the firm employing the LSRP (particularly when the PRCR's contract for retention of the LSRP was with the firm not the individual LSRP; consider the effect of the existence of a non-compete clause restricting post-termination actions of the LSRP [held both unenforceable and unethical as to lawyers, except in the case of a retirement]); consider the effect of bankruptcy of either the PRCR or the firm employing the LSRP; consider the effect of retirement of the LSRP; consider the effect of serious illness or disability of the LSRP, or death of the LSRP. We can hope that a common sense approach will be acceptable. Most likely the LSRP, as the regulated professional, will have higher obligations in most of these events, but in others (e.g., death or disability) the PRCR or employer of the LSRP will give notice to PRCR and DEP after learning of the event. These same situations may then raise other issues under SRRA.

◊ Is issuance of a site wide RAO automatically the termination of the LSRP's role for the PRCR and the site? Many used to think so. However, DEP clearly thinks that the LSRP continues with respect to the site and its client until someone files a termination. This may be helpful for some sites (for example if there is a later ISRA repeat trigger or if there is work required for a IC or EC). But in many cases it does not match the expectation of either the LSRP or the client. Each should consider terminating the LSRP formally in order to avoid surprise obligations and responsibilities: DEP deems the LSRP to be continuing, even if, perhaps, the Board does not, until DEP is notified.

○ Note that DEP advised, by its 9/17/2014 listserv blast e-mail, that "At all times, an LSRP is required to be retained for a case that has a Deed Notice, Classification Exception Area, Soil Remedial Action Permit, and/or Ground Water Remedial Action Permit until the remedial action(s) is no longer needed to protect the public health and safety and the environment, and until all unrestricted use remediation standards are met." As this is written, DEP likely would argue that if a PRCR dismisses its LSRP upon issuance of an RAO at a site with a deed notice and RAP then either that PRCR or another must promptly appoint a replacement LSRP. Arguably, this advice is in error. There is little if any regulatory or statutory support for the view that a stable site, subject to both a deed notice and a RAP needs an LSRP to stand-by. We also believe the separate question of whether an LSRP is required to be involved in scheduled monitoring and reporting has also been wrongly decided

by DEP. We do not believe such is necessarily "remediation" as defined by the SRRA Act requiring use of an LSRP.

■ 3.4.5 An LSRP must notify the Board or DEP when and as required by the various notification provisions in SRRA §16, even if discharged by the client prior to doing so. (N.J.S.A. 58:10C-16.w.; P.L.2009, c.60 §16.w. and N.J.A.C. 7:26I-6.22). Presumably client instructions and/or the contract between the LSRP and the client cannot waive or supersede this.

■ 3.4.6 Both the LSRP and the PRCR shall correct any deficiency in a submitted document identified by DEP in the period allowed by DEP to do so. (N.J.S.A. 58:10C-16.e.; P.L.2009, c.60 §16.e.; See also N.J.S.A. 58:10C-16.g.; P.L.2009, c.60 §16.g and N.J.A.C. 7:26I-6.6). As discussed elsewhere DEP will review documents filed by the LSRP, sometimes minimally, sometimes in detail (although if DEP's 9/10/2014 listserv blast e-mail is to be believed, perhaps not at all, at least until issuance of the RAO).

◊ Note: SRRA does not address how either a PRCR or LSRP are in fact to correct specified deficiencies for which the other is uniquely positioned. For example, a PRCR cannot correct certain submissions prepared by its LSRP (say a missing LSRP signature) except by either directing the LSRP to do so or replacing the LSRP with another (which poses other issues for both the PRCR and DEP). Similarly an LSRP cannot force the PRCR to cure many deficiencies, such as contracting or paying for additional work at a site so work can proceed on schedule, or obtaining or providing information necessary to resolve issues, or obtaining access necessary to conduct work (e.g. by filing suit for access), or providing its signature. Presumably the duty in that instance is not shared (joint), but individual (several), and similarly any violation of SRRA will be individual and not joint; in other words, the responsibility is not stated to be joint and several and should not be viewed as such, but rather should be seen as including reference to the relative powers and responsibilities of the persons or entities involved. Presumably DEP and the Board will recognize this reality in communications to PRCRs and LSRPs about deficiencies and specify who is to fix each deficiency when it is possible to do so. (However, we believe there has been at least one 2014 Board complaint in which issues of this kind suggest that DEP feels that an LSRP does have liability for decisions its PRCR client makes, and its client's actions and omissions, and the Board's own adoption of its Rules suggests that in some situations the Board itself may agree. See its Adoption Response to Comment 51 discussed at this Article § 3.4.2(D)). What if one of the two fails to act as required? In such circumstances what is the duty of the PRCR to replace the failing LSRP or the LSRP to resign from working for the failing PRCR (or to revoke an approval or contact DEP)? Can an LSRP be punished for what his or her PRCR fails to do? Must an LSRP resign to avoid attack, criticism or punishment? Likely the answer will vary with the facts and circumstances. If a default is material enough, or of a long enough duration, or perhaps even if is a repeated offense, the non-breaching of the two may need to act, in some manner (to prove its good faith and effort to convince or compel the other, and to avoid confusion as to who was responsible for what) to avoid DEP or Board enforcement. But otherwise, even if there is a breach after a DEP demand, we think arguments can be made that the non-breaching party is not required to resign or terminate, and move on, but instead may continue, if only to try to use his or her influence to pursue a cure of the deficiency. Indeed, in many cases it will be in the interest of the State to encourage such continuing involvement and curative efforts, and DEP and the Board should act reasonably by focusing on the differences in rights and responsibilities, in order to maintain and continue remediation progress, preserve knowledge and expertise, avoid added costs and delays, and minimize the loss of such scarce resources. Often under existing law and practices, at least recently, DEP has acted practically in similar circumstances (for example focusing initially on the breaching actor of a landlord and tenant and not both) but reserved the right, and sometimes thereafter acted, to claim liability of several (such as a group of owners and operators) even when one was more clearly at fault than others. Will such approaches be used with LSRPs and PRCRs? If not, as LSRPs terminate to avoid attack, work at more and more sites will grind to a halt.

◊ Note: SRRA does not address what are, or how DEP is to set, reasonable periods for correction of deficiencies. Presumably periods cannot be set arbitrarily or unreasonably. Presumably periods should be fair considering all the facts and circumstances, including how DEP has acted itself in the past. Presumably such periods should account for workloads and resources, including of LSRPs. Unfortunately on occasion DEP has been known historically to conclude that relatively brief periods should suffice; in recent times, however, DEP has been more forgiving. Will a new Governor bring a different attitude to DEP?

○ The Board may have set seven days as the relevant period. See discussion of N.J.A.C. 7:26I-1.3 at this Article § 3.3.9.

◊ Note: SRRA does not address how the regulated community is to address disputes and disagreements with DEP and/or an LSRP, particularly over matters of judgment. Presumably there will continue to

be both some informal discussion processes and dispute mechanisms to allow efficient and effective discussion of problems and solutions with DEP, particularly when DEP asserts a deficiency (although the effects on time periods are uncertain). There may be legitimate confusion and error on either or both sides that can be corrected with minimal effort and investment. There is reason to hope that DEP sees the advantage in a free good faith exchange of questions, answers, concerns and alternatives, at least in good faith situations, despite the end of "compliance assistance mode" that governed early SRRA efforts. However, without doubt DEP will be wary of those who abuse the privilege of discussion and extension and seek primarily to delay remediation rather than to achieve it. Those will be seen as bad actors and undoubtedly their behaviors will have adverse effects on others. But what if the PRCR and LSRP disagree over an issue (perhaps because DEP has provided informal advice and made informal threats, with which the PRCR disagrees but against which the LSRP is unwilling to proceed: is the sole recourse of the PRCR to fire the LSRP? Or can the PRCR "appeal" (Challenge? Re-open? Discuss?) the LSRP determination (or the DEP informal advice or threats), before it expends large sums of money or wastes a lot of time, in some way? (For example, if the LSRP decides that a problem does not have an offsite source, or an engineering control is not protective, or a variance should not be granted, or a PRCR is not an innocent purchaser? [Perhaps because DEP has cautioned that the LSRP has authority to act, but based on the available information DEP will scrutinize the decision with great vigor and, if then deemed inappropriate, rescind the RAO and refer the matter to the Board]). Yet how?

○ Should LSRPs formulate some independent process for seeking second opinions that might help bolster a particular LSRP decision against later attack?

○ Would the opinion of USEPA matter?

○ In appropriate cases should DEP be prepared to rescind its own prior decisions to confirm newly identified prior errors on application of a potential or actual PRCR or its LSRP or consultant? Or is DEP's tentative current view, that the last one standing should hire its own LSRP, fix any and all issues, and then sue whoever it wants, with minimum expense at, and help and input from, DEP, right?

◊ Note: it is not clear how the existence of LSRPs and SRRA will affect judicial review of DEP decisions in challenges by LSRPs or PRCRs (remembering that it is often not be easy to get a matter before a court absent a fine, a license revocation, a permit denial or a reversal of an LSRP decision). Can an LSRP apply to DEP for a permit, variance or waiver, which if denied or not responded to, can serve as a basis for a PRCR or the LSRP going to court, particularly if DEP guidance, official or unofficial, interferes with true independent application of the LSRP's professional judgment?

◊ Note: it is not clear if the courts can be convinced that in some senses LSRPs are decision makers for DEP and therefore PRCRs should have similar rights to challenge in court any LSRP decisions basically mandated by DEP, whether directly or by threat. Likely not.

◊ Issue: It may be that different LSRPs disagree with each other about particular sites or regional conditions? DEP may identify the issue as a deficiency and require resolution, perhaps by one or both LSRPs. What happens then? How are such to be resolved? Are two LSRPs with honest differences of opinion about the same site or region subject to punishment?

◊ Issue: What if an actual or potential deficiency is identified after the three year period for DEP reviews. Is the LSRP safe from discipline? The PRCR? New owners or operators? What if ISRA is triggered again? Likely the answers may depend on the nature of the deficiency and their impact on public health and the environment, and whether a related RAO is reopened.

■ 3.4.7 An LSRP may complete a remedial phase performed or initiated by another LSRP provided he or she (1) reviews all available documentation on which the LSRP relies, (2) conducts a site visit to observe current status and verify status (as much as is observable) and (3) concludes in the exercise of independent professional judgment that there is sufficient information upon which to complete any additional phase of remediation and prepare plans and reports. (N.J.S.A. 58:10C-16.f.; P.L.2009, c.60 §16.f. and N.J.A.C. 7:26I-6.7). That LSRP also must correct deficiencies in previously submitted LSRP documents as identified by DEP in the timeframes specified by DEP. (N.J.S.A. 58:10C-16.g.; P.L.2009, c.60 §16.g and N.J.A.C. 7:26I-6.7(b)). An LSRP who learns of material facts, data or other information subsequent to the completion of a report concerning a phase of remediation, which would result in a report with material differences from the report submitted, shall promptly notify the client and DEP in writing of those. (N.J.S.A. 58:10C-16.n.; P.L.2009, c.60 §16.n. and N.J.A.C. 7:26I-6.7(c)). A successor LSRP before the issuance of a RAO who learns of material facts, data or other information concerning a phase of the remediation for which a report was submitted, without disclosure in the report of those, shall promptly notify the client and DEP in writing of those. (N.J.S.A. 58:10C-16.o.; P.L.2009, c.60 §16.o. and N.J.A.C. 7:26I-6.7(c)).

◊ Note: an LSRP taking over a site in troubled condition (including from a dismissed LSRP, or an LSRP against whom DEP, the Board or the PRCR has acted) may find it necessary or wise to explore in advance its options, alternatives, available extensions and risks, perhaps under a limited engagement, perhaps even by discussion with DEP, before accepting responsibility for supervising remediation of the site (i.e., before filing the retention form with DEP or the retention form for the entire site). Otherwise the well intentioned effort may expose the new LSRP to investigation and censure, if not worse, by a wide range of potential complainants. Lawyers face similar challenges when asked to take over a case approaching trial from another lawyer. Sometimes lawyers decline to take over matters they view as too dangerous or hopeless, whether ethically or economically. Sometimes they consider doing so only after application to a Judge for some relief (for example, a less demanding trial schedule). Presumably LSRPs will do the same, with the PRCR's assistance, perhaps seeking a settlement administrative consent order. This may create issues for DEP to consider if DEP lacks resources to enforce or remediate such troubled sites and PRCRs and LSRPs are willing to proceed only with relief from ordinary requirements.

◊ Note: there is no similar transition rule for completing and relying on pre-SRRA work (such as work that happened 25 years +/- ago, before and without LSRP involvement). Presumably similar standards will apply to the LSRP's reliance on such materials; it seems unlikely that the legislature intended that the LSRP cannot rely on such work and prior DEP communications and approvals. However, this has already posed interesting issues for LSRPs, as it has for PRCRs and DEP, as to how to treat work conducted under earlier rules, guidance, practices, especially if there were DEP approvals and/or practices of uncertain meaning, scope and effect, and/or later changes in law, rules, guidance, criteria, standards and/or practices (which unfortunately has occurred frequently). For example, can an LSRP safely rely on a 1986 letter of DEP closing out an area of concern for further investigation based on 1985 composite sample results, when no such sampling and results would be considered determinative today? Would it matter if DEP itself could and did rely on such approvals in issuing NFAs prior to SRRA? Can an LSRP rely on DEP's past approval of a remedial action selection report without full review of that report and the basis for DEP's decision (often unstated)? Does the answer depend on the precise words in the approval or the overall course of conduct and circumstances? ("No further action is required" v. "No further investigation is required"; ever v. at this time; silence or acquiescence v. approval or acceptance; letter v. e-mail v. call v. behaviors?). Obviously, if the LSRP reviews the situation and concludes that in fact the decision was wrong (the letter says an area is clean; the data says otherwise), the LSRP needs to proceed independently from the document. Otherwise, we would argue that the LSRP can and should rely on all such DEP decisions without second-guessing or reviewing them and their foundations, at least in any detail, and that the LSRP may rely on existing data and prior efforts to the extent sensible to do so (but probably not otherwise). We are aware that most LSRPs will at least consider the basis for such prior decisions to determine their reliability. However, the precise language of the ARRCS Rule at N.J.A.C. 7:26C-6.2(d) expressly authorizes only LSRP reliance on DEP approvals of RAW or the like, without articulating expressly that other approvals are to be disregarded; we do not view this as a prohibition against reliance on other DEP decisions or approvals, but rather that DEP missed another opportunity to be more helpful (or elected to provide less guidance than would be helpful). Nothing in SRRA suggests that the legislature wanted to reexamine all work and decisions that went on before and thereby worsen the prospects of finishing sites quickly and efficiently. Indeed the inference is the opposite: SRRA and LSRPs were to provide a step forward not backward. DEP past silence, missing reviews and many delays at many sites were why the legislature decided that LSRPs were needed to correct the SEP caused backlog; but when DEP has spoken in the past we believe that LSRPs should not be forced by DEP to reopen and reexamine the DEP's basis for DEP's decisions. Perhaps future DEP or Board guidance will clarify the extent to which LSRPs can rely on prior approvals. Pronouncements by many LSRPs that such decisions are valueless or garbage are unhelpful and, in our view, legally incorrect.

■ 3.4.8 If an LSRP identifies an IEC (either (1) a contaminated potable well, (2) occupied or confined space with a toxic or harmful or oxygen-deficient atmosphere, or resulting in damage to essential underground services", (3) dermal contact, ingestion or inhalation could result in acute human health exposure, or (4) any other immediate threat to the environment or public health and safety), in his or her professional judgment, then the LSRP shall immediately (x) verbally advise the PRCR of the PRCR's duty to notify the DEP and (y) notify DEP by calling the hotline (now (877) 927-6337). (N.J.S.A. 58:10C-16.j.; P.L.2009, c.60 §16.j). This separate LSRP duty does not appear to be mirrored in the Tech Rule or ARRCS Rule. But see N.J.A.C. 7:26I-6.9 (which does not incorporate exactly the same statutory definition but instead, at N.J.A.C. 7:26I-1.2 refers the reader to DEP's definition of same at N.J.A.C. 7:26E-1.8).

◊ Note: SRRA created a new statutory requirement for reporting of IECs, although there was an existing technical requirement rule addressing reporting of IECs. See First N.J.A.C. §7:26E-1.4(b) now

N.J.A.C. 7:26E-1.11(a). SRRA also created a new LSRP obligation to report IECs. Are separate reports required or can the LSRP report for all? Some caution seems advisable absent DEP guidance. This new requirement has been the subject of extensive reflection, discussion and concern, particularly by PRCRs and their lawyers unwilling to lose control of interactions with DEP. How many real problems have occurred is uncertain, but seem likely not to be widespread.

◊ Note: Is a suspected IEC, or a suspicion of an IEC, or accusations, fears, evidence or conclusion of or from third parties not under control of an LSRP, required to be treated as an actual IEC? We think not. But what exactly then is required is, in our view, likely to be dependent on all the facts and circumstances surrounding the third party suspicions accusations, fears, evidence or conclusions. We believe there will be circumstances when an LSRP need do nothing, and there may be other circumstances in which some further due diligence is appropriate. Why? Because the LSRP's highest duty is to protect health, safety and the environment. If the third party suspicions accusations, fears, evidence or conclusions are credible, even if not proven or demonstrable, added review and work may be the only way to be protective. If they are incredible, however, or manipulative, or part of some larger and more complex series of attacks and accusations, unsupported by valid information and data, then we believe they can often be dismissed without more.

■ 3.4.9 If an LSRP obtains specific knowledge that "a discharge has occurred on a contaminated site for which he is responsible" then the LSRP shall (1) immediately verbally advise the PRCR of the discharge, and (2) notify DEP by calling the hotline (now (877) 927-6337). The PRCR is also separately responsible for notifying DEP. (N.J.S.A. 58:10C-16.k.; P.L.2009, c.60 §16.k and N.J.A.C. 7:26I-6.10). This separate LSRP duty does not appear to be mirrored in the Tech Rule or ARRCS Rule. .

◊ But this provision shall not apply to a discharge that "may be a result of the existence of historic fill material". Id. The exception for historic fill may be a new statutory exemption from reporting.

◊ But this provision may create some uncertainty as to whether or not the existence of historic fill, and conditions therein and therefore, are or are not themselves "discharges" the subject of the Spill Act and SRRA themselves. For example, is every owner or operator of a site included in DEP's mapping of areas of historic fill obligated by SRRA to undertake remediation of that historic fill? While some arguments to the contrary seem possible, particularly for existing innocent purchasers, DEP's current rules and guidance seems to take the view that such an obligation exists (at least to check if their mapping is accurate for each site so mapped). By that DEP logic perhaps a purchaser of property so mapped as subject to historic fill may not for a future purchase be eligible to become an innocent purchaser (unless either the property is actually investigated and remediated or the preliminary assessment properly finds that such is not required, perhaps due to site specific observations). Indeed, by some interpretations of DEP positions, does mere ownership of property mapped or otherwise thought or known to have historic fill require the owner or operator (each a PRCR unless innocent) to engage an LSRP to delineate, characterize, and prepare at least the default deed notice for the area so filled? At least to date, few seem to be so proceeding, DEP has not made a blanket announcement that such is required (as it has on other topics) and no enforcement of which we are aware has pursued such a view. However, there is some reason to believe that DEP is reconsidering its position, especially in that a harsh view if strictly applied across many areas of the state could cause many to enter the remedial system, using scarce LSRP and DEP resources for what are, in most instances, relatively safe and long standing sites and conditions (e.g., much of Hudson County). Until then, caution is warranted.

◊ Note: There is no clear statement of when an LSRP is responsible for a site. We believe the determinant factor is if the LSRP has filed the form for the site notifying DEP of his or her retention as the LSRP. Similarly, although not expressly stated, we read the narrowness of this Section to support the view that non-retained LSRPs do not have the obligation.

◊ Note: Despite the above views and experiences, the Tech Rule (and its training presentation at http://www.state.nj.us/dep/srp/srra/training/sessions/hf_historic_fill_111116.pdf and later guidance at http://www.nj.gov/dep/srp/guidance/srra/historic_fill_guidance.pdf) suggests DEP is willing to argue that, absent a defense to liability, an owner of a site suspected of having historic fill has an affirmative obligation to investigate, and if present, remediate (most likely by use of controls). See N.J.A.C. 7:26E-3.3(b) and -3.12. There is no exception for homeowners. DEP mapping (see http://www.state.nj.us/dep/njgs/geodata/dgs04-7.htm and http://www.state.nj.us/dep/njgs/geodata/historicfill/jersey.pdf) suggests there are large areas of New Jersey filled with historic fill (most likely not yet investigated or remediated under DEP rules). However, ongoing discussions with DEP raise the possibility that evolving new guidance will clarify that DEP does not expect all owners and operators to hire LSRPs to address mapped historic fill. And, as stated earlier, actual behaviors suggest this last view is correct.

◊ Note: In 2013 DEP provided guidance on how to address "diffuse anthropogenic pollution" ("DAP"), concluding that DAP is due to offsite sources and therefore not the obligation of the PRCR to remediate. See http://www.nj.gov/dep/srp/guidance/srra/dap_guidance.pdf. The guidance provides information for the LSRP to use in issuing an RAO for a site affected by DAP.

■ 3.4.10 An LSRP can't certify a document submitted to DEP unless he or she managed, supervised or performed the work which is the basis of the submission, or periodically reviewed and evaluated the work performed by others for the submission, or is completing work of another LSRP he or she concludes is reliable. (N.J.S.A. 58:10C-16.h.; P.L.2009, c.60 §16.h and N.J.A.C. 7:26I-6.24). N.J.A.C. 7:26I-6.24"(b) For PRCR documents submitted to DEP that require LSRP certification, the LSRP shall certify that: 1. The work was performed; 2. The LSRP has: i. Managed, supervised, or performed the work that is the basis of the submission; ii. Periodically reviewed and evaluated the work performed by other persons that forms the basis for the information in the submission; or iii. Completed the work of another site remediation professional, licensed or not, and has concluded such work is reliable pursuant to N.J.A.C. 7:26I-6.7; and 3. The work and the submitted documents conform to, and are consistent with, the remediation requirements in N.J.A.C. 7:26I-6.3(a). In (c) An LSRP shall certify electronic submissions he or she makes to the Department concerning the remediation of a contaminated site. The LSRP shall attest that no other person is authorized or able to use any password, encryption method, or electronic signature that the Board or the Department has provided to the LSRP."

◊ What should an LSRP do with uncertifiable reports, documents or data, potentially relevant to an issue (such as the existence of an IEC), particularly if DEP requires certification as a condition of a report or filing? Should same be omitted and dismissed as incredible? Filed without a certification? Filed with a certification but with an explanation? Acted in some other way?

◊ Note: At least hypothetically this may create transition issues as to work conducted before SRRA took effect. This seemingly creates the risk that a new LSRP may find it necessary to repeat prior work performed by others that the LSRP finds unreliable. This may not be a material risk for most sites, but at some it could be serious, time consuming, expensive and risky. In fact, some sites with extensive databases of past investigations, found themselves unable to certify the RI stage was complete before the anticipated May 2014 deadline, resulting in the push for the early 2014 amendment to SRRA allowing qualifying sites and PRCRs to have until May 2016 to finish. DEP's view on the appropriateness of the solutions used by PRCRs and LSRPs facing these issues may await the filing of the final RI report or the RAO itself.

◊ Note: What if the governing contract for the prior LSRP or firm work expressly provides (as many do) that the LSRP's and his or her firm/s work is not for the benefit of any other person or entity other than the client, and further expressly provides that no other person or entity can rely on that work without express prior written consent? Can a new LSRP in fact rely on that prior work without such express consent (in this case perhaps as an agent for the client) or does the new LSRP have to seek and obtain a reliance letter from the old LSRP or firm? And if the old LSRP or firm denies the reliance letter, or demands further payment for same, or issues disclaimers inconsistent with or absent from the original contract, must all work then be repeated in the absence of the letter or payment? Obviously hereafter such contractual clauses should be negotiated to allow reliance by those logically needing to rely. But given the role and professional responsibilities of the LSRP it is not clear that such restrictions automatically will be enforced by the courts, especially as there are restrictions on the ability of other professionals to limit reliance by foreseeable beneficiaries of their work (including DEP and those to be protected, or otherwise affected, by the remediation of the site in question).

■ 3.4.11 An LSRP shall provide any data, documents or other information as requested by DEP to conduct its review of documents under N.J.S.A. 58:10C-21. (N.J.S.A. 58:10C-21; P.L.2009, c.60 §21.d. and N.J.A.C. 7:26I-6.8(d))

◊ Consider earlier discussions that DEP may have a right of access to more than those documents the LSRP elects to file with DEP. Certainly data and work records not yet filed with DEP, but certain to be later filed, seem clearly within the realm of appropriate demands. Further, materials required to be filed with DEP by rule and omitted accidentally or intentionally from actual filings also should be available. But is it so clear that all meeting notes, e-mails, and memos, of the LSRP and his or her firm, potentially including client confidential information or attorney-client privileged information, are able to be sought by DEP. Consider whether an appropriate response is to file an action seeking a protective order and *in camera* (secret) review by the court of the propriety of the demand.

◊ How does this work as to prior work or work not conducted by or under the LSRP's supervision?

◊ Must an LSRP fully and solely comply with DEP restrictions on the use of DEP forms and electronic gateway? See discussion at this Article §2.10 above. We strongly recommend that in certain situations when DEP's forms or requirements are at odds with reality, the LSRP should not surrender and endeavor to bend reality to fit the form or website, at least without documenting his or her concerns and reservations in a separate communication to DEP. Obviously each LSRP faced with such a situation should consult with the PRCR, the PRCR's counsel and perhaps even the LSRP's own counsel. And the LSRP should use, if and as necessary or required, multiple techniques to try and get DEP attention and advice on the issue, if appropriate (including calls, memos to the file, e-mails, telecopied, mailed and Certified Mail letters, with markups of the form to show how the mark-up is more accurate, complete or responsive). Please note: we do not suggest that this occur in any way to evade the legitimate objectives of DEP for sound management of the SRRA system and protection of health, safety and the environment. It must occur only in good faith (We do not suggest that a filing can properly say that "sampling found no exceedances" and then a letter say otherwise). We do think that an LSRP retention form can be submitted with transmittal of a letter to DEP that such retention is not an admission that the person retaining the LSRP is either or both a responsible party under the Spill Act (as the current retention statement appears to state) or even a PRCR under SRRA (for example, if a party undertaking an investigation elects to file the retention form to that extent, but as an otherwise non-liable person or entity wants to reserve the right to withdraw from SRRA compliance if appropriate) and explaining why that is the case. Or perhaps a form can be submitted with a report providing an explanation that "all" or "none" (used in the form) does not really mean "all" or "none" when DEP would not let the LSRP explain the limits of its actions or conclusions, particularly if such limits are fully consistent with other law, rules, guidance and practices. Of course, sometimes the form, instructions and individual parts must be considered in context. Sometimes DEP uses terms or words that cannot mean literally what DEP says, and some common sense construction is appropriate, necessary and not worthy of separate comment or reservation. Consider, for example, DEP's 2014 addition to the remediation trust form agreement that requires a certification that there has been no change from the form: yet the form contemplates changes (names, addresses, amounts, instructions to the Trustee) and clearly such certification can be signed and certified without reservation (because to decide otherwise means the form can never be used- a result not intended).

■ 3.4.12 An LSRP must cooperate with any investigation by the Board. In such an investigation an LSRP can't: make false statements of material facts; fail to disclose a fact necessary to correct a material misunderstanding; knowingly falsify (or tamper with, alter, conceal or destroy) a document, data record, remedial system or monitoring device; or knowingly allow or tolerate any employee, agent or contractor of the LSRP to engage in the foregoing. (N.J.S.A. 58:10C-16.q.; P.L.2009, c.60, §16.q. and N.J.A.C. 7:26I-6.15). An LSRP shall cooperate with the Board audits and shall provide any information requested for the audit. (N.J.S.A. 58:10C-24; P.L.2009, c.60 §24 and N.J.A.C. 7:26I-5.6(a))

◊ Similar questions arise as to the limits on the Board's rights to investigate, and extent of LSRP and firm's obligations to cooperate, as are elsewhere discussed in this article.

■ 3.4.13 Upon completion of a remedial action, the LSRP issues an RAO to the PRCR when "in the opinion of the… [LSRP] the site has been remediated so that it is in compliance with all applicable laws, rules and regulations protective of public health and safety and the environment." an LSRP shall not issue an RAO until the PRCR has paid to the Department all fees and oversight costs. The LSRP files the RAO with the DEP within 30 days of when issued to the PRCR. (N.J.S.A. 58:10C-14.d.; P.L.2009, c.60 §14.d. and N.J.A.C. 7:26I-6.25). An RAO is deemed by operation of law to include a covenant not to sue (as certain no further action letters did, usually the final). (N.J.S.A. 58:10B-13.2; P.L.2009, c.60 §31.). See also ARRCS Rule at N.J.A.C. 7:26C-6.2.

◊ Note: It can be argued that it is an essential purpose of SRRA that LSRPs do this (issue RAOs) more often and faster than DEP previously issued NFA Letters. Any other result will arguably be a failure of the new SRRA system to accomplish the goals of the legislature. This analysis should lend support to oppose DEP and Board interpretations of SRRA that increase delays and inefficiencies in remediation. Of course pursuit of accelerated efforts and results should never encourage reckless LSRP or PRCR efforts or unsafe or unprotective remediation. Those are not intended results either.

◊ Note: The issue of the LSRP reaching an opinion as to the remediation's full compliance with all applicable laws, which certainly can include federal laws, and may extend to municipal and county requirements, may be complicated at some sites, particularly if construed as requiring detailed review and assessment, particularly for sites with a long history of prior work and the potentially complex task of addressing historic compliance with changing legal requirements (as opposed, perhaps, top a more common sense approach that no violations are then known in fact or have then been asserted by any regulator). It is also a new SRRA

requirement: pre-SRRA submissions to DEP for NFA Letters did not require proof or a determination of full compliance with all applicable laws (by the applicant or DEP). One can imagine past sites and remediations that received no further action letters from DEP without such evaluation or compliance (for example, perhaps a land use or construction requirement was not met for the remediation, a permit was not obtained or was violated, a waste was mismanaged: a fee was not paid; a document was not filed or recorded: is it really the legislature's goal to deny now an RAO due to same, even if such deviations are arguably immaterial or long past? Indeed the issue of whether or not a particular land use or construction permit was or was not then required might be unclear, as it often is today, given the range of practices of remediating parties, their consultants and the many municipalities and counties involved over time: so can the LSRP opine that the actual conduct did or did not comply? Can he or she do so based on reasonable assumptions (e.g., the absence of regulator enforcement)? Does materiality matter? Does the protectiveness of prior decisions and work trump all deficiencies? Can the LSRP do so without practicing law (to which he or she is unlicensed)? Yet if the LSRP cannot reach this conclusion thereafter he or she arguably cannot issue a RAO (unless the provision is interpreted or varied to narrow its meaning, or limit any such result to then uncured violations or to material violations adversely affecting protectiveness or to known violations, or to allow assumptions, explanations, limitations and exceptions). It is to be hoped that future DEP and Board guidance will acknowledge this possibility and address deviations by allowing RAOs to issue on a reasoned basis, at least if and when the remediation is protective. However, some legislative or regulatory correction may be appropriate.

◊ Note: Such a determination is without doubt a legal question. It arguably requires a judgment of a lawyer (the only licensed professional authorized to practice law). In practice, this may prove a small burden for most LSRPs at most sites, as DEP likely will not care about real analysis of the issue, and the LSRP may be able to reasonably assume compliance based on the absence of any contrary LSRP knowledge or government assertion (such as an open suit or proceeding, directive or notice of violation or contrary guidance), except in the most obvious circumstances (such as a failure to seek a clearly required permit from DEP [such as a wetlands permit]). Perhaps when there is doubt, some LSRPs will seek advice of counsel, either their own or the PRCR's, or will rely on techniques similar to those used by counsel in issuing formal legal opinions (e.g., including limitations, disclaimers, assumptions; obtaining certificates or other assurances). Can the LSRP retain counsel, or rely on the PRCR's counsel, to provide legal advice where appropriate? Arguably this should be permissible. Can the LSRP rely on his or her client's certifications or those of prior consultants or LSRPs, or contract representations or warranties? Absent further clarification, for the moment the LSRP will have to do itself what it needs to do to fulfill its role under SRRA. If an LSRP proceeds without a legal advisor, the LSRP may obtain more liability than it has had pre-SRRA working with clients and their counsel as a team effort (for example, an LSRP giving improper legal advice or opinions may be held strictly liable for any error, and not held to a less stringent standard of a deviation from professional care, and in rare cases might even be deemed to be practicing law without a license, with substantial exposure. See N.J.Ct.R. 1:21-1 & In re Jackman, 761 A.2d 1103 (N.J. 2000)). We need to see how LSRP practice in this area develops, and whether any DEP or Board complaints, audits or reviews focus on the issue specially, and whether any third party complaints or malpractice suits before the courts identify the issue, but some degree of care or caution by the LSRP is appropriate. It is, for example, possible that an adversary (such as a new site owner), neighbor, a municipality, or an interested group, could attack an LSRP RAO as invalid on legal grounds if any violation can be identified as missed by the LSRP. In such a case an LSRP could find itself defending its decisions and approvals, perhaps without the proper license and without adequate support, and indeed in the face of too-late legal conclusions that differ from the LSRP's certifications and decisions. In such a case will the approval be invalidated? Will the LSRP be subject to punishment? Or does the Court interpret the statute to basically eliminate any inference requiring an unlicensed behavior of the LSRP, require only a reasonable effort by the LSRP, and instead weigh the materiality of the defect or permit a cure? And in that view, does SRRA's requirement amount to only in the LSRP's statement that to the best of the LSRP's knowledge and belief he or she knows of no violation of law?

◊ Issue: What value will be assigned by potential buyers or lenders to LSRP decisions? Can a buyer blindly rely, or must a buyer hire its own LSRP to review the RAO and underlying documents to assess their worth? (Who watches the watchers? Who guards against the guards?) What if a non-LSRP preliminary assessment questions the validity of a prior LSRP decision, particularly under new DEP guidance? In particular, what if LSRPs (for example each hired for neighboring sites or a second review) disagree with each other? And, as noted earlier, if in the exercise of due diligence a bank or a buyer identifies the conflict, or a new third party LSRP identifies the conflict, what happens? Does DEP have to be notified by the objecting person or entity? By the new LSRP? By the LSRPs or PRCRs involved? Do complaints have to be filed before the Board? What does protection of public health and the environment require? Will a buyer who buys despite the conflict qualify for an innocent purchaser defense?

◊ Note: There is extensive guidance for issuance of RAOs available at: http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf. Appendix D of the ARRCS Rule is a template form of RAO letter to be used by the LSRP. See http://www.nj.gov/dep/srp/regs/arrcs/arrcs_app_d.doc. Indeed, LSRPs are not permitted to deviate from the RAO form template. Several changes to the RAO guidance, allowing additional notices in RAOs, were implemented in 2013 to address: In-Service Railroad Lines, Spurs and Sidings Not Remediated; Historic Fill Not Remediated for RAO-A; Soil Contamination From an Off-Site Source Not Remediated - General ; Soil Contamination From an Off-Site Source Not Remediated - Diffuse Anthropogenic Pollution and Naturally Occurring Levels of Constituents in Ground Water. See http://www.nj.gov/dep/srp/regs/arrcs/. In 2014 DEP added another notice to address Historically Applied Pesticides Not Addressed (posted 20 June 2014).

■ 3.4.14 An LSRP shall maintain and preserve all data, documents and information concerning remediation activities at his or her sites, including but not limited to, technical records and contractual documents, raw sampling and monitoring data (arguably whoever developed them, including attorneys), that relate in any way to the contamination at the site. At least one (under the ARRCS Rule), and perhaps three (under the SRRA statute), electronic copies of the records shall be submitted to DEP at the time the RAO is filed with DEP. (Compare N.J.A.C. 7:26C-2.5(c) to N.J.S.A. 58:10C-20; P.L.2009, c.60 §20 and N.J.A.C. 7:26I-6.27). N.J.A.C. 7:26I-6.27 includes the minimum period of time that an LSRP shall maintain and preserve all data, documents, records, and information concerning remediation activities at each contaminated site the LSRP has worked on, which is set at 10 years following the date that the LSRP submits a notification of dismissal or the last RAO for the site, whichever is later. N.J.A.C. 7:26I-6.27 also incorporates a prohibition against an LSRP's employer or client from restricting the LSRP from personally maintaining and preserving all data, documents, records, and information in the format and location that the LSRP chooses.

