2018 Update: LSRPs & SRRA *(v1/24/18[1])*

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I. Introduction:

● **1.1** Arguably all, and at least private party, "remediation" in New Jersey is subject to the requirements of the "Site Remediation Reform Act" ("SRRA"[2], enacted on May 7, 2009 as P.L. 2009, c.60). SRRA's scope and effect seem more accepted and understood, at least by LSRPs and sophisticated environmental practitioners, and at least at many, perhaps most, sites. Nonetheless for others SRRA's applicability, meaning and effect remain debatable. *{2018}* In rare circumstances, some act with no understanding of SRRA's requirements (sometimes including lawyers handling sale or lease transactions; sometimes consultants taking samples without LSRP involvement; sometimes NJDEP personnel making demands without appreciation of whether a discharge exists or whether a defense to liability exists). Without doubt uncertainties, and sometimes confusion, remain. NJDEP and the Board have left uncertain the answers to some critical questions, and have declined to provide clear, or any, guidance on important issues. And some positions taken by some at NJDEP seem to go beyond the law. It may take decades, and many Court decisions, before all issues are clarified and resolved.

NJDEP direct oversight of some sites is arguably now required for many sites (reportedly more than a thousand sites are arguably in direct oversight; but, notwithstanding the specific advice provided in its May 11, 2016 ListServ e-mail [discussed below], perhaps only a hundred or less are actually proceeding as advised). More demanding NJDEP enforcement of direct oversight is hampered by NJDEP's limited resources; third party enforcement, for example under the Environmental Rights Act, hereafter may assist NJDEP by bringing recalcitrants into court. And NJDEP may need such help: the fate of USEPA's staffing, funding, remedial efforts and regulation under President Trump's administration, and resulting impacts in New Jersey, are still uncertain. Potentially NJDEP will be the sole or most significant environmental enforcer in New Jersey, further challenging its resources and priorities. Further, with the recent inauguration of Governor Murphy, thought to be more pro-environment and NJDEP than former Governor Christie, the influence of prior pro-business or compliance-assistance policies at NJDEP may wane, cease or be reversed. 2018 seems likely to be an interesting year for the environment in New Jersey.

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). On adoption then Governor Corzine issued an executive order (2009 No. 140; [see http://www.nj.gov/infobank/circular/eojsc140.htm]; evidently still in effect- see http://www.state.nj.us/infobank/circular/eoindex.htm). NJDEP's implementation of SRRA relied heavily on promulgation of many guidance documents, forms and rules, a process still ongoing through NJDEP's stakeholder review process. See http://www.nj.gov/dep/srp/srra/stakeholder/. 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 NJDEP 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/. *{2018}* Further changes were embedded by NJDEP within the so-called "UHOT Rule Proposal" of July 2017 (discussed at § 1.2.24 and 3.8.17). See

[1] Prior Versions of this Article have been published and used for other seminars on LSRPs and SRRA. While there are numerous edits to this Article from last year's version, to assist the review of some readers, new material inserts for this version are introduced with a marker: "*{2018};*" if you have an electronic version of this article you can search for this marker to focus on these changes in your review.

[2] Definitions used in this article, some not universally accepted, are included in Attachment A.

http://www.nj.gov/dep/rules/proposals/20170717b.pdf and 49 N.J.R. 2055(a).Some recent historical events pertinent to SRRA are summarized in Attachment B.

Permanently licensed "licensed site remediation professionals" ("LSRPs") can be identified through DataMiner searches, both as a group and individually. *{2018}* See https://www13.state.nj.us/DataMiner/Search/SearchByCategory?isExternal=y&getCategory=y&catName=Site+Remediation**.** 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/. *{2018}* At present it has two vacancies to be filled. See http://www.nj.gov/lsrpboard/board/resumes.html.

● **1.2** *{2018}* Changes in the SRRA program in 2017 and early 2018 included:

◊ 1.2.1. In January 2017 NJDEP transmitted a ListServ notice of changes in USEPA hazardous waste rules. See http://www.nj.gov/dep/enforcement/advisories/2017-01.pdf NJDEP advised that the USEPA Administrator signed the final Hazardous Waste Generator Improvements Rule on October 28, 2016, published in the Federal Register on November 28, 2016 (to become effective on May 30, 2017). The NJDEP listserv does not advise if the Rule is fully effective and implemented in New Jersey, or if NJDEP has any reservations on such. Instead it advised that, according to the EPA, the goal of this update is to make the rules easier to understand, facilitate better compliance, provide greater flexibility in how hazardous waste is managed, and close gaps in the regulations. The EPA further states that this rule will:

- Allow some generators to avoid higher generator status when generating episodic waste;
- Allow Very Small Quantity Generators to send its hazardous waste to a Large Quantity Generator under control of the same entity;
- Enhance safety of facilities, employees, and the general public by improving hazardous waste communication and ensuring emergency management requirements meet today's needs; and
- Reorganize the regulations so that they are all in one place.

Obviously PRCRs and LSRPs are expected to understand and comply with changes resulting from this Rule and NJDEP's own reaction to same. See https://www.epa.gov/hwgenerators/final-rule-hazardous-waste-generator-improvements

◊ 1.2.2. In January 2017 NJDEP sent a ListServ notice inviting suggestions on future guidance documents. It noted that 24 final technical guidance documents have been posted on Site Remediation Waste Management Program's (SRWMP's; formerly SRP's) Guidance Library and eleven of these documents have been previously updated. The guidance document committee chairs are currently evaluating whether these documents need to be updated. In addition, SRWMP will soon be starting the next round of technical guidance development. Stakeholder input is being solicited for new technical guidance topics.

◊ 1.2.3. In February 2017 NJDEP sent a ListServ notice: Reminding LSRPs that submissions of SRRA forms were to be of "readable" PDFs, not mere scans (warning that submissions of mere scans would be rejected, as NJDEP extracts data for its databases from readable forms), reminding LSRPs to make Timeframe Compliance Notifications when and as required, and reminding LSRPs to ensure proper and full payment of Fees/Oversight Costs prior to RAO Issuance. Later NJDEP clarified that the first warning (re readable PDFs) is "only applicable to the 'Receptor Evaluation Form' and the 'Notice of Failure to Comply with a Mandatory or Expedited Site-specific Remediation Timeframe' form." NJDEP advised that "All forms that require a signature should be printed, completed and signed, scanned, and the scanned version submitted to the Department."

○ *{2018}* It is interesting that NJDEP then did not accept use of electronic signatures for signed forms, except in the case of scans of physically signed forms. Consider the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. 7001 et seq. (giving legal effect to electronic signatures in the course of business transactions) and New Jersey's Uniform Electronic Transactions Act, N.J.S.A. 12A:12-1 et seq. (recognizing the validity of electronic signatures in any transaction or contract except those governed by the law of wills, certain specific sections of the Uniform Commercial Code, and statutes, regulations and legal principles governing family law).

◊ 1.2.4. In February 2017 NJDEP sent a ListServ notice: Reminding LSRPs that pursuant to N.J.A.C. 7:26I-6.8, LSRPs have affirmative obligations with respect to notifying the PRCR and NJDEP regarding remediation timeframes. "Specifically, an LSRP must notify the … [PRCR and sometimes NJDEP] in writing when, in his or her professional judgment, a … timeframe referenced in … [ARRCS] (N.J.A.C. 7:26C-3) is unlikely to be met. … The notification to the Department [as to mandatory or expedited timeframes] must be made using the

"Notice of Failure to Comply with a Mandatory or Expedited Site-specific Remediation Timeframe" form available at www.nj.gov/dep/srp/srra/forms. … LSRPs should keep a written record of such communications [to clients]."

◊ 1.2.5. In February 2017 NJDEP announced the availability of revised Technical Guidance entitled "Technical Guidance for Investigating Child Care Centers and Educational Facilities" to provide an overview of the environmental requirements for child care centers and schools. It focuses on the requirements for obtaining a RAO as part of the Department of Children and Families' licensing package. Issues discussed include "the need to evaluate potential health risks posed to individuals occupying a building, such as indoor air quality, asbestos contamination, lead paint, drinking water and radon." See http://www.nj.gov/dep/srp/guidance/srra/childcare_ef_inv_guidance.pdf.

◊ 1.2.6. In February 2017 NJDEP published a Notice in the New Jersey Register that the Remedial Action Workplan and the Remedial Action Report NJDEP Online Services are available for the submission of a RAW and RAR. In accordance with N.J.A.C. 7:26C-1.6(c), the use of these services became mandatory on May 22, 2017. See 49 N.J.R. 341(a)

◊ 1.2.7. In February 2017 NJDEP released a new version of the Case Inventory Document (CID). See http://www.nj.gov/dep/srp/srra/forms/.

◊ 1.2.8. In February 2017 NJDEP announced the availability of new or updated forms and guidance: RFS Detailed Remediation Cost Estimate Guidance; RFS Exemption Guidance Document; Active RFS Data Miner Report; Remediation Cost Review form; and RFS-FA form and instructions. See www.nj.gov/dep/srp/rfs/index.htm and http://www.nj.gov/dep/srp/srra/forms/.

◊ 1.2.9. In March of 2017 NJDEP warned of being prepared for a winter storm and referred PRCRs and LSRPs to guidance at www.nj.gov/dep/srp/guidance/#catastrophic_events.

◊ 1.2.10. In March of 2017 NJDEP advised of a meeting of the Drinking Water Quality Institute and the final recommendation for an MCL for perfluorooctanoic acid (PFOA) having been delivered to the NJDEP Commissioner. Relevant documents regarding this recommendation are available at www.nj.gov/dep/watersupply/g_boards_dwqi.html.

◊ 1.2.11. In April of 2017 NJDEP announced the availability of technical guidance entitled "Administrative Guidance Regarding Compliance with Remedial Action Report Timeframes" that describes the expectations for the remedial action report and applicable timeframes, and provides tips for justifying an extension for a remedial action report. See http://www.nj.gov/dep/srp/guidance/srra/rar_timeframe_compliance_guidance.pdf

◊ 1.2.12. In April of 2017 NJDEP posted a Compliance Notice for those who have received a limited restricted use or restricted use NJDEP NFA Letter. NJDEP recites that such "therefore have an obligation to ensure the continued protectiveness of a remedial action that involves an institutional control or an engineering control…" (a position not accepted by all), in particular aimed at those "who have not fulfilled these obligations." See www.nj.gov/dep/srp/enforcement/post_nfa_compliance_notice.pdf (directs to a document with detailed information on the obligation, a link to a list of non-compliant sites, steps to be taken to regain compliance, and the potential ramifications of non-compliance. NJDEP warns in a listserv message that all should "… determine their obligations or alert clients or potential clients of their obligations and the possible ramifications of non-compliance."

◊ 1.2.13. In April of 2017 NJDEP announced the availability of three (3) new Online Services: the PAR, PAR/SIR, and SIR Online Services, allowing (not yet requiring) filings of such reports electronically. Instructions for the Online Services are available at www.nj.gov/dep/srp/srra/forms/. Training for Online Services can be viewed at www.nj.gov/dep/srp/srra/training/sessions/online_service_cid_webinar.wmv, and the handouts are at www.nj.gov/dep/srp/srra/training/sessions/online_service_cid_handout.pdf. Pursuant to ARRCS N.J.A.C. 7:26C-1.6(c), use of these three Online Services will become mandatory 90 days after NJDEP publishes a notice in the New Jersey Register. NJDEP also announced replacement of the previous Authorization form ("Authorization to Submit RIR, RAW, or RAR through NJDEP Online ") with a new form entitled "Authorization to Submit a Remedial Phase Report through NJDEP Online." To be used for all future submittals.

◊ 1.2.14. In April 2017 NJDEP announced the availability of new guidance entitled "Commingled Plume Technical Guidance Document" presenting technical approaches to demonstrate the presence of a commingled plume condition and to evaluate the impacts on current and future remedial decisions. It also serves to clarify the Department's administrative requirements for common commingled plume conditions. See http://www.nj.gov/dep/srp/guidance/srra/commingled_plume_guidance.pdf.

◊ 1.2.15. In April 2017 NJDEP proposed changes to groundwater standards. See http://www.nj.gov/dep/rules/proposals/20170403b.pdf.

◊ 1.2.16. In May 2017, NJDEP published a rule proposal in the New Jersey Register that included the proposed UST rules (N.J.A.C. 7:14B), incorporating USEPA's 2015 revisions in 40 C.F.R. Part 280. See http://www.nj.gov/dep/rules/proposals/20170515a.pdf . The new rule will require that owners and operators attach

to the Underground Storage Tank Facility Certification Questionnaire (USTFCQ) the entire financial responsibility document (such as an insurance policy) identified on the questionnaire. With an anticipated rule adoption date in December 2017, NJDEP has changed the UST Facility Certification Questionnaire to incorporate the new requirements. See www.nj.gov/dep/srp/forms/ust/.NJDEP is working on Frequently Asked Questions and will post them adjacent to the online form./

◊ 1.2.17. In May 2017 NJDEP advised in a Listserv message that the New Jersey Department of Children and Families (NJDCF) readopted the Manual of Requirements for Child Care Centers ("Manual"), with amendments, effective March 6, 2017. See http://nj-cca.org/images/17_CCM_NJ_Register_FINAL.pdf, formerly codified as N.J.A.C. 10:122 and recodified as N.J.A.C. 3A:52, effective January 3, 2017. Specifically, NJDEP noted that "… N.J.A.C. 3A:52-5.3(i)5, the applicant or facility operator must provide documentation of water testing for lead and copper to NJDCF, when the water is supplied by a Community Water System." Additional guidance, such as sampling protocol, submission of testing results, and mitigation measures if elevated levels are detected, are to be posted at www.nj.gov/dep/watersupply/pw_child.html and www.nj.gov/dcf/providers/licensing/.