○ Note: Can the LSRP deny any records to its employer?

○ Note: Why are the rights and concerns of employers and clients dismissed so cavalierly by the Board? Should not their interests be protected? Are there not alternate solutions that can equally protect LSRPs, the Board, clients and LSRP employers?

○ Note: Why would a terminated non-continuing LSRP want his or her own copy of the file? To protect himself or herself from accusations by the firm, the client, DEP, the Board and others. (But also to preserve his or her own work product for potential review on future projects, so that the LSRP can proceed in any or all of a consistent, better or more cost-efficient manner).

○ Note: We have long expressed surprise at the absence of concern within the engineering and consulting communities for then present or future actual or potential conflicts of interest and how such may bear on this and other issues. For example, can (or must) an LSRP leaving one firm for another, which new firm represents a party adverse to the LSRP's prior client, take a full file of the former client from the firm he or she is leaving and simply turn over that file to his or her new employer without any other precautions? Can the prior firm and his or her prior client insist on conditions, not approved by the LSRP, to protect against improper use of the records by the LSRP or his new firm, or would such violate this rule? We believe the Board should address this and related issues, particularly in the context of records and related information from prior relationships. We believe a proper balance is possible, but in fact the answers require balance of conflicting interests, not absolute determinations based on one or two factors.

◊ Note: we originally thought it unclear whether the restriction on employer rights meant that the employed LSRP can insist that he or she personally maintains the originals and the employing firm merely copies, or that the LSRP can deny originals to the client, or whether the LSRP's firm or client can insist on the opposite. It is also unclear how this should be interpreted if the LSRP felt it acceptable for the firm or client to maintain copies or originals up until the moment the LSRP decided (or had it decided for him to her) to leave the firm's employment (or client's retention ended). Reasonable accommodations of all interests of the LSRP, the firm and the client should be possible (e.g., we would ordinarily argue that the client determines who gets the originals, and all others have a right to electronic copies). However, the Board in its adoption at Response to Comment 5 says: "… the Board provides in the proposed new rules that 'no one, including without limitation an LSRP's employer and/or clients, shall restrict the LSRP from personally maintaining and preserving all data, documents, records, and information specified in (a) above in the format and location that the LSRP chooses' so that it is clear that the mandate to maintain data, documents, records, and information is personal to the LSRP, and cannot be restricted by anyone." But is this reasonable and consistent with the law? Perhaps not.

◊ Note: There is an absence of an express requirement for preserving drafts. Does this support the view that drafts need not be preserved? (Does "all" [the word used by the legislature] really mean all?

Are drafts still "documents"? Can any drafts or copies be discarded? What if drafts are discarded by the LSREP but retained by the LSRP's client or the LSRP's client's counsel? Does the Board or DEP have a right to see them?)

◊ Note: There is an absence of an exception for attorney-client privileged and confidential materials. Does this support the view that such materials are records subject to this provision? Can the legislature overturn the rules of court governing same (likely no).

◊ Note: There is a requirement of submission of three copies of "the records" to DEP. Does this mean that copies of "all" records need to be submitted? Does this include: contracts? Invoices? Drafts? Multiple versions and markups of drafts? Privileged and Confidential Materials (such as memos or work product)? Correspondence? E-mails? Or does it only include ordinary reports and supporting data (as appears to be the current practice and interpretation)? If the first, then clearly LSRPs, PRCRs and their counsel need to consider how to limit creation of unnecessary records. Can DEP or the Board alter this statutory requirement? Can the courts? In view of these requirements, should counsel be concerned that materials to and from LSRPs may lose any privilege otherwise available? How does the LSRP's duty to preserve confidentiality of client records affect this?

◊ Note: Will all records so submitted to DEP be subject to release to the public on request to DEP under the NJ Open Public Records Act? N.J.S.A. 47:1A-1 et seq. It would appear the Governor thought so when he issued his executive order (2009 No. 140; [http://www.nj.gov/infobank/circular/eojsc140.htm]). Can or must confidentiality be asserted to prevent this as to any confidential records submitted to DEP? Will assertion of confidentiality prevent posting on the internet, as required under Executive Order #140. This should be carefully considered by the PRCR, LSRP and counsel prior to submission of the RAO and supporting materials if containing confidential information. Such privileged and confidential materials should not be submitted.

■ 3.4.15 An LSRP shall be jointly responsible for a violation of N.J.S.A. 58:10C-16 committed by another LSRP he or she supervises or reviews if (1) the LSRP "orders, directs, or agrees to the provision of professional services conducted or prepared" by the supervised LSRP, (2) the LSRP knows that the professional services constitute a violation of SRRA §16 (N.J.S.A. 58:10C-16) and (3) the LSRP fails to take reasonable steps to avoid or mitigate the violation. (N.J.S.A. 58:10C-16.r.; P.L.2009, c.60 §16.r. and N.J.A.C. 7:26I-6.16).

◊ Note: This is actually a relatively narrow liability. It does not, for example, impose liability for similar breaches by PRCRs or non-LSRPs, even if supervised by the LSRP. It does not impose "strict" liability. We would not interpret this, however, to excuse such misconduct or suggest the LSRP has little to be worried about in such other circumstances.

■ 3.4.16 N.J.A.C. 7:26I-6.26: When direct oversight under SRRA and N.J.A.C. 7:26C-14 is triggered, the LSRP shall provide all submissions concerning the remediation that DEP requires simultaneously to DEP and the PRCR. Compare N.J.A.C. 7:26C-14.2(b). See N.J.S.A. 58:10C-27.c.

◊ Note: This is unclear as to both when the obligation arises and what the obligation is. Is notice from DEP that direct oversight has been triggered required? (Many would argue that it is; DEP says not.) Are only actual submissions required to be so transmitted, or drafts? (It says submissions; but DEP feels it too narrow a reading to limit it to only actual materials submitted to DEP, as then why have the clause? So likely it means submissions to DEP being sent to the PRCR for review.) Does it extend to other materials: Outlines? Proposals? E-mails? Brainstorming materials? Presentations of hypotheticals or alternatives? In our view, likely not. Note the statutory requirement is discussed at this Article § 3.8.4.

■ 3.4.17 Note: It is to be remembered, however, that LSRP liabilities are not limited only to express provisions set forth in the SRRA bill. LSRPs can and will have liabilities outside SRRA. Other statutes may be relevant, as may be principles of common law, negligence, contract, tort, and malpractice. LSRP liability can be broader than SRRA.

◊ An LSRP cannot commit a crime; for example he or she cannot provide false testimony, affidavits or certifications to regulators or others. He or she cannot perjure himself or herself.

◊ An LSRP cannot forge documents or signatures. He or she cannot steal. He or she cannot trespass.

◊ An LSRP cannot breach a contract without consequence.

◊ An LSRP cannot negligently or intentionally injure persons or property as to whom it has a duty of care. That may include a lot of people and a lot of property.

◊ An LSRP cannot safely commit "malpractice": breach of a professional duty of care to someone to whom it owes that duty.

○ Does the New Jersey Affidavit of Merit statute apply to malpractice cases against LSRPs? By its terms seemingly yes. Does it require that the affidavit of merit be provided by a plaintiff's exper LSRP? Likely not. N.J.S.A. 2A:53A-27 provides: "In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." The statute continues: " In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c.17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case."

● 3.5 Other Contractors

■ 3.5.1 Note: SRRA does not expressly regulate non-LSRP consultants, except in relatively narrow ways. For example, any person violating SRRA, whether an LSRP, a PRCR or others (such as those signing certifications), may have liability under SRRA. N.J.S.A. 58:10C-17; P.L.2009, c.60 §17. But no provision of SRRA expressly regulates non-LSRP consultants (who are not PRCRs).

◊ See discussions at this Article §§2.1 and 3.4.1 above as to whether or non-LSRPs can do the things that LSRPs can do subject to SRRA, or whether by doing so they are violating SRRA.

■ 3.5.2 Note: SRRA does not expressly regulate lawyers. Obviously if a lawyer can become an LSRP, a PRCR or a person subject to SRRA's terms generally, then he or she will be subject to SRRA requirements without regard to his or her lawyer's license. But if not himself or herself an LSRP or PRCR, by virtue of serving as either a PRCR's lawyer or an LSRP's lawyer does he or she become otherwise subject to SRRA and the DEP's and the Board's powers? For example, can his or her office be invaded, records inspected and seized by the Board or DEP, just because he or she represents PRCRs and either one or several of his or PRCR clients are under investigation? Can the actions of a lawyer with respect to a site under remediation, a PRCR or an LSRP become subject to DEP or Board review under SRRA? Certainly there are a number of SRRA provisions that have effects on attorneys and their clients (including LSRPs, consulting firms, contractors and PRCRs). See e.g., this Article § 3.3.6(B). How should LSRPs, the Board and DEP interact with lawyers as they seek to deal with SRRA requirements? Can the fact of the Supreme Court's separate licensure and oversight of the practice of law by lawyers and non-lawyers be ignored?

■ 3.5.3 Note: SRRA affects certified subsurface evaluators by confirming that they cannot act for remediation of regulated USTs but can act as to remediation of UHOTs. (N.J.S.A. 58:10C-15; P.L.2009, c.60 §15). The ARRCS Rule addresses UHOTs at N.J.A.C. 7:26C-13. Under this rule a person remediating a UHOT may use an LSRP for that work, but the LSRP does not issue an RAO when it is finished and the UHOT is remediated; DEP instead issues a NFA.

◊ Thus DEP still has the power to issue NFAs. Can it do so in other circumstance? Seemingly not under the express terms of SRRA.

● 3.6 DEP Roles

■ 3.6.1 DEP supports the Board. (N.J.S.A. 58:10C-3.a. & e; P.L.2009, c.60 §3.a. & e.) DEP Staff provide the Board with necessary services. In view of this, it is fair for the regulated community to question how separate and independent the Board will be from DEP. Certainly it will be separate enough to avoid being forced by DEP to act if and as the Board chooses not to act. But will the Board in fact recognize the conflicts inherent, for example, in the DEP filing complaints to the Board, investigated by the assigned complaint review teams, provided significant support by the DEP's staff assigned to the Board, and assisted by the Attorney General's office (itself having a conflict of interest in representing the DEP generally, the Board when acting, and the DEP when complaining about LSRPs). But does the Board have the ability and interest to act without DEP support (e.g., over

DEP opposition or intransigence)? Perhaps not. As a practical matter, we believe DEP can have and does have a disproportionate impact on the Board.

■ 3.6.2 DEP has independent "authority to enter, at reasonable times and in a reasonable manner, any known or suspected site, vessel, or other location, whether public or private, for the purpose of investigating, sampling, inspecting, or copying any records, condition, equipment, practice, or property relating to activities" under SRRA. (N.J.S.A. 58:10C-18.b.; P.L.2009, c.60 §18.b.). DEP can seize records, equipment, property or evidence if it "has reason to believe that any person has made fraudulent representations to the board or the department or has destroyed or concealed evidence". (N.J.S.A. 58:10C-18.c.; P.L.2009, c.60 §18.c.). See discussions of the effect of privileges and confidentiality elsewhere. (For example this Article §3.3.6(B) above.)

■ 3.6.3 DEP had the power and responsibility to establish the temporary LSRP license program. (N.J.S.A. 58:10C-12 & 13; P.L.2009, c.60 §12 & 13).

■ 3.6.4 DEP shall inspect all submissions of LSRP concerning a remediation upon receipt. (N.J.S.A. 58:10C-21.a.; P.L.2009, c.60 §21.a.).

◊ 3.6.4(A) Note: The degree of inspection, and the identity, experience and qualifications of the inspector, are not specified in SRRA and are not certain. But we are relatively sure that the inspector will not likely be licensed as a PE, LSRP or attorney and therefore any inspections is arguably going to have weaknesses if examining the professional judgments of those licensed professionals. So we believe the initial inspection is likely to be more cursory and checklist-oriented (completion-oriented) than substantive. This appears to be even more likely now that DEP has announced it is no longer more fully reviewing submissions until after issuance of the RAO. See DEPs 9/10/2014 listserv blast e-mail. Interestingly, the nature of DEP complaints to the Board suggests that DEP is inspecting some submissions more substantively than others.

◊ 3.6.4(B) DEP may provide additional review of any filed document upon a determination that: (1) the LSRP did not comply with SRRA; (2) any deficiencies, errors or omissions will result in an inability to determine if the remediation is protective; or (3) the remediation will not be protective of the public health, safety, or the environment. (N.J.S.A. 58:10C-21.a.; P.L.2009, c.60 §21.a.). This is a seemingly stringent standard.

○ We believe in practice that often DEP will provide additional review of documents after the initial inspection for other reasons than specified, if and when it deems appropriate (for example, if it is in the middle of, or planning, a confrontation with a particular PRCR or LSRPR). We believe DEP will justify any challenge to this behavior by rationalizing the topic of concern to DEP as somehow falling within the legislature's tests.

○ Can DEP provide less or minimal review, support, comment and guidance to an LSRP and PRCR, and their submissions to DEP, and still initiate a complaint to the Boards? In our view it appears so.

◊ 3.6.4(C) DEP shall (mandatory) perform additional review of any document, or the performance of a remediation, if: (1) the contamination poses a significant detrimental impact as determined by a receptor evaluation or the site is ranked by DEP in the highest priority in the RPS; (2) the contamination may affect a licensed child care center, school or other sensitive population; (3) the contaminated site is located in a low-income community of color that has a higher density of contaminated sites and permitted discharges with the potential for increased health and environmental impacts, as compared to other communities; or (4) State grants or loans are being used to remediate. (N.J.S.A. 58:10C-21.b.; P.L.2009, c.60 §21.b.) Under Executive Order #140 DEP is to increase its review, monitoring and auditing of such sites, including ball fields.

○ Note: the determination that additional review is required is seemingly subjective in several of these cases (such as the comparative potential for impacts in a low-income community of color) but objective in others (such as if the site is ranked in the highest priority [recognizing, however, that DEP has not yet published these rankings]).

○ With the long-promised and often-delayed publication of the RPS rankings, the requirement for additional review may have important implications for sites then ranked by DEP as more significant. In view of the increased scrutiny and costs likely to be borne by PRCRs for such sites, if in fact DEP

undertakes such, will there be enough incentive for challenges to DEP's RPS system (still, when last considered, DEP using criteria and weightings that could be attacked.)

○ Whether DEP intended the result or not, it does appear that DEP's new policies (discouraging LSRPs from interim filings before the RAO and allowing DEP to not review most filings substantively until RAO submission) minimizes the number of sites for which this legislative mandatory requirement to perform additional review will be a factor. As a result, arguably the public interest is less protected.

◊ 3.6.4(D) DEP may (optional) perform additional review of any document, or the performance of a remediation, if: (1) the site is in a brownfield development area (a "BDA") or other economic development priority area; (2) the remediation is subject to federal oversight; (3) the PRCR or LSRP has been out of compliance with N.J.S.A. 58:10C-1 et seq. (SRRA), N.J.S.A. 58:10B-1 et seq., N.J.S.A. 58:10A-21 et seq., ISRA or the Spill Act; (4) the site has had an impact on a natural resource; (5) an oversight document, administrative order or remediation agreement is in effect that requires DEP review and approval; (6) there is substantial public interest in the contaminated site; (7) the PRCR has proposed the use of alternative or site specific remediation standards; (8) the remediation requires the issuance of a DEP permit; (9) the use of the site is changing from any use to residential or mixed use; (10) the submission may not be in compliance with any rules and regulations applicable to contaminated site remediation; or (11) the remediation may not be protective of the public health, safety, or the environment. (N.J.S.A. 58:10C-21.c.; P.L.2009, c.60 §21.c.). The LSRP and PRCR shall provide any data, documents or other information as requested by DEP to conduct its review. (N.J.S.A. 58:10C-21.d.; P.L.2009, c.60 §21.d. and N.J.A.C. 7:26I-6.28). Unless directed otherwise by DEP, the PRCR and the LSRP may continue to conduct the remediation while DEP so inspects or reviews. (N.J.S.A. 58:10C-21.e.; P.L.2009, c.60 §21.e.) DEP shall, at a minimum, provide additional review of at least 10 percent of all documents submitted annually by LSRPs. (N.J.S.A. 58:10C-21.f.; P.L.2009, c.60 §21.f.)

○ Obviously this power allows DEP considerable flexibility in providing additional review whenever it feel appropriate, and not in other similar circumstances. Indeed, it appears that only a relatively small percentage of sites, and only the simplest group, will be outside all categories allowing for additional review. However, DEP staffing may make it impractical for DEP to undertake reviews of a large number of sites. DEP undoubtedly will be selective in such efforts.

○ There are no stated time periods for the conduct of this additional review. It is obvious that the PRCR and LSRP may be proceeding with their efforts towards the goal of finishing remediation, and yet find out, only after significant time and expense, that DEP has concerns, perhaps at a time when correction may be close to impossible or disastrously expensive (such as after remedy implementation, recordation of a deed notice, receipt of a RAP, issuance of an RAO, and transfer of the site). Such timing may then result in litigation about DEP's power to substitute its judgment for the independent judgment of LSRPs (because doing so may then be the only viable alternative), when if earlier raised by DEP either or both the LSRP or the PRCR may have surrendered to DEP demands for more or different work or approaches (because doing so would then have been the less expensive alternative). Even if not so problematic, in many other instances there could be serious difficulty and expense in pursuing correction as DEP demands. In certain cases (brownfields redevelopments, for example, particularly if involving mixed or residential uses) new techniques will be needed to allow those projects to proceed safely when and as planned.

○ Note that the finding by DEP that an LSRP has been out of compliance with SRRA on one site may allow DEP to provide additional review of the filings by that LSRP on other sites.

■ 3.6.5 DEP shall act to invalidate a RAO or NFA Letter if DEP determines that the subject remedial action is not protective of public health, safety, or the environment, or if a presumptive remedy was not implemented as required pursuant to N.J.S.A. 58:10B-12.g. (as amended by the SRRA). Again this seems to be a relatively stringent standard. However, if a presumptive remedy is not implemented as required, but DEP determines the remedial action is as protective of the public health, safety, and the environment as the presumptive remedy, DEP shall not invalidate the RAO. (N.J.S.A. 58:10C-22.; P.L.2009, c.60 §22.). See ARRCS Rule at N.J.A.C. 7:26C-6.4 (which also addresses modification or rescissions, including an obligation of the LSRP to so act in certain cases).

◊ Note that N.J.S.A. 58:10B-12.g.(10) allows that "[i]f the person responsible for conducting the remediation demonstrates to the department that the use of an unrestricted use remedial action or a presumptive remedy is impractical due to conditions at the site, or that an alternative remedy would be equally protective over time as a presumptive remedy, then an alternative remedy for the site that is protective of the public health and safety may be proposed for review and approval by the department." Clearly this is for DEP to determine, not merely the LSRP.

○ Does new SRRA provision this modify or override N.J.S.A. 58:10B-13.b. ("If the owner of the real property does not consent to the recording of a [deed] notice…, the person responsible for conducting the remediation shall implement a remedial action that meets the residential soil remediation standard in the remediation of that real property.")? If so, how is it to be implemented if a deed notice is still advisable?

◊ In the most recent adoption of the ARRCS Rule, DEP elected at N.J.A.C. 7:26C-6.4(b) to not act itself but instead to require the LSRP himself or herself to rescind (and perhaps thereafter reissue with amendments) his or her own RAO in certain circumstances: 1. The remedial action is not protective of the public health, safety, and the environment pursuant to N.J.A.C. 7:26C-6.4(a); or 2. the PRCR implemented a remedial action rendering the site unusable for future redevelopment or recreational use. N.J.A.C. 7:26C-6.4(a) defined the circumstances requiring rescission, arguably more broadly than the statute, as: 1. a pre-FRD discharge is discovered after the FRD, which discharge should have been addressed before that FRD issued; 2. DEP amends a remediation standard after the FRD which differs by an order of magnitude and the PRCR does not remediate further; 3. a prior contaminant exposure pathway is identified after the FRD; 4. any liable person violates conditions of the FRD; 5. a permittee fails to comply with a RAP; 6. the remediation was not conducted in accordance with the remediation standards; 7. the FRD is not supported by environmental data; 8. the scope of the FRD is not consistent with the actual remediation; 9. mistakes or errors in the FRD may result in detrimental reliance by a third party; 10. the remediation was not conducted pursuant to *N.J.A.C. 7:26C-6.2(c)*, (f) or (g), as applicable; 11. a presumptive remedy or alternative presumptive remedy was not implemented when required; or 12. other factors exist that demonstrate that the remediation is not protective of the public health, safety and the environment. There has been some debate about the extent of these criteria and their inconsistencies with the statute, particularly in view of the consequences if applied more broadly than the legislature intended. Some corrective amendment of the rule is warranted.

◊ Note: It is not clear procedurally how this power or obligation to invalidate should work. Should any or all of the LSRP, affected PRCR, owners, operators or others be given prior written notice of any deficiency, and an opportunity to explain or cure or dispute DEP's demands, before any modification or rescission takes effect? Can DEP and the LSRP together unilaterally adversely alter the rights of the PRCR and those who rely on the issued FRD (such as a buyer, tenant or lender), without notice to and participation of those parties? Is there a right of the PRCR to a hearing (particularly if there has been reliance on the approval to proceed with some transaction or construction or use)? Is there a right of the LSRP to a hearing? Certainly the consequences of DEP's exercise of this power may be quite significant, on the PRCR, the LSRP, and many other parties. And constitutionally the DEP cannot ignore its obligations to provide notice, fundamental fairness and due process (much as it may want to do so). We believe DEP should be cautious and allow notice and opportunity to be heard before acting in any such manner. And we also believe any LSRP being threatened with this requirement should consult with the affected parties and their counsel, and perhaps its own, before acting- and if the LSRP acts, perhaps do so under protect and reserving all rights, claims and defenses (and perhaps filing an action for relief immediately).. Efforts by DEP to terrorize LSRPs act in circumstances when DEP itself would be restrained, should be addressed cautiously and skeptically.

◊ Note: It is not clear how such a determination can be challenged. Is such a decision a final agency action entitling the aggrieved to seek judicial review? (We believe it may well be such.) Or is there only a right to file a contested case proceeding in the Office of Administrative Law? Who can challenge? The LSRP? The PRCR? The LSRP client? The buyer? Others? We believe all whose rights are adversely affected have rights to protect their own interests, particularly as the DEP and LSRP may not be focused on those parties' concerns. And can a stay be sought? Perhaps; but we believe a stay should be sought if the results are irrevocable damage.

◊ Note: The consequences of such invalidation (or rescission) are unstated. If a transaction subject to ISRA closed under a RAO that is later rescinded, is the transaction now an illegal transaction under ISRA? Does the transferee have a claim to void the transaction? If loans have been made can they be called by the lender? If a lease has been signed can it be undone? If a certificate of occupancy issued, can it be recalled? Is collateral at risk? If a childcare facility operates based on a license based on the RAO in question, must the license be rescinded, the childcare facility closed and children sent home and employees terminated immediately? Are lawyers who issued opinions at risk for malpractice claims? If a remediation funding source was released upon the RAO does it have to be reposted? By whom? When? What if the source of funds or collateral are gone? If an RAP was obtained and an FA posted, with the invalidation of the RAO should the FA also be invalidated and returned? Is the buyer still an innocent purchaser (or a buyer similarly protected by relying on a then valid FRD)? Does everyone potentially affected have a right to notice and a right to be heard? In our view, DEP cannot be the sole and final arbiter of such actions and their consequences. So in our view those adversely affected must have the right to

judicial protection. The consequences of unilateral DEP demands are too severe. Equity requires a right to challenge such power and dictates.

■ 3.6.6 DEP may recommend to the Board that an investigation of an LSRP be initiated and conducted to consider the suspension or revocation of his or her license, or the taking of other appropriate action, based upon the result of an audit or a document review. (N.J.S.A. 58:10C-23.; P.L.2009, c.60 §23.)

◊ Please note that DEP staff had become significant sources of complaints to the Board. Remember that other DEP staff assist the Board in evaluating the merits of those DEP complaints.

■ 3.6.7 DEP shall not audit a RAO more than three years after the date the LSRP filed the RAO with DEP, unless: (a) undiscovered contamination is found on the site with the RAO; (b) the Board investigates the LSRP; or (c) the LSRP has his or her license suspended or revoked by the Board. (N.J.S.A. 58:10C-25.; P.L.2009, c.60 §25.)

◊ Note: It is to be hoped that these circumstances will happen relatively rarely.

◊ Note: As these events seemingly can occur after the three year ordinary (safe) period has expired, there is arguably no absolute period after which an RAO is unable to be audited by DEP. This presents clear issues for drafting contract documents (sale agreements; leases; loans; access; escrows) that provide releases of liability, shifts of responsibility, releases of escrow, etc. Many parties make business bargains assuming DEP will limit its exercise to the three-year statutory period, perhaps sensibly as a practical matter, but with some risk under the express terms of SRRA. However, we would argue that the DEP's rights after the three year period cannot be expansively construed and should be limited to "extraordinary" circumstances (particularly if the issue in question was or could have been evident on the face of the relevant materials and no concealment or serious mistake is involved).

◊ Note: Does the three year period limit actions by the LSRP himself or herself after those three years? The right of DEP to direct the LSRP to act after those three years?

■ 3.6.8 DEP shall establish a permit program for IC and EC. (N.J.S.A. 58:10C-19.; P.L.2009, c.60 §19.) It has done so. See ARRCS Rule at N.J.A.C. 7:26C-7. See this Article §3.8.1 below.

■ 3.6.9 DEP is required to provide mandatory direct oversight of certain sites, most notably if mandatory periods for PRCR remediation are not met or extended, or for older sites where the remedial investigation was not completed within 10 years after the discharge before SRRA and the remedial investigation is still not finished within 5 years after SRRA is adopted. DEP may elect to provide direct oversight of others. (N.J.S.A. 58:10C-27.; P.L.2009, c.60 §27.) See this Article §3.8.2 below.

■ 3.6.10 Under Executive Order 2009 #140, as soon as an internet site with document posting capability is established, the DEP shall post on such site <u>every document</u> submitted by an LSRP in connection with a contaminated site as well as all audit findings within 60 days of their being finalized.

◊ Evidently DEP does not yet have such a web site. When will it? And when it does, it is not clear when and how this will be implemented. For example, does "every" really mean every? What about confidential submissions, for example?

◊ The potential uses and misuses of this web site and data base are yet to be fully considered and appreciated. They include:

○ Use by citizens groups and citizens (including to evaluate potential suits under the NJ Environmental Rights Act N.J.S.A.: 2A:35A-1 et seq. ("ERA"), notably when there are violations of law and DEP is not acting to enforce the law (e.g., arguably if DEP is required to take mandatory oversight and fails)).

○ Use by lenders and purchasers in conducting due diligence of target sites and neighborhoods.

○ Use by appraisers and tax assessors, perhaps creating areas of the state with greatly depressed values, marketability and loan potential.

○ Use by government entities (such as municipalities and counties; potentially including non-New Jersey government entities surfing the data base to build support for relocation to their community instead of New Jersey.).

○ Use by plaintiffs' counsel in evaluating and pursuing toxic tort and stigma damage claims, as well as potential ERA suits (which has already occurred by an entity providing notices to those

when DEP's data base has shown the absence of compliance with some regulatory requirement (such as the biennial certification, or retention of an LSRP).

○ Use by remediating parties and consultants to see what the remediation market is like.

○ Use by neighbors in assessing their own site conditions and other sites' contribution to such conditions.

■ 3.6.11 DEP's enforcement options (including under SRRA, ISRA, UST Law and Spill Act) are summarized under the ARRCS Rule at N.J.A.C. 7:26C-9. This rule addresses fines, including after Grace Periods (required under the NJ Grace Period Law, N.J.S.A. 13:1D-127 to -133). For example, each day of a failure to remediate under N.J.A.C. 7:26C is subject to a $20,000 civil administrative penalty as a non-minor violation. But DEP has other rights and powers, including to make threats and to file complaints with the Board.

■ 3.6.12 DEP must better distinguish the separate roles and responsibilities of PRCR and LSRP. It needs to communicate more often to both, not one. Communications sent by DEP (and others) only to the PRCR sometimes fail to make it to the LSRP (obviously the PRCR should have sent the communication to the LSRP). Communications to the LSRP alone should be promptly forwarded by the LSRP to the PRCR, but sometimes are not. Other persons should also be considered (e.g., site owners and interested party agents and counsel). But DEP often inappropriately directs the LSRP to act when he or she cannot act alone (for example without site ownership or client funds and contracts), or directs an LSRP to correct a deficiency not within the LSRP's control, sometimes in unrealistic timeframes. Failure of DEP to understand the realistic roles of the players (the PRCR is liable; the PRCR has the money; the PRCR sometimes controls the site; the PRCR signed the contract and usually has more control than the LSRP; the PRCR decides many things; the LSRP plans the work) is certain to create problems, conflicts and delays. Certainly DEP needs to focus on the LSRP if its thoughts turn to enforcement. In our view an LSRP is not liable whenever a PRCR breaches.

● 3.7 PRCRs & the Regulated Community.

■ 3.7.1 A PRCR shall provide any data, documents or other information as requested by DEP to conduct DEP's review of documents under SRRA §21. (N.J.S.A. 58:10C-21.d.; P.L.2009, c.60 §21.d.)

◊ The ARRCS Rule elaborates that the PRCR "shall maintain and preserve all data, documents and information concerning remediation of a contaminated site, including, but not limited to, technical records and contractual documents, and raw sampling and monitoring data, whether or not the data and information, including technical records and contractual documents, were developed by the licensed site remediation professional or that person's divisions, employees, agents, accountants, contractors, or attorneys, that relate in any way to the contamination at the site." See N.J.A.C. 7:26C-2.5. The rule continues that the DEP can demand to see same (but the PRCR can reserve confidentiality). And finally at least one copy of all these must be submitted upon and after issuance of the RAO. See N.J.A.C. 7:26C-2.5(c); compare N.J.S.A. 58:10C-20; P.L.2009, c.60 §20. See discussions of similar issues at this Article §§ 3.4.11, 3.4.12, 3.4.14. & 3.6.4(D).

◊ Note, however, that there is no official technique for third parties to seek copies of an LSRP's or PRCR's records, before or after a RAO, prior to submission of such records to DEP. (And given DEP's stated preference that interim RI Reports are to be avoided (see http://www.state.nj.us/dep/srp/srra/listserv_archives/2011/20111222_srra.html), and only a final RI Report is favored, less information may now be available under post-SRRA cases than was previously available under pre-SRRA cases, a curious policy choice by DEP). After submission to DEP, non-confidential records submitted by the LSRP for the PRCR should be available from DEP under OPRA. But OPRA does not by its terms apply to LSRPs or PRCRs (as they are not the State itself or instrumentalities of the State, despite the view that LSRPs are, in some ways, acting in lieu of or for the DEP). Indeed the Board itself, in its Adoption Response to Comment 9, says "An LSRP's data and records are not "public records" as defined in the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq. As a result, an LSRP has no obligation under OPRA to provide the public with access to his or her records." But do the public outreach obligations require that LSRPs or PRCRs provide information when and as requested by third parties? See N.J.A.C. 7:26C-1.7 and N.J.A.C. 7:26I-6.19 (discussed at this Article §3.3.4(C) above). Not expressly, at least prior to a DEP determination otherwise under N.J.A.C. 7:26C-1.7(o). Also, consider a Board decision dismissing a complaint that an LSRP violated his obligations in that: "the LSRP will not provide copies of, or access to, work product communications between him and his client; the LSRP will not share drafts of reports before they are submitted to the Department; and the LSRP will not accept information and input from the

Complainant's consultant on remediation decisions." See http://www.nj.gov/lsrpboard/board/prof_conduct/20121120_summary0112.pdf.

◊ See This Article §3.4.14 as to drafts and confidential materials.

■ 3.7.2 No person shall take retaliatory action (or threaten to do so) if an LSRP: **a.** discloses to the Board or DEP an activity, policy or practice the LSRP reasonably believes: (1) is a violation of Law(s), including any violation involving deception of, or misrepresentation to, any client, customer, DEP, or any other governmental entity; or (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation that the LSRP reasonably believes may defraud; **b.** provides information to, or testifies before, any public body conducting an investigation into any violation of Law(s) by a client or customer with whom there is a business relationship, including any violation involving such deception of, or misrepresentation, or, in the case of an LSRP, provides information to, or testifies before, any public body conducting an investigation into the quality of a remediation; or **c.** objects to, or refuses to participate in, any activity, policy or practice which the LSRP believes: (1) is in violation of Law(s), including any violation involving such deception or misrepresentation; (2) is fraudulent or criminal, including any such activity, policy or practice of deception or misrepresentation; or (3) is incompatible with a clear mandate of public policy concerning the protection of the public health, safety, or the environment. (N.J.S.A. 58:10C-26.; P.L.2009, c.60 §26. and N.J.A.C. 7:26I-9).

◊ Note: This statutory provision suggests that an LSRP has a right to disclose such circumstances (a retaliatory action for improper reasons) to the Board or DEP even if he or she is not obligated to do so. But does such a statutory right supersede contrary contractual or ethical duties of loyalty or confidentiality to a PRCR? Can a PRCR's contract clauses limit the right of an LSRP to so act? Can the LSRP be required, for example, expressly or implicitly by contract, to disclose the concern to his or her client and allow a period for cure, or to arbitrate any such situation, before acting to go to the Board or DEP unilaterally, at least when not obligated by law or rule to disclose to the Board or DEP? Can the LSRP be required to preserve attorney-client confidential materials and be punished for a failure to do so? How should an LSRP act if faced with conflicting rights and duties? (Seek legal advice? Seek DEP advice? Seek Board advice? Seek judicial advice? Arguably only the last is safest.)

◊ Note: This restriction against retaliatory action could extend to the PRCR for whom the LSRP is working, a firm employing an LSRP or others. Could it extend to an attorney retaining an LSRP? To a person seeking bids from LSRPs who elects to hire others? To unrelated retentions (a different site or matter)? Possibly. (Obvious proof issues exist). To a Judge? (No.) Is dismissal of an LSRP for any reason always to be considered a retaliatory action such that any and every dismissal is limited by this provision? (Potentially yes. Retaliatory dismissal may be limited in an employment context.) Could it extend to prevent dismissal of an LSRP despite the loss of trust between LSRP and client or despite a breach of a contract right limiting the LSRP's right to so behave? Or will dismissal be permitted with a claim for damages? (It would seem more appropriate to allow dismissal, but allow a claim for damages, if dismissal is wrongful, than to force the two to work together in a damaged relationship).

◊ Can an arbitration clause, or the like, limit an LSRP's rights to challenge a dismissal as retaliatory? (Likely yes.)

■ 3.7.3 Perhaps as one of the most significant provisions under SRRA, an owner or operator of an industrial establishment subject to ISRA, the discharger of a hazardous substance or a person in any way responsible for a hazardous substance pursuant to the Spill Act, or the owner or operator of an underground storage tank regulated pursuant to N.J.S.A. 58:10A-21 et seq., that has discharged a hazardous substance, (all within the definition of PRCR) shall remediate the discharge. (N.J.S.A. 58:10B-1.3.a.; P.L.2009, c.60 §30.a.) No option or discretion is expressly provided. Correlating changes have been made to a range of rules under the ARRCS Rule, including N.J.A.C. 7:1E, N.J.A.C. 7:14B, and N.J.A.C. 7:26E. For example, N.J.A.C. 7:26E-1.5(a) provides that the PRCR "shall conduct remediation pursuant to this chapter and N.J.A.C. 7:26C-1.2."

◊ 3.7.3(A) Post-SRRA Cases: Since SRRA took effect, a person who initiates a remediation of a contaminated site shall: (1) hire an LSRP to perform the remediation; (2) notify the DEP of the name and license information of the hired LSRP; (3) conduct the remediation without the prior approval of DEP, unless directed otherwise by DEP; (4) establish a RFS if required pursuant by N.J.S.A.58:10B-3 (i.e., if subject to ISRA or "issued a directive or an order by a State agency, [or] … entered into an administrative consent order… or {if so]… ordered by a court"); (5) pay all DEP fees and oversight costs; (6) provide access to the contaminated site to DEP; (7) provide access to all applicable documents concerning the remediation to DEP; (8) meet the mandatory remediation timeframes and expedited site specific timeframes established by DEP under

N.J.S.A. 58:10C-28.c., P.L.2009, c.60 §28.c.; and (9) obtain all necessary permits. (N.J.S.A. 58:10B-1.3.b. and c.(3); P.L.2009, c.60 §30.b. and c.(3)). The ARRCS Rule confirms these obligations at N.J.A.C. 7:26C-2.3. The PRCR is given 45 days after the event requiring remediation (such as an ISRA triggering event) to notify DEP of the hiring of an LSRP.