◊ 1.2.18. In May 2017 the Board approved a "Statement of Interpretation 2017-01: Independent Professional Judgment, " "… intended to clarify provisions… regarding the conduct of …[LSRPs] with respect to applying Independent Professional Judgment." See www.nj.gov/lsrpboard/board/ind_prof_judge_statement_int.pdf. Notably the Statement says such is: ".. the practice of applying the specialized knowledge, skill, education, training and experience of an LSRP to the facts, data, reports, site history, and other information regarding contamination or environmental conditions at a site to make informed remediation decisions that comply with all applicable .. [Laws], and requirements of … [NJDEP] and the Board. It is applied by an LSRP to all actions during the entire course of the remediation, and is also used when an LSRP determines it is appropriate to vary from the technical regulations, propose or implement an alternative remediation standard or screening level, or deviate from technical guidance. Independent Professional Judgment is based on the LSRP's own expertise and decision-making even when information from other environmental professionals has been considered. Its exercise should be free from outside interests or influences that do not have the protection of public health and safety and the environment as the highest priority." Importantly the Board warns that such should be documented.

◊ 1.2.19. In June 2017 NJDEP advised of its "Annual Site Remediation Reform Act Program Fee Calculation Report" under ARRCS, published in the June 19, 2017 New Jersey Register. See www.nj.gov/dep/srp/fees. For FY 2018 annual fees became: $890 (Category 1), $1,780 (Category 2- 2-10 Contaminated AOCs), $9,790 (Category 3), $19,580 (Category 4), and $,1585 (contaminated media); soil RAP application fees increased to $1470, and groundwater RAP application fees to $1955 for passive and $2445 for active; and annual RAP fees increased to $320.

◊ 1.2.20. In June 2017 NJDEP advised that the Bureau of Water Allocation and Well Permitting (BWAWP) within NJDEP's Division of Water Supply and Geoscience, developed guidance for the reporting of damaged, destroyed, and/or lost wells. See www.nj.gov/dep/watersupply/pdf/wells-lostdestroy.pdf. Owners have responsibilities for wells under N.J.S.A. 58:4A-4.1 et seq. An LSRP submits the necessary information to the BWAWP and receives either a letter that the well is considered lost/destroyed or further work is needed. The letter serves as an "alternate" decommissioning report for a destroyed well. Ultimately, the status of lost or destroyed for each well will be viewable online via DataMiner reports.

◊ 1.2.21. In July 2017, faced with growing delays in RAP issuance, NJDEP reminded all of its checklists for RAPs and its intent to reject as "incomplete" administratively and/or technically deficient RAP applications when: (1) a response to a Notice of Administrative Deficiency or Notice of Technical Deficiency is not received within 30 days, (2) an application is not withdrawn in order to address the deficiencies, or (3) the response to the Notice does not sufficiently satisfy all of the deficiencies identified in the notice. If a RAP application is rejected as incomplete, the PRCR will be required to re-apply for a RAP. NJDEP cautions that rejection of an incomplete RAP application does not constitute a final agency action (thereby reducing the opportunity to challenge such determination). See www.nj.gov/dep/srp/guidance/#top_permits.

◊ 1.2.22. In July 2017 NJDEP announced updated webpages concerning UHOTs. See www.nj.gov/dep/srp/unregulatedtanks/ and www.nj.gov/dep/srp/unregulatedtanks/uhot_guidance.htm.

◊ 1.2.23. In July 2017 NJDEP published a rule proposal in the New Jersey Register that included the proposed new Heating Oil Tank System Remediation Rules (N.J.A.C. 7:26F), as well as proposed amendments to the Discharges of Petroleum and Other Hazardous Substances rules (N.J.A.C. 7:1E), the NJPDES rules (N.J.A.C. 7:14A), the UST rules (N.J.A.C. 7:14B), the ISRA (N.J.A.C. 7:26B), ARRCS (N.J.A.C. 7:26C), and the Tech. Regs (N.J.A.C. 7:26E). Originally written comments could be submitted by September 15, 2017. NJDEP later extended the public comment period to September 29, 2017. See http://www.nj.gov/dep/rules/proposals/20170717b.pdf. See §3.8.17.

◊ 1.2.24. In July 2017 NJDEP adopted revisions to its flood and freshwater wetlands rules. See http://www.nj.gov/dep/rules/adoptions/adopt_20171218b.pdf.

◊ 1.2.25. In August 2017 NJDEP adopted the its proposal for rules governing legacy landfills and all sanitary landfill facilities to codify and implement the provisions of the Legacy Landfill Law, N.J.S.A. 13:1E-125.1 et seq. See http://www.nj.gov/dep/rules/adoptions/adopt_20170905b.pdf. Key changes included:

○ exempting nonwater-soluble, non-decomposable, inert solids, such as rock, soil, gravel, concrete, glass, and/or clay or ceramic products, from the definition of "solid waste," provided these materials do not contain contaminant concentrations exceeding the more stringent of the residential or nonresidential direct contact soil remediation standards. The adopted definition of "solid waste" at N.J.A.C. 7:26-1.6(a)(2) also maintains the existing exception for recyclable materials that are exempted from regulation pursuant to the Recycling Rules, N.J.A.C. 7:26A. However, some materials produced by Class B facilities may be considered solid waste. For example, Class B materials that have no end market may be classified as solid waste.

○ regulating Hydrogen sulfide as an air pollutant (adopting an ambient air quality standard at N.J.A.C. 7:27-7.3) at landfills (reportedly an odorous, noxious, colorless, poisonous, flammable gas that may cause eye, nose, and throat irritations, headaches, and nausea, as well as aggravate preexisting respiratory issues and cause injury, detriment or annoyance to nearby residents or endanger their comfort, repose, health or safety. Specifically under N.J.A.C. 7:26-2A.7(h)10, NJDEP may require monitoring based upon the determination that the landfill is the source of emissions that violate the general prohibition on air pollution at N.J.A.C. 7:27-5.2, or an exceedance of the standard at new N.J.A.C. 7:27-7.3.

○ implementing N.J.S.A. 13:1E-125.7 which provides that "[t]he owner or operator of a legacy landfill or a closed sanitary landfill facility that undertakes any activity that includes the placement or disposal of any material, regrading, compression, venting, construction, or installation of monitors or wells at a legacy landfill or a closed sanitary landfill shall hire a New Jersey licensed professional engineer to perform the closure and to oversee any other activities performed at the legacy landfill or closed sanitary landfill facility." See the notice of proposal Summary, 48 N.J.R. at 1529, and adopted N.J.A.C. 7:26-2A.9(c). and extending these requirements to all sanitary landfills by requiring a licensed professional engineer to certify the Closure and Post-Closure Plan. Adopted N.J.A.C. 7:26-2A.9(c)5 implements the requirement that the licensed professional engineer to "certify on a quarterly basis … that all provisions and prohibitions of the administrative consent order, closure or post-closure plans, permits, or approvals are complied with" N.J.S.A. 13:1E-125.7.

○ excluding dredged material from the lists of material at N.J.A.C. 7:26-2A.9(h) and (i)

○ requiring preparation of post-closure evaluation reports every 10 years

○ confirming that, except for remediating a sanitary landfill, the adopted rules do not require the owner or operator of a landfill (operating, legacy, or closed) to retain an LSRP. N.J.A.C. 7:26C-1.4(c)2 states that the provisions of ARRCS do not apply to any person who is remediating a landfill, with limited exceptions (such as an FRD is desired).

○ ensuring that municipal site plan requirements are met during landfill closure and redevelopment

○ confirming that the adoption is not intended to expand the definition of "sanitary landfill," which is defined at N.J.A.C. 7:26-1.4 as a solid waste facility at which solid waste is deposited on or into the land as fill for permanent disposal or storage for a period of time exceeding six months, except that it does not include any waste facility approved for disposal of hazardous waste.

◊1.2.26. In August 2017 NJDEP proposed to amend the Safe Drinking Water rules at N.J.A.C. 7:10 to establish an MCL for perfluorononanoic acid (PFNA) of 0.013 micrograms per liter (µg/l) and an MCL for 1,2,3-trichloropropane (1,2,3-TCP) of 0.030 µg/l. The proposal includes monitoring requirements and treatment, as necessary, for these contaminants for both public community and public nontransient noncommunity water systems. NJDEP is also proposing to amend the rules to require public nontransient noncommunity water systems to begin monitoring for radionuclides in 2019. Further, NJDEP is proposing to amend the Private Well Testing Act rules at N.J.A.C. 7:9E, to require testing of private wells subject to sale or lease and of newly constructed wells for public noncommunity water systems and nonpublic water systems for 1,2,3-TCP as well as ethylene dibromide (EDB) and 1,2 dibromo-3-chloropropane (DBCP). See http://www.nj.gov/dep/rules/notices/20170807b.html

◊ 1.2.27. In September 2017 NJDEP advised that, as a result of OSHA changes and USEPA changes, Facilities subject to the Community Right to Know (CRTK) program or Section 312 of the Emergency Planning and Community Right to Know Act (EPCRA) will be required to report based on updated hazard codes on the Community Right to Know Survey for 2017. Facilities may be subject to this program if they fall into certain industrial classifications or if they store certain hazardous materials above defined thresholds. See http://www.nj.gov/dep/enforcement/advisories/2017-06.pdf.

◊ 1.2.28. In September 2017 NJDEP published a Notice of Administrative Change in the New Jersey Register in accordance with N.J.A.C. 7:26D-6.2, that updated the soil remediation standards for 19 contaminants, based on revisions to the USEPA toxicity data USEPA in IRIS (see www.epa.gov/iris), operative as of September 18, 2017. See http://www.nj.gov/dep/rules/adminchg/20170918a.pdf and a correction (for 1,1,1-Trichloroethane and Hexachloroethane)at http://www.nj.gov/dep/rules/adminchg/20171016a.pdf. Changes included: Benzo(a)anthracene- 5ppm res./17ppm nonres.; Benzo(a)pyrene- 0.5ppm res./2ppm nonres.; Carbon tetrachloride- 2ppm res./4ppm nonres.; Tetrachloroethene- 43ppm res./1500ppm nonres.; Trichloroethene- 3ppm res./10ppm nonres.;

◊ 1.2.29. In September 2017 NJDEP cautioned that the submission of the Annual Remediation Fee Reporting Form via the on-line portal service will not automatically update the remedial timeframes that are listed in the case activity tracking found in DataMiner. It is necessary to verify that the correct RI and RA regulatory timeframes are listed in activity tracking. The Remedial Timeframe Notification Form must be completed to notify the Department of the contaminated media so that activity tracking can be updated (specifically, Section D). The form can be found at www.nj.gov/dep/srp/srra/forms/.

◊ 1.2.30. In October 2017 NJDEP announced availability of the Confirmed Discharge Notice and ISRA General Information Notice Online Services. See www.nj.gov/dep/srp/srra/forms/. Use of these Online Services is currently not mandatory. Pursuant to ARRCS, use of these Online Services will become mandatory 90 days after NJDEP publishes a notice in the New Jersey Register stating that the Online Services are available. Until such time, either the Online Service or a paper Form may be submitted. NJDEP advised that: 1- Owner/Operators should not link to an existing case if the person responsible for the Incident is different; or remediation timeframes for the incident will not meet the existing case's timeframes. 2- a completed and scanned 'Authorization Form is required to complete the services. 3. CDN and GIN online services where the preparer did not choose an existing Facility (program interest) or Responsible Party will receive a status of Pending DEP approval and will be reviewed to match to an existing facility or responsible party. An acknowledgement email will go out after the matching process is completed or a new Program Interest (PI) ID is created.

◊ 1.2.31. In October 2017 NJDEP announced availability of the new "In Situ Remediation: Design Considerations and Performance Monitoring Technical Guidance Document " See http://www.nj.gov/dep/srp/guidance/srra/in_situ_remediation.pdf?version_1_0.This document information on site characterization concerns, selected design considerations, and how to develop performance monitoring plans. It also provides related guidance on DGW proposals required by the NJPDES Permit-by-Rule, other approvals that may be needed to implement in situ remediation work, interplay with or transition to the RAP phase of remediation, and related reporting requirements.

◊ 1.2.32. In October 2017 NJDEP announced that the online EPH Calculator has been updated to Version 3.0. See www.nj.gov/dep/srp/guidance/srra/EPHCalculator.xls.

◊ 1.2.33 In November of 2017 NJDEP announced a new web page, with information regarding contaminants of emerging concern. The web page currently focuses on PFAS, including information related to the accepted New Jersey Drinking Water Quality Institute's recommended health-based maximum contaminant level (MCL) of 14 nanograms per liter (ng/L, or parts per trillion) for perfluorooctanoic acid (PFOA). See www.nj.gov/dep/srp/emerging-contaminants/.

◊ 1.2.34. In December 2017 the Board issued a ListServ for LSRPs on 1. the next licensing examination on Wednesday October 17, 2018. 2. LSRP Annual Licensing Fee due by January 15, 2018. 3. 2018 License Renewals. 4. Ethics Course obligations, and 5. Change in the LSRP Contact Information

◊ 1.2.35. In December 2017 the Board announced a guidance document entitled "LSRP Notifications to the Site Remediation Professional Licensing Board, the Person Responsible for Conducing the Remediation, and the New Jersey Department of Environmental Protection" to help LSRPs comply with SRRA notification requirements by collecting in one place all of the notifications that LSRPs are responsible for making. See http://www.nj.gov/lsrpboard/board/lsrp_notifications_guidance.pdf

◊ 1.2.36. In December of 2017 a NJ Superior Court Appellate Division decision found that NJDEP engaged in illegal rulemaking by issuing Interim Specific Ground Water Quality Criteria of 0.01 ppb for perfluorononanoic acid ("PFNA" by posting on its website. See 17-2-5466 Chemistry Council of N.J. v. Dep't of Envtl. Protection) .