○ The ARRCS Rule exempts certain minor discharges (for example, a discharge from (i) a car accident or (ii) involving less than 100 gallons of petroleum that does not impact state waters, or (iii) a discharge referred by DEP to its Bureau of Emergency Response, to the New Jersey Office of Emergency Management, or to a County Environmental Health Agency) from the obligation to use an LSRP or submit documents to DEP, unless DEP directs otherwise. See N.J.A.C. 7:26C-1.4(e). The exemption does not eliminate the need to remediate the discharge.

○ Note: Arguably a notice of retention of an LSRP for other purposes (for example, as a trial expert, for a second opinion or for pre-purchase due diligence) need not be provided to DEP.

○ Older sites (where the discharge happened 10 or more years ago and the remedial investigation is not yet done) were allowed only two years (until May 2014) to finish the remedial investigation, unless they exercised the 2014 right to extend that deadline by two years (until May 2016). See N.J.S.A. 58:10C-27.

◊ 3.7.3(B) Cases before Licensure: Until May 2012 many who initiated remediation prior to the date of SRRA, or prior to the issuance of temporary licenses to LSRPs pursuant to N.J.S.A. 58:10C-12, were only obligated to comply with certain provisions of N.J.S.A. 58:10B-1.3.b. paragraphs (4) through (9). (N.J.S.A. 58:10B-1.3.c(1); P.L.2009, c.60 §30.c.(1)).

○ Note: This meant that such cases needed not then to use LSRPs or proceed with remediation without DEP involvement. In that period DEP theoretically should have continued its then existing oversight system to process such existing cases. But in reality, except for the easiest and/or luckiest cases, those closest to completion, or those economically or politically significant were able to maintain sufficient DEP attention and resources to finish (by receipt of a NFA letter), other cases languished without DEP oversight. All must be using LSRPs now.

○ What about prior administrative consent orders ("ACOs") and Remediation Agreements? DEP has advised that: "Upon the date that a party enters the LSRP program, the Department will hold in abeyance all requirements in ACOs/RAs that concern obtaining the Department's preapproval of reports, workplans, progress reports, and all requirements to meet ACO/RA-specific timeframes. Parties are expected to proceed with remediation using an LSRP in accordance with N.J.A.C. 7:26C-2.4, and to meet all regulatory and mandatory timeframes contained in the applicable rules, including N.J.A.C. 7:14B, N.J.A.C. 7:26B, N.J.A.C. 7:26C and N.J.A.C. 7:26E. … All other requirements of the ACO/RA remain in effect and are not held in abeyance, including, but not limited to, requirements for a remediation funding source (RFS), the RFS surcharge, and stipulated penalty provisions. The person responsible for conducting the remediation pursuant to an ACO or RA should be aware that the ACO/RA remains in effect and will not be terminated until remediation is complete or all remaining remediation is covered by a remedial action permit." See http://www.state.nj.us/dep/srp/guidance/aco/index.html. The significance of the lines drawn by DEP remain to be seen and addressed. But the initial intent is clear: look to the SRRA program and LSRPs for the process of remediation and not to the terms of the ACO or remediation agreement.

○ The real meaning and consequence of this partial continued effect of ACOs etc. is uncertain.

○ MOAs? Abolished. And, in DEP's view existing MOAs are either terminated or of no further force and effect. (The prior website page that announced this is no longer available.)

- Some who have legitimate positions that they are not PRCRs under SRRA or RPs under the Spill Act would like to conduct remediation, using LSRPs, but feared that doing so may convert them into PRCRs or RPs. In the absence of such a program some decline to take such steps out of fear that once they begin there is no escape from the SRRA label of PRCR. We think that counter arguments are available, but acknowledge the concern that a strict interpretation of SRRA converts those who retain LSRPs into PRCRs without the option to revert to prior status, a view potentially more troubling in the absence of DEP guidance otherwise.

○ Restoration of the voluntary cleanup program would allow some sites to be remediated that now languish waiting for DEP enforcement to test the validity of defenses to liability. This delay is not in the public interest and can be easily and cost efficiently resolved. The absence of a DEP voluntary cleanup program, with rules to permit those who want to remediate without admitting or accepting liability or without need

to await eventual uncertain and delayed enforcement if and when DEP gets around to it, limits some, who might elect to do so in whole or in part, in proceeding with remediation (for example, at sites where there are disputes among various persons and entities, and DEP, as to relative liabilities and defenses). Those who believe that they have a bona fide defense that may protect them, and will not abandon such, do nothing while DEP lacks sufficient resources to pursue all. Others who believe they may escape attention or prioritization, and fear that, even if willing to act, doing so may bring themselves to DEP attention, weaken their defenses and indeed constitute a voluntary acceptance of SRRA liability and responsibilities, decide to stay hidden. We believe the scarcity of DEP enforcement resources, and the large number of sites and parties potentially requiring attention, and the difficulties faced by DEP in adequately prioritizing and enforcing against enough parties in any given year to make a meaningful difference, cries for a solution that achieves more with less. In our view DEP should re-create some program, like the now abolished MOA program, that would allow for such efforts, likely under LSRP oversight and with minimal DEP involvement, rather than rely on guilt, fear, deterrence and punishment to drive compliance. For the moment, absent such a program, in appropriate matters, assuming DEP is willing to cooperate, it may be possible to use a court action, and a court approved order in settlement, or a threat of same resolved by a settlement agreement or consent order, to proceed with a different process for remediation at appropriate sites.

○ Does the absence of such a program and the lack of a clear exemption from SRRA certainly mean that those persons and entities who undertake remediation using an LSRP have lost the ability to terminate their efforts without liability? We would hope not but we confess concern that DEP may take such a position.

○ Does the absence of such a program and the lack of a clear exemption from SRRA mean that those persons and entities who undertake remediation without using an LSRP, voluntarily but in fear that LSRP retention is a waiver, are automatically in violation of SRRA? We would hope not but we confess concern that DEP may take such a position. Will the Board act against those non-LSRPs for remediating without LSRP involvement?

◊ 3.7.3(C) Exceptions: N.J.S.A. 58:10B-1.3 shall not apply to any person who remediates a discharge from a UHOT (but N.J.S.A. 58:10C-15 shall apply). (N.J.S.A. 58:10B-1.3.d.(1); P.L.2009, c.60 §30.d.(1)). N.J.S.A. 58:10B-1.3. shall not apply to any person who: (a) does not own a contaminated site, (b) conducts a preliminary assessment or site investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property as provided in N.J.S.A. 58:10-23.11g.8., and (c) has not discharged a hazardous substance at the site or is not in any way responsible for a hazardous substance discharged at the site pursuant to N.J.S.A. 58:10-23.11g.8. (N.J.S.A. 58:10B-1.3.d.(2); P.L.2009, c.60 §30.d.(2)) In the ARRCS Rule DEP clarified that due diligence under N.J.S.A. 58:10C-30.d.(2) is not remediation requiring use of an LSRP and other compliance with SRRA. See N.J.A.C. 7:26C-1.4(c)(1). See also N.J.A.C. 7:26I-6.10(c). As drafted this might leave regulatory uncertainty whether other due diligence is subject to SRRA (for example, under N.J.S.A 58:10-23.11gd(2) or to prepare for foreclosure of a lien). We believe the better view is that other due diligence and all appropriate inquiry should not be subject to SRRA, including, for example, if not for the purpose of addressing known contamination for which the actor is responsible.

◊ 3.7.3(D) Any person who fails to comply with the provisions of N.J.S.A. 58:10B-1.3. shall be liable to the enforcement provisions established pursuant to N.J.S.A. 58:10-23.11u (which provides DEP can bring a civil action for [(1) a temporary or permanent injunction; (2) the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating; (3) the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, any lost income, and any reduction in value of the property caused by the discharge; (4) the cost of restoration and replacement, where practicable, of any natural resource; and (5) any other costs incurred by the department pursuant to P.L.1976, c.141.], for a civil administrative penalty of not more than $50,000 for each violation, and each day of violation shall constitute an additional, separate and distinct violation, a civil administrative order for the costs of any investigation, cleanup or removal, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty, for a civil penalty not to exceed $50,000.00 per day for each violation, and each day's continuance of the violation shall constitute a separate violation, and forfeiture of conveyances used or intended for use in the willful discharge of any hazardous substance).

○ Note: The liability extends to “any person” and is not by its terms limited to PRCRs or LSRPs. However, the nature of the obligations under this Section suggest a relatively narrow universe of potential targets.

○ See also N.J.A.C. 7:26C-9 for detailed provisions allowing for DEP enforcement, including issuance of civil administrative penalties and tables of offences with respect to same, application of the grace period rule, Spill Act directives and hearing rights.

○ See this Article §3.7.3(B) as to the need for, and significance of the absence of, a voluntary cleanup program.

◊ 3.7.3(E) Receipt of an RAO from the LSRP is deemed to include a covenant not to sue by operation of law. (N.J.S.A. 58:10B-13.2.a; P.L.2009, c.60 §31.a). Under the ARRCS Rule the scope of the FRD and the Covenant not to sue are limited by the scope of the remediation so addressed. See N.J.A.C. 7:26C-6.5. The covenant not to sue is, under the ARRCS Rule but not expressly under SRRA itself, without prejudice to claims for NRD and pending litigation with DEP. But see this Article §3.8.8(E).

○ Does the limitation of a RAO to the scope of the remediation addressed, include an element of time? Likely yes. For example, assume a site entered the system in 2005 because of an ISRA trigger (a sale of the site and business by OldCo to NewCo). Assume the PA promptly performed identified 30 hypothetical AOCs, of which only 1 AOC later required investigation and remediation. Completion occurs by Mid 2013 and the entire site RAO issues 9/1/2013. If NewCo triggers ISRA for the same site on 12/1/2013, does the NewCo LSRP examine site operations only as they existed since the 9/1/2013? Likely no. The scope of the 9/1/2013 is determined not by the date of the RAO but by the date of the work leading up to the RAO. If after the original RAO for OldCo, NewCo continued operations in a number of the older AOCs and perhaps new ones, we think that DEP expects that the new NewCo LSRP must look at NewCo's operations since that older PA because those operations were not considered in the prior ISRA case.

○ It remains to be seen if the DEP's regulatory limits on the scope of the covenant not to sue imposed in N.J.A.C. 7:26C-6.5, at least as to NRD, will be challenged or, if challenged, enforced.

○ In our view this provision supports the practice of DEP allowing PRCRs to retain individual and multiple LSRPs for its site, each of whose jurisdiction is limited to a particular task or AOC. We believe this to be consistent with legislative direction that LSRPs not act outside their individual competence (potentially allowing one LSRP to take responsibility for his or her own expertise, and another to do the same). See N.J.A.C. 7:26I-6.3 discussed at this Article §3.4.3(B). And we believe the risks to the public from such practice are limited to non-existent as the scope of the resulting RAO is limited to the work conducted. Of course, the PRCR itself must use care to assess that it is meeting its legal obligations as if it limits the roles of one or more LSRPs, who will assess whether or not all SRRA requirements have been met? (DEP and the PRCR).

◊ 3.7.3(F) DEP Requirements for submissions are specified in various places including ARRCS Rule at N.J.A.C. 7:26E-1.6., and to some extent in DEP's instructions and guidance for such submissions. They are not identical to those applied by DEP prior to SRRA.

○ A growing issue under SRRA is the ability of DEP to force LSRPs and PRCRs to limit their submissions to the precise forms prepared by DEP, particularly as to those forms that can be submitted only through the electronic gateway. While on the one hand it is understandable that DEP wants to improve efficiency and consistency, on the other hand DEP cannot, in our view, alter substantive rights or require waivers of defenses and reservations, or cause legal, technical or factual conflicts or errors, by forcing parties to limit themselves to the choices acknowledged by DEP in its drafting choices as valuable to DEP. For example, if DEP does not allow a party to alter the LSRP retention form to reserve the party's assertion that it is not by retaining an LSRP admitting liability or waiving defenses, does the form have the result of being a waiver? And if the party and its counsel are nervous about something in the form, what can be done? At a minimum, we believe submitting separately a physical corrected submission to DEP, perhaps by certified mail or hand delivery or telecopy, e-mail or overnight service, may suffice to preserve the party's positions, even if DEP declines to review the materials on receipt as improperly submitted, or even if DEP discards them or returns them unread. In our view, it is doubtful that DEP can disclaim knowledge of what has been sent to it, merely if it elects not to review or understand, at least in many instances.

◊ 3.7.3(G) DEP imposes specific requirements for addressing LNAPLs under DEP's LNAPL Free Product Interim Remedial Measures guidance within 60 days after the LNAPL is identified, by initiating the recovery of free product and notifying DEP on a DEP form and, within 270 days thereafter, completing delineation of the free product; and then completing the installation of a LNAPL recovery system, initiating

operational monitoring, and submitting an Free Product Interim Remedial Measures Report form to DEP. See N.J.A.C. 7:26C-3.3 and N.J.A.C. 7:26E-1.10(c).

◊ 3.7.3(H) DEP prior approval is needed for remediations at: Sites suspected or known to be contaminated with anthropogenic radionuclide contamination of any media; Sites with IECs; and Sites with a landfill, if the landfill or any portion is slated for redevelopment that includes structures intended for human occupancy; or when landfill remediation activities are funded by the HDSRF or a Brownfield Redevelopment agreement or the Municipal Landfill Closure and Remediation Reimbursement Program; or the person conducting the remediation wants a FRD. See N.J.A.C. 7:26C-2.3.

◊ 3.7.3(I) DEP imposes new PRCR requirements for remediation of IECs including: to provide immediate notice to DEP; within 5 days to mitigate the IEC impacts (such as by providing bottled water to affected residents or mitigating or treating infiltration of vapors or restricting access to soil contaminated above acute levels); within 5 days to submit to DEP its IEC Immediate Response Action form, IEC Information Spreadsheet, a map indicating the location of the site and IEC condition; and all required analytical results, with a Potable Water Data form; within 60 days implement IEC engineered system response actions (Provide water treatment or an alternative water supply to affected residents, install a vapor mitigation system, and otherwise reduce exposure to acceptable levels). Further within 120 days the PRCR shall submit an IEC engineered system response action report with an updated IEC Response Action form including a description of all immediate response actions and engineered system response actions, including dates, a summary of all analytical data, all maps and figures, a description of the contaminant source and a GIS compatible map of the estimated area of ground water contamination prepared pursuant to the Department's IEC Guidance. Within 270 days after identifying the IEC condition, the PRCR shall initiate control of the IEC contaminant source using DEP's IEC Guidance, complete the delineation and submit an IEC contaminant source control report, with an updated IEC Response Action form that includes a descriptions of Remedial actions to remediate the IEC contaminant source, a monitoring plan for the mitigation system, and A monitoring plan for the wells or structures that are located downgradient of the wells or structures that are impacted by the IEC condition. See N.J.A.C. 7:26E-1.11.

○ Note: with respect to vapor exceedances, DEP IEC guidance provides that "A Vapor Intrusion (VI) Immediate Environmental Concern (IEC) exists when there is a chronic exposure that exceeds a Rapid Action Level(s) (RAL) in a building, a contaminant source related to the site exists and there is a demonstrated pathway between the two." (emphasis supplied). This language supports the view that a mere sampling result may not be enough to require reporting by a PRCR or its LSRP of an IEC in the absence of either a chronic exposure or a pathway." Of course, any LSRP needs to exercise great care in deciding not to report a potential IEC in view of both the fundamental issue of whether people are at risk and DEP's likely excitement if it learns that an LSRP has data suggesting the possible existence of an IEC on which he or she and his or her PRCR fail to act. A Board complaint could well follow. In addition, if the LSRP concludes, for any reason, that the PRCR either has no obligation to act or will not act, or that DEP expects the LSRP and PRCR to act, but such action will not occur promptly or at all, and no other will act, then at a minimum the LSRP would be well served by advising the PRCR, preferably in writing, of what the LSRP thinks the DEP's position is or will or may be, what the rules and statute say and what the PRCR needs to do to satisfy those DEP positions and requirements, rules and statute if and as applicable. That then might allow all to apply a proper focus on whether the LSRP was in violation or the PRCR was in violation or no one is in violation, if a complaint is filed by DEP or the Board, particularly if, in the exercise of caution, the LSRP reported the data giving rise to the issue and the possible existence of an IEC. In this regard, recall again the issues posed by DEP demands for form/IEC responses and certifications in its forms any guidance.

○ Note: with respect to vapor exceedances, a troubling issue for an LSRP may be how to address a potential, suspected or alleged IEC, when the potential, suspicion or allegation do not expressly require action under DEP guidance, or when the accuser is itself subject to SRRA requirements.

○ Note: with respect to vapor exceedances, another troubling issue for an LSRP may be how to respond when DEP feels the PRCR should be acting with respect to a potential, suspected or alleged IEC, but is not acting. Must the LSRP act? Resign? Will the LSRP face enforcement?

◊ 3.7.3(J) DEP imposed new requirements for receptor evaluations. Under new rules proposed in October 2010, if remediation was initiated before March 1, 2010 the initial receptor evaluation was due by March 1, 2012, otherwise thereafter within 2 years of the event. See http://www.state.nj.us/dep/srp/srra/training/matrix/new_responsib/6_timeframe_req.pdf. N.J.A.C. 7:26C-3.3(a)2.

The receptor evaluation form then shall be updated as work progresses. Copies of the evaluation shall be sent to the clerk of each site municipality and its local health official. In essence the receptor evaluation is intended to identify within 200 feet of the site boundary all current land uses and proposed changes, each residence, school or child care center, as well as each park, playground or other recreation area. A well search (and door to door survey) is required within 90 days of identification of groundwater contamination and within 120 days notify DEP and sample each potable well within 1000 feet, or if ground water flow direction is known, limit sampling to wells 250 feet upgradient, 500 feet sidegradient and 1000 feet downgradient. Further sampling, notification, work to address IECs and other requirements are imposed depending on results. See N.J.A.C. 7:26E-1.12.

◊ 3.7.3(K) DEP imposed new requirements for vapor intrusion work. If shallow ground water is impacted by petroleum hydrocarbon contamination greater than any vapor intrusion screening level within 30 feet of a building, or other volatile contamination greater than any vapor intrusion screening level within 100 feet of a building, or free product is identified in ground water within 100 feet of a building, or soil gas or indoor air contamination is detected exceeding vapor intrusion soil gas or indoor air screening levels or a landfill is located on or adjacent to the site or a wet basement or sump in a building contains free product and/or ground water containing any contaminant listed in Table 1 of the VIG or Methanogenic (methane generating) conditions are present that may cause an explosion; or any other information indicates that human health may be impacted via the vapor intrusion pathway. Further sampling, notification, work to address IECs and other requirements are imposed. See DEP Vapor Intrusion Guidance at http://www.nj.gov/dep/srp/guidance/vaporintrusion/vig.htm and N.J.A.C. 7:26E-1.11 &1.15.

◊ 3.7.3(L) DEP reimposed requirements for ecological work. See N.J.A.C. 7:26E-1.16. These include that (a) the PRCR shall conduct an ecological receptor evaluation to 1. Determine if any environmentally sensitive natural resource, other than ground water: i. Are present; ii. Are adjacent; or iii. May be, have been, or are impacted; and 2. Determine if any contaminant concentration is present that exceeds any ecological screening criterion or any aquatic surface water quality standard. (b) If so then the PRCR shall conduct a remedial investigation of ecological receptors under N.J.A.C. 7:26E-4.8.

■ 3.7.4 PRCRs must report newly occurring or newly discovered historical discharges in accordance with the Spill Act, if and to the extent applicable (N.J.A.C. 7:1E-5), including immediately by phone call to 1-877 WARNDEP or 1-877-927-6337 and in writing. IECs must be similarly reported. N.J.A.C. 7:26C-1.7. IECs and discharges must be confirmed on the Confirmed Discharge Notification form available from the Department at www.nj.gov/dep/srp/srra/forms, within 14 days. N.J.A.C. 7:26E-1.11 & N.J.A.C. 7:26C-1.7. In addition a PRCR conducting sampling of potable wells or under DEP's vapor intrusion guidance must report at the time of contact for the purpose of gaining access to conduct sampling, but no later than 7 days prior to the scheduled sampling date using DEP's Potable Well/Indoor Air Sampling Notification form. N.J.A.C. 7:26E-1.14 & -1.15. Signs posted under the public participation rule need list the LSRP or other contact instead of DEP's community affairs office. N.J.A.C. 7:26C-1.7(h). Similar changes have been made to the former migration notice, advertising and fact sheet requirements. An alternate communications plan may be approved by the LSRP. There are other requirements to copy local officials and provide further information to DEP on request. N.J.A.C. 7:26C-1.7.

● 3.8 Changes to the Pre-SRRA Remediation Program

■ 3.8.1 Engineering and Institutional Controls

◊ SRRA required DEP to establish a new permit program to regulate the operation, maintenance and inspection of EC and IC and related systems installed as part of a remedial action of a contaminated site. DEP may require periodic monitoring, inspections, and maintenance by the person responsible for the controls and the submission of certifications regarding those activities. Such permits may by statute be individual, by rule, or be general permits. (N.J.S.A. 58:10C-19.a.; P.L.2009, c.60 §19.a.) DEP may require any person responsible for the monitoring, operation, and maintenance of EC and IC before SRRA, and any person required to submit a certification on a biennial basis pursuant to N.J.S.A. 58:10B-13.1, to obtain such a permit. (N.J.S.A. 58:10C-19.b.; P.L.2009, c.60 §19.b.) DEP may charge reasonable application fees and annual fees to cover the costs of permit issuance, administration and enforcement. (N.J.S.A. 58:10C-19.d.; P.L.2009, c.60 §19.d.). DEP has implemented these requirements at ARRCS Rule at N.J.A.C. 7:26C-7 (addressing deed notices [and older declarations of environmental restrictions {at least to the extent DEP has the power to unilaterally change the rules, which DEP power is subject to question under prior law and recorded instruments}] and CEAs), -4.5 & -4.6 (RAP fees) and -5.2 (FA).

○ Permittees are not limited to one express Person. They include each owner, operator and PRCR. See ARRCS Rule at N.J.A.C. 7:26C-7.4. They include, for example, each tenant (being a "statutory permitee"). Co-permittees are jointly and severally liable under the ARRCS Rule. See N.J.A.C. 7:26C-7.4(b). The precise meaning and effect of such joint and several liability yet needs to be seen.

○ Permits are required and are obtained pursuant to detailed requirements for specified remedial actions: CEAs; a recorded deed notice or declaration (N.J.A.C. 7:26C-7.5); EC or IC; obligations for monitoring, maintenance and evaluation of a remedial action. Pursuit of a RAP requires submission of DEP application forms. See N.J.A.C. 7:26C-7.3 &7.5. In certain instances recorded deed notices are no longer required (i.e., if there is no deed for the affected property, e.g., roads and US properties). See N.J.A.C. 7:26C-7.2. There are extensive notice requirements. See N.J.A.C. 7:26C-7.2, -7.3, and -7.5. Applications for RAPs for existing remedial actions, ECs, ICs, deed notices and declarations are due within two years after the last biennial certification was due to the Department, but in no case later than May 7, 2014 (a requirement not changed by the recent law allowing extension of the RI May 2014 deadline). See N.J.A.C. 7:26C-7.6(a). Otherwise they are due when and as consistent with the filings for the remedial action.

○ Permits require: biennial certifications (N.J.A.C. 7:26C-7.7(a), -7.8 and -7.9), FA under N.J.A.C. 7:26C-7.10 and -5.2(e), if applicable, and payment of fees. The FA requirements are based on the estimate of the future lifetime costs to operate, maintain, and inspect all ECs (but not CEAs or mere ICs) part of any remedial action (although some are exempt, such as governments, small businesses, schools, child care centers, residences, schools and certain innocent purchasers [those who purchased a contaminated site prior to May 7, 2009, and are remediating, or have remediated, the contaminated site pursuant to N.J.S.A. 58:10-23.11g.d]. See N.J.A.C. 7:26C-7.10(c) and N.J.S.A. 58:10C-2; P.L.2009, c.60 §19.c.(2); but if one permittee is exempt and others are not, the FA is still required). The annual 1% surcharge against RFS under N.J.A.C. 7:26C-5.9 is not collected for such RAP FA. See N.J.A.C. 7:26C-7.10(d). As to FA see also N.J.S.A. 58:10C-19.c.(2), P.L.2009, c.60 §19.c.

- We have seen instances when LSRPs rely on DEP approvals of FA in the amount of $30,000 without independent calculation of the true life time costs associated with an EC and IC. We believe LSRPs should be careful to document their reasoning in calculating the FA as such amount.

○ Permits should be transferred to new owners or operators by at least 60 days prior notice to DEP and the transferee on the DEP's Remedial Action Permit Form (which requires the transferee to acknowledge its responsibility as such) appropriate for the specific remedial action permit. N.J.A.C. 7:26C-11. Permits may be modified by DEP itself (when necessary to be protective) or on application (mandatory of a permittee if the contaminants change, a remedy is no longer protective or is being changed, the lot and block change, the permittee changes name and address. N.J.A.C. 7:26C-7.12). Similarly permits may be terminated, if and when appropriate. N.J.A.C. 7:26C-7.13.

○ Note: the rules and the statute provide little guidance as to how multiple permittees are to allocate their obligations and liabilities inter se. Future conflict can and should be anticipated on such issues, particularly as site ownership and operations change and Persons disappear (through bankruptcy, death or other natural phenomenon). Care should be exercised to elaborate on contract requirements in sales and leases, even if the PRCR intends to maintain responsibility in perpetuity.

◊ "If any permittee fails to comply with the actions required pursuant to a remedial action permit or this subchapter, the Department, or another party as the Department may authorize, may draw on the financial assurance to achieve compliance." N.J.A.C. 7:26C-7.10(g).

■ 3.8.2 Mandatory DEP Oversight of Remediation

◊ DEP shall undertake direct oversight (over the preferences and control of a PRCR and its LSRP) of a remediation of a contaminated site: (1) the PRCR has a history of noncompliance with the Law(s) concerning remediation that includes the issuance of at least two enforcement actions (administrative order, notice of civil administrative penalty, or a court order) during any five year post-SRRA period; (2) the PRCR has failed to meet a mandatory remediation timeframe (N.J.A.C. 7:26C-3.3) or an expedited site specific timeframe (N.J.A.C. 7:26C-3.4) adopted by DEP under N.J.S.A. 58:10C-28, including any extension thereof granted by the department, or a schedule established pursuant to an administrative order or court order; or (3) unless a longer period has been ordered by a court, the PRCR has, prior to the date of SRRA, failed to complete the remedial investigation of the entire contaminated site 10 years after the discovery of a discharge at the site and has failed to complete the remedial investigation of the entire contaminated site within five years after the date of SRRA. (N.J.S.A. 58:10C-27.a.; P.L.2009, c.60 §27.a.)

○ Note: Thus many sites had only 5 years after SRRA (until May 2014, unless extended to May 2016) to complete the remedial investigation, seemingly without any other right to an extension

absent court order, or else DEP shall undertake direct oversight. As noted earlier, in January 2014 SRRA was amended to allow for a two year extension of this deadline for completion of a RI on older cases. See_P.L.2013, c.283. However, extension was not automatic and some did not extend. Furthermore, while arguments can be made otherwise, the words in this enactment do not expressly alter any other mandatory deadline (such as those for completion of actual remediation). The law provides the extension was available on application of the PRCR provided that "the applicant continues to comply with the conditions imposed pursuant to this subsection. The applicant was required to certify, in a document submitted electronically by the licensed site remediation professional retained by the applicant, that the following conditions have been met:

(1) an LSRP has been retained to conduct a remediation of the site;

(2) any remediation requirements included in mandatory remediation timeframes under N.J.S.A. 58:10C-28 have been met at the time of the certification;

(3) technically complete submissions have been made in compliance with all DEP rules, as applicable, for the (a) initial receptor evaluation, (b) immediate environmental concern source control report, (c) light non-aqueous phase liquid interim remedial measure report, (d) preliminary assessment report, and (e) site investigation report;

(4) a RFS has been established, if required of the applicant by N.J.S.A. 58:10B-3;

(5) if a RFS is not required then a remediation trust fund for the estimated cost of the remedial investigation has been established pursuant to the standards of N.J.S.A. 58:10B-3 (which DEP has now clarified does not eliminate certain exemptions under N.J.S.A. 58:10B-3 from the requirement for a RFS- such as for schools or governments);

(6) any DEP oversight costs, known at the time of the application, and not in dispute on the date of enactment have been paid; and

(7) the annual DEP fees for the remediation and RFS surcharges under N.J.S.A. 58:10B-11 have been paid, as applicable.

For further guidance and forms see http://www.state.nj.us/dep/srp/timeframe/extension.html.

○ Note: The nature, extent and effect of DEP direct oversight, when it is to occur, is somewhat uncertain and unexplained. But see N.J.S.A. 58:10C-27.c. Consider, for example, how DEP oversight is implemented if no LSRP is willing to become responsible for the remediation of such a site under DEP oversight. Is the PRCR in breach due to the LSRP's unwillingness? Can DEP pick its own LSRP? Force an LSRP to act? Also, many thought DEP would advise targets that they were subject to direct oversight, requiring establishment of the required RFS, and then undertake a more direct role. This has not occurred often, in part because DEP's stated view has been that the provisions are self executing. Those subject to direct oversight are, and they should each comply with the requirements without demand, in DEP's view (but not likely in many PRCR's view) It seems unlikely that this strategy has been effective in all cases, perhaps even in a majority of cases.

- N.J.A.C. 7:26C-3.4(d) acknowledges that DEP can take direct oversight of "a site, area of concern or site condition" when DEP determines that a mandatory deadline is missed and thereby prevent the PRCR and its LSRP from proceeding without DEP oversight. But when and how will DEP direct oversight work in such instances? DEP has issued limited guidelines establishing specific criteria for the conditions under which a site may be subject to direct oversight pursuant to this subsection at N.J.A.C. 7:26C-14 (which essentially are the SRRA statutory criteria). N.J.S.A. 58:10C-27.d. It does not appear that DEP has appointed case managers in many such cases.

○ Note: Does "shall" really mean "shall" or does DEP have discretion? To forgive violations? To allow cure? To prioritize its efforts? To apply scarce resources? To enter into consent orders or settlement orders?

○ Note: Does this really mean, as DEP seems to now assert, that it is not for DEP to take direct oversight, instead it is for the PRCR and the LSRP to provide it to DEP.

◊ DEP may be asked to provide relief against such deadlines and mandatory oversight in some circumstances by willing parties struggling with specific problems preventing full compliance. It is to be hoped that DEP brings to the issues the range of past imagination and flexibility that has sometimes tempered its positions. For example, DEP repeatedly stated in 2013 that it was not, and still is not, able to vary mandatory time frames (a position for the regulated community to consider in planning its own efforts); only new legislation provided relief. But in fact DEP itself has a long history of missing legislatively imposed deadlines (such as for the adoption of standards or the publication of a remedial priority system) or allowing variance from strict legislative requirements (such as under the original 1983 Environmental Cleanup Responsibility Act which required receipt of an approved negative declaration or cleanup plan before a transaction closing could occur, in lieu of which DEP entered into many ACOs, without express legislative authority, allowing closing to proceed with compliance to follow). Not surprisingly these efforts were practical and effective. Such could be again. Further DEP should be able

to exercise prosecutorial discretion, and provide assurances that it will do so, in a manner similar to that it has followed before (including, for example, pursuant to ACOs).

◊ When is the RI Completed? In June 2013 DEP provided critical guidance on key issues at http://www.state.nj.us/dep/srp/timeframe/policy_statement.pdf (seemingly deviating from DEP's often maddening demands for a ring or circle of clean samples bounding each AOC, in favor of professional judgment, conceptual site models and multiple lines of evidence).

○What "entire contaminated site" means: the discharges/CAOCs which include all portions of environmental media and any location where contamination is emanating, or which has emanated there from, that contain one or more contaminants at a concentration above any remediation standard or screening criterion. Environmental media include soil, ground water, surface water, sediment, and air. Contamination "...which has emanated there from..." includes onsite discharges that have migrated or are migrating offsite.

○ When RI is complete: "In order for the Department to consider the remedial investigation complete, the following must be determined: (1) The nature and extent of a discharge of a contaminant both on and off site; (2) The impacts and potential impacts to receptors presented by the discharge; and (3) The need for a remedial action, and, if one is necessary, collection of information to support the evaluation of possible remedial actions. Completion of the remedial investigation is demonstrated by the submission of the following: (1) A remedial investigation report pursuant to the Technical Requirements (N.J.A.C. 7:26E-4.9) (Note: this covers the nature and extent of the discharge of a contaminant); (2) An updated receptor evaluation as part of the remedial investigation report (N.J.A.C. 7:26E-4.9(a)2) (Note: this covers the problems presented by the discharge); and (3) A determination of whether a remedial action is required for the site/CAOC pursuant to the Technical Requirements (N.J.A.C. 7:26E-4.9(a)6ii(2)) (Note: this covers determining the necessity for remedial action and to support the evaluation of remedial actions if necessary)…. From a performance-based perspective, a remedial investigation can be considered complete when the LSRP in his or her professional judgment can conclude (1) there is sufficient information to know the nature and extent of a discharge of a contaminant both on and off site (2) there is sufficient information to know which, if any, receptors have been or may be impacted by the discharge being remediated, and (3) additional delineation is not necessary in order to select appropriate remedial action(s) to protect public health and the environment"

○ What "nature and extent of a discharge of a contaminant" means: "The Department interprets "the nature and extent of a discharge of a contaminant" to mean: delineation to the applicable remediation standards at the time the remedial investigation report is submitted. "Delineation" is not defined in the Technical Requirements or any applicable statute. For the purposes of N.J.A.C. 7:26E-4.1(a)1 (horizontal and vertical extent of contamination) and N.J.A.C. 7:26E-4.1(a)2 (aquatic surface water quality standard and ecological screening criterion), the Department strongly emphasizes that delineation does not mean that "clean zone" samples indicating contaminant concentrations are at or below the applicable standards are required for all environmental media to complete the remedial investigation. … The licensed site remediation professional (LSRP) should use applicable regulations, guidance, and professional judgment to determine when sufficient data exist to demonstrate "the nature and extent of a discharge of a contaminant." The LSRP is allowed to employ multiple lines of evidence, including, but not limited to, analytical data indicating that contaminant concentrations are at or below the applicable remediation standards; extrapolation or modeling based on existing data; application of conceptual site models; or other means for determining the extent of the contamination. The remedial investigation report should include information documenting how the LSRP determined the nature and extent of the contamination."

○ Not all DEP staff seem to have received, read or agree with the above. Subsequent staff reviews of data and submissions suggest that some DEP staff do not agree with all LSRPs that in each such case an RI is complete in the absence of the favored "circle of certainty," even if each case involves the asserted application by an LSRP of his or her exercise of licensed professional judgment, as well as the absence of a threat to health, safety and the environment. We believe at least one pending complaint involves such an issue and future conflicts and complaints seem certain.

○ Note that DEP has stated that while modeling may allow an LSRP to opine as to the RI being complete, further compliance points may still be required to attain full compliance (e.g., a clean downgradient well).

■ 3.8.3 Permissive DEP Oversight of Remediation

◊ DEP may elect (not shall) to undertake direct oversight of a remediation of a contaminated site under the following conditions: (1) the contamination includes chromate chemical production waste (by rule either Cr^{+6} is detected in soil in excess of 20 ppm or Cr^{+6} in ground water exceeds 70 ppb)); (2) DEP determines that more than one environmentally sensitive natural resource has been injured; (3) the site has

contributed to sediments contaminated by PCBs, mercury, arsenic, or dioxin in a surface water body (by rule above DEP's Ecological Screening Criteria at www.nj.gov/dep/srp/guidance/ecoscreening) and the concentration exceeds either severe effects level for freshwater or the effects range medium for saline conditions; or (4) the site is ranked by DEP in the highest priority pursuant to the RPS established under N.J.S.A. 58:10-23.16. (N.J.S.A. 58:10C-27.b; P.L.2009, c.60 §27.b. & N.J.A.C. 7:26C-14.3) Under Executive Order 2009 #140 DEP was to develop guidelines for undertaking direct oversight within sixty (60) days after enactment. It did so at http://www.nj.gov/dep/srp/guidance/srra/direct_oversight.pdf.