◊ 1.2.37. The Site Remediation Advisory Group met four times in 2017, discussing many items of concern to LSRPs and PRCRs. Agendas, information, handouts and presentations from these meetings, including on limited statistics on the NJDEP's Site Remediation Program, can be found at http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/index.html. Topics addressed included: Site Remediation Metrics; Board updates; pending guidance efforts; Post SRRA UST Remediation; Overview of PFAS; Ecological

Evaluation Guidance; Perimeter Air Monitoring Guidance; Field Sampling Procedures Manual Planned Update; Remediation Standards; Confirmed Discharge Notification; Pre-Purchaser ACOs; Direct Oversight ACOs; Multiple LSRPs on a Site. The most recently available NJDEP statistics for late 2017 are included in Attachment C.

○ A notable presentation explained that NJDEP has formalized policies allowing for some limited options for obtaining better treatment that otherwise required for Direct Oversight, at least to unrelated site purchasers (see http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_pre_purchaser_aco_1213.pdf) and certain PRCRs (not all) prepared to sign an ACO to earn that better treatment (See http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_earned_adjusted_do_aco_1213.pdf).

◊ 1.2.38. In January 2018 NJDEP advised by ListServ that effective January 16, 2018, certain ground water remediation standards were revised as amendments to Ground Water Quality Standards, N.J.A.C. 7:9C, published in the January 16, 2018 edition of the New Jersey Register (see 50 N.J.R. 334(a)). These amendments provided specific ground water quality standards for 23 constituents, including more stringent standards for three of these constituents. Additionally, Appendix A of the Discharge of Petroleum and Other Hazardous Substances rule (N.J.A.C. 7:1E) was amended to add Perfluorononanoic acid (PFNA) to the List of Hazardous Substances. See http://www.nj.gov/dep/rules/adoptions/adopt_20180116c.pdf. The ground water remediation standards for the three are as follows: Caprolactam decreases from 5,000 micrograms per liter (ug/L) to 4,000 ug/L.; 4,6-Dinitro-o-cresol decreases from 1 ug/L to 0.7 ug/L; and 2-Hexanone decreases from 300 ug/L to 40 ug/L.

◊ 1.2.39 In January 2018 NJDEP announced the availability of an updated Vapor Intrusion Technical Guidance (to version 4.1), including adding language regarding Indeterminate Vapor Intrusion Pathway status, clarifying the establishment of a CEA in a Vapor Intrusion investigation, defining near slab and exterior soil gas samples, as well detailing the step out sampling for vapor concern and IEC cases. See http://www.nj.gov/dep/srp/guidance/vaporintrusion/vig_main.pdf?version_4.1

◊ 1.2.40 In January 2018 USEPA acknowledged and approved use of the ASTM International Jan. 2017 update of its Phase I environmental site assessment standard for assessing large rural and forestland properties. (This Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property, E 2247-16 (2016 rural property standard), replaces a 2008 version, numbered E2247-08., effective for a closing on or after March 14, 2018). (Please Note: This Article does not purport to cover all recent developments, particularly by authorities other than NJDEP, such as USEPA; however, if something come to our attention we sometimes include it).

● **1.3 The Remediation Advisor's Role.** Those counseling clients on remediations continue to address most site areas of concern in a manner much as before, without need (or ability) to delay for NJDEP review and approval of plans, relying on LSREPs instead. Many clients find this to be an opportunity worth embracing; a few find it intimidating and problematic. Counsellors 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, and now the strengths and limitations of LSRPs. For example, as always, 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: the use of LSRPs does not avoid this risk. A Seller's plans to retire comfortably with proceeds of sale, relying on a Buyer's assumption to avoid further dealings with NJDEP, may be confounded by new permit requirements, some of which may not yet exist under SRRA. 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. LSRPs may have to reconcile such discussions and projections with filings made to NJDEP (including for remediation certifications and RFS and FA), with potential liability if inconsistent or erroneous. *{2018}* Business budgets for remediation, even upon the LSRPs report of completion, may prove wrong, with potential ramifications with management or third parties. Even courts may find themselves adrift without the advice of a comfortable advisor (NJDEP). 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 different clients and their separate advisors, including lawyers, seek advantage against prior owners and operators, neighbors and others, without as much influence of DEP itself, and, in some cases, with the threatened oversight of the Board, and in others the uncertain review of the courts. To best counsel clients, advisors need to understand and consider a range of concerns, most similar to those addressed before and since SRRA's adoption. Some examples:

◊ 1.3.1. What are the client's goals? How much uncertainty and risk can the client tolerate? *{2018}* Given that risk and uncertainty are somewhat unavoidable, what techniques can be used to manage those risks and uncertainty?

◊ 1.3.2. What is and is not known? *{2018}* How old and unreliable is existing "knowledge?" Has the site been through NJDEP or LSRP review before? When? What was the nature, extent and quality of prior work? What has happened since prior work? How reliable is it? *{2018}* Would it meet current NJDEP or LSRP requirements? No matter what the LSRP says to start, what is the risk of additional work for closed issues? What are the risks that a new review, by a new LSRP, will identify a difference of opinion, requiring more work? For that reason, in the case of prior LSRP decisions, is it better for the client to use the prior LSRP if possible?

◊ 1.3.3. Is the site under client control? Is there ownership? Access? *{2018}* Over both the short-term and long-term what changes can be expected? How can they be addressed? Who else has an interest? (Buyers? Lenders? Tenants? Easement holders? Prior Owners and Operators? The Municipality? Carriers? Future occupants?) What are their needs and goals? Can a deed notice be used, signed and implemented? Will the owner consent? (Do you know who the owner is or will be?) Who will be able to, and responsible to, enter and work on the site, and deal with deed notice and RAP issues and requirements?

◊ 1.3.4. What are the planned or potential site uses? (Residential? School? Child Care? Playground? Green Acres? Restaurant? Hospital? Prison?) What is the schedule for uses (construction) and risks of change in the schedule or uses? How long will the site be retained by the owner? What changes are possible or likely?

◊ 1.3.5. 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? If there are successor owners or operators, or LSRPs or counsel, will they be friends or foe? Is the LSRP conservative or aggressive? Are the client's and LSRP's priorities the same? *{2018}* How do you know? Have you asked?

◊ 1.3.6. Will this site cost more or less to assess, investigate and remediate under current requirements of SRRA than before? Is there a budget (or annual budgets) or limit on resources available to finish the job? Have you asked? How realistic is the budget and the projections on which it is based? Does the client have the resources (money, experience, expertise and support) to begin and finish? To post an RFS and fund the work? If not, what is the client's exit strategy? Delay? Death? Sale? Bankruptcy? Is there a lender? What does it think? What is the annual cash flow? What are the reserves? What are the contingency plans? Will or 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? Are there any cost sharing arrangements? Are there pending or anticipated lawsuits? *{2018}* Are those involved familiar with New Jersey, NJDEP, SRRA or LSRPs? Do they know what they are getting into?

◊ 1.3.7. Will the process take longer or less time than pre-SRRA? What are the deadlines under SRRA? What are the client's deadlines? Can they be met? If not, when does the LSRP have to tell the client and DEP? How much flexibility is there? What can be done to improve the schedule? What happens if deadlines are missed?

◊ 1.3.8. What about past, ongoing and new NJDEP rules, standards and SRRA requirements and changes? Will standards for contaminants of concern likely change? *{2018}* In 2018? Will there be new contaminants to be addressed for the first time? How many changes will be new or by more than an order of magnitude? Will NJDEP or USEPA guidance on topics of concern likely change (e.g., vapor intrusion? Pesticides? Ecological receptors? Schools? Day care facilities? Residential uses? Dioxane? PFOA? PFAS? PERC?)? Is there anything that can be done now or then to protect against such changes? Do the parties understand the risks of such? Is the LSRP sufficiently experienced and aware to address same when and as needed? If not, how much can non-LSRPs assist? Are such non-LSRPs complying with SRRA if they act under LSRP direction or review? How do they know? *{2018}* What is the role of LSRPs not engaged as such for the site? What is the role of multiple LSRPs engaged for the same site? By the same PRCR? By different Persons?

◊ 1.3.9. What is NJDEP's role now, post-SRRA? Can tough questions be resolved in a binding way after consultation with NJDEP? Does NJDEP in fact defer to the professional judgment of LSRPs or not? *{2018}* Everyone at NJDEP? Will NJDEP help LSRPs answer tough questions? Will NJDEP recognize the tough questions? Will NJDEP choose to resolve issues more conservatively than LSRPs and threaten those LSRPs who resist overly conservative approaches? What are the real risks of direct oversight? What happens when NJDEP finally reviews everything? *{2018}* What happens in 2018 as the Governor Murphy takes charge? Are the days of compliance assistance gone?

◊ 1.3.10. What is the role of prior owners, tenants, lenders, neighbors, municipalities, insurers and others in the remedial process? What about new owners, tenants, lenders, and neighbors? How does the nature of neighborhood uses (e.g., residential) and plans (e.g., a brownfields development) affect remedial options, timing and decision making? Are there any known or likely adversaries to the remediation or client? What is their interest?

What should be done about them? What is the role of the public? What about USEPA, Fish & Wildlife or the Corps of Engineers (for example for PCB remediations, sediments, stream or wetlands remediations)? What about DEP permitting arms (such as land use for sediments, wetlands, tidelands and CAFRA)? *{2018}* Will LSRPs or other professionals ever be granted permit authority to expedite remediation's?

◊ 1.3.11. What happens if someone else is responsible for one problem at a site being remediated by another? *{2018}* What are the roles of multiple LSRPs for the same site? Can efforts proceed in parallel? In series? Cooperatively? Using the same or different LSRPs? No LSRPs? Is litigation pending or likely? *{2018}* What is NJDEP's role? The Boards? The LSRPA? Arbitration or Mediation? In ISRA, what does a remediation in progress waiver really mean?

◊ 1.3.12. As a practical matter do available legal protections provided by NJDEP or LSRP approvals (NFAs and RAOs; RAWP approvals) matter less or more now than pre-SRRA? Does NJDEP believe in such protections? LSRPs? The Board? The Courts? Buyers? Lenders?

● **1.4 The Transactional Counselor's Role.** Those counseling clients on transactions and contracts (usually lawyers) still have to address environmental issues, also much as they have before SRRA. 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 discussed with clients are required as a result of SRRA. Some examples:

◊ 1.4.1. What different promises are to be 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? How does NJDEP's and the Board's rights to review LSRP's work change the deal?

◊ 1.4.2. What are the deliverables required for closing? After closing? Is an RAO necessary to close? Is an RIPW acceptable? If a remediation certification is acceptable under ISRA, how will the RFS be determined? How do requirements for and by reason of RAPs affect the deal? 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?

◊ 1.4.3. What is the schedule for performance? Pre-closing? For closing? How long must everyone wait to close? Post-closing? How long must everyone wait for all work to be finished? For all contamination to be remediated? For RAPs to issue? Post-RAO? What happens if something takes too long? What if remediation takes decades (before or after closing)? What transactions and changes are likely to occur as time passes? What if standards change? What if there is a new discharge? How should they be addressed? Is there an escape clause, deadline or failsafe date? Must change in use, construction or demolition wait? Be coordinated? For how long? What if schedules and estimates prove wrong because the assumptions, facts or rules change?

◊ 1.4.4. 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?

◊ 1.4.5. Can an LSRP be used in any way for Buyer due diligence? What happens if due diligence finds something? Does Buyer tell Seller? Does Seller report? Is an LSRP retained? *{2018}* Can a Buyer hire its own LSRP to watch Seller's LSRP? How does that work? Can the Buyer's LSRP sample after closing to test the accuracy of Seller's LSRP's work?

◊ 1.4.6. Is confidentiality relevant? Attorney-client privilege? Joint-defense? Conflicts? Who represents whom? If the parties agree to maintain the results of due diligence confidential, will they? What if someone breaches? What if the consultant breaches? What if someone is physically hurt by undisclosed conditions? *{2018}* What if an initial sale is terminated, the Seller has no information from the original buyer's consultant, and the new buyer performs little to no due diligence? But what if there was really a problem found by the first? Is anyone liable for concealing the facts?

◊ *{2018}* Note: There are rumors that NJDEP is offended by the practice of Seller's allowing Buyer due diligence, without use of an LSRP, and subject to the obligation to maintain results confidential, particularly if SI sampling is conducted and finds something (not reported by the Buyer's consultant because it is not an LSRP, and not reported by the Buyer because it is not then an owner, operator or discharger, and not reported by the Seller because it does not know. Supposedly NJDEP believes everyone should have a duty to report. If this change is made, what do transactional counselors tell Sellers to do? Not sell?

◊ 1.4.7. What are the standards of performance for remediation required as part of the transaction? Unrestricted? What is the quality of work to be done? Can Controls be used? Will a deed notice be allowed? Who has what responsibilities if and after a deed notice is used and an RAP is issued? What if NJDEP adds requirements later (as happened as to deed notices when SRRA took effect)? What are the rules for remediations to restricted standards? What warranties for the work are being provided? By whom? To whom? For how long? Are there disclaimers? Who will be the LSRP? For whom does the LSRP work? Who can fire and hire LSRPs? Can anyone

else hire an LSRP? 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?

◊ 1.4.8. What are the assurances, guaranties, indemnifications and collateral being provided under the contracts? Does insurance play a role? What form of RFS is acceptable? Will a self-guaranty suffice? Is the LSRP's view and the RFS alone enough protection for the parties? Does a self-guaranty suffice?

◊ 1.4.9. What are the contingencies affecting the contract expectations and results (closing schedule? price? Guaranties? Performance?)? What happens if contingencies are not met? *{2018}* Might Seller still have to continue with remediation? When might a Seller not?

◊ 1.4.10. When is there a breach of remedial or environmental promises? Is there a right to cure? What happens on breach? Does every claim for breach of environmental promises survive closing (and for how long)? What recourse do the parties have against each other and third parties? What are the limits of liability? Is anyone being released? Of anything? 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 any 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 a change in zoning? Or a new redevelopment plan? Or Buyer's new tenant has a discharge and denies liability? What if there is new construction? What can Seller's LSRP do if Seller needs an RAO to shift long-term responsibilities?