◊ Under N.J.A.C. 7:26C-14.3(b) DEP will consider the following when evaluating whether to undertake direct oversight of a portion, a condition, or the entire remediation of a contaminated site:

1. The extent that the PRCR: i. Is in compliance; ii. Has implemented an IRM to contain or stabilize contaminants in all media to prevent migration and exposure; iii. Has entered into a voluntary agreement with DEP to resolve natural resource injuries; and iv. Has implemented green remediation; and
2. Whether: i. Ground water contamination is greater than five acres; ii. Wetland soil or sediment contamination is greater than five acres; iii. Surface water sediment contamination exceeds, for any given contaminant, the severe effects level for freshwater or the effects range medium concentration for saline; iv. Surface water contamination exceeds an acute aquatic surface water quality standard, pursuant to N.J.A.C. 7:9B-1.14(f); v. Ground water contamination, which is discharging to surface water, exceeds the acute aquatic surface water quality standard, pursuant to N.J.A.C. 7:9B-1.14(f); vi. Soil contamination, except for pesticides, exceeds, for any given contaminant, 100 times the greatest value in DEP's Ecological Screening Criteria; or vii. Pesticide soil contamination exceeds one mg/kg for any given pesticide.

■ 3.8.4 Effect of DEP Oversight

The consequences to the PRCR of DEP oversight (mandatory or discretionary) are specified at N.J.A.C. 7:26C-14.2(b). See N.J.S.A. 58:10C-27.c.; P.L.2009, c.60 §27.c. In DEP's mind except if otherwise expressly provides, the requirements apply automatically without new DEP demand. Under these provisions the PRCR shall:

1. Proceed with the remediation as DEP directs, including retaining an LSRP;
2. Conduct and submit a FS to DEP for approval;
3. Implement each remedial action the DEP selects;
4. Submit an initial remediation cost review, pursuant to N.J.A.C. 7:26C-5.10(a), within 60 days after the applicable event, and submit an annual remediation cost review thereafter;
5. Establish a remediation trust fund pursuant to N.J.A.C. 7:26C-5.4 within 90 days, and maintain it in the estimated cost of the remediation;
6. Pay an annual RFS surcharge pursuant to N.J.A.C. 7:26C-5.9;
7. Obtain DEP's prior approval before making any disbursements from the RFS;
8. Ensure that all LSRP submissions concerning the remediation are provided simultaneously to the DEP and the PRCR;
9. Submit a proposed public participation plan, with a schedule, to the DEP pursuant to N.J.S.A. 58:10C-27.c7, that contains the strategy for soliciting public comment, within 30 days after the applicable event; and
10. Implement the DEP-approved public participation plan.

○ Note: Thus, in cases of direct oversight DEP seemingly is required to review and approve or deny every submission. Déjà vu all over again. Clearly if the SRRA program is to succeed the number of cases subject to direct oversight needs to be a small fraction of the inventory of all cases or else we will return to the same chaos and delay associated with DEP review and approval of far too many submissions. However, perhaps DEP views this as a right it can either waive or postpone to a later date or time. However, if a PRCR is under direct oversight, perhaps the PRCR and LSRP each has the right to refuse to proceed without DEP review and approval?

○ Note: The conduct of a feasibility study was previously specified to be as required under federal law. See First N.J.A.C. 7:26E-5.1(f). No such requirement is specified by rule now, despite the requirement in N.J.A.C. 7:26C-14.2(b); nonetheless federal guidance on such is likely to be determinative.

○ Note: DEP's power to choose the remedy is potentially both powerful and damaging. For example, if the PRCR was aiming towards a restricted use remediation leaving contaminated soils under a vacant structure, having negotiated and paid the owner for the right to do so, can DEP determine that health and the safety would be better protected by an unrestricted remedial action instead? Does it have to have some technical basis or preference for doing so? Can it do so simply out of a belief that a recalcitrant remediating party is

not to be trusted to meet the various obligations associated with restricted remedies for all time? Can it do so on the basis of municipal or neighborhood uses or preferences? Can it ignore then existing contract rights (for example preexisting owner consents)? Litigation seems sure to follow if DEP chooses a remedy that the PRCR would not have chosen, especially if the PRCR's LSRP has opined that the restricted use remedy is protective. And if pre-enforcement review is denied, then constitutional requirements may affect the efficacy of this statutory approach unless the later effort to collect fines or costs, or draws against an RFS or RFA, allows the PRCR to resist such an attack then. And if this is the case, will DEP in fact elect to spend excessive amounts on remediations it chooses over PRCR objection when cost recovery is in doubt? Also, consider how a court is to respond to an unlicensed DEP personnel selecting a remedy over the objection of both the PRCR and the LSRP? What qualifies that DEP personnel to make that decision? (In some cases properly adopted regulations may allow for a choice; but in others, can DEP reject otherwise valid choices of the PRCR and LSRP for a remedy [for example for a particular EC or IC]?) All these considerations, and the absence of an excess of DEP enforcement and other resources, suggests that even in direct oversight a cooperative PRCR's views, if reasonable and protective in the common sense, will carry substantial weight. Of course, at the other end of the spectrum, bad relationships between DEP and PRCRs and complex very contaminated sites may result in very aggressive DEP positions and perhaps court decisions to match.

○ Note: The power to require PRCR payment into a remediation trust fund is also powerful and expensive to the PRCR. Indeed it is easy to imagine that many bold PRCR's will challenge DEP's right to this remedy, at least by refusing to pay, and perhaps by seeking an administrative hearing. Further, it may be impossible for many PRCRs to comply (for example because they have no cash to do so). Litigation will challenge this right of DEP. Again, if pre-enforcement review is denied, then constitutional requirements may affect the efficacy of this statutory approach. Can DEP otherwise force payment without an adjudication of liability and constitutionality? It seems unlikely. On the other hand, even if not challenged some will simply lack the ability to pay or perform. What will DEP do if the PRCR indeed cannot post funds? Cannot find an LSRP willing to serve? Does DEP have any discretion?

○ Note: To comply with this mandate must the PRCR use exactly the form required by DEP for RFS (forms never proposed by rule, and therefore not having the force of law)? Can the RFS be tailored, as has happened before, by inclusion of instructions to a trustee holding a trust fund, or issuer of a letter or line of credit, to not disburse funds except in certain rare circumstances (such as a court order)? Can the PRCR challenge any provision that requires the trustee or issuer to follow DEP direction without notice to the PRCR and opportunity to object?

○ Note: When DEP has direct oversight, various documents must be provided by the LSRP to DEP and the PRCR at the same time. Apparently this is to allow DEP greater and earlier insight, input and control. But can this be argued to mean otherwise, or worked around? Is it clear it includes any and all drafts? Can there be pre-draft drafts? Or drafts that are privileged and confidential prepared in anticipation of litigation, followed by drafts for DEP review? Drafts that are prepared by non-LSRP consultants for LSRP and client and counsel review first? Drafts that are prepared by non-LSRP consultants client and counsel review first without LSRP review? Drafts that are prepared by third parties (such as a non-LSRP consulting firm) and submitted to the LSRP and not DEP for discussion? ? Drafts that are prepared by client staff and submitted to the LSRP and not DEP for discussion? Meeting agenda that are prepared by client staff, non-LSRPs and counsel and shared with the LSRP for discussion? Documents that are prepared by the LSRP and then rejected by the PRCR or PRCR counsel?

○ Note: When DEP has direct oversight, can DEP use the required funds, if posted, to finance work not authorized by the LSRP?

■ 3.8.5 Exceptions

◊ Any oversight procedure, remedy, or other obligation in N.J.S.A. 58:10C-27.c. shall not affect a remediation conducted pursuant to and in compliance with a settlement of litigation to which DEP is a party if the settlement (a) occurred prior to the date of SRRA, or (b) is a settlement of litigation pending on the date of enactment of SRRA. For any litigation pending or settled on the date of enactment of SRRA, concerning a remediation performed pursuant to the "Resource Conservation and Recovery Act," 42 U.S.C. s.6921 et seq., nothing in SRRA shall affect an oversight procedure, remedy, or other obligation imposed by a federal administrative order or federal court order. (N.J.S.A. 58:10C-27.d.; P.L.2009, c.60 §27.d.).

○ Note: This provision does seem somewhat inconsistent with the possibility of varying statutory requirements by consent, in administrative consent orders, for example, as has happened extensively in the past.

○ Is this relevant to pre-SRRA ACOs?

■ 3.8.6 Timeframes

◊ DEP shall establish mandatory remediation timeframes, and expedited site specific timeframes when necessary, to protect the public health and safety and the environment, for each of the following: (1) a receptor evaluation; (2) control of ongoing sources of contamination; (3) establishment of interim remedial measures; (4) addressing IEC conditions; (5) the performance of each phase of the remediation including preliminary assessment, site investigation, remedial investigation and remedial action; (6) completion of remediation; and (7) any other activities deemed necessary by DEP to effectuate timely remediation. (N.J.S.A. 58:10C-28.a.; P.L.2009, c.60 §28.a.) In establishing these timeframes DEP shall take the following into account: (1) the potential risk to the public health, safety, and the environment; (2) the results of the receptor evaluation; (3) the ongoing industrial or commercial operations at the site; (4) whether, for operating industrial or commercial facilities, there are no releases of contamination to the groundwater or surface water from the site; and (5) the complexity of the contaminated site. (N.J.S.A. 58:10C-28.b.; P.L.2009, c.60 §28.b.) Under Executive Order 2009 #140 DEP is to increase its review, monitoring and auditing of sites with groundwater issues. DEP has acted as required. See regulatory timeframes pursuant to N.J.A.C. 7:26C-3.2, mandatory remediation timeframes pursuant to N.J.A.C. 7:26C-3.3 and expedited site specific remediation timeframes pursuant to N.J.A.C. 7:26C-3.4, as extended pursuant to N.J.A.C. 7:26C-3.5.

○ DEP has established the following mandatory periods in the ARRCS Rule N.J.A.C. 7:26C-3.3. (Note that the deadline for some older cases to complete the RI by May 7, 2014 was extended by two years. See above and http://www.state.nj.us/dep/srp/timeframe/extension.html.)

1. If required to conduct a PA and SI pursuant to ISRA, or a UST site investigation, submit the PA and/or SI report, within two years from the later of: i. March 1, 2010; or ii. the earliest of any of the list at N.J.A.C. 7:26C-2.2(a)1 through 6 occurs;

2. Submit the initial receptor evaluation report known at the time within two years from the later of: i. March 1, 2010; or ii. the earliest of any of the list at N.J.A.C. 7:26C-2.2(a)1 through 6 occurs;

3. Initiate IEC contaminant source control and submit an Immediate Environmental Concern Contaminant Source Control Report, pursuant to the Tech Rule, no later than two years from the later of: i. March 1, 2010; or ii. The date to report the IEC pursuant to the Tech Rule;

4. Complete a RI for the delineation of LNAPL, initiate an LNAPL IRM, initiate monitoring, and submit an LNAPL IRM report pursuant to the Tech Rule, within two years from the later of: i. March 1, 2010; or ii. The date LNAPL was identified;

5. Complete the RI and submit the RI report with form, by the date which is two years after the date of the regulatory timeframes established pursuant to the Tech Rule; and

6. Complete the remedial action and submit the remedial action report with form by the date which is two years after the regulatory timeframes established pursuant to the Tech Rule.

○ The regulatory timeframes subject to N.J.A.C. 7:26-3.2 are those established by all applicable statutes, rules and guidance, including the UST rules, N.J.A.C. 7:14B, ISRA rules, N.J.A.C. 7:26B, the Tech Rule, N.J.A.C. 7:26E, and the ARRCS Rule. See, e.g., N.J.A.C. 7:26E-4.10 and -5.8 (and NJDEP summary at http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf.

○ Expedited site specific remediation timeframes are those established by DEP under N.J.A.C. 7:26C-3.4 based on: the risk to the public health and safety, or to the environment; and the compliance history of the PRCR.

○ PRCR failure to meet a mandatory remediation timeframe results in DEP direct oversight under N.J.S.A. 58:10C-27, for the site, area of concern or condition to which the mandatory remediation timeframe applies.

◊ DEP shall grant an extension to a mandatory remediation timeframe as a result of: (1) a DEP delay in reviewing or granting a permit, provided that there was a timely filing of a complete application; (2) a delay in the provision of State funding for remediation, provided that there was a timely filing of a complete application; or (3) a delay by the department for an approval or permit required for long-term operation, maintenance and monitoring of an EC at the site provided the request for approval or permit application is complete. (N.J.S.A. 58:10C-28.c.; P.L.2009, c.60 §28.c.) DEP may grant extensions to other time frames as provided in the relevant rules.

○ Note that, arguably without rational basis, these same factors do not seem to apply to the 5 (7, if the new 2014 extension is obtained) year test (failure to complete an RI) for mandatory DEP

direct oversight so as to permit an extension of that period. This arguably is a significant defect and undoubtedly will serve as a basis for challenge.

○ The ARRCS Rule provides at N.J.A.C. 7:26C-3.5 that DEP can extend mandatory or expedited site specific remediation timeframe by submitting a written rationale for the request in a completed Remediation Timeframe Extension Request Form at www.nj.gov/dep/srp/srra/forms submitted no later than 60 days prior to the end date of the timeframe. The rationale must describe the cause for the extra time needed and the steps taken to minimize the extra time needed to complete the work. The PRCR shall continue any remediation pending reviews, unless the Department directs otherwise.

- Note: In our experience neither PRCRs nor their LSRPs are rigorously seeking any and all extensions for which a site may be eligible. Instead the assumption is that if there are delays they can be made up later. This may prove unwise.

◊ Extensions are deemed granted under N.J.A.C. 7:26C-3.5(c) in a few circumstances: 1. DEP permit delays if: i. The PRCR timely filed a complete application; and ii. The extension equals the delay; or 2. A delay in the government funding for remediation, provided that the PRCR timely filed a complete application for funding and that the extension equals the delay. DEP may grant (and must do so in writing) an extension to a mandatory remediation timeframe on a case-by case basis as a result of: (1) a delay in obtaining access to property, provided the PRCR demonstrates that good faith efforts have been undertaken to gain access, access has not been granted by the property owner, and, after good faith efforts have been exhausted, a complaint was filed with the Superior Court to gain access, in accordance with Law(s); (2) other circumstances beyond the control of the PRCR, such as fire, flood, riot, or strike; or (3) other site-specific circumstances that may warrant an extension as determined by DEP. (N.J.S.A. 58:10C-28.c.; P.L.2009, c.60 §28.c.) See N.J.A.C. 7:26C-3.5(d).

○ Note that, arguably without rational basis, these same factors do not seem to apply to the 5 (7 if the new 2014 extension is obtained) year test for mandatory DEP direct oversight.

○ N.J.A.C. 7:26C-3.5 adds that DEP can extend in two other examples: i. On-going litigation, the outcome of which will bear on the ability to meet timeframes; or ii. The PRCR is an owner of a small business who does not have sufficient monetary resources to meet the timeframes.

○ Note that DEP has elaborated on the PRCR's obligations to seek access for remediation at N.J.A.C. 7:26C-8.

○ Note that many fail to timely pursue access by litigation, perhaps trying to avoid negative effects on the community, perhaps wary of toxic tort or stigma damage suits and perhaps thinking a cooperative arrangement may eventually work and preserve the chance of a negotiation for deed notice if ever needed. This failure could have serious repercussions as the rules, seemingly without exception, require suit. We routinely urge clients to reduce delay by gearing up for access. Routinely as such effort occurs, up through threat or filing of suit, access is obtained by settlement or court order.

○ Note also that DEP has sometimes expressly advised against suit against homeowners in a residential neighborhood who have refused access, in seeming contradiction of its own rules, apparently allowing completion of a remedial investigation likely in reliance on available information for other sites. Can the LSRP rely on these decisions? We believe so. But can other LSRPs assume the same result at new sites? It appears DEP gives inconsistent information by phone and e-mail today. Perhaps future guidance will clarify. (But if new guidance re-affirms the rules as written, can the LSRP on the prior site still rely on prior DEP decisions? We hope so.)

■ 3.8.7 Active Remediation

◊ SRRA is often stated to be the source of a new affirmative obligation of PRCRs and others to remediate discharges. (N.J.S.A. 58:10B-1.3.a.; P.L.2009, c.60 §30.a.) See N.J.A.C. 7:26C-2.2.

○ As of the moment, there appears to be little, if any, basis for advising any person or entity who is or may be a PRCR that they do not have an obligation to hire an LSRP and initiate and pursue remediation to completion. Indeed, all professionals need to consider affirmatively warning any potential PRCR of DEP's likely aggressive enforcement position if the potential PRCR does not retain an LSRP and initiate and pursue remediation to completion: the duty to properly advise clients may require this and indifference or assumption that a client accepts risks may backfire later if DEP does enforce. Perhaps those who are innocent purchasers are not so liable. Perhaps those who are bankrupt can escape their liability. But professionals, both LSRPs and counsel, must use great care to fulfill their professional obligations and avoid malpractice and other claims from faulty advice. Will DEP eventually enforce? Yes. Against everyone? Likely not. But can any of us foretell accurately DEP's enforcement priorities after Governor Christie's administration moves on?

○ Does this affirmative obligation apply to all remediations? For example, to landfills? Perhaps not. See brief discussion below at §3.8.13(H).

◊ It appears that, in addition to the reporting obligation under the Spill Act for discharges, a PRCR responsible for remediation is obligated to report to DEP pursuant to N.J.A.C. 7:26E-1.5. See discussion at this Article §3.7.4 above.

◊ "The LSRP program does not apply to certain types of remediation, including the remediation of a discharge from an unregulated heating oil tank that is specifically exempted by SRRA, and certain Federal-lead cases (RCRA, CERCLA, Department of Defense, Department of Energy), Department publicly funded cases, and landfill cases that remain under the oversight of the Department's Solid Waste program…." See http://www.nj.gov/dep/srp/. The ARRCS Rule clarifies that its rules for remediation do not apply to remediation of sanitary landfills (registered or not) except if (1) the landfill is slated for redevelopment involving human occupancy or (2) remediation is funded from the HDSRF or (3) the PRCR wants a FRD. N.J.A.C. 7:26C-1.4(c). There is guidance for investigation of landfills. See http://www.nj.gov/dep/srp/guidance/srra/landfill_guidance.pdf. However, recent experiences suggest that DEP remedial priorities and approaches are beginning to insert themselves into landfill remediations, and issues of coordinating landfill deed notices with SRRA text, RAPs and use of LSRPs (such as for inspections and biennial certifications) seem likely to increase with time. See also FQ9 http://www.state.nj.us/dep/srp/guidance/srra/capping_remediation_sites.pdf. See this Article §3.8.13(H) below.

■ 3.8.8 No Further Action Letters & RAOs with Covenants Not to Sue

◊ LSRPs issue RAOs. They do not issue "no further action letters with covenants not to sue" (the "gold standard" pre-SRRA, and still issued by DEP in rare circumstances). (N.J.S.A. 58:10C-14.d.; P.L.2009, c.60 §14.d.). Originally under SRRA, DEP's right to issue NFA Letters with covenants not to sue was limited; this has been corrected but it appears DEP does not now expect to be issuing many NFA Letters (e.g., except for UHOTs). DEP does not issue RAOs; it has no license or authority to do so. But if DEP hired an LSRP, its LSRP could issue an RAO to DEP.RAOs and NFAs can be collectively referred to as FRDs.

○ The scope of an LSRP's RAO varies with the scope of the work undertaken (and overseen by the LSRP). See discussion at this Article §3.7.3(E). FRDs may be for "an entire site or one or more areas of concern, including all areas to which contamination originating at the site or area of concern may have migrated". N.J.A.C. § 7:26C-6.2. Guidance for RAOs is available at http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf. The template for RAOs is Appendix D of N.J.A.C. § 7:26C (see http://www.nj.gov/dep/srp/regs/arrcs/arrcs_app_d.doc); but guidance has adjusted and is expected to continue to adjust the template by allowing use of certain notices not expressly authorized in the template (see http://www.nj.gov/dep/srp/guidance/srra/rao_notice_guidance.pdf). RAOs can be issued successively, for individual AOCs as resolved, with a final RAO for the entire site or all remaining AOCs to follow on conclusion. In order to protect against changes in DEP rules and standards, on complex sites there may be significant advantages to issuance of multiple RAOs. (Note: in some cases there are requirements for an RAO for the entire site [e.g., a new school]; DEP seems to have accepted that entire site in such contexts does not always mean the entire surface, subsurface and all media at, from or of the whole lot and block, and adjacent lots and blocks, but only those with which the receptors being protected (students) may come into contact. Is that right? If so does the precedent affect other provisions addressing the entire site?)

◊ After an LSRP issues an RAO or DEP issues a NFA Letter to the PRCR, the person shall be deemed, by operation of law, to have received a covenant not to sue with respect to the real property upon which the remediation has been conducted. The precise protection provided by that covenant should be interpreted as broad, but DEP sometimes behaves as if it is quite narrow (for example, under SRRA imposing a requirement even on those with no further action letters with covenants not to sue for restricted remediations to apply for, obtain and comply with remedial action permits, even though, by DEPs own interpretation, such constitutes a new remedial requirement [thereby in DEP's mind also requiring use of LSRPs for example, and potentially reopening the previously closed case], seemingly in violation of the interpretations applicable to such covenants [e.g., a covenant not to sue is a provision releasing the PRCR from all civil liability to the State to perform any additional remediation {See e.g., N.J.S.A. 58:10B-13.2.a.}]).

○ The covenant not to sue shall be subject to any conditions and limitations contained in the RAO. The covenant remains effective only for as long as the real property continues to meet the conditions of the RAO. Upon a finding by the DEP that real property no longer meets with the conditions of the RAO, DEP shall provide notice of that fact to the person responsible for maintaining compliance with the RAO; DEP may allow a reasonable time to come into compliance. If the property does not meet the RAO conditions and if DEP does not allow for a period of time to come into compliance, or if the person fails to come into compliance

within the time period, the covenant not to sue shall be deemed to be revoked by operation of law. (N.J.S.A. 58:10B-13.2.a.; P.L.2009, c.60 §31.a.).

- Note: While the effect of a revocation of the covenant is not explained, presumably it means DEP (and others) can sue for remediation of the problem no longer addressed in compliance with Law(s) and the prior RAO (as it could not before). However, if a covenant not to sue is revoked, liability for any additional remediation shall not be applied retroactively to any person for whom the covenant remained in effect during that person's ownership, tenancy, or operation of the property. (N.J.S.A. 58:10B-13.2.c.; P.L.2009, c.60 §31.c.): the precise extent of this exception is unclear.

- Note: Revocation of the covenant may permit reopener of a wide range of issues beyond the problem causing the revocation. For example, can DEP (and the new LSRP) require additional sampling and/or remediation, or pursue natural resource damages, under then current rules and practices? Presumably it can. If standards have changed, even though by less than an order of magnitude, and new sampling and remediation be required to delineate? What time frames apply? If an LSRP was not used before, must the new-LSRP reexamine the entire file? Is direct oversight triggered instantaneously (because, for example, interim mandatory deadlines have been missed)? Further, what effect will revocation have upon prior contract arrangements between buyers and sellers, landlords and tenants, lenders and borrowers, for example? Must missing RFS and escrows be replaced? By whom? The answers may depend on precise contract language and future case law.

- Note: The effect of a revocation of the covenant is not limited to the breaching person. It likely can extend to the original PRCR, at least under law if not contract, and to some extent even intervening persons (for example, if the RAO is revoked, is any other approval dependent on the revoked approval also revoked- consider an RIPW approval or a license of a daycare center or a new schools certificate of occupancy).

○ The covenant not to sue can be for any area of concern remediated. It may apply to the entire real property if the remediation included a preliminary assessment and, if necessary, a site investigation of the entire real property, and any other necessary remedial actions.

○ Except as provided in N.J.S.A. 58:10B-13.2.e., a covenant not to sue shall by operation of law provide for the following, as applicable: (1) a provision releasing the PRCR from all civil liability to the State to perform any additional remediation, to pay compensation for damage to, or loss of, natural resources, for the restoration of natural resources or for any cleanup and removal costs; (2) for a remediation that involves the use of EC or IC: (a) a provision requiring the person (presumably the one who undertook the remediation), or any subsequent owner, lessee, or operator, to maintain those controls, conduct periodic monitoring, and submit to DEP, on a biennial basis, a certification that the controls are being properly maintained and continue to be protective (stating the underlying facts and results of any tests or procedures performed); and (b) a provision that the covenant is revoked by operation of law if the controls are not being maintained or are no longer in place; and (3) for a remediation that involves the use of EC but not for IC only, a provision barring the persons whom the covenant not to sue benefits, from making a claim against the New Jersey Spill Compensation Fund and the Sanitary Landfill Facility Contingency Fund (and not bar such claims if, after a valid RAO DEP orders additional remediation, except that the covenant shall bar such a claim if DEP ordered additional remediation in order to remove the IC). (N.J.S.A. 58:10B-13.2.a.; P.L.2009, c.60 §31.a.).

- Given this specificity, how valid is the DEP RAO template purporting to reserve NRD claims? See this Article §3.7.3(E).

○ The covenant not to sue shall apply to all successors in ownership of the property and to all persons who lease the property or who engage in operations on the property. (N.J.S.A. 58:10B-13.2.b.; P.L.2009, c.60 §31.b.).

○ A covenant not to sue and the protections it affords shall not apply to any discharge that occurs subsequent to the issuance of the RAO, nor relieve any person of the obligations to comply in the future with Law(s). (N.J.S.A. 58:10B-13.2.d.; P.L.2009, c.60 §31.d.).

○ The covenant not to sue shall not provide relief from any liability to any person who is liable for cleanup and removal costs pursuant to N.J.S.A. 58:10-23.11g.8.c., and who does not have a defense to liability pursuant to N.J.S.A. 58:10-23.11g.8.d. (N.J.S.A. 58:10B-13.2.e.; P.L.2009, c.60 §31.e.). The scope of exception (for those with a liability defense) is unclear but may apply to successor owners or operators of the original RP or PRCR obtaining the covenant. But does it mean that the original RP or PRCR obtaining the covenant obtains no protection from the covenant if it is a liable person without the defense (as many are)? (That would seem to make the clause of far less value than likely the legislature intended with minimal, if any, support for such a conclusion.) It remains to be seen whether DEP and others will acknowledge the broad scope of the covenant not to sue set forth in the statute, particularly if and to the extent DEP's template contradicts, or imposes conditions,

not expressly set forth in SRRA itself. Consider, for example, a paragraph in the RAO template provides: "In concluding that this remediation has been completed, I am offering no opinions concerning whether either primary restoration (restoring natural resources to their pre-discharge condition) or compensatory restoration (compensating the citizens of New Jersey for the lost interim value of the natural resources) has been completed." Is this exception truly contemplated by the legislature, or is a covenant not to sue to cover the topic so excluded, as a reward for finishing remediation? Arguments can be made either way.

■ 3.8.9 Grants & Loans; Technical Assistant Grants

◊ The availability of technical assistance grants to independent non-profit community groups, not to exceed $ 10,000 per RI or remedial action phases, to hire an LSRP to advise the group, is addressed by N.J.A.C. 7:26C-10. The availability of grants and loans to eligible persons or public entities (see N.J.S.A. 58:10B-1*)* from the HSDRF is addressed by N.J.A.C. 7:26C-11; according to these rules reimbursement for pre-application remediations must be for remediations approved by DEP. The availability of grants and loans to eligible applicants from the Petroleum Underground Storage Tank Remediation, Upgrade and Closure Fund is addressed by N.J.A.C. 7:26C-12.

◊ The NJEDA shall require that payment of a grant or financial assistance from the HDSRF shall be conditioned upon the subrogation to DEP of all rights of the recipient to recover remediation costs from an insurance carrier, discharger, or person in any way responsible for a hazardous substance pursuant to N.J.S.A. 58:10-23.11g.8.c. who does not have a defense to liability pursuant to N.J.S.A. 58:10-23.11g.8.d., upon the failure of the recipient to repay the financial assistance to the State. (N.J.S.A. 58:10B-8.1.a.; P.L.2009, c.60 §32.a.).

◊ The NJEDA shall not award a grant or financial assistance from the HDSRF if the applicant relinquishes, impairs, or waives, or has relinquished, impaired, or waived, any right to recover the costs of the remediation against an insurance carrier, discharger, or person in any way responsible for a hazardous substance pursuant to N.J.S.A. 58:10-23.11g.8.c. (N.J.S.A. 58:10B-8.1.b.; P.L.2009, c.60 §32.b.).

◊ In any action by DEP to enforce a right of subrogation, DEP shall be entitled to invoke any right or defense available to the recipient. (N.J.S.A. 58:10B-8.1.c.; P.L.2009, c.60 §32.c.). All moneys collected in a cost recovery subrogation action shall be deposited into the HDSRF. (P.L.2009, c.60 §32.d.).

◊ The HSDRF no longer receives the 1% annual surcharge on RFS. (N.J.S.A. 58:10B-4; P.L.2009, c.60 §44). Instead such surcharges go to the Remediation Guarantee Fund established pursuant to N.J.S.A. 58:10B-20. (N.J.S.A. 58:10B-11 & 20; P.L.2009, c.60 §46 & 51). That fund also now may be disbursed by DEP as technical assistance grants to nonprofit organizations to evaluate remediation methods and monitor site conditions at specific sites of public concern in the local community."

■ 3.8.10 ISRA

◊ The definitions at N.J.S.A. 13:1K-8 were expanded to include a definition of "licensed site remediation professional" and "response action outcome". (N.J.S.A. 13:1K-8; P.L.2009, c.60 §33.)

◊ The requirement at N.J.S.A. 13:1K-9 to attach certain approvals from DEP to the contract or agreement of sale or agreement to transfer or any option to purchase with respect to the transfer of ownership or operations of an industrial establishment (or to later send them) now extends to a RAO or remediation certification. (N.J.S.A. 13:1K-9.b.(2); P.L.2009, c.60 §34. b.(2))

◊ The requirement at N.J.S.A. 13:1K-9 allowing a transfer closing to proceed on and after DEP's approval of a remedial action work plan now extends to "a remedial action work plan certified by a licensed site remediation professional" or a remediation certification (replacing remediation agreements; see below) and a remediation funding source has been established. (N.J.S.A. 13:1K-9.c.; P.L.2009, c.60 §34.c.). N.J.A.C. 7:26B-1.10(b).

◊ N.J.S.A. 13:1K-9 allows the LSRP to file the RAO with DEP upon the remediation of the industrial establishment in accordance with N.J.S.A. 58:10B-1.3. (N.J.S.A. 13:1K-9.d(2); P.L.2009, c.60 §34.d.(2)), which includes the steps of investigation and assessment. Closing of any transaction awaiting the result action outcome should be able to proceed immediately upon and after receipt of the RAO, despite neither SRRA nor the ARRCS Rule at N.J.A.C. 7:26B-1.10 expressly so providing, at least by inference from the absence of a prohibition under N.J.A.C. 7:26B-1.10 and in view of post-SRRA practices and DEP comments (including on adoption of revised ISRA regulations). Alternatively it also can still be argued that under the statute the owner or operator of the industrial establishment should be allowed to file a negative declaration. N.J.S.A. 13:1K-9(c) & (d). N.J.S.A. 13:1K-9(d) still provides that DEP approves a negative declaration by issuing a no further action letter. However, DEP deleted its obligation to review negative declarations under its existing rule. See FIRST N.J.A.C. 7:26B-6.7 (now deleted). The ARRCS Rule does not appear to address this process. See e.g., the deletion at FIRST

N.J.A.C. 7:26B-1.8(b) and the limitation of DEP no further action letters to pre-existing cases at FIRST N.J.A.C. 7:26B-1.8(a). While initially there was debate between some lawyers and DEP as to how these ambiguities should be resolved, the practice now seems accepted to close transactions relying on the RAO.

◊ N.J.S.A. 13:1K-9 now provides for the owner or operator to submit to DEP a remediation certification (replacing the former application for, and receipt of a remediation agreement): (1) an estimate of the cost of the remediation prepared and certified by an LSRP; (2) a certification of the statutory liability of the owner or operator pursuant to ISRA to perform and to complete a remediation of the industrial establishment in the manner and time limits provided by DEP consistent with all Law(s) (without admission of Spill Act or common law or other liability) (3) evidence of the establishment of a RFS in an amount of the estimated cost of the remediation and in accordance with N.J.S.A. 58:10B-3; (4) a certification that the owner or operator is subject to the provisions of ISRA, including the liability for penalties for violating the act, defenses to liability and limitations thereon, the requirement to perform a remediation as required by DEP, allowing DEP access, the requirement to comply with [SRRA]…, and the requirement to prepare and submit any document required by the DEP to the remediation; and (5) evidence of the payment of all applicable DEP fees." (N.J.S.A. 13:1K-9.e.; P.L.2009, c.60 §34.e.) See also N.J.A.C. 7:26B-1.8 and 3.3(c). The ISRA rule governing application for, issuance of and performance under remediation agreements now provides no mechanism for seeking a remediation agreement, but requires compliance with preexisting remediation agreements. See N.J.A.C. 7:26B-3.3.

○ Note: The form to be submitted to DEP as a remediation certification is available at: http://www.state.nj.us/dep/srp/srra/forms/remediation_certification_form.pdf

○ It is possible the use of a remediation certification, which is self executing without need for a DEP signed agreement, in many cases, can accelerate the ability to proceed with closings of transactions subject to ISRA to less than the time periods required before SRRA (because of the absence of a need for DEP approval). In the absence of prior LSRP involvement and conduct of a preliminary assessment, the instructions for the remediation certification form specify use of a default RFS estimate of $100,000 for sites suspected of only soils contamination and $250,000 for those suspected of groundwater contamination (a dramatic reduction from DEP's pre-SRRA practice of requiring a minimum of $1,000,000 RFS when groundwater contamination was known or suspected). While under the text of SRRA itself arguably remediation agreements should continue to be available, it appears DEP disagrees.

◊ N.J.S.A. 13:1K-9 allows the remediating party to pick the approach for remediation so as to obtain LSRP approval, but subject to the provisions of N.J.S.A. 58:10C-27 that allow or require DEP to take direct oversight. (N.J.S.A. 13:1K-9.g.; P.L.2009, c.60 §34.g.) It appears arguable that under ISRA the remediating party can still seek a prior approval of DEP as to the approach selected for remediation (although DEP will not cooperate with this). (N.J.S.A. 13:1K-9.i.; P.L.2009, c.60 §34.i.)

◊ N.J.S.A. 13:1K-9 allows the remediating party to proceed with remediation without prior DEP approval for soils or groundwater remedies if and permitted by SRRA. (N.J.S.A. 13:1K-9.f; P.L.2009, c.60 §34.f.) However, under Executive Order 2009 #140 DEP is to increase its review, monitoring and auditing of sites with groundwater issues.

◊ Alternatively, by its terms ISRA still allows that the remediating party may seek and obtain DEP review and approvals. (N.J.S.A. 13:1K-9.f, g. & i.; P.L.2009, c.60 §34.f. g. & i) However, DEP does not believe that the legislature could have meant what it wrote and will not act if so requested. It would be interesting if a PRCR under an ISRA case sought DEP prior approval and then elected to await review. A court should find the conflict difficult to resolve in DEP's favor if DEP insists that SRRA overturned a process expressly retained under SRRA, allowing delay for DEP review.

◊ It is unclear whether the power of the DEP to look at remedial actions is applicable only to remediation under their direct review or is a separate right to review and audit LSRP decisions. (N.J.S.A. 13:1K-9.l.; P.L.2009, c.60 §34.l)

◊ DEP initially relocated and altered the de minimis quantity exemption as an alternate approval process. See N.J.A.C. 7:26B-5.9. DEP's first alteration of the tests previously applied and established to require that the industrial establishment not be "contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D" has since been overturned in a court challenge. But DEP approval is still required. An LSRP is not expressly involved in pursuit of this exemption. On occasion DEP delays in processing alternative compliance applications have been more lengthy than they were pre SRRA.

◊ DEP, somewhat surprisingly, deleted the opportunity for a pre-notice conference with DEP. N.J.A.C. 7:26B-3.1. Presumably in some circumstances such conferences will still be available despite this change.

◊ DEP still allows that if an ISRA triggering event terminates, the PRCR may withdraw from continued ISRA compliance, but emphasizes that this withdrawal will not relieve the withdrawing PRCR from other obligations to remediate. See N.J.A.C. 7:26B-3.2(c).

◊ Certain of the alternate processes for seeking an authorization letter from DEP to proceed with closing, for example by reason of remediation in progress (due to a pending remediation), remain viable alternatives. N.J.A.C. 7:26B-5. However, the expedited review process, applicable when a prior no further action letter exists and a preliminary assessment shows no issue, is no longer available under the DEP rules for new ISRA triggering events. This is inconsistent with the statutory provisions of ISRA itself. See N.J.S.A. 13:1K-11.2. But DEP can conduct a PA and issue a RAO faster than DEP could undertake this process itself, thereby saving DEP scarce resources. However, as the approach is inconsistent with the statute, it may be that a future court case will reverse this DEP decision, made clearly in disregard of the statute and legislature's directives.

◊ DEP has removed separate ISRA periods for remediation in reliance on those applicable under the ARRCS rule, including DEP Guidance. See, e.g., N.J.A.C. 7:26E-4.10 and -5.8. .

■ 3.8.11 Spill Act

◊ The Spill Act includes a new term "final remediation document" which means either a NFA letter issued by DEP under N.J.S.A. 58:10B-1 et seq., or a RAO issued by an LSRP, as well as definitions of "licensed site remediation professional" and "response action outcome" and "person responsible for conducting the remediation" conforming to SRRA. (N.J.S.A. 58:10-23.11b.; P.L.2009, c.60 §35)

◊ The requirement for published notice of NFA letters under N.J.S.A. 58:10-23.11e2 is eliminated. (N.J.S.A. 58:10-23.11e2; P.L.2009, c.60 §36.)

◊ The contribution provisions of N.J.S.A. 58:10-23.11f are altered to account for RAOs, and to allow notice of a remediation in lieu of an agreement with DEP as a condition of a possible treble damage claim against recalcitrant directive recipients. (N.J.S.A. 58:10-23.11fa.(2)(b) & (3)(d); P.L.2009, c.60 §37.).

◊ The Spill Act debt and lien provisions are changed to apply to cleanup and removal costs and related costs of the State. (N.J.S.A. 58:10-23.11ff.; P.L.2009, c.60 §37.)

◊ The Spill Act innocent purchaser defense available for those who rely on a NFA letter now allow such protection for reliance on a FRD (including a RAO). (N.J.S.A. 58:10-23.11gd.(2)(e); P.L.2009, c.60 §38.) It similarly limits claims against the Spill Act Fund and the Sanitary Land Fill Fund for RAOs involving EC. (N.J.S.A. 58:10-23.11ge.; P.L.2009, c.60 §38.)

◊ The seeming Spill Act defense against liability available to those who know of a problem before they buy but follow certain steps for post-purchase remediation that results in a NFA letter now allows the same protection if an RAO similarly issues. (N.J.S.A. 58:10-23.11gf.(4); P.L.2009, c.60 §38)

◊ The Spill Act required RPS List is altered to be a database and ranking system of known cases, sites and areas of concern. No later than 1 year after SRRA DEP shall establish (but to date has not) a ranking system that establishes categories in which to rank sites based upon the level of risk to the public health, safety, or the environment, the length of time the site has been undergoing remediation, the economic impact of the contaminated site on the municipality and on surrounding property, and any other factors deemed relevant by DEP. There shall be public access to reports from the database on DEP's internet website. (N.J.S.A. 58:10-23.16; P.L.2009, c.60 §39). DEP missed this deadline. The RPS is expected to be available for public use and review before mid-year 2014.

○ Note: A site's ranking on this list may allow DEP to undertake direct oversight of remediation.

◊ The adoption of the ARRCS Rule clarifies that a remediation of a discharge under the Spill Act must occur in compliance with the ARRCS Rule at N.J.A.C. 7:26C. See N.J.A.C. 7:1E-5.7(a)2i. Failure to so proceed is subject to a civil administrative penalty under N.J.A.C. 7:1E-6.5. It also changed a number of the rules regulating Spill Fund and Sanitary Landfill Fund claims. See e.g., N.J.A.C. 7:1J-2.7.

■ 3.8.12 Brownfields

◊ The Brownfields Act now includes conforming definitions of "licensed site remediation professional", "response action outcome", "final remediation document" and "Person responsible for conducting the remediation". (N.J.S.A. 58:10B-1; P.L.2009, c.60 §40).

◊ A new term of "presumptive remedy" is added as used at N.J.S.A. 58:10B-12g.(10). (N.J.S.A. 58:10B-1; P.L.2009, c.60 §40).

◊ DEP shall no longer adopt merely minimum standards and guidance for remediation; it shall adopt "rules and regulations establishing criteria and standards". It need no longer publish a list of alternate remedies (N.J.S.A. 58:10B-2; P.L.2009, c.60 §41)

○ Note: Does this mean the end of the occasional demand by DEP that its rules and guidance set only minimum requirements and it can always ask for more than they provide (see e.g., former N.J.A.C. §7:26E-1.1(a))? Possibly (as no equivalent statement remains). Does this mean PRCRs and LSRPs can better rely on DEP published criteria and standards (if they can figure them out), and interpret the absence of same as allowing more leeway, with less concern for DEP initiated abrupt changes and unforeseen interpretations? Perhaps; time will tell. But certainly the legislature meant to require more from DEP by this change than it has demanded of DEP before. DEP needs to change its ways as well, allowing greater latitude to PRCRs and LSRPs, if SRRA and LSRPs are to succeed. A failure to do so will expose DEP to attack, but may also, and more importantly, hamper efforts of PRCRs and LSRPs to remediate quickly and efficiently, arguably a critical goal of the legislature in adopting SRRA. How is DEP doing so far? Generally well, but with occasional flashes of old-style conservatism, bureaucratic behaviors, and reluctance to let go, particularly by staff.

◊ A person who performs a remedial action in the manner prescribed in DEP rules, and who certifies this fact to DEP, shall obtain a FRD for that particular remedial action. (N.J.S.A. 58:10B-2; P.L.2009, c.60 §41).

○ Historically some have felt aggrieved by DEP's refusal to issue NFA letters after similar compliance, but were left with no practical remedy other than to await DEP action or surrender to DEP demands. Many waited for DEP, and lengthy delays ensued, often without success (receipt of the NFA Letter). Many surrendered to DEP demands, and still found themselves unable to obtain the coveted NFA letter, ending up facing new demands instead as rules, perspectives and personnel changed and delays added to delays. Judicial relief seemed rarely available. While the legal standard used in this section remains essentially the same as before SRRA, the possibility now exists that an LSRP will be more willing to issue a FRD (a RAO) than DEP has been. This is arguably a key goal of SRRA- to accelerate remediations. But if this is the case, another consequence may be a shift in the relative legal positions of PRCRs and DEP. Absent clear error, efforts by DEP to reopen cases having obtained RAOs from their LSRPs are certain to meet opposition in court by both the PRCR and LSRP. In such suits, one can speculate that courts will be less fearful of ruling against DEP and less compelled to blindly defer to DEP (because SRRA suggests LSRPs are equal to the task of remediation, at least if they follow DEP rules and, to some extent, guidance). Courts likely will be more willing to accept good faith determinations by LSRPs based on published rules and guidance, and less willing to defer to DEP fears, speculations and concerns unsupported by objective evidence of a failure to comply or an actual unremediated condition, than has previously been the case. In fact, DEP may lack the time, staff, qualifications and resources to challenge LSRP decisions with anything other than claims of uncertainty and deficiency, assertions of possibilities and threats. Real judgment may be unsupported by objective evidence, and in those circumstances courts, we believe, should defer to LSRPs not DEP. Lack of clarity may be construed against DEP, if alternative interpretations by LSRPs are reasonable. For the same reason, while DEP can be expected to review LSRP decisions carefully, and sometimes even skeptically, DEP may find it far easier to sit silent and accept an LSRP decision when uncertain, particularly after a strong effort by the LSRP and PRCR, than it ever found it in itself before SRRA to issue a final NFA letter with covenant not to sue in similar circumstances (as if there is an error the legislature, PRCR and LSRP will take more of the blame than DEP will and some opportunity for correction, even if tardy, is likely, at least absent actual harm to receptors). Whether in fact these speculations will later prove to be the fact will have to await the passage of time.

◊ The oversight charges that can now be recovered include costs related to the work charged to DEP by other State departments or agencies. (N.J.S.A. 58:10B-2.1; P.L.2009, c.60 §42).

◊ The obligation to post a RFS is altered so that it is both consistent with N.J.S.A. 58:10C-27 and exempt certain Persons from this obligation: government entities, persons remediating their primary or secondary residence, the owners and operator of child care centers, and PRCRs remediating schools. LSRPs can set the amount of the RFS, including for a remediation certification. Decreases in the amount of an RFS may occur based on LSRP certifications. The time periods for establishing the RFS remain essentially the same except that when DEP takes over direct oversight under N.J.S.A. 58:10C-27 the RFS is to be established when that occurs. Otherwise the RFS is due when DEP approves a RAW (under ISRA) or remediation agreement or a remediation certification is submitted under ISRA (N.J.S.A. 58:10B-3; P.L.2009, c.60 §43). See also the ARRCS Rule at N.J.A.C. 7:26C-5.2(l).

○ The amount of the RFS is calculated similar to the approach used previously as the "cost estimate of the implementation of the remediation, including the Department's fees and oversight costs, but excluding the estimated cost to operate, maintain and inspect engineering controls as part of a remedial action

permit as provided in N.J.A.C. 7:26C-7, as approved by…" DEP or certified by the LSRP and PRCR. N.J.A.C 7:26C-5.3(a)1. Annually thereafter the PRCR shall submit to DEP a detailed cost review of past costs and estimates of future costs on DEP's Remediation Cost Review Form certified by the PRCR. N.J.A.C. 7:26C-5.10 and http://www.nj.gov/dep/srp/srra/forms/draft_remediation_cost_review_est.pdf. The RFS amount is subject to revision by reason of changes in that form or other events, including DEP's own projections. As previously, the RFS is released upon a FRD. The PRCR may be obligated to add an amount to any existing RFS so that the aggregate amount serving as RFS remains adequate to assure performance.

◊ A letter of credit (LC) can be used again as an RFS, except of course when DEP acts under N.J.S.A. 58:10C-27 (taking direct oversight). (N.J.S.A. 58:10B-3; P.L.2009, c.60 §43). See N.J.A.C. 7:26C-5.7.

○ Note: LCs were often used as RFS before 1993 statutory changes. For some, LCs may be less expensive and more available options. Of course, language required by DEP may make some banks less willing to provide these LCs. Also, they are subject to the 1% annual surcharge.

◊ Self Guarantees now require an unqualified audited opinion in the supporting financial reports. (N.J.S.A. 58:10B-3; P.L.2009, c.60 §43). See N.J.A.C. 7:26C-5.8. This change may make self guarantees less available than before SRRA. Unfortunately Self Guaranties are unavailable as FAs and in cases of direct oversight,

◊ DEP can draw against a RFS to finance the cost of the remediation for a failure to perform a required remediation or after a failure to meet mandatory timeframes. (N.J.S.A. 58:10B-3; P.L.2009, c.60 §43). See N.J.A.C. 7:26C-5.13(c).

◊ When DEP has not taken direct oversight, the LSRP may draw against the funds in a remediation trust fund (or even less typically an environmental insurance policy, letter of credit or a line of credit) to fund costs for remediation up to four times a year. N.J.A.C. 7:26C-5.12. But then the PRCR and LSRP "… shall provide the Department with notice of the disbursement and the amount of the remaining remediation funding source within 30 days after disbursement on a form available on the Department's website at www.nj.gov/dep/srp/srra/forms." It seems likely that if any disbursement causes a deficiency in the amount remaining to secure full performance of all remaining remediation, the PRCR is obligated to add to the RFS.

◊ The 1% annual surcharge on the amount of certain RFS does not have to be paid after an RAO. It still need not be paid by those acting under a "memorandum of understanding" (presumably meaning MOAs) so long as DEP mandatory timeframes for remediation are still being met. (N.J.S.A. 58:10B-11; P.L.2009, c.60 §46).

○ Note: This statutory reference confirms that MOAs (or memorandum of understanding, whatever else those may be at DEP) may still pose advantages to applicants, if they were still available (as for the moment they are not). Perhaps one day they or their equivalent will be again (most likely after DEP accepts that some sites will not be remediated by those not liable to do so [i.e., with defenses to liability] without some concession and flexibility from DEP). See discussion at this Article § 3.7.3(D).

◊ Conforming changes were made to the statutes addressing redevelopment agreements. (N.J.S.A. 58:10B-26, 28, 29 & 31; P.L.2009, c.60 §52, 53, 54 & 55). The ARRCS Rule addresses developer certifications (a/k/a Indirect Cost Exemption Certification) in Appendix A of N.J.A.C. 7:26C.

■ 3.8.13 Standards

◊ 3.8.13(A) DEP hereafter shall (mandatory) require the use of an unrestricted use remedial action, or a presumptive remedy or an alternative remedy as provided in N.J.S.A.58:10B-12g(10), at a site or AOC where new construction is proposed for residential purposes, for use as a child care center, or as a school, or where there will be a change in the use of the site to residential, child care, or school purposes, or another purpose that involves use by a sensitive population; it may do so as to remediations initiated between SRRA's adoption and one year thereafter. Except as provided in this subsection, and P.L.2009, c.60 §27 DEP may not disapprove the use of a restricted use remedial action or a limited restricted use remedial action so long as the remedial action meets the required health risk standard, and is protective of the environment. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(1)). See N.J.A.C. 7:26E-5.3 for remedial action requirements for residences, schools, and child care centers.

○ According to DEP rules, for such uses:

- a unrestricted use remediation must be used in two situations: 1. A discrete area discharge (defined at N.J.A.C. 7:26E-1.8 as "a discharge that only results in less than or equal to 300 cubic yards of contaminated soil. Historic fill is not a discrete area discharge") and 2. Widespread polychlorinated biphenyl contamination where the planned use is Residential Type I (defined at N.J.A.C. 7:26E-1.8 as any non-discrete discharge area which is not "an area under the control or authority of an entity or person, other than the

occupant, who has the legal authority to preclude anyone from disturbing an engineering control.") N.J.A.C. 7:26E-5.3(b).

- a remedial action workplan must be filed, and DEP approval obtained, in two situations: 1. An area "containing unexploded ordnance, polychlorinated dibenzo-p-dioxins, polychlorinated dibenzofurans, hexavalent chromium, or landfills" and 2. When treatment or removal of free product or residual product is not practicable. N.J.A.C. 7:26E-5.3(d).

○ Note: Presumptive remedy guidance, applicable to such circumstances when the PRCR does not implement an unrestricted use remedial action, is available on DEP's website, for review. See http://www.nj.gov/dep/srp/guidance/srra/presumptive_remedy_guidance.pdf. This was updated in late 2013. Some guidance is relatively novel, never having been proposed or used by DEP before then. Some differs from prior approaches. Many sites have previously been developed and are being used for these specially protected uses which sites may not meet these requirements. Issues may arise with future sales, leases, refinancings and permitting at sites that do not meet these requirements. Fortunately, DEP has clarified that the presumptive remedies are not the only methods for remediation and alternatives are possible. See N.J.A.C. 7:26E-5.3(c) which provides the PRCR may propose an alternative remedy by submitting to DEP a RAW pursuant to N.J.A.C. 7:26E-5.5 that includes: i. An analysis that: (1) the presumptive remedy is impractical due to site conditions; or (2) the alternative remedy would be equally protective over time; ii. A detailed description of the alternative remedy including specifications for EC and IC and a monitoring plan; and iii. An explanation of how the alternative remedy is protective of public health, safety and the environment; and 2. Obtain DEP's prior written approval. (Anew?)

○ Note: In such cases can the owners, occupants and LSRPs rely on the prior approvals (especially if pursuant to a DEP approved RAW)? Or must such remedies be reexamined or reopened based on rule changes? The applicability test is unclear as to whether it applies as to any phase of remediation occurring after the critical dates or whether it applies only if no remediation occurred before the critical dates. For example, if a prior remediation was conducted without approval of a RAW or issuance of a NFA letter, and the remediating party later approves a deed notice reflecting that remedy as the final, can DEP disapprove if the owner is seeking approvals to build a residential development? In our view DEP guidance suggests that if remediation started soon enough, the presumptive remedies need not be used.

○ Note: There is no guidance clarifying which other uses may involve sensitive populations requiring more protection of this nature. Further guidance is needed. Possibilities include: senior citizen facilities, hospitals, campgrounds, and nursing care facilities. Are there others? Perhaps. (Restaurants? Medical Offices? Hospitals? Prisons? Environmental Justice areas? Churches? Parks? Athletic or recreational facilities?).\

- Can an LSRP be the subject of a Board or DEP complaint for relying on present DEP guidance to avoid further effort for unspecified potential sensitive populations, or is the absence of more express and direct DEP and Board guidance as to requirements for other sensitive populations, and the absence of identifications of such populations, a defense to same?. Does the LSRP's stated highest duty under SRRA sufficient to require that an LSRP and his or her client do more than DEP ND Board rules and guidance now specify? In our view, the existence of DEP rules and guidance that speak to the issue should be treated as the equivalent of a regulatory "safe harbor," the compliance with which excuses the need for the LSRP to consider acting beyond it (at least in the absence of extraordinary and relatively clear facts and circumstances certainly requiring more (which we are unable to identify)- and, even then, we believe the LSRP should not be subject to punishment and discipline (and rather the Board and DEP can use the opportunity to provide clarification as to its expectations).

○ DEP's guidance provides that "At an existing school, child care center or residence, the person responsible for conducting remediation is not required to use a presumptive remedy. "

- Is the same true as to other existing sensitive receptors? We would argue it is.

○ DEP's guidance provides that: "To obtain Department approval for an alternative remedy proposal, prepare and submit to the Department the "Alternative Remedy / Remedial Action Pre-Approval Form" and a RAWP prepared pursuant to N.J.A.C. 7:26E-5.5 prior to the submission of the final RAWP."

○ In some cases an LSRP may be permitted to issue an RAO without his or her client implementing ordinary remedial measures, or meeting presumptive or alternative remedies. One example would be in the case of technical impracticability. See e.g., N.J.A.C. 7:26E-1.10 & N.J.A.C. 7:26E-5.1. As to ground water see http://www.nj.gov/dep/srp/guidance/srra/ti_guidance_gw.pdf. DEP Alternative Remedy guidance provides that: "The Department will consider various site specific factors, including the nature and severity of these factors, when evaluating the impact on the practicability of implementing the unrestricted use remedy or presumptive remedy at a given site. Combinations of several of the factors below, or other factors, may increase the cost of

remediation to the degree that an unrestricted use remedial action or the presumptive remedy may become cost prohibitive.

•The presence of steep slopes, unsuitable subsoils or other physical constraints that will affect the implementability or long-term effectiveness of the remedy

•The remedy will be prohibited or environmentally undesirable due to proximity to wetlands or flood plains.

•The remedy will require excavation near or beneath structures (either on the site or on adjacent sites) that would jeopardize the stability or integrity of such structures.

•The need for substantial dewatering that will affect the implementability or feasibility of the remedy.

•A discrete area discharge is contained within a widespread area of contamination such as historic fill.

•The remedy will require excavation of bedrock.

•The remedy will require extensive excavation support (e.g., shoring, sheeting).

•The remedy will damage or otherwise compromise the integrity of an existing remedy or engineering control.

•The remedy will render the site unusable.

•The site includes multiple discrete area discharges.

•The remedy will require extended disruption to public service, public utilities or other vital infrastructure improvements."

◊ 3.8.13(B) Except as provided in N.J.S.A. 58:10B-12g and N.J.S.A. 58:10C-27, the choice of the remedial action to be implemented shall be made by the PRCR in accordance with Law(s) and that choice shall be approved by DEP if all the criteria for remedial action, as applicable, are met. (N.J.S.A. 58:10B-12g.(1); P.L.2009, c.60 §47). (The exceptions relate to presumptive remedies and direct oversight circumstances.)

○ Presumably the LSRP is similarly constrained to honor PRCR decisions.

◊ 3.8.13(C) DEP may disapprove the selection of a remedial action for a site which will render the property unusable for future redevelopment or for recreational use (N.J.S.A.58:10B-12g.(1); P.L.2009, c.60 §47).

○ Note: When does a remedial action so render a site unusable? What if factors not directly related to the remedy have that effect (especially if by reference to the remedy, as opposed to by sound science) (e.g., then or later: zoning; construction codes; municipal or county action; local redevelopment plans; land use regulation by the state; lender requirements). Does DEP have to come up with guidance or rules before it can exercise this power? Arguably yes (otherwise it may be arbitrary, capricious and unreasonable). See e.g., P.L.2009, c.60 §41; N.J.S.A. 58:10B-2. But in the ARRCS Rule DEP simply states the LSRP and DEP shall invalidate a RAO if this is the result. See N.J.A.C. 7:26C-6.4(b)2 and -6.4(c)2.ii.

○ Note: Presumably the LSRP should consider these issues, particularly if DEP provides guidance. But absent such guidance, how do the LSRP and PRCR protect themselves against DEP second guessing? Compare, however, N.J.S.A.58:10B-12g.(7) which clearly authorizes the LSRP and DEP to make the required evaluations while N.J.S.A.58:10B-12g.(1)speaks only to DEP: is this difference support for the view that this is a DEP power, right and responsibility, but not that of an LSRP? Obviously not in DEP's view.

○ Note: This subsection does not explain if there are restriction in the process or timing for DEP to exercise this right. Arguably DEP should only be able to so act in the same manner as it reviews and/or audits other LSRP decisions and, absent error or deficiency, not simply substitute its judgment for the LSRPs, particularly years after the remedy is complete and RAO issued.

○ Note: If a municipality complains after issuance of an RAO that it believes the remedy selected makes a property unusable, can DEP reopen the RAO for that reason? What if local officials do not want the property developed as intended by the site owner (perhaps as a lawful but a locally offensive use [such as a place of worship of a disliked religion, a halfway house, an abortion clinic, a porn shop, a minority owned business]): can the municipality regulate some common attribute of the remediation and that use so as to defeat or delay the use or the remediation, if only by making it more expensive? What if after the remedy is implemented (or perhaps after the RPO) the municipality changes its zoning requirements and the change has the prohibited effect (such as to require larger setbacks from deed restricted areas, or prohibit construction over same, or to prohibit residential use over deed restricted areas in a pre-existing zone allowing only residential uses- thereby rendering the property unusable unless the remedy is revisited). One would hope DEP (and the courts) would not permit municipal manipulation of circumstances to negate sound remedial measures. And even if DEP can consider municipal intrigues for some period, the 3 year review limit arguably should still apply.

○ Note: What if a pre-SRRA remedy and deed notice have already rendered a site unusable? Does this new statutory requirement apply retroactively? Need the PRCR or LSRP now note the issue in any inspection report or biennial certification under the deed notice or SRRA? If an RAP is sought, can it issue? If an LSRP files a biennial certification without identifying the issue, is the certification erroneous and the LSRP subject to sanction? If ISRA is triggered again, must the new LSRP overturn the prior remedy and DEP NFA Letter because of this provision? We would argue that the requirement cannot be applied retroactively, particularly to those having the benefit of covenants not to sue. We think any contrary argument is constitutionally deficient (violating requiring due process and fundamental fairness and limiting interference with a contract).

◊ 3.8.13(D) DEP may also require the treatment or removal of contaminated material that would pose an acute health or safety hazard in the event of potential failure of an EC. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(2)). This requirement does not appear to be specifically addressed in the ARRCS Rule or Tech Rule.

○ Note: It is not clear if there are limits on when DEP can do this. Hopefully it would do so early by issuance of guidance that the LSRP and PRCR can consider, and not on a case by case basis after issuance of an RAO.

○ Note: Presumably the LSRP should consider these issues as the project advances and potential concerns for such are identified, particularly if and after DEP provides guidance. In general there may be a general understanding on many of the more obvious issues to which this may apply (creation of an explosive condition, for example). But absent that consensus, or new DEP guidance, can an LSRP safely rely in his or her own judgment? And if an LSRP fails to spot the issue, authorizes and directs a remediation, and the issue then requires substantial costs to address, has the LSRP committed malpractice? Can a Board complaint be filed by the PRCR, DEP or the Board? Compare, however, N.J.S.A.58:10B-12g.(7): is the difference in the text support for the view that this provision creates only a DEP power, right and responsibility, but not those of an LSRP?

◊ 3.8.13(E) Property that does not meet unrestricted use criteria can still be used for residential use, essentially on the same logic as before (that controls may suffice to protect residents), but now only if there is compliance with a DEP presumptive remedy or implementation of a DEP approved alternative remedy for same under N.J.S.A.58:10B-12g.(1) & (10). (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(3)). Obviously, as before, a developer planning a residential development without using an unrestricted remediation needs to have assurance of DEP approval before proceeding.

◊ 3.8.13(F) In evaluating a remedial action an LSRP must consider its implementability in a reasonable time frame without jeopardizing public health, safety or the environment. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(7)). This requirement does not appear to be specifically addressed in the ARRCS Rule or Tech Rule.

○ Note: Presumably this means that an LSRP should prefer a remedy that is implementable in a reasonable time frame over one that is not. But it may also mean that delay in a remediation to reduce risk to public health, safety or the environment is justifiable. Does such a delay on such reasoning avoid the need to meet deadlines? Not expressly.

◊ 3.8.13(G) DEP may authorize a PRCR to divide a contaminated site into one or more areas of concern. For each area of concern, a different remedial action may be selected provided the requirements of this subsection are met and the remedial action selected is consistent with the future use of the property. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(11)).

○ Note: It is unclear why this provision was added or needed in that it reflects common practice before DEP, except perhaps with respect to schools and licensed child care centers as to which existing law suggests a need for a no further action letter for an entire site. It at least ratifies the concept of approaching different portions of a site in different manners.

○ Note: It is unclear if this supports or limits the practice of some PRCRs to divide responsibility for some AOCs or sites amongst multiple LSRPs.

◊ 3.8.13(H) The construction of single family residences, schools, or child care centers shall be prohibited on a landfill that undergoes a remediation if EC are required for the management of landfill gas or leachate. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(12)). See N.J.A.C. 7:26E-5.3(e).

○ Note: This is unexplained. Some such uses exist today, both with and without such controls. It is not clear that this new legislative policy judgment is truly appropriate: EC do suffice technically, and should suffice legally, to be protective, at least absent an acute risk aggravated by, for example, a failure of controls in the presence of such a use (such as a risk of explosion from methane accumulation if a vapor mitigation system EC failed). But such risk is already separately addressed elsewhere. But presumably the legislature determined more protection was needed for future sensitive uses on landfills. But can this policy decision withstand judicial scrutiny?

○ Specific requirements for investigating landfills are provided at N.J.A.C. 7:26E-3.11 for SIs and N.J.A.C. 7:26E-4.6 for RIs. See discussion at this Article § 3.8.7 above.

○ Note: Is it clear whether construction on known landfill sites, pursuant to a DEP approved closure plan or disturbance permit, perhaps resulting in a new or a revised deed notice, is or is not subject to SRRA requirements in whole or in part? Does remediation as part of such construction require use of an LSRP? Will such deed notice require biennial certifications certified by LSRPs? Arguably not. Certainly the DEP unit in charge of solid waste landfills has not required such. Although SRRA references the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.) ("SWMA"), and the remedial standards adopted by DEP under N.J.S.A. 58:10B-12 require that "[r]emediation standards and other remediation requirements established pursuant to this section and regulations adopted pursuant thereto shall apply to remediation activities required pursuant to…[SWMA]", it appears that the provisions mandating remediation and use of LSRPs do not reference SWMA. See N.J.S.A. 58:10B-1.3 and discussion at § 3.8.7 above.

- However, DEP clearly feels, and the SRRA law itself provides, that SRRA requirements can apply, at least in some cases. See http://www.nj.gov/dep/srp/guidance/srra/landfill_guidance.pdf. In that document DEP advises that per ARRCS N.J.A.C. 7:26C-1.4(c)2, the following three categories of landfills are required to be remediated in accordance with the Technical Rule and this technical guidance: i. The sanitary landfill or portion thereof is to be developed with structures for human occupancy; ii. When sanitary landfill remediation is funded by the HSDRF per N.J.S.A. 58:10B-4 through 9, a Brownfield Redevelopment agreement pursuant to the Brownfield Act at N.J.S.A. 58:10B-27 through 31, or the Municipal Landfill Closure and Remediation Reimbursement Program pursuant to the SWMA at N.J.S.A. 13:1E-116.1 through 116.7; or iii. The person conducting the remediation wants a [FRD]."

○ Note: What if pre-SRRA construction of single family residences, schools, or child care centers have occurred with EC required for the management of landfill gas or leachate? Does this new statutory requirement apply retroactively? If a deed notice or the like is in place, need the PRCR or LSRP now note the issue in any inspection report or biennial certification under the deed notice or SRRA? If an RAP is sought, can it issue? If an LSRP files a biennial certification without identifying the issue, is the certification erroneous and the LSRP subject to sanction? If landfill review is triggered again (perhaps for a landfill disruption permit for new construction at a school), must any new LSRP overturn the prior status because of this provision? We would argue that the requirement cannot be applied retroactively, particularly to those having the benefit of covenants not to sue. We think any contrary argument is constitutionally deficient (violating requiring due process and fundamental fairness and limiting interference with a contract).

◊ 3.8.13(I) The protection afforded against changes in standards by less than an order of magnitude granted to DEP approved remedial action work plans now also extends to approved remedial action work plans of LSRPs. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12j). See also the RAO template.

◊ 3.8.13(J) The obligation of a person who remediates a site and "who remains liable for the discharge on that site due to a possibility that a remediation standard may change, undiscovered contamination may be found, or because an engineering control was used to remediate the discharge" to maintain a current address will now be incorporated in the EC and IC permit under P.L.2009, c.60 §19 and the FRD. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12o).

○ Why should the consequence of a failure of a PRCR to meet this obligation be loss of the protection from the FRD, particularly if the remedy remains protective? In such cases should the violation be treated as minor or immaterial, at least absent demonstrable harm? Further, in some cases the requirement is of minimal significance (e.g., after the death of a natural person or the dissolution of a corporation).

◊ 3.8.13(K) The obligations of a PRCR with respect to EC and IC have been revised to be apply more directly to the PRCR (e.g., the PRCR "provide" certain compliances rather than "require" them). (P.L.2009, c.60 §48; N.J.S.A.58:10B-13).

◊ 3.8.13(L) DEP cannot require more remediation if an LSRP approves an EC if the EC is in fact protective. (P.L.2009, c.60 §48; N.J.S.A.58:10B-13g.). This seemingly provides protection to the PRCR even if DEP disagrees with the LSRP decision. (Of course, if DEP really opposes the LSRP decision, will it undertake more careful review of the LSRP;s files and decisions in an effort to find some other basis to attach the decision, LSRP or PRCR?)

◊ 3.8.13(M) The prior inability of DEP to issue covenants not to sue, in the original SRRA Act, has been corrected. (P.L.2009, c.60 §49; N.J.S.A.58:10B-13.1f.)

◊ 3.8.13(N) Although SRRA did not alter the standards for remediation directly, DEP elected in the ARRCS Rule to advise that guidance for soils standards to address impact to groundwater is or will be available at www.nj.gov/dep/srp/srra/regs/guidance.htm. See N.J.A.C. 7:26D-1.1(b). Also DEP requires completion and submission of DEP's Alternative Soil Remediation Standard Application form for use of an Alternative Soil Remediation Standard. N.J.A.C. 7:26D-7.4. Further, DEP allows development of an alternative standard by use of N.J.A.C. 7:26D-Appendix 5 and modification of site-specific input parameters. N.J.A.C. 7:26D-7.5.

○ Does grandfathering for filed RAWPs and RARs to then existing standards or criteria extend to impact to groundwater standards or criteria? I would argue that it does. See N.J.A.C. 7:26E-1.5 (c).

◊ 3.8.13(O) N.J.A.C. 7:26E-1.7 addresses variances from DEP requirements. Prior DEP approval for LSRP approval and reliance on a variance is not required, so long as the variance is reported by the LSRP with appropriate rationale, and the variance meets the following criteria: i. it provides results that are verifiable and reproducible; ii. it achieves the objectives of the technical requirement; and iii. It furthers attainment of the purpose of the specific remedial phase. But variances are not permitted for the following: DEP notification requirements: 1. Regulatory, site-specific expedited, or mandatory timeframes; 2. requirements to obtain or comply with a permit; 3. requirements to submit a document; 4. requirements to comply with a remediation standard; 5. requirement to comply with a quality assurance laboratory requirement; or 6. requirements to obtain DEP's prior approval. DEP also allows sampling to be for fewer parameters in certain cases, at least after the first round. See N.J.A.C. 7:26E-2.1(c)4 provided the technical rationale for the reduced list is included in the applicable remedial phase report submitted to DEP. DEP also implements its new protocol for samples for petroleum hydrocarbons contamination (PHC) pursuant to the Department's Protocol for Addressing EPH Contamination Guidance. See N.J.A.C. 7:26E-2.1(a)(6) and www.nj.gov/dep/srp/guidance/srra/eph_method.pdf.

○ Variances also cannot be granted as to the text of the deed notice form.

○ DEP imposes requirements for historic fill at N.J.A.C. 7:26E-3.12 (for SIs) and -4.7 (for RIs) and -5.4 (for remedial actions: as before excavations are not required). See also this Article §3.4.9.

■ 3.8.14 Fees

◊ Fees payable by PRCRs conducting remediation are explained at N.J.A.C. 7:26C-4.

○ Under N.J.A.C. 7:26C-4.2 and -4.3 there will be an annual fee (which can change each year based on program costs and available PRCRs) based on the number of areas of concern for each site not the subject of a FRD, in 2013 set as roughly being $450 for 0 to 1 AOCs, $900 for 2 through 10 AOCs or any number of USTs, $5,000 for 11 through 20 AOCs or a landfill, or $9500 for more than 20 AOCs. A PRCR cannot combine, at least hereafter, contaminated AOCs or contaminated media for the purpose of determining the amount of the annual remediation fee. A PRCR must submit a new Annual Remediation Fee Reporting form reporting upon either any RAO or discovery of a new AOC 90 days prior to the annual remediation fee anniversary date. Fees are due until RAOs close out all AOCs. The definition of AOCs at N.J.A.C. 7:26E-1.8 appear aimed at avoiding consolidation of multiple areas into one AOC per type, although that remains to be seen.

○ Under N.J.A.C. 7:26C-4.2 and -4.3 there will be a separate annual fee (which also will change annually) based on each contaminated media of $1400 for groundwater, $1400 for surface water sediment and $1400 for groundwater discharging without a permit to surface water.

○ The first annual fee for new cases is due on the first of: i. The submittal of a preliminary assessment report; ii. The submittal of a site investigation report; iii. The submittal of the first remedial phase document; or iv. 270 days after any event listed at N.J.A.C. 7:26C-2.2(b). Thereafter DEP will send invoices. The obligation alters after DEP takes direct oversight. Cases pre-existing SRRA have fee obligations that phase in under somewhat complex rules. See N.J.A.C. 7:26C-4.3.

○ Annual fees are not due if there is an assigned full time case manager for the entire site, the remediation is of a child care center or a UHOT.

○ Under N.J.A.C. 7:26C-4.4 there will be periodic document fees, payable on submission: Remedial action report for UHOT system $400.00; Biennial Certification $375.00 (unless the PRCR has a remedial action permit that covers the biennial certification); Child care center RAO $225.00.

○ Under N.J.A.C. 7:26C-4.5 & -4.6 there will be remedial action permit fees (also subject to change), payable when invoiced: for a soil remedial action (i.e., for an engineering or institutional control) permit application fee ($600), modification fee ($400), transfer fee ($300) or termination fee ($600); for a groundwater natural attenuation RAP application fee ($800), modification fee ($600), transfer fee ($300) or termination fee ($800); for a groundwater active remediation RAP application fee ($1,000), modification fee ($800), transfer fee ($300) or termination fee ($1,000); for an annual soil RAP fee of a deed notice without engineering controls - $300.00; or a deed notice and engineering controls- $320.00; for an annual ground water RAP fee of natural attenuation- $550.00; and for any other ground water remedial action- $650.00. It should be noted that the annual fee is payable annually until the RAP is terminated.