◊ 1.4.11. 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? Do they ever have to be increased? How and when? What if they are inadequate to their purpose? Does anyone have liability for erroneous projections (the LSRP? Counsel?) if the escrow runs out before completion?

◊ 1.4.12. 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 these changes? What if they are totally unforeseen (a new emerging contaminant, for example)?

◊ 1.4.13. Is an RAO or NFA Letter worth the paper it is printed on? Ever? To everyone? 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?

◊ 1.4.14. Is innocent purchaser status worth anything? More or less than an RAO? Ever? Does the client waive the protection, if any, of this status by proceeding without strict compliance (for example, to save time or money, or to get a "good deal")? *{2018}* If the client qualifies, does the client understand that it may have a defense to liability but, when the defense is needed, it still has a contaminated (and therefore at least a less valuable, and at worse an unmarketable and maybe unusable, site? And even with a defense can the client ignore the contamination? Does the client understand all it needs to understand? How does the advisor prove that the client understood?

◊ 1.4.15. Is there a specific dispute resolution process? Or do the courts suffice? Can an LSRP be bound to an arbitration or mediation clause on issues within the LSRP's responsibility as a licensed professional? Can NJDEP? *{2018}* What might it mean if the LSRP and others agree to mandatory binding arbitration, and the LSRP becomes bound to a decision he or she, or worse NJDEP, do not accept?

◊ 1.4.16. 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? On neighbors or visitors? 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? Do the agreements address any of these contingencies?

● **1.5 New Issues for advisors.** Still, some new issues continue to exist under SRRA that many counselors must consider:

◊ 1.5.1. When and where can the LSRP's right and obligation to provide independent professional judgment make a difference in remediation today? Are LSRPs ever <u>required</u> to exercise professional judgment so as to go beyond (to require more than) the "black letter' requirements printed in statutes, rules and guidance? What exactly is such professional judgment? Will everyone at NJDEP accept an LSRP's good faith professional judgment? Do differences in professional judgment mean someone is or was wrong? And what is Professional Judgment? See this Article at § 3.4.18.

◊ 1.5.2. Can a purchaser, tenant or lender ever (before or after closing) use a consultant who is an LSRP for any remedial-like activity without that person filing the retention form with NJDEP? For anything? *{2018}* For sampling? What are the limits on consultants fulfilling LSRP and non-LSRP roles? What can a non-LSRP do for a client with remedial concerns without violating SRRA? Take samples? Inspect controls? Advise on legal or technical requirements? Review other LSRP work? Work on a landfill? *{2018}* Take indoor air samples? Work on a site for which the owner has or asserts an innocent purchaser defense? Work on a construction project likely to disturb historic fill? *{2018}* Work on a site with DAP or an offsite upgradient source?

◊ 1.5.3. *{2018}* How accurate will remedial cost estimates filed with NJDEP prove to be? Should there be greater discipline in how they are prepared (particularly for remediation certifications, remedial action work plans under ISRA and remedial action permit financial assurances)? Does NJDEP review and acceptance (or approval) matter? What happens if they are wrong? Can an LSRP be liable for a bad estimate? To whom? Should estimates to clients for budgets vary from filings with the NJDEP for FA or RFS? What if they do? Is NJDEP guidance on the issue adequate?

◊ 1.5.4. 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 NJDEP's status on Data Miner? Buyer's approval?)? Is there any safe period?

◊ 1.5.5. 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 NJDEP or the Board? Arbitration? Can an arbitrator really force the LSRP retained for remediation to act differently than he or she proposes?

◊ 1.5.6. Can the client trust the consultant and LSRP? Can the lawyer? Can any discussions between them occur confidentially? Which? How? *{2018}* Do we yet know NJDEP's view on LSRP treatment of client and attorney communications as confidential? Can we predict the view of the Courts? *{2018}* If some communications occur that can't be preserved as confidential then what can be done at the time or in advance of confrontation, if anything, to avoid loss of confidentiality and privilege? Will contract terms and conditions matter? Will labeling of materials matter? Will filing of different communications (such as a lawyer's e-mails and mark-ups) in different files help? 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 a retention form 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 NJDEP based on what the informally acting LSRP says, finds or does? Is that LSRP to be trusted? Does the Board have jurisdiction on such an LSRP when so acting? What happens if NJDEP or the Board demands to see a file? A draft? A lawyer's e-mail? What if NJDEP or the Board seek access to all files of the consulting firm employing the LSRP, even those unrelated to the remediation (such as those in which the LSRP, acting as an expert or consultant, assisted his or her client respond to a subpoena, or prepare for, pursue or defend a litigation)?

◊ 1.5.7. Can the consultant and LSRP trust the client and counsel? Can any discussions between them occur confidentially? Which? How? If some can't, then 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 or consultant need its own counsel, confidentiality and advice? Who pays for such counsel? What happens if there is a Board or NJDEP complaint against the LSRP in which the client has a keen interest? *{2018}* Is the LSRP obligated to tell the PRCR and its counsel? Should the Board or NJDEP treat the client as a necessary party? Ever? Does the client have a right to intervene? Can the client dictate how the LSRP responds? What if the LSRP, PRCR or counsel disagree on what should be done in that matter? What if NJDEP or the Board threatens or asserts a complaint against the LSRP? Can and will client and LSRP work together? Can and will client and LSRP rely on each other and each other's counsel? Whose interests come first? If there are seeming conflicts between different statutory and regulatory provisions and duties, what governs under SRRA? Who decides- the Board? What controls- the statute or rules? Can the client and client's counsel instruct the LSRP and LSRP counsel on how to proceed, and obligate them to so proceed? What if the Contract so provides? If there is conflict can there be liability? Of whom to whom? Is a joint defense agreement appropriate, viable, likely to succeed in protecting joint efforts?

◊ 1.5.8. 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? Can an LSRP ignore the law? Who decides the viability of a client's or adversary's claimed defense: NJDEP? The LSRP? LSRP Counsel? PRCR? PRCR Counsel? The Board? A Court? When and how?

◊ 1.5.9. *{2018}* If an LSRP cautions a client, per training by NJDEP, that all potential or suspected discharges must be reported, and thereafter advises the client to retain an LSRP, investigate and remediate, so the LSRP will issue an RAO, but is advised by the client's lawyer that the advice is flawed, how should the LSRP proceed? Does the law matter, or only what NJDEP says is the law?

◊ 1.5.10. What does the LSRP do if the client refuses to follow his or her recommendations? What does the client do if the LSRP refuses to follow his or her instructions? *{2018}* Can a client, and the client's lawyer, be sanctioned by the Board if the client dismissed the LSRP for failing to follow client instructions on a matter in debate between client, LSRPO and the lawyers? How does the Board exercise jurisdiction over another separate licensed professional? How does the Board decide the law?