○ Under N.J.A.C. 7:26C-4.7 oversight costs will be due to DEP whenever the Department assesses those costs in any of the following circumstances: 1. pursuant to N.J.A.C. 7:26C-2.3(a)3i (which do not impose such oversight costs); 2. If DEP assigns a case manager pursuant to SRRA at N.J.S.A. 58:10C-21b or c (undertaking additional review of LSRP documents); or 3. pursuant to N.J.A.C. 7:26C-4.3(i)1 (DEP assigns a case manager for the entire site) or 2 (a childcare center). Oversight fees are subject to review under N.J.A.C. 7:26C-4.8.

○ Fees shall be paid pursuant to N.J.A.C. 7:26C-4.9 by certified check, attorney check, money order, or personal check made payable to "Treasurer, State of New Jersey" or, when available, E-check or credit card. Failure to pay is subject to interest, enforcement, liens or withholding of an RAO.

○ The application of the cap on DEP fees and costs to 7.5 percent of the total remediation costs for a site as provided pursuant to the Brownfield Act at N.J.S.A. 58:10B-2.1d is addressed in N.J.A.C. 7:26C-4.10.

■ 3.8.15 Access

◊ N.J.S.A. § 58:10B-16 allows for a suit to obtain access to a site not owned by the PRCR for remediation if the PRCR is denied requested access. DEP has elaborated on the PRCR's obligations to seek access for remediation in the ARRCS Rule at N.J.A.C. 7:26C-8. By its terms it provides "the minimum requirements for the person responsible for conducting the remediation of real property not owned by that person, to obtain access to that property." This process involves requests by two letters to each owner followed by suit. The initial letter must be sent by certified mail and include: 1. A description of the PRCR obligation to remediate the site; 2. A site map indicating each area for which access is needed; 3. A description of the reason access is needed and the extent of access needed; 4. A description of the remediation to be conducted, indicating the approximate time of initiation and the approximate time necessary to implement; and 5. A request that the property owner respond in writing within 30 days after receipt. If there is no response, a second letter must be sent (also by certified mail), including a copy of the first. Thereafter, the PRCR "shall initiate and rigorously pursue an action in Superior Court, including an appeal to the Appellate Division, if appropriate, for site access. The person responsible for conducting the remediation shall provide written confirmation to the Department of the filing of such action." Please recall, however, that the party requesting access is under an obligation to negotiate same in good faith, before suit, or else access may be denied.

○ The provisions do not expressly address tenants or other persons with interests in the site to which access is sought. In our view such Persons must be considered, likely approached in many instances, and perhaps asked to agree to access for work

○ The problems presented in negotiating for access are relatively self-evident. These include: requests for payment (not required by the statute or rule); requests for reimbursement of legal fees (not required by statute or rule); payment for actual damages and restoration of same (because of the indemnity required to be granted by the court in an order of access, some such protection may be required; the owner retains its right to sue for same); time limits or terms (not required by statute or rule and potentially inconsistent with the need for remediation); copies of plans and results (routinely granted); veto over plans (routinely rejected); promises to remediate (routinely rejected; the owner retains its right to sue for same); insurance (not addressed, but usually granted); restrictions on time and manner of work (if reasonable, often negotiable).

○ The problems presented by a suit for access include: costs; delay in remediation; adverse publicity; damage to community relationships; increased risk of political interference and toxic tort or stigma damage suits; and loss of ability to negotiate a deed notice. Some PRCRs are relatively quick to sue,

others more tempered in their approach. Some recognize the avoided costs if suit is not needed and use the savings to pay the target site owner for its fee; others refuse to pay out of a matter of principle.

○ Nonetheless, lawyers have been fairly successful in relatively quickly handling and resolving access issues between clients after many months, and sometimes years, of effort by clients and their consultants have filed. Most such resolutions occur without suit or preparation of a complaint, at least when competent and experienced counsel are involved. The rest occur after suit is filed. Remarkably few suits result in court orders.

■ 3.9 Presumptive Remedies & Alternatives

◊ DEP shall, by rule or regulation, establish presumptive remedies required on any site or area of concern to be used for residential purposes, as a child care center, or as a school. DEP may also issue guidelines that provide for presumptive remedies that may be required as provided in N.J.S.A. 58:10B-12g.(1) on a site to be so used. The presumptive remedies shall be based on the historic use of the property, the nature and extent of contamination, the future use and any other factors deemed relevant. DEP may allow for the use of EC and IC in the presumptive remedies. (P.L.2009, c.60 §47; N.J.S.A.58:10B-12g.(10)). See discussion at this Article §3.8.13(A) above.

■ 3.10 Statutes of limitation

◊ The general five year and six months statute of limitation for any civil action concerning natural resource damages no longer runs from the completion of the remedial investigation but instead runs from the completion of the remedial action for the entire contaminated site or the entire sanitary landfill facility (P.L.2009, c.60 §48; N.J.S.A.58:10B-17.1b.) except if the statute of limitation has previously expired. (P.L.2009, c.60 §48; N.J.S.A.58:10B-17.1d.)

○ Does this mean that if groundwater is to be remediated over the next 99 years that the statute of limitation never runs? Arguably so.

○ Yet if an RAO issues by the LSRP in favor of the PRCR, which by operation of law includes a covenant not to sue, can the state still thereafter seek NRD? Arguably not. However, the language included in the RAO template suggests that DEP thinks it can.

IV. Some Questions and Answers:

1. Program Effects:

● **Q1.1:** What happens pending SRRA's full effect and full transition to LSRP oversight?
A: The question is now moot.

● **Q1.2**: Is there an opportunity to influence DEP's initial and continuing efforts under the SRRA?
A: DEP has reached out to the regulated community on various issues for input. Opportunities exist to provide thoughts to various task forces. These opportunities continue even in 2016. See http://www.nj.gov/dep/srp/srra/stakeholder/tech_guidance_committee_rd_2.pdf. DEP is working on added guidance. Even completed guidance will continue to be subject to debate and revision. New topics have been raised and new committees formed to consider same. Some old committees struggle to resolve complex issues (such as the guidance for dealing with clean fill issues, such as the possible existence of natural background levels of hazardous substances in quarried stone and gravel used as clean fill). The Board itself and LSRPs have an excellent opportunity to affect the program as administered by DEP (although to date they have not availed themselves of this opportunity). If you have an idea, speak up sooner rather than later. If you want to participate there may be a way to do so.

● **Q1.3:** Is compliance under SRRA saving remediating persons time and money?
A: There have been and will be savings to some but not likely for all as, at least in some cases, some LSRPs have demanded and will demand more work than their client would have been willing to propose (and perhaps even DEP demanded) before SRRA. Notably the fear that many LSRPs might charge a premium rate for their involvement appears not to have been realized, likely due to competitive and market forces to date, although this may change hereafter. LSRPs have found it necessary to review in detail many historic activities and decisions, and in some cases question prior DEP approvals, most notably on older cases (particularly when work performed decades ago fails to meet current approaches). Also DEP's new preference for submission of many forms has resulted in a number of efforts not previously experienced by PRCRs. DEP fees and charges are not, at many sites,

minor. Many fear these fees will increase as DEP maintains a significant staff, audits and reviews become more involved and time-consuming, and DEP seeks fees to fund that staff. However, it is to be hoped and expected that there are real opportunities for saving time and expediting work, subject to the risk of post RAO audits and reopeners. In that regard, experience to date does support the view that PRCRs who prefer action to debate, and accelerated efforts to delayed, are benefitting from the attention of LSRPs with minimal DEP involvement. Of course, changes in DEP rules, guidance and standards continue, almost always resulting in added costs and delays as changes cause revisitation of closed issues, or raise previously unaddressed concerns.

● **Q1.4:** Will the LSRP program "work" in achieving the Legislature's goals?

A: It can. It is to be hoped it will. Many can help it to succeed or, if too many act poorly, to fail. DEP itself has that opportunity. It is to be hoped that DEP personnel will embrace SRRA and help it to work, as many of DEP's senior officials seem to have done, but there may need to be continued shifts in DEP attitudes, particularly at staff levels. Some feel the program must work, as no other appetizing alternative exists. Others fear that some at DEP and the environmental community seek to find, collect and provide evidence to the press, public and legislature that LSRPs and PRCRs will allow (or have allowed) environmental problems to fester or worsen, and, therefore, the old ways should be restored (Long Live DEP!). Some fear that with Governor Christie's departure, these fears will be realized. Certainly early skeptics have to admit that DEP has taken real steps to assist the program in becoming successful. The regulated community will need to watch and see what happens, particularly on older sites, many of which have not yet seen much benefit from the program. It may take several years (and perhaps decades) to fairly evaluate SRRA: LSRP, PRCR and DEP perfection, of course, never was and is not achievable- how much failure will be tolerated by the public and the legislature is unclear. If the program fails to achieve its goals in any material respect, potentially after the first major failure is discovered and publicized (as, without doubt, such a failure will occur), change by DEP and the legislature is quite likely. And if LSRPs find themselves the victims of a search for perfection, whether by DEP, the Board, their clients or the public, they themselves may decline to pursue the demanded role. What will happen then is unclear. Public resources are limited. The State's economy has not improved enough to permit application of more funds to the environment, particularly as other needs for funding demand attention (decaying infrastructure; unfunded pensions; educational needs; senior citizens; the collapse of Atlantic City finances). DEP's and the legislature's threats of all-out enforcement have never worked previously, even in better and more aggressive times, but a shift in the governing party in power at the same time as a major failure, may make such more likely. Are there any scenarios under which DEP power and authority will be largely or fully restored and LSRPs abolished? While it seems unlikely, perhaps. Strong professional behavior and performance by LSRPs will make this more unlikely.

● **Q1.5:** Does all sampling and/or remediation require use of LSRPs?

A: We would argue not. Certainly purchaser due diligence does not. We believe the same should be true for lender due diligence. Perhaps such work by non-liable parties also should not (although in most cases if the goal of the work is some remediation, whether to assess and evaluate conditions and options, to stabilize a site's conditions, or to allow for transfer of title, use of an LSRP may be important). We acknowledge that the definition of remediation includes investigation of discharges and suspected discharges (thereby supporting a view that an owner or operator, at least non-innocent ones, who hires a consultant to investigate a suspected discharge should be using an LSRP). We also believe sampling and inspections for verification of CEAs, ECs and ICs should not require an LSRP (as they are not, in our view, remediation but rather compliance [there being no remaining discharge or suspected discharge to be further remediated but rather a discharge or condition that has been remediated by use of Controls as the remediation with post-remediation monitoring]), but it seems clear that DEP disagrees (and in the face of DEP's view, who can afford to argue? And if argument is preferred, perhaps there are better ways than simply disregarding DEP guidance?). Similarly, we think investigation in the absence of a known discharge is also not remediation and therefore not requiring of an LSRP. But counterarguments exist. We think not all spills and discharges should require LSRPs or RAOs if quickly addressed (DEP agrees only to a limited extent- such as in car accidents). We think there are legitimate issues of how to proceed if a DPCC or SPCC addresses spills or discharges without need for DEP or LSRP interaction. We think cogent arguments can be made about remediation-like work at or for landfills as not requiring LSRPs. We think minor correction of deficiencies in ECs, site conditions or remediation also may not (again DEP seems to disagree). We believe remediation which is voluntary by non-liable parties should not (as to which there is some evidence DEP agrees, but the promise of a RAO obviously requires an LSRP), and even use of an LSRP by such Persons voluntarily should not make them PRCRs, at least to full extent, and as a result DEP should restore some voluntary cleanup program like that previously available under MOAs. See discussions above.

● **Q1.6:** Has the SRRA program reached a stage of stability permitting PRCRs, LSRPs and their counsel a solid understanding of all the important issues?

A: While more is known today in 2016 than in 2009, change continues, sometimes threatening stability of past and future decision making. Many known issues continue to fester (e.g., clean fill). Important DEP guidance was issued in 2014-2015 and more can be expected. Case law is non-existent. Board enforcement, and DEP and Board audits, have occurred and are continuing, and as decisions are made such enforcement and audits will affect LSRP and PRCR behaviors, and potentially even reopen prior decisions. But harder cases are taking longer for the Board to decide. And public information about many actual important decisions and behaviors is limited. A good database of key decisions made by LSRPs and DEP does not exist (but should be created). Statutory and regulatory change seem likely, but difficult to predict (in part because of possible political implications and effects). DEP occasionally ignores its own rules and the law (many examples are provided above), often for good purpose. Key issues remain uncertain (technical impracticability; historic fill; clean fill; DAP; impact-to-ground water standards; ecological standards; grandfathering of standards; delineation and modeling limits; deadlines; presumptive remedies; alternative standards and remedies; DEP and Board enforcement; recourse to the courts; dueling LSRPs; innocent purchaser status; foreclosing lender status; reliance on FRDs; LSRP focus and resolution on legal issues; roles and limits on non-LSRPs). At some sites, many of these issues and uncertainties will be of minor concern; at others they will be determinative. So, clearly today we understand much better. But we do not understand it all.

2. LSRP-Client Issues:

● **Q2.1**: Who hires the LSRP?

A: Likely the person responsible for conducting the remediation (the PRCR) or a volunteer (who in at least some senses, arguably in DEP's view, thereby becomes a PRCR- requiring, we believe, extra care to ensure that the volunteer is not a PRCR in all senses [assuming that is possible, as we believe but DEP may not]). That could be a seller or buyer, a landlord or tenant, a lender, a directive recipient, a brownfields developer or others. The definition of PRCR does not seem, in DEP's view, likely to include DEP (although perhaps it could be- for example, if DEP exercises direct oversight and wants an LSRP to be involved but the PRCR does not retain an LSRP [posing the question if DEP can remediate without an LSRP in such cases]; or perhaps when DEP uses public funding to remediate and wants to obtain a RAO to evidence its own compliance and, perhaps, capture added value on sale of a clean site on which it may have a lien). It could conceivably be a lawyer, a parent or affiliated person or entity or an insurer contracting for, or perhaps even directing, services (and not just for expert testimony or advice or second opinions; perhaps, but, likely rarely, for remediation itself), all of whom previously and now have retained non-LSRPs. There is no clear rule to determine who should or should not hire the LSRP, although caution is appropriate (especially if someone does not want to be a PRCR). Indeed there are cases of multiple parties interested in the same or multiple nearby sites, each hiring their own LSRPs to guide them and make decisions, presenting the fact and ongoing risk of dueling LSRPs, opinions and decisions, for the moment with neither DEP nor the Board to referee, leaving only the Courts to do so and lawyers to prosecute and defend the issues. Conversely, we expect that there will be sites when parties may bargain together as to who will hire the LSRP, or perhaps agree that the group will hire an LSRP for all (with rules pre-negotiated for payment and control of the LSRP).

● **Q2.2:** Who is the LSRP's "client"? To whom does the LSRP owe duties?

A: There is no definition of this term ("client") in SRRA or DEP rules or guidance, or even in the Board's new rules. Presumably, as the Board suggests, it is to be determined by common understandings of the term. It is not DEP. It is not the Board. It is not the public. However, presumably SRRA means to identify the Person most analogous to a lawyer's client and a vendor's customer. If this presumption is correct the LSRP's client could be the person or entity contracting with the LSRP for services; but it also could be the person to whom the LSRP owes a special duty by contract, statute or common law, or professional or ethical guidance (not yet speaking to the issue). In any such case this "client" may or may not be the PRCR at or for a site, and certainly will not be all the Persons in the group defined by SRRA as PRCRs. Consider: when an attorney represents an owner of a contaminated site, but was retained by an insurance company, who is his or her client? Is it both the owner and the carrier? (To some extent, likely both). If a conflict develops between the insurer and the insured, whose direction does he or she follow? Who is to be more protected by the lawyer? (Likely the insured). But absent such conflicts, does the attorney have duties to both? (Yes.) Similar issues and answers may apply to LSRPs. (For example, consider an LSRP selected by a carrier after a bid proposal, contracting with the insured on terms prepared by the carrier: to whom does the LSRP owe duties? Who is his or her "client?") It appears the client may be different than the PRCR

and it seems possible that an LSRP could have more than one client for a site and more than one set of obligations (including, for example, differing under SRRA and contract). It also does seem appropriate to consider the issue of who needs to be able to rely on the LSRP's work and ensure that the Client-LSRP contract allows for such reliance, perhaps expressly (for example by all the parties to a transaction, future LSRPs and DEP). Of course, as a matter of professional licensing, the LSRP must at all times fulfill the duties required of him or her as a professional, even if such generates contract issues. This is the price of licensure.

● **Q2.3:** When might an LSRP's "client" not be a PRCR?

A: It is possible an LSRP could be retained by a buyer, a lender, a government entity, a tenant, an insurance company, a parent or affiliated entity, a consulting firm or a lawyer, any of whom could at the time of retention not be a PRCR. It is also arguable that certain persons or entities seemingly in the definition might not be PRCRs because of the absence of either their liability under the Spill Act or the absence of a known or suspected discharge for which they might have liability. To what extent then would such a Person obtain by that retention for investigation some of the obligations of a PRCR? (and if that retention results in more liability than the Person wants, can the Person hire a non-LSRP to perform such work and avoid those added liabilities?) It appears some of the provisions of SRRA could still apply to the LSRP, consultant and/or client in such an instance. And arguably the ability to retain a non-LSRP for work that ordinarily should be conducted by an LSRP is at least constrained, if not prohibited. But if, for example, such a person or entity elects to retain an LSRP for investigation, we would argue not all SRRA requirements should automatically apply (particularly if the retention filings make it clear that the retention is for a limited purpose), admittedly with some concern that our argument may prove wrong (in the first instance in DEP's eyes, and thereafter in the Board's, and finally in a court's view), particularly absent guidance on point. Absent a voluntary cleanup program allowing for innocent compliance, we believe neither DEP nor the courts should hold such persons as "guilty or "fully liable" under SRRA and both should allow termination of any temporary or limited LSRP retention to restore the prior status (as a non-PRCR) of the Person retaining the LSRP for such limited purposes. In other words, we would argue that the retaining Person (say a municipality; perhaps even DEP itself) might be a PRCR for the work by the LSRP within the scope of the retention but, for example, if engaging the LSRP for pre-condemnation sampling, would not merely by that retention become fully liable as a PRCR for all pre-existing problems and the obligations to resolve them, even if the sampling found a previously undiscovered problem. Of course, if the risk and doubt of and from this uncertainty are both high then perhaps a special purpose asset-less entity should be formed to undertake that work and retain the LSRP, at least in the absence of the voluntary cleanup program (the absence of innocent purchaser status of such an entity may be unimportant in comparison to the reality that the entity has no assets to which its liability attaches; indeed such an entity could have as its sole asset the tainted real estate and the added liability might be minimal to nonexistent [as DEP has the right to remediate a contaminated site and impose a super-lien, whether the owner is assetless or well-heeled).

● **Q2.4:** To whom does an LSRP owe duties?

A: At a minimum an LSRP owes duties to its client and to those with whom it contracts. For some purposes it owes duties to those to be protected by its efforts (The public? Tenants? Occupants?). Yet some LSRP contracts purport to renounce duties or liabilities to others. It is clear, in our view, that this is inappropriate in many cases. At a minimum the LSRP owes duties to DEP (who needs the LSRP to do his or her job) and the Board (who has issued the license and needs to ensure that each LSRP performs as required in order to have a successful licensed community of professionals) under SRRA, and arguably to those to be protected from contamination intended to be remediated by the LSRP and PRCR: we believe the LSRP's contract cannot disclaim those duties and expect that such terms will not be honored or enforced against those intended to benefit from LSRP services under SRRA. Arguably it may be unethical or worse to try and disclaim such duties and then enforce such disclaimers: consider e.g. the effects of N.J.A.C. 7:26I. But an LSRP also may owe duties to future LSRPs, who need to rely on its work (for example, because the earlier LSRP terminates as LSRP and the later LSRP takes over), and to the LSRP's PRCR who needs those future LSRPs to be able to rely on that work (for example, because the earlier LSRP leaves his original company and is bound by a restrictive covenant and the later LSRP takes over), given that if the future LSRPs cannot rely on earlier efforts then much time, money and effort will be wasted to the detriment of DEP, the PRCR and others. And the LSRP may owe duties to future owners and operators who are entitled to rely by law on its decisions and RAOs. Should a contracting party allow an LSRP to disclaim such duties? Can an LSRP properly disclaim such duties? We would argue that outright disclaimers of all such duties should be viewed skeptically and likely not enforced in every instance, if at all, although potentially reasonable limitations on reliance might be sensible and enforceable. For example, can a future LSRP simply rely on the prior work of an LSRP, even if

prohibited by that LSRP's contract, for any use, including one not foreseen by the original LSRP, despite clauses disallowing reliance (for example groundwater work not addressing vapor intrusion pathways, or surface water receptors, but then used by a later LSRP to address that pathway or receptor)? This is uncertain: it probably is better for the new LSRP to at least discuss such reliance with the prior LSRP to identify any impediments and reasonable concerns (and if the original LSRP's contract or terms were drafted to allow reliance upon notice and approval of the original, not to be unreasonably conditioned, delayed, withheld or delayed, or perhaps on payment of a reasonable fee, or both, such a provision may be more likely to be enforceable). If the prior LSRP or firm takes a non-negotiable position that its contract prohibits reliance by the new LSRP on the prior LSRP's work, and that any such reliance is without recourse to the original LSRP and his or her firm, then careful assessment will be required by the new LSRP (and the PRCR and relevant lawyers) to avoid or minimize problems that may arise if such position is simply ignored. In most cases we expect that the PRCR and its counsel should be able to discuss the issues with the prior LSRP and its counsel and come to a reasonable accommodation. If not, should a complaint to the Board be filed? A court case challenging the clause?

● **Q2.5**: Should every owner or operator whose site has been or is suspected of having contamination, have hired an LSRP by now? Should every owner or operator whose site hereafter is suspected of having contamination hired an LSRP promptly?

A: DEP's answer today to both questions is likely to be yes, although it has answered differently before after SRRA was adopted. Certainly DEP, using its data bases, has threatened or actually undertaken enforcement against those it thinks liable under SRRA to remediate who failed to hire an LSRP by the May 2012 deadline (after having repeatedly warned most that they should retain LSRPs, allowing those to respond if they thought they had no such obligation- for example because they had purchased in reliance on a NFA or otherwise had an innocent purchaser defense), including some of those who have now failed to meet the May 2014 RI deadline (not having filed for an extension because they did not hire an LSRP to do so). We note that DEP has not historically shown much interest or ability to assess the bona fides of asserted defenses to environmental liability. We believe it certain that some owners and operators are entitled to assert defenses against liability for known or suspected contamination. They may have an innocent purchaser defense (either because they bought before due diligence was required, or the due diligence they performed found nothing, or because they relied on a no further action letter). The contamination may be migrating onto the site from offsite. It is to be hoped that any targets of future DEP enforcement will have received prior warning from DEP and had some opportunity to respond. And, if they did, they would have been well counseled to provide a good faith response to DEP that may alter DEP actions (or perhaps provide a defense to the highest penalties, or even any penalties, DEP may seek), and hopefully did so. Certainly as DEP enforcement occurs court action will be needed to protect some targets by assertions of defenses. But even now, it may be worth some time and consideration to the advantages, disadvantages, costs, processes and alternatives of addressing known or suspected contamination at a site, voluntarily, in advance of any DEP action (particularly if future sale [as the buyer may not be eligible for a defense], borrowings [as a lender may be less interested] or death [as those who inherit will be liable to the extent of what they inherit and estate fiduciaries will have their own concerns and obligations] is likely). How to do so pre-DEP enforcement is a difficult issue. In some circumstances a potential target should consider a court action (which will face the serious burden of court doctrines impeding pre-enforcement review) in which, perhaps, some more favorable settlement can be negotiated with DEP and approved by the court, bypassing the most stringent SRRA demands (such as mandatory oversight). In other instances perhaps some settlement or consent order can be sought which, if DEP and the Attorney General's office can be made to see the advantages, can be entered into subject to reservations of claims and defenses, and preserving a right to terminate, in exchange for which work is done, with an LSRP and sharing of information and plans, without using public funds. If so implemented, perhaps sites can proceed to RAO allowing DEP to preserve scarce time, personnel and monies for use at other sites. Unfortunately, to date, as best we are aware, DEP has been hesitant to enter into administrative consent orders or settlements with late or recalcitrant PRCRs, sometimes taking the position that if compliance is pursued diligently, even if late, DEP will use its enforcement discretion to pick on others not those seeking to come into compliance. Of course, such a position does not protect the late or recalcitrant PRCR against either a change in DEP priorities, impending mandatory deadlines, or Environmental Rights Act plaintiffs.

● **Q2.6:** Are there any reasons to not hire LSRPs for environmental matters at NJ sites?

A: At first and ongoing reflection, there are reasons to consider retention of non-LSRPs when not required to hire LSRPs by law. Certainly various scientists, engineers and consultants are expected to work in the field of environmental consulting and remediation without becoming LSRPs, at least for a long time hereafter. Some

consultants, sometimes the most senior, have perceived sufficient disadvantages as to await and evaluate more experience with DEP and Board demands and consequences of licensure. Some have not had the required years of experience and yet are able to provide valuable resources and judgment to PRCRs. Some will be needed and willing to work with LSRPs, just as many work under the supervision of more senior professionals today. Some may offer a less expensive rate or price to their clients for services that do not need actual efforts from LSRPs. Some may fail the test, yet have invaluable expertise, knowledge or site or client familiarity. Some situations may benefit from having a non-LSRP with whom a client, PRCR or counsel may brainstorm alternatives or concerns, perhaps of a sensitive nature, less burdened, perhaps, by the duties and risks associated with involving an LSRP too early in such discussions. Some tasks may not require an LSRP because they are not part of the process of remediating a site. As one example, conduct of a preliminary assessment under state law and/or a Phase I/Environmental Site Assessment/All Appropriate Inquiry report under federal law, for basic due diligence, or innocent purchaser status, does not likely require use of an LSRP (nor, perhaps, for loan underwriting, pre-foreclosure assessment, compliance auditing, or litigation planning or preparation, or expert testimony). Also, lawyers and PRCRs, and potentially others (such as buyers or lenders or insurers), concerned with maintaining confidentiality of various evaluations, including handling of actual or potential litigation, including by or against government agencies or officials, particularly in view of the current provisions of the Board's rules at N.J.A.C. 7:26I, may prefer to reduce the risk of a conflict, between LSRP duties of reporting (particularly of IECs, but also potentially of discharges if the "safe harbor" will not apply), record keeping and disclosure and the attorney's client's needs of confidentiality to preserve attorney-client privilege, by use of non-LSRPs. Also, assuming a rational basis exists that conduct of environmental work will not require use of an LSRP by a Person, and not automatically convert the person into a PRCR (an issue on which some doubt remains, and on which we express no certain view here), then whereas use of an LSRP for such work likely will be safe only if retained officially as LSRP (because the risks to the LSRP of not notifying DEP of his or her retention will be higher), use of by a non-LSRP for a then non-PRCR will arguably not require notice to DEP (clearly a complex position, based on the argument that a non-PRCR does not automatically become a PRCR by such investigation, requiring good legal assessment and advice, discussion with the client of risks and uncertainties, and reasonably likely to result in some risk of confrontation with DEP and the Board in the absence of clear guidance, and also based on the view [subject to criticism and doubt] that a non-LSRP can do much of what an LSRP can do without becoming subject to punishment by so proceeding without a license under SRRA). On the other hand, use of an LSRP for such tasks, especially pre-purchase due diligence and a preliminary assessment, should create a better result for the client, such as a more viable defense, more reliable data and conclusions or even potentially allowing prompt issuance of a full and valuable RAO in certain instances, and/or serve as a better foundation for a later compliance with remedial requirements, under ISRA or SRRA? Alternatively, can a person determine to use an Person licensed as an LSRP (for his or her insight), but not engaged before DEP as such (no form is filed), to conduct non-LSRP activities (e.g., due diligence) and avoid LSRP duties (such as reporting) or is the LSRP always, whether engaged as such or not, burdened by such duties (it appears that the client can so hire that LSRP, but the Person who is an LSRP will not avoid all duties under N.J.A.C. 7:26I - therefore should the client and LSRP Person so proceed)? Also consider: are there any other reasons to use an unlicensed out-of-state professional in New Jersey? (To save money? To have national insight and perspective? To avoid LSRP duties? To use a trusted advisor?) To use an unlicensed out of state laboratory? (To avoid reporting, as DEP deems such data unreliable? To use a testing methodology deemed more reliable? To save money or obtain better contract terms?) To use in-house staff not licensed as LSRPs for New Jersey work? And are there risks of doing so (e.g., will DEP or the Board deem such to be illegal per se)? Of course, can one really rely safely on the conclusions of a non-LSRP if eventually its work will be subject to review and/or repetition and/or bypass by an LSRP? Possibly not. Certainly PRCR and consulting practices are still evolving in New Jersey. So imaginative thought is still possible. But due care is still warranted to avoid or minimize future problems. Note: in providing this advice we do not seek to suggest any answer or approach, or encourage anyone to violate law. We only raise the possibility that good lawyers might not agree with likely DEP or Board positions. And in any event that there may be good reasons separate from the purposes regulated by SRRA to consider alternate approaches.

● **Q2.7.1:** Should PRCRs with multiple sites use multiple LSRPs or just one? **Q2.7.2:**Should PRCRs with multiple AOCs at a site use one LSRP or is it feasible to use more than one, perhaps splitting various AOCs amongst various LSRPs, or perhaps splitting different issues or responsibilities of one AOC among various LSRPs, or perhaps deciding that one or more AOCs or portions do not require an LSRP because of prior DEP decisions, approvals and NFA Letters?

A Both: Either strategy could work well for a particular PRCR and site or sites depending on the choices and philosophy of the PRCR. There does not appear to be any regulatory or statutory limitation or prohibition, or regulatory guidance (of the Board or DEP), inhibiting such an approach, at least as yet.

A2.7.1: The question may be most relevant to a PRCR having multiple sites with similar issues now or hereafter using multiple consultants. Even if each such existing consultant has its own LSRP available, as by this date should be known, the philosophy of each particular LSRP may or may not match the strategies sought to be implemented by that PRCR at all its sites. Use of one LSRP might reduce the risks of problems from audits if that LSRP is particularly talented, as undoubtedly some will be. Conversely, use of only one LSRP may pose risks if that LSRP is audited, with resulting problems before DEP extending to all sites. And if the PRCR already was using multiple consultants at multiple sites then the risk of different LSRPs may be acceptable to the PRCR.

A2.7.2: As to the second situation, particular environmental problems may be better resolved by individuals or firms with particular expertise in preference to others, perhaps otherwise useful to a PRCR. A PRCR may have a preferred firm and LSRP for USTs, another for solvent problems, another for sediment concerns or VI concerns, and a last for groundwater or surface water issues or remedial measures. Indeed, within the same firm there may be multiple LSRPs with different expertise, and rather than have one supervising LSRP for all AOCs the PRCR or client may prefer using separate LSRPs (in which case, if the PRCR's obligation pertains to the entire site, someone will need to be responsible for assessing that the combination of prior no further action letters with LSRP AOC RAOs addresses all AOCs [which DEP may feel is only or best accomplished by one LSRP reviewing all separate RAOs and NFAs and issuing an entire site RAO relying on same, so DEP need not do so {although PRCRs may feel otherwise}]). Further a PRCR may legitimately believe it has reduced obligations because of prior DEP decisions and be prepared to rely on its own judgment as to such, augmented by its counsel, without requiring or exposing any LSRP to review that determination. Reportedly different techniques are already in use. One technique is for one firm or LSRP to work with another in a supervisory role. Another is retention of separate LSRPs for separate AOCs or media (for example for soils, ground water and ecological issues). For example, a specialist LSRP may be more comfortable in issuing a RAO for an AOC fitting his or her particular expertise, and uncomfortable outside it. However, some care will be needed in certain remedial cases (for example ISRA subject sites) to ensure that the sum of the decisions of all LSRPs, together with prior DEP decisions, in fact address all AOCs; failure to do so can present multiple risks and complications, including of DEP enforcement. Indeed, it is not yet clear whether the final deliverable expected of PRCRs to close out an entire site is one master RAO of one LSRP issued for all media and AOCs or whether separate RAOs can be assessed and determined by the PRCR (and later DEP) to suffice, as some appear to argue, with little support for or against the alternate views, but with risk at least to the PRCR, and perhaps the last LSRP, if its assessment is wrong (in that a missed AOC could support a DEP enforcement position that the PRCR has breached SRRA (by not having retained an LSRP for an AOC required to be addressed). We note that we are aware of at least one instance in which the division of labor in such manner poses difficult issues for DEP and the Board in assessing a DEP complaint as to the responsibility of an LDRP for an alleged IEC in the face of prior DEP decisions, a limited retention and new accusations or suspicions.

● **Q2.8:** When are new cases initiated such that the PRCR must use an LSRP?

A: Although mere investigation is included within the statutory definition of "remediation," and a PRCR who is aware of a discharge, or investigating a suspected discharge, initiating remediation for the first time is by its express terms subject to SRRA, it seems unlikely that in every case the legislature intended that mere investigation or assessment by any then non-PRCR Person, or perhaps even a Person otherwise identified by SRRA as a PRCR (such as a site owner) then without knowledge or suspicion of a discharge, should always be addressed as a new PRCR remedial case requiring an LSRP. See discussions elsewhere, e.g. Q1.5. Clearly new discharges (and in certain instances potentially suspected discharges) requiring reporting and remediation under the Spill Act (or N.J.S.A. 13: 1K-16, addressing reports to DEP by industrial establishments of suspected discharges) will be subject to SRRA, at least from the discovery and reporting of such. But what if the existence of a discharge is not expected? What if a due diligence effort finds what could be DAP or an offsite source? How much planning and discussion of the issue can occur between a potential PRCR and a consultant before an LSRP must be retained? Hours? Days? Weeks? Months? Years? Forever? (There is no clear answer). Can a geophysical study be undertaken without retention of an LSRP to assess if there are lost USTs on a site? (We would argue yes). What if the study finds an anomaly that could be a tank? Need an LSRP be retained then? What if there is a tank, but there is no evidence of a discharge? What if an owner knows that a site is mapped by DEP as having historic fill? What if a neighbor is in ISRA and finds historic fill running up to the shared border of the property? What if there are rumors that a particular four acre piece of the site was once used as an orchard? In each or any case need an LSRP be retained on notice to DEP to investigate? Is the presence of pesticides on land formerly an orchard remediable without an LSRP

because the pesticides were used and not, in most lawyers' views, discharged? (Although then there will be no RAO; not a small factor if the property is ever to be sold). Can a non-LSRP investigate site conditions? Any and all site conditions? If a site is under the responsibility of one or more LSRPs already? Can a non-LSRP investigate and conceal the results from one LSRP and seek to compel another LSRP to act? The actual facts and circumstances, and future DEP and Board guidance, as well as the nature of complaints to the Board made and not made, and Board decisions on such complaints as are made, may determine the answer, at least until courts act. However, we believe that many such circumstances do not impose an obligation on the owner or operator to investigate, and we believe DEP should allow both that an investigation of such does not require use of an LSRP and the conduct of such investigation does not violate SRRA or make the investigator a PRCR, although the discovery of a problem may be reportable (including to maintain any innocent purchaser defense) and thereafter result in obligations of the owner or operator, at least to the extent that the innocent purchaser defense does not apply. As we have argued elsewhere herein we believe DEP should restore the voluntary cleanup program and MOAs to allow for such work.

● **Q2.9**: What should the PRCR do now about its existing pre-SRRA contracts with third parties (for example those calling for pursuit of no further action letters)?

A: By now critical contracts should have been reviewed to assess if there are or were issues under SRRA in view of the changes. In that case we suggested PRCRs should consider seeking amendments to clarify the issues in advance of need or conflict. We suggested professionals should have already discussed issues with their clients and assessed how open and reasonable the other parties will be if changed documents are sought. Obviously a key issue has been how the contract will be interpreted if required deliverables are no longer possible (such as a DEP NFA Letter or a letter of nonapplicability- abolished by DEP as part of SRRAs implementation, although such result was not required or even addressed by SRRA), or new obligations (such as for RAPs or FAs for RAPs) were not addressed in the contracts. In practice, however, while some situations have been faced and addressed, sometimes by contract amendments, it appears that many more either await evidence that existing contracts in fact pose problems before seeking any solution or await the move of many low-level confrontations and disagreements into court.

● **Q2.10:** Will there be problems under existing contracts given the new approach?

A: In many cases likely yes there will be. In other cases reasonable persons can probably find alternate approaches that will come close to satisfying old contract provisions made under prior law and terminology (for example an LSRP RAO should suffice in lieu of a NFA Letter: but there may be a need to consider what to do about the three year DEP audit period for an RAO not addressed in the contract, for example if indemnities are to expire, releases become effective or escrows are to be released). Unreasonable Persons and/or Persons forced into confrontations (for example, by reason of a bankruptcy), may insist on performance as written in older contracts. For example, parties to a lease that requires a tenant to obtain a no further action letter in certain circumstances likely can agree that a RAO suffices. But if they do not so agree, is the tenant obligated to pursue a NFA Letter that DEP refuses to provide if the landlord is inflexible? Does the Landlord have to accept an LSRP RAO? Immediately when issued? Does the tenant have to ask DEP for a NFA Letter? Does the tenant have to appeal a DEP decision to deny same? Is the tenant liable for holdover rent if it cannot deliver the no further action letter? Is the tenant liable for holdover rent during the three year audit period? If DEP requires withdrawal of an RAO, or material revision of the RAO, is holdover rent then due? Retroactively? The answers likely depend in part on the precise wording of the lease, but in New Jersey the implied covenant of good faith and fair dealing, and equity itself, may also compel acceptance of a RAO in most circumstances (but perhaps less so if the RAO is invalidated). Other contract issues may similarly arise. Some issues, however, may be much more difficult to resolve. For example, can (or perhaps equally importantly, will) an escrow agent release funds or documents upon receipt of a RAO when the underlying escrow agreement allows release only on receipt of a NFA Letter? (Our view is that, absent an amendment of the escrow terms, or mutual consent of the parties establishing the escrow, or clear provisions in the escrow agreement [which if signed pre-SRRA undoubtedly will not exist with respect to an LSRP's RAO, as opposed to DEP's NFA] the escrow agent will likely be cautious and, if in doubt, either await further agreed instructions or deposit the funds into court for a judicial determination). Conversely, if one party to an escrow agreement objects to release pending successful passage of the three year audit period without adverse effect on the RAO, but concedes the RAO is the required NFA (perhaps because the parties foresaw the possibility of change and referred to the requirement of an NFA from DEP as including any similar approval of DEP or any other government or other authority), can the Escrow Agent in fact hold the funds or property? Should it? (Our view is similar: we expect the escrow agent will likely be cautious and, if in doubt, either await agreed instructions for a reasonable period or deposit the funds into court for a judicial determination [and thereby avoid claims that its failure to release the escrowed funds or documents was a breach]). Or should it go to court for instructions? Must a new owner automatically accept liability

for a remediation, and deed notice, and new RAP and FA requirement, when prior contract language did not address all such matters.

● **Q2.11:** Should a PRCR sign the LSRP's proffered contract for services unchanged?

A: Like consulting firms, LSRP's will differ, as will their contracts. Some contracts will be minimal in their scope. Others will be lengthy. We start with the advice we give clients as to most contracts: if the contract is important enough to the client then the client and counsel should review, assess, understand and negotiate it before it is signed (doing so only after something goes wrong may be disastrous). Obviously a client can determine that less significant matters and low-resources may not require or allow for full (or perhaps any) review and revision: that this was the client's decision should be evidenced in some letter, e-mail, memo or other document. But once issues with the terms and conditions are identified by any review then parties should consider negotiating problematic provisions, at least the most important. Typical discussions will include: rates and charges; add-ons; insurance (including not only coverage and amounts, named insured status and cancellation issues, but also whether copies of policies and endorsements should be obtained and reviewed, inasmuch as today certificates are arguably of little to no value); quality of work product; ownership of product; disclaimers of and warranties of quality and utility; client roles; rights to follow an LSRP from a firm if the LSRP departs the firm; site access; limits on liability; indemnities in favor of the LSRP and consultant; indemnities in favor of the client and others; confidentiality; exclusivity and conflicts; assignment and reliance; third party beneficiaries; record preservation and access; reliance rights if LSRP changes occur; client, other consultant and counsel rights and participation; effects of audits or DEP reviews. Do not hesitate to discuss specific issues and concerns with candidates and, when appropriate, document the results as part of their terms and conditions (such as special confidentiality or timing needs; transition from DEP oversight or prior consultants or LSRPs; costs for review of prior files; reliance on prior approvals). Do not hesitate to address possible or likely issues under N.J.A.C. 7:26I (e.g., confidentiality; audits; complaints before the Board).

● **Q2.12**: When should a PRCR or client fire an LSRP? When should an LSRP quit?

A2.12.1: A PRCR or client should fire an LSRP when the PRCR can no longer trust or rely on the LSRP (perhaps because of conflict issues) (subject, however, to some evaluation to assure that such firing is not subject to SRRA's and the Board's anti-retaliation rules- see below). A PRCR or client likely will fire an LSRP when the quality of the LSRP's work is too deficient or too costly, or if the LSRP does not honor its commitments (such as if he or she told the PRCR that he or she need not repeat previous work or decisions, only to reverse this position later without justification). A PRCR or client likely will fire an LSRP when the LSRP has inadequate time, energy or other resources to meet the PRCR's or client's needs. A PRCR or client should not fire an LSRP merely because the LSRP indicates a concern or disagreement with the PRCR or client, or makes a mere mistake (at least the first time), or because the LSRP is doing his or her job, delivers bad news, or is concerned with protecting health, safety or the environment. A PRCR or client cannot fire an LSRP in retaliation for the LSRP meeting his or her professional responsibilities (such as reporting an IEC or discharge). A PRCR or client can fire an LSRP for being indecisive, reckless or too aggressive, or too timid or conservative. Some have indicated a concern with firing their LSRP as somehow inducing a higher level of concern at DEP or the Board: while this is possible, there are many PRCRs who have successfully changed consulting firms many times in the past, sometimes for economic reasons, without adverse effects before DEP (other than the momentary loss of control, continuity and schedule that often accompanies such changes). Of course, if the fired LSRP accuses the PRCR of improper motives, such disparagement may prove problematic for the PRCR.

A2.12.2: An LSRP should quit if he or she is not being paid or the PRCR or client is not honoring the contract. An LSRP should consider quitting if his or her PRCR or client is acting in violation of obligations under SRRA or other Law(s) such that the LSRP's own reputation or license could be impaired or the LSRP could have liability (for example, if the LSRP is being set up to take the blame). An LSRP should consider quitting if the PRCR is not reliable, or never listens or complies with LSRP determinations or recommendations, or the LSRP is being set-up as the fall guy. An LSRP should not quit just because the PRCR is not likable or does not always listen to the LSRP. An LSRP should not quit merely if the case is hard or DEP or the Board is threatening. There are other steps that an LSRP can take to protect himself or herself. At all times the LSRP should act professionally.

● **Q2.13.1:** Who decides legal issues critical to LSRP work? **Q2.13.2:** What are the legal issues an LSRP may find itself facing?

A2.13.1: Ultimately the courts will decide such critical issues. But likely in many cases and in the first instance, as a practical matter the LSRP will decide many legal issues himself or herself after consultation with DEP, likely with minimal concern and exposure for the limitations of the LSRP's license. Certainly, each LSRP

should endeavor to know and understand DEP's own views if such are available publicly (in published rules or guidance for example), and sometimes, but only with great care and often only with PRCR or client, and their counsel, consent, after consultation with DEP. Certainly, each LSRP should endeavor to know and understand the critical rules and statutory requirements. However, in many cases, certainly the more complex (like grandfathering or liability concerns) the PRCR's or client's legal counsel should be permitted a role in discussions with the LSRP (and perhaps the LSRP counsel, if any) about same. The LSRP should be able to consider such legal advice, after all coming from properly licensed professionals, in rendering its professional judgments under SRRA, just as DEP itself could consider the advice of both the PRCR's lawyers and those of DEP and DOL. Clearly neither the decision of the DEP nor the PRCR nor the LSRP, nor any of their respective lawyers, can be seen as determinative on legal issues. But pending a determination binding at law, some reasonable and protective approach is required to advance remediation, particularly absent material conflict. Perhaps in certain cases the LSRP will be able to make reasonable decisions based on reasonable assumptions that avoid or address legal issues or the limits of his or her decisions and issue RAOs clearly articulating the issues and decisions or assumptions, which then will be subject to a different risk and different kind of DEP or Board review (for example, can an LSRP issue an entire site RAO to a PRCR believed to be an innocent purchaser, noting the existence of an unresolved environmental issue but explain that the owner or operator is not obligated to remediate such issue but nonetheless is entitled to an entire site RAO on all other issues? We would argue it can. If DEP then wants to challenge that conclusion or assumption, DEP is free to do so. But in the interim such decision is arguably both in compliance with Law(s) and environmentally beneficial. But does the DEP's RAO template allow for such?) Perhaps the LSRP can make a decision relying on the advice or direction of its PRCR, client and counsel (but do those views have to be formally documented? Do they have to be disclosed to DEP?). It remains to be seen how serious the uncertainties posed by legal issues will actually prove to be and how often they will need to be resolved, and what resolutions will occur. We suspect there will be instances requiring assessment and resolution, but not in the majority of cases. We suspect there will be instances where the issues may be exceedingly important, confusing, difficult or perhaps even very dangerous, but not in the majority of cases. We have already seen instances of multiple consultants and LSRPs caught in the legal stratagems of adversarial parties and their lawyers. How should the consultants and LSRPs dealt with same, given that a central issue was and likely will be more often hereafter the relative liability of the multiple parties involved, particularly if the LSRPs and consultants involved had not been retained for all issues at the site(s)? To date neither DEP nor the Board have provided any useful guidance on such issues. DEP would prefer to be the arbiter of any and all legal issues, but the law does not make it so, and there is substantial evidence that DEP is not always right (or always wrong). Perhaps one day the Board will provide some guidance on various issues involving legitimate legal uncertainty (although not in its recent rule adoption), but even the Board needs to be careful in addressing issues on which it is not the proper licensing authority. Also, while it may be hoped that the Board and DEP will allow that an LSRP can make decisions based on its legal judgment, or legal advice it receives, as it reasonably determines, without liability for being wrong, it will not surprise anyone if most LSRPs elect to duck, ignore, or assume away legal issues (as DEP often does). But will LSRPs be allowed to so proceed?

A2.13.2: Sample legal issues that may affect the LSRP's ability to act as SRRA seems to contemplate, and as to which an LSRP might benefit from legal advice from a lawyer, include:

- ○ Whether a remediation complies with all laws (including state, federal, county and municipal)?
- ○ Whether all required permits have been obtained?
- ○ Whether all actual permits and approvals have been satisfied?
- ○ Whether a particular material is or is not recyclable or is or is not to be treated as a hazardous waste? Whether disposal occurred in compliance with Law(s)?
- ○ Whether on-site re-use of soils is permitted under all Law(s)?
- ○ How should an LSRP handle seeming violations in its case or other matters? Should it merely seek correction in due course? Should it notify anyone or refer the matter to others? Should it demand correction? Should it withhold an RAO pending correction? Can it issue an RAO subject to a condition requiring correction? Should it resign? How material or egregious must a matter be to require any of the foregoing? Does it matter if the violation was innocent or intentional? Short term or long term? By the PRCR or client or others?
- ○ Whether a PRCR or client has a defense to liability such that it need not remediate a site?
- ○ Whether a Deed Notice, CEA or RAP has been violated?
- ○ Whether changes in law or rules (including state, federal or local, and including zoning) have occurred so as to require re-examination of, or change in, a prior remediation or disclosure or discussion in a biennial certification?
- ○ Whether or not a site is "grandfathered" against new rules, standards or guidance?
- ○ Whether a remedy will prevent use of a site?

○ How to interpret ambiguities in DEP rules and guidance? How to interpret DEP disagreement with its own guidance and rules? How to interpret DEP refusal to assist in interpreting DEP rules and guidance?

○ How to handle and protect client confidences and attorney-client privileged information?

○ How should past decisions by non-LSRPs and now-unlicensed interim licensed LSRPs be treated?

○ How should past decisions (NFA Letters; Permits; Approvals; Correspondence; E-mails; NOVs; NODs; Demands; Directives; Suits) by DEP be treated?

○ How should past decisions (Permits; Approvals; Correspondence; E-mails; NOVs; NODs; Demands; Directives; Suits) by USEPA be treated?

○ Were prior permits and approvals then valid? Are they still so?

○ Will DEP itself and the Board accept DEP's own approvals as valid and proper? Will DEP and the Board question or reject the LSRP's decides to accept and rely on them.

○ How should past decisions by other LSRPs at the same or nearby sites be treated? What must an LSRP do when different LSRPs come to differing conclusions about similar or the same matters?

○ How does the LSRP protect itself and its client when he or she feels that a particular decision is right, but DEP resists or threatens?

○ How does the LSRP protect itself and its client when the Board undertakes an audit or advises that a complaint has been filed?

○ Must a prior LSRP consent to reliance by a new LSRP on its work? What conditions, if any, can it impose on such reliance?

○ How to respond to requests of DEP or the Board for information, documents or access?

○ How to respond to third party requests for information, documents or access?

○ Is the LSRPs insurance adequate?

○ Are the LSRP's contract and subcontracts adequate?

○ Does the LSRP have a reporting obligation?

○ How should the LSRP handle suspicions, allegations and accusations by third parties? Must he or she investigate all?

○ Is compliance with DEP rules and guidance enough? Does it constitute a "safe harbor" against DEP and Board attack?

○ If there is a disagreement on legal issues, how does the LSRP resolve them? Can he or she rely on his or her own judgment? Must he or she do as DEP requires? As his or her own lawyer, or the PRCR's lawyer advises? As a court decrees?

3. Technical Issues:

● **Q3.1.1:** Has there been more or less sampling after SRRA than before? **Q3.1.2:** How much older work has been, or hereafter will be, reviewed and revisited? How much can LSRPs rely on older work?

A3.1.1: It is not clear whether in fact there has been more sampling in and for the same circumstances than was the case under DEP oversight. Certainly there was more sampling in the same or similar circumstances than pre-SRRA as certain PRCRs and LSRPs accelerated their investigation efforts in an effort to complete the RI phase by the May 7, 2014 deadline, and the same can be expected before May 7, 2016. We originally speculated that likely in new cases there would be more sampling than before SRRA, at least in initial rounds of new matters. We thought this because we thought LSRPs could be expected to be more cautious than mere consultants pre-SRRA, and perhaps even than DEP itself, because LSRPs have a license exposed to loss if DEP or the Board is or are displeased with their work or decisions, or hindsight shows they missed problems. Certainly it has been argued, and at some sites demonstrated, that earlier and more extensive sampling can accelerate and improve remedial results, allowing for better planning, decision making and faster completion by PRCRs and LSRPs than before. Cost arguably now is less relevant to the regulatory process than before. Further, the possible use of site-specific conceptual site models, modeling and other techniques may reduce the need for excessive and repetitive sampling. But at other sites, contrary experiences, and indeed strategies, seem to have occurred.

A3.1.2: Originally we thought it more difficult to assess whether and when LSRPs would revisit past decisions and require more sampling when DEP did not. It has occurred, but prior to 2015 our experience that such did not occur often and, when it did it seemed to occur with appropriate support and concern. But in 2015 and hereafter, our prediction is that it will happen more often? We predict more instances when an LSRP may feel that under then current rules and practices more work is now required than previously was performed. Likely there will be instances when an LSRP may feel that past decisions and practices were inadequate, and insufficient to protect

the client and PRCR, the public and environment (and in some cases at least to protect the LSRP's license). In some cases the facts and circumstances may be clear that there is a known or suspected problem, of sufficient magnitude and risk, that needs to be addressed before a site can be ruled fully "clean:" it will be hard to argue with an LSRP in such cases except, perhaps, if the law provides a defense of sufficient clarity as to require LSRP or DEP deference (for example, the discovery of an area of contamination missed in a prior DEP NFA Letter may require correction: but is the current owner, who bought the contaminated site in reliance on the newly-determined-defective NFA Letter obligated to do so? No. So what does the LSRP do then?). Likely there will also be cases when the LSRP's current judgment actually or potentially differs from prior judgments: must or should the LSRP defer or not? Should the LSRP engage in a partial or full review, or undertake confirmatory or new work? It appears possible that the answer will depend on the particular LSRP's professional judgment under all the facts and circumstances, for an LSRP likely has some discretion to act in many cases either way. It is to be hoped that DEP and the Board will accept as adequate the good faith decision of each LSRP faced by such dilemma, without forcing such LSRPs to defend themselves against attack, and without demand that in each case the judgment prove right, and without substituting its or their own judgments for those of the LSRP. To date, we have not yet experienced an actual instance of problems presented by these issues which were insurmountable or fatal to PRCR or client goals.

● **Q3.2**: If there are technical issues as to DEP interpretations and requirements, or with the LSRP's view of DEP's view, can one still go to DEP or elsewhere?

A: Apparently to a lesser extent than previously, potentially yes, an LSRP can go to DEP when it faces issues (at least if the PRCR allows and if DEP priorities and resources incline them to help- seemingly less in 2014 [and likely 2015] than in 2012). And if he or she does go to DEP, can the LSRP afford to ignore DEP demands, even if believed to be wrong? Or, once consulted, will DEP then insist on its own way, perhaps attacking a seemingly defiant LSEP before the Board? But can a PRCR seek DEP review against LSRP demands (particularly if there is a disagreement between the PRCR and the LSRP) and effectively obtain aid from DEP? The lack of available full timely advance consultation with DEP poses an obvious dilemma and added risk for both LSRPs and PRCRs. Despite DEP assertions otherwise, investigation and remediation are rarely "cook-book" or formulaic. Judgment is critical. And reasonable professional minds can disagree, posing concern for each LSRP that a different group of professionals (whether of the Board or at DEP) might judge his or her particular professional judgment as faulty. DEP's view of LSRP right and requirement to use professional judgment appears fairly demanding and intolerant (in essence that an LSRP may use his or her own judgment so long as it is acceptable to DEP and proves right in hindsight). How should an LSRP or PRCR proceed if DEP is unavailable or unhelpful (as opposed to if it is obstinate and unhelpful)? Certainly the book answer is to use his or her best professional judgment. An LSRP who is one of many LSRPs at the same firm can consult internally. But other mechanisms may exist for all, including consultation with other professionals or professional associations, that will be worth pursuing particularly when DEP guidance is unavailable or unhelpful. Perhaps one day there will be a clearing house of decisions created by DEP itself (seemingly unlikely), the Board (also seemingly unlikely), or professional organizations. Perhaps other agencies (EPA?) or other regulatory guidance will be helpful, at least if an LSRP is open-minded. But if an LSRP is inflexible, rightly or wrongly, or risk-averse, timid or fearful, and declines to proceed in a manner that the PRCR (and maybe its other advisors or counsel) reasonably believes proper, perhaps a manner already acceptable to other LSRPs despite the absence of DEP assurances, including potentially at other sites of that PRCR, a PRCR may have little recourse but to dismiss the LSRP, perhaps at significant cost, and retain a new LSRP more suited to its needs and beliefs (and in such cases we do not view that as improper "retaliation" prohibited by SRRA). If DEP itself is inflexible or threatening, wrongly, a PRCR and LSRP may have little recourse, in most cases, but either to surrender or to prepare to go to court (although the precise timing and route for doing so is not yet apparent, except, in only some cases). Can the PRCR obtain judicial review for (i) actual or planned defiance of DEP requirements, perhaps by submissions to DEP short of a RAO (maybe, for example, an interim submission or an application for a remedial action permit; or a RAWP for an alternative remedy for a sensitive receptor use, actual or potential) requiring, daring or demanding a DEP response (which if negative or silent may support a request for judicial relief), but without a final LSRP decision (thereby reducing the risk of some DEP or Board enforcement against the LSRP), with the result less secure due to the absence of an LSRP RAO or other final decision, but also not irrevocably committed to all-out conflict, (ii) or for defiance of DEP requirements in and with a supporting LSRP final decision or RAO, carefully lawyered and articulated to support it, perhaps with less prospect of amicable revision on DEP review but also with increased prospect of judicial review, and also running increased risk of enforcement or attack on the LSRP or the LSRP's decision, which enforcement should be entitled to judicial review of the merits of the underlying positions, or (iii) delay in proceeding with further remediation in the absence of either an LSRP decision or DEP assistance, and also thereby running the risk of enforcement (perhaps due to missing deadlines), which

enforcement should be entitled to judicial review of the merits of the underlying positions, or other prejudice (such as adverse changes in DEP guidance, rules or standards).

● **Q3.3**: If the PRCR has a complex technical question about its site, in every instance can or should the PRCR brainstorm the issue with the LSRP, or even the other consultants of the LSRP firm, particularly if it wants to maintain maximum choice?

A: A PRCR who wants a strong relationship and the highest quality result from its LSRP arguably should interact with, and seek advice of, its LSRP on all issues, although some apparently disagree. However, there may be hypothetical issues the PRCR would like to discuss in confidence with a technical advisor, and it may be difficult to do so in a free-wheeling exchange of ideas with its LSRP, and perhaps even others of the LSRP's firm, without risk of tainting the LSRP's thoughts and behaviors. (An example might be how best to address a concern, newly rumored to the attention of the PRCR, which rumor the PRCR feels is without merit, but on reflection is uncertain whether to ignore or otherwise address. Calling it to the LSRP's attention may compel the LSRP to pursue a conservative result. Brainstorming with others that the LSRP may allow the PRCR to obtain a full appreciation of alternatives, probabilities or risks without the compelled result, at least at first. We note that similar issues arise with other professionals (for example, some defendants in criminal actions hesitate in advising their counsel of their guilt or other matters [such as where cash to pay bills is stored], out of a fear that the knowledge may somehow thereafter alter the approach of their counsel despite the protection of attorney-client privilege [with some merit because, for example, with certain knowledge of defendant's plans defense counsel may not allow the defendant to testify on the stand so as to perjure himself, which the defense counsel may better understand is a risk with the defendant's disclosure than might be the case without disclosure]). In that case consultation with an independent advisor, perhaps on a hypothetical basis, may have utility for the PRCR, perhaps identifying alternatives and preliminary steps or investigations that may be beneficial, thereby preserving the ability to later discuss the facts and/or issues with the LSRP in a manner and at a time more acceptable to the PRCR, reducing the risk that a premature and less focused consultation with the LSRP may result in the equivalent of a binding result with the LSRP. Remember, though, that facts, errors and deviations from rules, standards and guidance must be addressed by the LSRP; confidential discussions as to those, even with counsel, is likely not achievable (because, for example, neither the LSRP nor counsel can permit false certifications to be made by the PRCR). Circumstances at particular sites may make this consultation with others more or less easy. Some LSRP workloads, or PRCR or counsel preferences, require or allow use of a team of professionals, including perhaps a non-LSRP project manager, permitting some preliminary efforts and interaction with such personnel, potentially without prejudicing the LSRP. Other sites, likely the more complex, will use both an LSRP to handle the remediation and an independent consultant to assist the client and counsel (as sometimes happens in environmental litigations), and such concerns will be more easily addressed in such cases. Some clients have multiple LSRPs with whom they can readily brainstorm hypotheticals. Some have out-of-state advisors. We are aware that there are remedial cases in which the LSRP's role is somewhat circumscribed by being less involved in strategy decisions and more involved in implementation of strategies established by others. We assume the PRCR, client and counsel have some reasoning for this. One clearly legitimate reason might be because the remedial effort involves multiple parties and funding sources, using one LSRP to lead the approach, but with complex rights and obligations of the parties depending on a range of considerations (such as when a particular problem arose), and because of such discussion of some issues with the lead LSRP could prejudice the PRCR, prior to assessment of how the issue affects the relative liabilities, obligations and cost sharing of the parties.

● **Q3.4:** Is it safe for a PRCR or client to conceal material information from the LSRP? Is it safe for counsel to help a client or PRCR conceal such information? Is it safe for a non-LSRP consultant to do so?

A: Most information relevant to remediation cannot safely be concealed from an LSRP by any member of a site team. The LSRP has duties that will be hampered, and perhaps seriously prejudiced or compromised, by such concealment, and the validity of decisions based on incomplete information can and will be questioned. See e.g., N.J.S.A. 58:10C-16.a, P.L.2009, c.60 §16.a. (the LSRP's "highest priority shall be the protection of public health and safety and the environment."). Also there may be real world risks from supplying incomplete information for the PRCR: in general, environmental issues have a smaller chance of disappearing or improving over time than the larger chance of spreading and getting worse. More seriously, people, the environment and property may be actually harmed by delay, uncertainty, misinformation or confusion. Absent full disclosure, the LSRP process will have a greater risk of failure and the RAO, if and when issued by an LSRP, may be worthless or worth less, if and when material information is missing or concealed. Real problems may be missed or mishandled by the LSRP with an inaccurate or incomplete understanding. The PRCR also has separate duties, including to certify submissions as true,

accurate and complete; if information is concealed by the PRCR can the PRCR validly give that certification? (Note that the ARRCS at N.J.A.C. § 7:26C-1.5 does not include the actual content of the required certification; instead the language is within the forms [e.g., "I certify under penalty of law that I have personally examined and am familiar with the information submitted herein, including all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, to the best of my knowledge, I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil penalties for knowingly submitting false, inaccurate or incomplete information and that I am committing a crime of the fourth degree if I make a written false statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable for the penalties."] Can the certification legally be changed? It can be argued that it can, at least if made in good faith.) In many such circumstances when relevant information is concealed, such a certification cannot be made easily or validly. See N.J.S.A. 58:10C-14.b., P.L.2009, c.60 §14.b. Concealment may be a violation of law in some cases; it may be perjury in others. Any person violating the law may have liability. N.J.S.A. 58:10C-17, P.L.2009, c.60 §17. Lawyers cannot assist clients violate law. RPC 1.2(d) ("A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law…."). Even sacred attorney-client confidentiality yields to such lawyers' duties in some instances. RPC 1.6(b) ("A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person: (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.") and RPC 3.3. ("A lawyer shall not knowingly:… fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client"). In sum, concealment of material facts is dangerous and possibly illegal. And if the facts are immaterial, why conceal them? (Or at least, that is what DEP and a prosecutor will ask, if the decision made is to conceal relevant facts because they are not material.)

● **Q3.5**: For an existing case, if delineation is not complete what should the PRCR do now?

A: Get busy. The clock has been running on existing cases who have, or should have, retained an LSRP. A PRCR must act to complete the remedial investigation in the near future (for some now by May 2016) to a point where the consultant/LSRP is convinced of that completion, files a form with DEP reporting same, and DEP either will also itself be convinced or likely unwilling to argue. Failure to act within the specified mandatory periods increases the risk of DEP asserting direct oversight and/or asserting a violation of SRRA. That should be avoided if possible. If delineation is in progress but will be delayed for reasons that are valid, extensions should be sought, even if of uncertain effect. If access issues are a source of delay, sue for access sooner. Time is now short to fulfill this obligation. Also, remember that the RI extension does not automatically alter other deadlines.

● **Q3.6:** What happens hereafter when there is uncertainty about whether or not to sample a particular area of concern? In the past, DEP's own behavior often varied as to whether or not to sample particular areas of concern (say, for example, the area around a transformer pad without evidence of a leak or release from the transformer, or an unused well to be sealed). If the PRCR prefers not to spend the money, in the past the consultant might willingly propose to DEP that there be no sampling (to see if DEP could be convinced). Will the LSRP take the same approach hereafter? Will the LSRP will reach the same professional judgment as decision maker under the new professional standards as he or she would have argued (or made) before as a mere consultant? If the DEP already made that decision as to an area, perhaps in response to positions taken by the very same Person now acting as LSRP, and the case is still open, will the LSRP revisit the decision?

A: It has already occurred that the LSRP for a case has come to a different judgment under SRRA than when it acted as a mere consultant before, although actual experience to date has not seen that result very often. As different DEP personnel themselves often came to different judgments in similar circumstances, sometimes as a matter of experience, sometimes as a matter of attitude, it is to be expected that different LSRPs will come to different judgments in precisely the same facts, at least in atypical situations (where there may be no clear guidance). This does not mean that some are right and others are wrong: all may be right. It may be a matter of professional judgment and different professionals can validly make different judgments (when the Supreme Court votes 5-4 on an issue of law, no one asserts that the minority have committed malpractice, are negligent or are guilty of intentional misconduct- all accept that their professional judgments simply differ, although sometimes quite vehemently). Clearly an LSRP is to be held to a different and higher standard than a mere consultant. An LSRP must act to protect public health and safety, and the environment. His or her highest duty is no longer to the client or

PRCR. As DEP decision makers themselves sometimes elected historically to be overly cautious, at least in the view of PRCRs, so some LSRPs may find themselves taking a more conservative path hereafter. Further, remember that neither a NFA Letter or RAO provide protection to a current PRCR at a site where the decision not-to-sample, whether by the prior DEP case manager or a new LSRP, results in an actual demonstrable failure to detect and remediate a problem in fact then existing (although it may provide some protection to PRCRs who became such in reliance on that NFA Letter or RAO), certainly when it is later detected. Legal arguments and rights do not change bad facts, and actual environmental conditions likely must be addressed, whether a mistake was made, or a justifiable decision in full compliance was made. In the case of a newly detected problem the subject of a faulty NFA Letter or RAO likely the FRD will be rescinded and the original PRCR will have duties (and the LSRP may face some consequences if he or she acted wrongfully): only those without liability and entitled to rely on the faulty NFA Letter or RAO will have some protection from the FRD- and, to such an innocent purchaser, for example, that may be of limited value in that the asset it bought is tainted. This possibility itself may justify a more conservative approach, if only to reduce the risk and consequences of later discoveries. However, it is also possible that LSRPs, having on average more experience and qualifications than DEP personnel on average, may be more willing to more quickly and efficiently form opinions and judgments, and act decisively on their own views, than has been the case with DEP personnel. At least PRCRs can hope that will be the case. Certainly an LSRP who wants to prosper will need to be sensitive to the needs and interests of its clients. However, it is not likely that any PRCR can induce an LSRP to make a decision the LSRP believes is wrong or bad (that may point to a key test of professionalism: not inflexibility, but integrity). Indeed, if an LSRP sees a prior LSRP, consultant, PRCR or DEP decision that the LSRP believes is wrong, it seems more likely that the LSRP will require a correction of that decision than the LSRP will look the other way, even if the LSRP might, in his or her prior life, have been willing to argue with DEP about the issue.

● **Q3.7:** Is the LSRP authorized to make decisions about the most thorny decisions previously faced in many cases and yet to be faced in many other cases (such as: offsite or background contributions and sources; innocent purchaser status; free and residual product existence and behavior, and correction; groundwater flow [in fractures; in bedding planes]; controls and deed notice terms; technical impracticability; grandfathering; retroactivity; fairness; conflicting LSRP views)? Or need DEP be involved?

A: At present LSRP flexibility on these issues does not appear expressly to be as extensive as DEP's had been before SRRA. In some of these examples, the LSRP has considerable influence (such as the terms in the deed notice attachments- at least until application for the required RAP), but DEP has reserved to itself some of the other issues previously debated (such as the frequency and nature of inspections and monitoring, now addressed in the RAP and sometimes not addressed in the deed notice itself). In others we do not yet know. We need to experience if and how LSRP decisions on such matters are made and thereafter survive DEP scrutiny on permit issuance, review and audit. But we believe that if the SRRA system is to work as the legislature intends then LSRPs must be able to face, address and decide most of these in a manner similar to how DEP itself did before SRRA, and to the extent that DEP reserves to itself the sole real authority to make such decisions (including by reviews for RAP applications in advance of RAO submissions), the role of LSRPs will be reduced in favor of determinations by less informed, less experienced and less qualified DEP personnel, necessarily biased towards managing uncertainty less confidently and bureaucratically. Although DEP is given sufficient power under SRRA to clarify the LSRP's power and authority on these and other issues, and constrain or enhance the ability of LSRPs to move forward on such issues, and the Board itself may be able to speak as to some issues if and as it elects, it remains to be seen if and how guidance and determinations will allow or constrain LSRPs in handling these and other thorny questions. At this very moment, the interest in anticipating and assisting LSRPs in such issues appears minimal: on some issues DEP acknowledges the LSRP's rights and obligations, providing little to no guidance, and yet expressly or impliedly threatening the LSRP against "wrong" decisions. Certainly LSRP decisions must ensure protectiveness: but if and when protectiveness is assured in fact or in the reasonable view of the LSRPs, how much flexibility can and will LSRPs have and exercise on such topics, especially if some at DEP feel less secure? Some fear that, absent express DEP or Board guidance, LSRPs may find it safer to decline to take most risks and simply require more work and more stringent cleanups in many situations.

4. Finality:

● **Q4.1:** How reliable is an RAO as a substitute for a NFA Letter?

A: It is to be hoped that RAOs will prove at least as reliable as NFA Letters have been. They in fact may eventually be more so because LSRPs may prove to be more cautious, consistent and comprehensive than DEP

personnel have sometimes been. Some buyers and lenders, for example, have hesitated to rely blindly on DEP NFA Letters, especially when granted speedily on complex sites. Perhaps more will rely willingly on RAOs. However, RAOs are subject to DEP review and reopener. That is potentially very problematic, particularly if DEP exercises this right often. Parties and contracts need to consider this risk somewhat more carefully than they have considered the rare reopener of NFA Letters. They need to consider addressing the effects of RAOs, and reviews, modifications and rescissions of same, particularly within the three year period for review. As with all professionals, third parties will need to consider the quality of each LSRP in order to assess the quality of an RAO. But only time and experience will permit a real understanding of the difference between RAOs and NFA Letters. Of course to date few RAOs have been invalidated, although more have been withdrawn by LSRPs, usually at DEP insistence. Feel better?

5. DEP Oversight of LSRPs and Sites:

● **Q5.1**: How exactly will DEP direct oversight work?

A5.1.1: We don't know. Certainly all sites that missed the May 2014 RI deadline and did not extend, and all sites that have failed to retain PRCRs, are subject to mandatory direct oversight by DEP. How many is that? What in fact is transpiring at those sites? Information is scarce. We don't expect the process to work well or easily. It likely will work confrontationally if it works at all, at least in many cases, unless DEP finds techniques to convert the process into something less intrusive than the legislature appears to have intended. As is often the case, those PRCRs who are weak and in difficult positions may find themselves with the most headaches and least flexibility. Those PRCRs who are strong and willing to fight DEP may find themselves acting hereafter substantially as they have before, in the face of DEP threats but for the moment at least with little (but seemingly increasing) DEP action. Indeed if DEP acts incautiously, the intransigent regulated community may have more defenses against DEP than before. (For example, the judicial hesitance against pre-enforcement review may disappear if DEP demands creation of an RFS as part of direct oversight, as SRRA requires): there will certainly be challenges to DEP decisions, process, rules and perhaps even the very constitutionality of the system as direct oversight is implemented. We expect to see more DEP enforcement of and through direct oversight in 2015.

A5.1.2: Of course by its terms the statute is relatively clear. DEP can take charge of picking the remediation. To support same the PRCR and LSRP must prepare a feasibility study. DEP will see reports and other documents from the LSRP when the PRCR does. The PRCR will deposit cash to secure performance of the remediation into a remediation trust fund, seemingly under DEP control. See this Article §3.8.2. We are unsure of how many sites are in fact so complying as of the beginning of 2015: we believe few, but not none.

● **Q5.2**: Will it be a fun experience to have DEP take over direct oversight.

A: Fun for whom? PRCRs? We suspect not if DEP actively exercises its rights, although it is possible that at some sites DEP may make the experience less traumatic and confrontational than at others. For example, if a PRCR has been proceeding in good faith but misses deadlines such that DEP undertakes direct oversight, DEP may be less aggressive in its approach and demands than may be the case when DEP takes over a site it perceives has languished for decades, in the face of known serious issues, where the PRCR is, in DEP's view, a known or suspected recalcitrant or violator. We suspect that if direct oversight is upheld and it works as designed, it will be fun for DEP and its manager. But we are also sure that few at DEP will enjoy the process of litigation likely to be faced by DEP if and as well funded recalcitrants attack DEP decisions and interpretations using hard-ball litigation tactics.

● **Q5.3:** When, if ever, is a remedial investigation phase clearly completed so as to reduce the risk of DEP taking direct oversight?

A: This may be uncertain at sites where DEP, and perhaps some LSRPs hereafter, have a seemingly insatiable desire for more samples and more wells, in more places, depths, and directions than previously conducted. Arguably at such sites the remedial investigation may never finish. However, we do not believe that the need or fact of additional sampling always eliminates a valid position that a remedial investigation has been previously completed (in essence, we would argue, and some at DEP seem to accept, that the plume or contamination may be delineated "enough," including by application of professional judgment, use of areal information and models, and similar approaches, even though, for example, sampling is ongoing or even expanded for effective remedial design or selection or verification, or even risk assessment). Based on new guidance issued in 2013, it appears DEP agrees. See this Article §3.8.2. Of course, DEP requires submission of a form as a clear articulation by the LSRP that the remedial investigation for the site is complete. Absent the form, DEP believes the RI is not complete. To make such a case, it would seem necessary that horizontal and vertical delineation be complete (at least "enough"; at least under

modeling). Of course, at complex sites that issue has itself often been the centerpiece of debate, as parties and DEP have argued directions of groundwater or product flow, the presence and significance of past or present product, horizontal or vertical fracture sets and bedding planes, geologic faults or other features, the effects of past and present pumping wells, the presence and effect of regional or background conditions, the presence and effect of historic fill, and the need for onsite and offsite evaluations of ecological, groundwater and/or vapor intrusion issues. It certainly appears to us that DEP, in good faith, will always be able to argue that there is not enough data to be sure, and that despite the application of valid professional judgment, more conservative and protective views require more. (We are hopeful that eventually the Board rules, perhaps in response to one of a seeming growing number of DEP complaints, that a disagreement between DEP and an LSRP is not a basis for an attack on the LSRP's decision). But if additional sampling is conducted after a declaration of a completed remedial investigation, and such sampling finds a further problem or a bigger problem, is the prior determination then seen as so wrong so that the original remedial investigation then is now seen as incomplete (with the possible effect that DEP can or must take direct oversight and the PRCR must establish a trust fund?) Perhaps in some cases. The totality of the facts and circumstances likely will determine the DEP approach and judicial conclusion.

● **Q5.4:** How will the need for permits (such as wetlands or flood), and delays in obtaining them, factor into assessment of whether a PRCR is meeting required deadlines?

A: It is to be hoped that changes at DEP will reduce unnecessary delays. Further, to the extent that DEP rules establish time periods for remediation, those rules should account for such issues. However, the statutory periods for completion of remedial investigations at older sites may not be subject to extension for such or other matters, absent new DEP rules or court intervention. We would suggest that consideration be given to DEP promulgation of rules for general permits for remediation that can be used or approved by LSRPs to expedite remediations with minimal DEO review or intervention.

● **Q5.5**: Do the rules for residential development stay the same?

A: No; but practices may ultimately prove similar to practices existing when SRRA took effect. We need to see future further DEP guidance on presumptive remedies for residential developments, updated in 2013. If the SRRA's new rules, like those for schools and day cares, are used to discourage or prevent residential developments on contaminated sites (which has not been the case to date), many new and pending projects may have problems. However, if DEP allows such developments where there is an adequate barrier against exposure, vapor intrusion protections are taken, water comes from public water supplies, and mechanisms (such as a the new remedial action permits) are in place to ensure that controls are honored, then perhaps such developments will still be feasible. At the moment it seems clear DEP wants to discourage single family residential development on contaminated sites, but mixed use developments or townhouses relying on associations to police compliance appear to be viable.

● **Q5.6**: Does a PRCR still need to deal with DEP for remedial projects?

A: DEP has a continued role in permitting and alternate remedies for certain uses. It has a new role in reviewing LSRP work. It sets rules and standards, some of which will need regular intervention with DEP. It reviews work product and submissions. It supports the Board. The PRCR and its advisors may be unwilling to rely on the LSRP as the sole point of contact with DEP (although on some issues it remains to be seen how tolerant DEP will be of discussions with both the LSRP and the PRCR or other advisors). If DEP considers enforcement for any reason, the PRCR will be well advised to be fully informed and involved. Further, if the remedial project has a future development or use as its endpoint, regular and thoughtful interaction may be essential to ensure that DEP is comfortable. Imagine how bad it would be to remediate a site, obtain a RAO, begin or complete construction and only then learn that DEP has serious problems with the remediation and construction and use. This can only be avoided, if at all, by early proactive interaction with DEP. Certainly there are and will be many instances when interaction with DEP is and will be essential.

6. Disputes:

● **Q6.1:** When there is a disagreement between the LSRP and another, who prevails?

A: When two LSRP's disagree, at least in the first instance, the one LSRP responsible to supervise the remediation is likely to prevail. If two separate LSRPs are responsible (for example due to separate ISRA triggers), it may be that as a practical matter the first to make final submissions to DEP will have the advantage, at least as a practical matter, if the disagreement is not obvious to DEP at that time (suggesting that the second LSRP may need to consider interfering as to the first's submission within DEP). When an LSRP and a client or PRCR disagree,

likely the LSRP prevails unless the client fires the LSRP, hires another LSRP who agrees with the client or PRCR, and the disagreement does not cause problems before DEP. When an LSRP and DEP disagree, more likely than not the DEP prevails, particularly in matters that do or may involve questions of IECs, unless DEP is acting improperly (and most LSRPs will not want to fight DEP at all costs, even if their client wants them to do so). Indeed, a disturbing trend is that seemingly DEP prefers to attack an LSRP before the Board instead of itself dealing with the supposedly erroneous technical decision of the LSRP or the erroneous actions or omissions or unsatisfied obligations of the PRCR. When an LSRP, DEP and/or the Board disagree and cannot find another solution, then the disagreement likely ends up before a Judge (in some cases with a detour before an administrative law judge) and the Judge prevails (at least until some other Judge says otherwise). It remains to be seen how much deference the Courts will give to DEP and the Board, especially if the DEP or the Board try to enforce policies and rules that are unwritten, vague, unclear, and/or contradictory (and at the moment DEP and Board policies are in sync, even if DEP staff practices may not be, and even if important policies or views are unwritten or unsupported). When third parties (like a bank)disagree with an LSRP, within the jurisdiction of the LSRP, the LSRP likely prevails, but the third party likely prevails in its area of expertise (for example the bank may choose not to loan; a buyer may choose not to buy; a neighbor may choose to sue; a lawyer and PRCR may decide to go to court).

● **Q6.2:** What happens if an RAO is wrong?

A: If sufficient time has passed, or parties have acted in reliance on the faulty RAO, basically chaos. If little time has passed, or parties have not acted in reliance on the faulty RAO, perhaps little harm except added delay and expense. The underlying case, closed with the RAO, can be reopened. More work can be required. Different results may be determined. How significant the effect of a reopener will be obviously varies with the extent of the issue and reopener. A small defect likely has minor consequences. A large defect could be catastrophic, especially if people are hurt. Perhaps as important, the LSRP license may be threatened and other cases before DEP of the LSRP may be examined (although it is arguably unclear if cases outside the three year limit can always be fully reopened). The domino effect could be severe, could damage new owners and operators of sites, and, worst case, stop projects and put LSRPs out of business. Even if legal defenses to liability remain, as a practical matter use, development, sale, lease and refinancing of the site are all impaired. In turn that may adversely affect the marketplace confidence in LSRP RAOs. We are not looking forward to the first confrontation about the propriety of an LSRP RAO. Generally, after much reflection, we join DEP and we recommend that all RAOs be right. And if not, we recommend the LSRP seek good advice.

● **Q6.3:** If DEP rejects (invalidates) an RAO and requires more work, will all the parties be returned to the *status quo ante*?

A: Probably not, unless everyone is ready, willing and able to do so, including to take steps to seek restoration. For example, escrows may have been released and funds dissipated, distributed or expended. Releases of liability may have been delivered or become effective. Indemnities may have expired. Recorded documents may have been terminated (such as access agreements). A person may have died or moved, or a company dissolved. A site may have been sold or abandoned. A bankruptcy may have occurred. A rejection of an RAO may not avoid the results of such changes. What happens upon invalidation remains to be seen. Certainly a lot of uncertainty will result, expense will be incurred, and a lot of lawyers will have a lot to do. We would expect in some cases the issues will be manageable, even if everyone asserts and reserves all rights, at least if the problem to be corrected is discrete. In other cases, especially if appeals of DEP decisions are filed, the consequences may be time-consuming and deleterious to many of the interests of the parties. Even if courts intervene, restoring the *status quo* may be impossible.

● **Q6.4:** Will there be more court cases than before?

A: Likely yes, at least eventually. We are aware of some new cases already filed and more threatened as DEP and the Board seek to review LSRP and PRCR decisions on complex sites. First, some aspects of the SRRA create greater risk and need for adjudication because of the significance of the issues and DEP unilateral powers (such as the compulsion under direct oversight for a PRCR to deposit a lot of cash in a trust account in some cases or the invalidation of a RAO). Second, LSRPs are certain to defend themselves on license issues, whether denials, audits or enforcement issues. Third, PRCRs have reason to ensure that decisions made by LSRPs are preserved and enforced. Second, PRCRs are certain to defend themselves against DEP and third-party attacks. Finally, courts may be expected to be less deferential to DEP judgment as much as previously given the legislatively mandated roles specified for LSRPs and the Board and the obligations and limits on DEP, perhaps encouraging parties to seek judicial review when previously such would have been unavailable.

● **Q6.5:** Are there limits to the Board and DEP's inspection, access, seizure and other rights?

A: Yes. These powers will not be absolute, especially if the Board or DEP do not act narrowly. It is unlikely that their powers can be used to ignore legitimate privileges and confidentiality. If they fail to respect those legitimate concerns, courts will intervene. Attorneys, in particular, may be willing to seek judicial assistance to challenge overzealous demands.

● **Q6.6:** Will any LSRPs and/or PRCRs suffer by reason of DEP reviews and/or audits?

A: Yes. Mistakes by LSRPs are certain. Disagreements in the proper application of professional judgment also are certain. DEP and the Board are likely to want to establish a strong precedent that poor work will be detected, reversed and punished, particularly in instances of serious disagreements about actual or potential threats (such as from actual or potential IECs). Some LSRP will be disciplined, although the extent of such to date have been relatively minor, and/or lose a license early- unless in the most obvious instances of error, likely thereafter to result in many challenges, at great expense and potentially with uncertainty for the litigants and others lasting across many years. And some PRCRs will also be the focus of enforcement, to deter PRCR misconduct and ensure LSRP independence and work quality. Other PRCRs (and perhaps even other LSRPs) will suffer because of LSRP errors. It is to be hoped, however, that if all proceed in good faith, errors will be able to addressed and corrected without catastrophic results. Whether this will be the case remains to be seen.

● **Q6.7**: If DEP attacks, rejects or invalidates an RAO requiring additional work, are there PRCR or client claims against the LSRP? If the Board attacks its LSRP, does that expose the client or PRCR to harm? Does the LSRP have claims against third parties in such instances? Who pays for corrective measures if and when DEP or Board audits and more work occurs?

A: Perhaps. Did the LSRP violate a standard of care or DEP rules, policies or guidance? Or does DEP simply want more (assuming for the moment that DEP can so act)? Does the attack allege bad decisions of the LSRP or PRCR? Are the LSRP and PRCR aligned with, indifferent of, or opposed to each other? What does the underlying contract say? Consider the possibility that an LSRP issues an RAO in the absence of sampling around a transformer pad and on audit DEP wants sampling: does the answer depend on what specifically DEP rules, policies or guidance say? (I think so). Does the answer depend on the results of added sampling? (It may). In general, one would expect a professional to avoid malpractice type liability if he or she exercises the judgment of an ordinary professional, even if in hindsight that judgment proves wrong. But if DEP rules that the LSRP should have required PCB sampling around a transformer pad, and the PRCR was indifferent, then the PRCR may expect the LSRP to address the added costs and consequences. Conversely, if the LSRP and PRCR both agreed and wanted to avoid further offsite groundwater sampling, and determined the RI was complete, both aware that a more conservative approach could be argued, then if the DEP rules against the LSRP, the PRCR should have no claim. Of course, it remains to be seen what DEP, the Board and the courts will say about LSRPs and their decisions in cases such as these and others, and until enough rulings are made, predictions are speculative and quite possibly wrong. But we do not believe that it is a condition of licensure that an LSRP always be right. As to who pays, experience suggests that in most cases, absent clear misconduct or error by the LSRP, particularly if the PRCR arguably benefitted from the original LSRP decision, the PRCR will pay, at least for the added work and maybe any DEP audit (but not likely the defense of any LSRP complaint), although review of the governing contract may provide a different agreement between the parties (client and LSRP).

● **Q6.8**: Is there personal liability for an LSRP (or is only his or her employer or insurance liable)? Should a candidate for LSRP fear individual liability?

A: As with all professionals there is potential personal civil liability (and in rare cases criminal exposure) if something is done wrong. The glib answer to such a fear is that no one who does a good job need fear personal liability. The second glib answer is that an LSRP should get and rely on good insurance. But there are many who were once thought of as good lawyers and Doctors who found themselves on the wrong end of malpractice suit finding little comfort in how good they thought they were and the existence of an insurance policy to protect them. Each person needs to decide how fearful to be of individual liability; it cannot be avoided, even by not becoming an LSRP, perhaps not even by writing clauses that disclaim such liability. Being an LSRP, particularly early in the program, will shine more of a light on a person's decisions than staying behind the scenes, particularly as against DEP. Obviously good insurance helps to manage exposure for civil damages, and likely the costs of defense (if the terms of the policy so provide), and likely even associated damages to the client and third parties, but not likely for fines, criminal sanctions or loss of license. Even so, each insurance policy needs to be assessed to see how much it

helps. Personally, as lawyers we face similar risks as well. While DEP has scant powers over our careers, the courts have substantial power over each lawyer and his or her license. Yet we could not imagine any other career for ourselves; we like helping clients; and we like the professional challenge of handling difficult matters and making professional judgments in areas within which often there is little certainty (why else would clients come to us for our advice?). If an LSRP believes in his or her own skills, qualifications, experience and abilities, if risks are evaluated and taken carefully and thoughtfully (there being no way to engage in a professional business and take no risks), after appropriate deliberation and research, in cooperation and discussion with decent clients, with due regard for DEP guidance, practices and rules, and with care to disclose relevant limits, we think the exposure to LSRPs should be fully manageable. We urge eligible LSRP candidates so inclined to seek and maintain licensure and enjoy their role. PRCRs and DEP needs good people to step forth and take the responsibility of serving as an LSRP, even if at some risk. Hopefully hindsight will show that the risks of doing so were small because LSRPs will do their jobs well. Hopefully, DEP and the Board will understand that no one can be perfect and professional judgment does not mean perfection. But certainly, there is a risk. And those who are unable or unwilling to take added risk probably need not apply.

● **Q6.9:** Does the SRRA affect Natural Resource Damage claims?

A: Yes. First, for many sites it extends the statute of limitation so that claims can be brought by DEP after remediation is complete, but perhaps only in the absence of a covenant not to sue. At some sites that could be a long time from now. Second, DEP's occasional past practice of delaying issuance of a NFA Letter until NRD was resolved for the site will now disappear with LSRP issuance of RAOs (unless future DEP guidance about RAOs tries to force LSRPs into NRD enforcement), but likely DEP will deem that it can undertake review of NRD automatically on submission of the RAO. Third, RAOs may impede NRD suits by their very terms. Fourth, DEP will have more time to prepare and prosecute NRD claims. It will be able to wait longer to establish favorable precedents before chasing more cases. It will be able to use its resources better. (Of course, the future of DEP's program for pursuing NRD claims is unclear.) We note, however, that we find some conflict in DEP's interpretation of the effects of RAOs on NRD claims (evident in the language of DEP's form RAO template).

7. DEP Processes:

● **Q7.1:** Will there be more or less reporting to the DEP Hotline?

A: Likely more. In a few cases both the PRCR and LSRP must make several calls. Historic conditions appear to be reportable more often. No express exemption exists for previously reported conditions, although past practices suggest multiple reports are not needed. With LSRP licenses at stake, conservative reporting is more likely. In addition, under the ARRCS Rule new reporting is required of discharges by persons responsible for conducting remediation (N.J.A.C. 7:26C-1.7. See also N.J.A.C. 7:26I). PRCRs, of course, resent DEP's view that if their LSRP has reported a discharge they then must address it. Lawyers may be willing to argue with DEP over this view, at least in some facts and circumstances. LSRPs may help their PRCRs and lawyers by using appropriate language in their reports.

● **Q7.2:** Are MOAs dead?

A: DEP has made MOAs unavailable for new cases. We believe DEP should create a replacement program similar to the former MOA process. We think the costs to do so are minimal, the risks very low, and the potential gain significant. Regrettably, we are not in charge and often DEP does not care what we think. We are aware of some lawyers exploring the possibility of some similar arrangements with DEP, at least in enforcement circumstances.

● **Q7.3**: Some companies conduct audits before they proceed with remediation. Sometimes they try to do so confidentially. Is this still possible?

A: Conducting a confidential site audit has always been challenging because an audit cannot be used to evade the law. Many environmental issues trigger self-reporting, at least for owners and operators. Many environmental issues pose issues of continuing violations of law. Some PRCRs have used attorneys and attorney-client privilege to shield audits, at least of preliminary assessment or compliance type audits, although shielding test results is arguably impossible. Such audits have proven to provide valuable tools to many. It would be a shame if such voluntary audits are now less likely to occur than before. However, use of an LSRP for such audits may pose added challenges because of the new duties of LSRPs.

● **Q7.4- to Q7.6**: Omitted

● **Q7.7**: Can a PRCR protect itself against DEP review of its LSRP's work?

A: It is unlikely that a PRCR's LSRP will provide a contractual guaranty that its work will pass DEP or Board review unscathed in every instance. Indeed, the more of a guaranty a PRCR seeks contractually the more conservative the LSRP is likely to be in handling the PRCR's sites. Still some contractual provision addressing such issues may be appropriate in some case, although not necessarily all. Obviously picking well experienced, thoughtful and careful professionals may prove useful in reducing risks of DEP or Board review. Avoiding overly aggressive strategies also can reduce risks. And monitoring DEP or Board review of your LSRP's work may provide useful in either assisting the LSRP sustain a review successfully, limiting damaging consequences from such a review or better anticipating, resolving and/or mitigating any such damage.

● **Q7.8**: Can a PRCR indemnify its LSRP against DEP or Board review of its LSRP's work or conduct?

A7.8.1: We think that a PRCR or client may voluntarily or by contract agree to pay for the LSRP for expenses to handle a DEP audit or review of its work, and the consequences of any rescission or change in LSRP decisions, because such may occur without any actual misconduct or breach by the LSRP of duties to the PRCR. Naturally if such occur because of deficiencies in the LSRP's work under prior Board rules or guidance then the PRCR likely will not be obligated to so proceed, although it may elect to, and it may have recourse if the LSRP breach constitutes malpractice. The precise terms of the contract between the LSRP and his or her client may be important. We note that NJ corporate law allows corporations to indemnify and defend its own officers, directors and employees even in cases of serious breach: but not in all cases. See e.g. N.J.S.A. 14A3-5 "(2) Any corporation … shall have the power to indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such a corporate agent, other than a proceeding by or in the right of the corporation, if (a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation; and (b) with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his conduct was unlawful.".

A7.8.2: We think it will usually harder, and perhaps impossible (at least until the LSRP is excused), for a PRCR or client to voluntarily or by contract pay for the LSRP to defend itself against a Board audit or complaint, and the consequences of any enforcement action by the Board, because the issue of professional misconduct likely is at stake in every instance. If the Board takes no action and finds no misconduct, this result may be in the interest of the PRCR and client and therefore perhaps the LSRP can bill for some of the costs associated with same, if the contract expressly so provides. But it is doubtful that even if the contract expressly allows for same, the PRCR or client can be made, or allowed, to pay the LSRP for costs incurred when the LSRP is found to have breached his or her duties. Such a contract clause is likely void against public policy. However, we acknowledge that if a complaint is made against an LSRP as part of a multi-front attack on the LSRP's PRCR, the PRCR may have strong reasons to defend its LSRP and may want to do so. Given that corporations can indemnify and defend their employees (see A7.8.1 above), we can see arguments that a PRCR can do so for its LSRP.

8. Licensure:

● **Q8.1 and Q8.2:** Omitted.

● **Q8.3 (old Q19):** Should a consulting firm maintain some of its staff as LSRPs and others not?

A: Yes. Not every consultant now practicing can or will be licensed. Some will fail the exam. Some will not meet licensing criteria. Further, there may be a role in some client's minds for non-LSRPs, particularly if non-LSRPs cost less. However, there will be problems if a non-LSRP engages in any conduct prohibited to an LSRP in the same firm. A firm planning to so proceed needs to think about this issue so as to protect the LSRP's license.

● **Q8.4 (old Q20):** Omitted.

● **Q8.5 (old Q21):** Omitted.

● **Q8.6:** Can an LSRP consider, or even change its mind based on, discussions with its client or does professional judgment stand apart from the client?

A8.6: An LSRP must consider the views of his or her client and the client's advisors. Professional judgment is seldom simple or formulaic. A good professional is willing to engage in discussion and debate with others, including his or her client, and be flexible in his or her thinking, subject of course always to the requirements of his or her profession. And the LSRP owes duties to the client that likely cannot be met absent consultation and thought. Also while the goal should not change, different paths may be available to reach the goal. Discussions with the client are to be expected and encouraged, especially if the LSRP program is to be effective. Contracts and professional duties will include protection of client interests such as consideration of budgetary issues and application of scarce resources, perhaps to conflicting goals. Also if a professional relationship is to be maintained, an LSRP's client must have confidence that its concerns are considered and addressed by the LSRP. At the same time the LSRP must be attentive to its professional obligations. But professionalism does not depend on dictatorial power. And the LSRP does not work for DEP, it works for a Client. While some tension may exist in some cases, and in the worst case the LSRP may resign or be terminated, the most effective LSRPs are likely to be those who find a balanced approach to achieving mutual goals to finish remediation in a reasonable manner, at reasonable cost, and in reasonable periods. DEP has been criticized for failing to reach appropriate decisions in the past; while LSRPs will undoubtedly prove more conservative than mere consultants, especially those advocating client positions have been, it is to be expected that LSRPs will be more willing to make decisions faster than DEP itself has been. And clients and PRCRs will likely be more willing to expedite work relying on those LSRP judgments because they will have had a more complete discourse with a professional hereafter than they have experienced in the past.

● **Q8.7**: Can a PRCR protect itself against an LSRP's loss of license?
A8.7: See Q7.7.

9. Uncertainties:

● **Q9.1:** Will changes in DEP guidance and/or DEP or Board audits alter the expectations of how remediation occurs, or the LSRP program works?

A9.1: For the moment it is unclear how DEP future rules and guidance will change the future conduct of remediation. Even thereafter, no one can be sure how detailed, demanding and/or skeptical DEP and Board inspections, reviews and audits of LSRP deliverables will be. Only after a number of such have occurred and assessed will there be increased confidence in the ability of LSRPs to act decisively (assuming there are none to few reversals). But further changes can be expected. There is inadequate experience as yet with Board reviews and complaints to ascertain any patterns that enable substantial direction for LSRPs. Even the new Board regulations largely codify SRRA except for administrative rules (such as how audits will occur, complaints be handled, disciplinary action taken, continuing educational requirements and licensure administered), providing remarkably little additional guidance or insight for the benefit of DEP, PRCRs and LSRPs.

● **Q9.2:** Are there provisions in other existing law that do not mesh with the role to be allowed to LSRPs and DEP that may generate uncertainty as to DEP rights and PRCR and LSRP obligations?

A9.2: Yes. Consider, for example, unamended N.J.S.A. 58:10B-12f.(2) which provides "The department may, upon its own initiative, require an alternative remediation standard for a particular contaminant for a specific real property site, in lieu of using the established minimum residential use or nonresidential use soil remediation standard adopted by the department for a particular contaminant pursuant to this section. The department may require an alternative remediation standard pursuant to this paragraph upon a determination by the department, based on the weight of the scientific evidence, that due to specific physical site characteristics of the subject real property, including, but not limited to, its proximity to surface water, the use of the adopted residential use or nonresidential use soil remediation standards would not be protective , or would be unnecessarily overprotective, of public health or safety or of the environment, as appropriate." Unless superseded by other provisions of SRRA, this provision, read as paramount to others, would seem to allow DEP to overrule an LSRP decision, even if compliant with all rules and regulations, to exercise its own initiative, based on DEP views of site specific and contaminant specific factors. While these should be rare, and undoubtedly if exercised will be attacked, there is doubt as to how to reconcile this provision. An alternate resolution, for example, would be to conclude that if DEP wants to exercise this power it must better explain in advance the factors to be considered by the LSRP so the LSRP can follow DEP guidance and, absent such guidance, DEP cannot unilaterally use this section to overrule an LSRP decision. See e.g., P.L.2009, c.60 §41; N.J.S.A. 58:10B-2. There may be many other provisions that will show themselves to be problematic in view of the new LSRP program.

● **Q9.3:** Are there similar provisions in SRRA itself that do not mesh with the role allowed to LSRPs and DEP that may generate uncertainty as to DEP rights to reopen LSRP decisions?

A9.3: Yes. Consider, for example, amended N.J.S.A. 58:10B-12g.(1) which provides "The department may disapprove the selection of a remedial action for a site on which the proposed remedial action will render the property unusable for future redevelopment or for recreational use." This provision, read as paramount to others, would seem to allow DEP to overrule an LSRP decision, even if compliant with all rules and regulations (such as presumptive remedy guidance), based on DEP hindsight views of the particular site use issues. But in order to do so, does DEP have to establish advance guidance for the LDRP to consider, or can it act at whim, after the fact, when, for example, local municipal forces intervene? There may be other provisions that will show themselves to be internally inconsistent with one or more elements of the new LSRP program.

● **Q9.4**: Can reports be filed with DEP but avoid being posted by DEP on the internet?

A9.4: It remains to be seen what, if anything, DEP does to preserve confidentiality if asserted. It is possible redacted reports will be accepted for posting if confidentiality is asserted. It is possible Executive Order #140 can be challenged if DEP does not address this issue. It appears appropriate to assume that anything filed with DEP may end up accessible from the internet. Further, filing reports without taking steps to assert and protect confidentiality may ultimately prove to be a waiver of any such protection, so care must be exercised in writing reports and submitting them to DEP.

● **Q9.5**: What can an LSRP to do to protect him or herself in cases with complex legal issues, and disagreements between DEP and its client or PRCR, and their respective legal advisors, when technical progress on a case suffers? Must an LSRP resign? Can the LSRP safely ignore clear IECs?

A9.5: There are few certain steps, but many to be considered.

● Focus on protection of health, safety and the environment. Do the facts show an IEC? Have the facts been reported to DEP? DEP and the Board expect that IECs should be addressed: if they have not been think harder about how to proceed. And what about rumors, accusations and suspicions?

● Do you understand the issue? Hopefully it was not a surprise: if it was a surprise then act quickly to get up to speed and involve the client.

● The LSRP has no right or power to resolve complex legal issues. To some extent he or she should be able to rely on competent legal advice. Consider how best to document that legal advice was sought, obtained and what was its scope and limits. Formal legal opinions are expensive and time consuming.

● Consult with LSRP counsel early.

● Discussions with the client and its counsel may be critical. Don't delay.

● Evaluate if there are preventive or corrective measures that can be taken quickly and cost effectively. If so, take them. If there are options that permit compliance without surrender on important issues to the client or the LSRP those should be explored by the LSRP with the client. If the LSRP has confidence as to what must be done the LSRP may be obligated to document such and act on such. If the DEP is making legal determinations, the LSRP cannot challenge those or ignore them, but may not be obligated to accept them as certain.

● Has the LSRP provided good advice to the client. Even if the client elects to proceed differently than DEP likely wants, has the LSRP clearly advised of DEP's likely positions and the consequences of not satisfying DEP. Has the LSRP done so in writing? Clients should be advised to comply with the law, rules and guidance. If DEP's views are clear the LSRP should make sure the client understands those views and what, if anything, should be done to satisfy DEP. The LSRP can advise the client to seek its own legal advisor's view on legal issues, interpretations and obligations, particularly of that counsel has not been involved before.

● Can the client get involved? Is a joint meeting important? Can the client and its counsel take any legal steps to protect the status quo and avoid, manage or resolve issues? Is a settlement possible? Should an appeal or challenge be filed?

● Contracts need to be clear on the relative rights and responsibilities if such issues are anticipated. If not, the LSRP must assess his or her options in view of the contract, and the client's rights and obligations, to assess how best to proceed.

● In some cases the LSRP will become entangled in the dispute no matter what. Hopefully the contract provides guidance on the economic effects of the dispute. If not perhaps the client can be approached and an honest fair result sought

● There is uncertainty. Hindsight may be 20-20. Error is possible. Perfection is impossible. You may be right in everything you do and still be attacked and suffer fees, losses and criticisms. Welcome to the world of professional dilemma.

10. Policy Questions:

Q9.1: If further change is to be pursued for and under SRRA, what should be considered?
A9.1: We believe a number of changes should be considered.

● LSRPs should be empowered to issue permits that are essential to remediation. These should include wetlands, stream encroachment, air and waste/recycling related permits

● DEP should initiate processing of applications for ISRA LNAs again.

● There should be revisions for more realistic time frames and deadlines, particularly to account for the extended RI deadline and for more complex sites.

● There should be an official DEP consultation process.

● There should be a voluntary remediation process pursuant to MOAs.

● There should be better dispute resolution processes including between parties, LSRPs and DEP, perhaps including special environmental appeals, adjudicatory or arbitration processes, especially to address DEP audits and reviews, threatened rescissions, requests for RIPW and de minimis quantity exemptions, applicability issues, defenses, and directives.

Index of Attachments:

Attachment A: List of Acronyms and Definitions

Attachment A:
List of Acronyms and Definitions

■ A.1.1 Acronyms or terms (herein)

◊ ARRCS Rule = the rules DEP adopted as the "Administrative Requirements for the Remediation of Contaminated Sites", N.J.A.C. 7:26C, adopted as of May 7, 2012 at 44 N.J.R. 1339(b). See http://www.nj.gov/dep/rules/rules/njac7_26c.pdf.

◊ brownfields. See Brownfield and Contaminated Site Remediation Act (Brownfield Act), N.J.S.A. 58:10B-1 et seq.

◊ child care center = a center licensed pursuant to N.J.S.A. 30:5B-1 et seq.

◊ DEP (or NJDEP) = the New Jersey Department of Environmental Protection.

◊ DOH = the New Jersey Department of Health (formerly DHSS = the New Jersey Department of Health and Senior Services).

◊ DOL = the New Jersey Division of Law (or Attorney General's office)

◊ EC = engineering control.

◊ FA = financial assurance (for a RAP). See N.J.A.C. 7:26C-5.

◊ FRD = final remediation document; an RAO or NFA Letter.

◊ FS = feasibility study. Newly defined under the First Tech Rule at First N.J.A.C. 7:26E-1.8 but now undefined there (but see below).

◊ HAZWOPER = Hazardous Waste Operations and Emergency Response; usually cited in connection with OSHA training requirements under 29 C.F.R. §1910.120.

◊ HDSRF = Hazardous Discharge Site Remediation Fund.

◊ IC = institutional control.

◊ IEC = immediate environmental concern. Re-defined under the Tech Rule at N.J.A.C. 7:26E-1.8.

◊ ISRA = Industrial Site Recovery Act, N.J.S.A. 13:1K-6 et seq. (and associated statutes, regulations, policies and guidance, including the ISRA Rule N.J.A.C. 7:26B, adopted as of May 7, 2012 at 44 N.J.R. 1339(b). See http://www.nj.gov/dep/rules/rules/njac7_26b.pdf).

◊ Law(s) = all applicable statutes and regulations (and associated policies and guidance).

◊ LC = letter of credit (a form of RFS or FA)

◊ LOC = line of credit (a form of RFS or FA)

◊ NFA = no further action (of DEP under N.J.S.A. 58:10B-1 et al.).

◊ OPRA = New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq. Information regarding OPRA procedures is available at http://www.state.nj.us/dep/opra/oprainfo.html.

◊ OSHA = the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 et seq.

◊ PRCR = person responsible for conducting the remediation.

○ Note: this may or may not be the LSRP client (an undefined term; first used in N.J.S.A. 58:10C-16.l., P.L.2009, c.60 §16.l.).

○ Note: that this may or may not be the actual discharger.

◊ RAO = response action outcome (of an LSRP under N.J.S.A. 58:10C-14).

◊ RAP = remedial action permit.

◊ RCRA = the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6901 et seq.

◊ RFS = remediation funding source. See N.J.A.C. 7:26C-5.

◊ RPS = ranking system of and by DEP for prioritizing future efforts for contaminated sites under N.J.S.A 58:10-23.16.

◊ school = a public school or private school as defined in N.J.S.A. 18A:1-1, or a charter school established pursuant to N.J.S.A. 18A:36A-1 et seq.

◊ Spill Act = Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. See Discharges of Petroleum and Other Hazardous Substances (DPHS) rules, N.J.A.C. 7:1E.

◊ SRRA = Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq., P.L.2009, c.60 §§1-29, (and for these purposes all associated statutes, regulations, policies and guidance, including the balance of P.L. 2009, c.60, enacted as of May 7, 2009, having passed the Senate and Assembly on March 16, 2009 as A.2962/S.1897).

◊ SWMA = the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.

◊ Tech Rule = the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, adopted as of May 7, 2012 at 44 N.J.R. 1339(b). See http://www.nj.gov/dep/rules/rules/njac7_26e.pdf.

◊ UHOT = unregulated home heating oil tank.

◊ USEPA = United States Environmental Protection Agency.

◊ UST = underground storage tank. See Underground Storage of Hazardous Substances Act (UST Act), N.J.S.A. 58:10A-21 et seq. and UST Rule, N.J.A.C. 7:14B.

■ A.1.2 SRRA Definitions:

◊ "Board" or "SRPLB" = Site Remediation Professional Licensing Board. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Feasibility Study" (or "FS" herein) = a study to develop and evaluate remedial options and create a list of those feasible. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Final remediation document" (or "FRD" herein) = a NFA letter issued by DEP under N.J.S.A. 58:10B-1 et seq., or a RAO issued by an LSRP. (N.J.S.A. 58:10-23.11b.; P.L.2009, c.60 §35).

◊ "Immediate environmental concern" (or "IEC" herein) = a condition (1) of contamination in a potable well above standards, (2) of contamination migrating into occupied or confined space "producing a toxic or harmful atmosphere resulting in a unacceptable human exposure, or producing an oxygen-deficient atmosphere, or resulting in demonstrated physical damage to essential underground services", (3) of contamination such that dermal contact, ingestion or inhalation could result in acute human health exposure, or (4) any other immediate threat to the environment or public health and safety. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

○ Please note that there may be important guidance on the issue of what constitutes an IEC available on NJDEP's website.

◊ "Licensed Site Remediation Professional" (or "LSRP" herein; sometimes "LSP" by others) = an individual licensed by the Board under N.J.S.A. 58:10C-7 (a permanent license) or DEP under N.J.S.A. 58:10C-12 (a temporary or interim license). (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Person responsible for conducting the remediation" (or "PRCR" herein) = (1) any person who executes an oversight document to remediate a site, (2) the owner or operator of an industrial establishment subject to ISRA for remediation of a discharge, (3) the owner or operator of a regulated UST, (4) a person who discharges a hazardous substance or is in any way responsible for a discharged hazardous substance under the Spill Act, or (5) any person remediating a site. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2). See N.J.A.C. 7:26C-1.3.

◊ "Response action outcome" (or "RAO" herein) = a written determination by an LSRP that the contaminated site was remediated in accordance with all applicable Law(s), made based upon an evaluation of the historical use of the site, or of any area of concern ("AOC") at that site, and any other investigation or action deemed necessary, concluding there are no contaminants present at the site, or at any area of concern, at any other site to which a discharge has migrated, or that any contaminants present at the site or that have migrated from the site have been remediated in accordance with applicable remediation regulations, and all applicable permits and authorizations have been obtained. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Small Business" = an entity not acquiring property for development employing not more than 50 full time employees in last three tax years qualifying under 15 U.S.C.A. §631 et seq. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Temporary License" = an LSRP license issued by DEP. (N.J.S.A. 58:10C-2; P.L.2009, c.60 §2).

◊ "Unregulated heating oil tank" (or "UHOT" herein) = one or more tanks for on-site heating of residential building or of 2000 gallons or less used for on-site heating of a nonresidential building. N.J.S.A. 58:10C-2; (P.L.2009, c.60 §2).

◊ Note: There are other terms and definitions, many of which are relatively self evident for the purposes of this outline (for example, "preliminary assessment").