◊ 1.5.11. What should the contracts between LSRPs, consultants and their clients say differently than they did before SRRA? *{2018}* How should the contracts for remediation of NJ sites between LSRPs, consultants and their clients differ from similar contracts between client and the same consulting firm for a site not in NJ and therefore not subject to SRRA? 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 NJDEP or a third party asserts that the LSRP is wrong?)? Does the LSRP get indemnified or paid for his or her time, that of his lawyer, and any corrective work, if NJDEP audits the LSRP? If a Board complaint is filed? Can or should a client indemnify or defend 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?

◊ 1.5.12. By whom can't an LSRP be engaged as LSRP of record (a concept not embraced by NJDEP, and maybe the Board, but clearly useful to legal analysis)? An LSRP can work for another person or entity, whether affiliated with its employer or client. An LSRP can be paid for services by another, even the client he or she represents before NJDEP. This relationship is not prohibited; in fact it is often necessary. But an LSRP cannot be retained for a PRCR who is its employer and cannot be retained by certain unspecified others to whom he or she is related. But exactly what relationships are prohibited to LSRPs? NJDEP and the Board have elected not to explicate to date.

○ *{2018}* Consider the Board's recent guidance to those hiring LSRPs. See discussion at this Article § 2.3. It is fascinating as much for what was not said, as what was.

○ *{2018}* Is there a clear ethical breach by an LSRP serving for a company as PRCR in any way affiliated with the LSRP's employer? Doe the degree of affiliation matter? Stated differently, what exactly is meant by "affiliation."

○ *{2018}* What about bonus incentives or fixed fee remedial contracts?

◊ 1.5.13. Who doesn't need an LSRP to "remediate" in any respect in New Jersey? The Army? USEPA? NJDEP? Innocent Parties? Non-liable parties? Municipalities/ Lenders/Foreclosing parties? Bankrupt entities? How do you know? *{2018}* Where is the guidance?

◊ 1.5.14. Who can rely on what? Can the client, consultant and LSRP benefit from prior NJDEP decisions? Prior consultant work product? Other LSRP work? How should the LSRP review or supervise a client's remedial efforts? If conducted by or at his or her own firm? If conducted by a prior LSRP or firm? If conducted by or at another consulting firm? Of a contractor to his or her firm or client or prior LSRP of firm? Of the client itself? Can one LSRP automatically rely on the work of another? Do contract terms matter? If a new LSRP relies on a prior LSRP without express permission, is there liability? 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)?

◊ 1.5.15. *{2018}* How should an LSRP document his or her efforts and decisions? What documentation, aside from NJDEP forms and reports, is required? Absent proper documentation, what are the consequences to an LSRP and his or her client? Inadequate proofs? A loss before NJDEP? A loss in Court? Or can the LSRP explain even without documents?

◊ 1.5.16. Can an LSRP be engaged before a site has: (i) an ISRA trigger; (ii) a known or suspected discharge; or (iii) a PI # or other case number in NJDEP's records and website? How? Need an LSRP be engaged for conduct of a site inspection for a preliminary assessment, or other preliminary assessment activities, or to

propose or conduct a site investigation, for such a site if none of these conditions exist? Note: recent changes in forms to be used for online filings suggest that NJDEP has taken steps to address these concerns.

◊ 1.5.17. How will future USEPA and NJDEP initiatives for historic and multi-source conditions in key rivers of the State (Hackensack; Berry's Creek; Passaic; Raritan; Delaware) affect past compliance with SRRA, then pending SRRA cases, and sites not then undergoing remediation? Will RPs accused of liability, whether by regulators or others (third party plaintiffs) be obligated to then hire LSRPs to assess whether in fact they have discharged into those water bodies? Will the mere accusation create a suspicion of liability such that under SRRA an LSRP must be engaged? How should an LSRP or counsel advising a potential RP now, currently address these issues? Advise his or her client? *{2018}* If they fail to hire an LSRP are they in breach of SRRA? If they fail to fully remediate by a mandatory deadline, are they in breach of SRRA? Under Direct Oversight?

◊ 1.5.18. Can there be a change in the LSRP under the deal papers? Under the client-consultant contract? Under NJDEP or Board rules? 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?

○ *{2018}* Can or do the contracts require that after a sale there must be a change in LSRPs? At whose election? At what risk?

○ *{2018}* Can or do the contracts require that after a sale there cannot be a change in LSRPs? That either the buyer or seller is counting on the same LSRP continuing? Forever? In such cases, for whom does the LSRP work? Are there potential contract, professional and ethical issues? Is there a "conflict of interest? What happens if there is in fact a change in the LSRP (whether caused by the LSRP or the LSRP's formal client?) If Seller is remediating, even if at its own pace, can the Buyer or Buyer's lender, or Buyer's tenant, hire a second LSRP for the same site and issues? How is the site to be addressed if two separate LSRPs are hired?

◊ 1.5.19. What happens if the Board audits an LSRP and brings a complaint? Can the LSRP keep working as LSRP for his client? Can others associate with him or her pending the complaint? Until….? Does the complaint need to be disclosed to any client? Which? Remember: initially the complaint process before the Board is confidential.

◊ 1.5.20. 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 NJDEP set the product of that LSRP aside? Is someone liable for unfair consequences? Who? Is the LSRP, the Board or NJDEP liable for failing to disclose the risk to the retaining client caught by the delay? Can a replacement LSRP safely rely on the prior LSRP's work? Who pays?

◊ 1.5.21. 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? *{2018}* Can different LSRPs be used for different AOCs? If multiple RAOs are issued, must there be an entire site RAO in any cases? Who issues that RAO? What if the LSRP for the entire site RAO does not agree with one or more of the AOC specific RAOs?

◊ 1.5.22. 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?])? What if NJDEP issues new rules or guidance that affect prior work (New sampling frequencies or methods? New remedial guidance, such as kinds and minimum characteristics of caps or covers?)? Is the PRCR responsible for the biennial certification the entity trapped by any required corrections due to new requirements? Is the original PRCR off the hook? What if there was a release?

◊ 1.5.23. However the parties and advisors deal with SRRA 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? *{2018}* How best to advise a client who wants to be done? Should he, she or it file in bankruptcy? Dissolve? Die? Move out-of-state? Move out-of-country? Never return to NJ or the USA?

◊ 1.5.24. How do the parties integrate their relative liabilities under multiple successive simple or complex transactions or events, perhaps with separate NJDEP cases and LSRPs? How will NJDEP or the Board treat such matters? Does the party with the most conservative (the one whose professional judgment is least flexible or imaginative or willing to deviate or vary from black-letter requirements) LSRP win or lose? Is the standard the equivalent of the result of a game of "musical chairs?" (The one standing when the tune stops is "it?")

◊ 1.5.25. How should NJDEP, LSRP, Counsel and PRCR interact? Sometimes NJDEP communicates only with the LSRP. Some individuals at NJDEP may act differently than others. Other times only

with the PRCR. How do the parties ensure that communications are promptly shared and all are protected against delays by any?

◊ 1.5.26. *{2018}* How should multiple LSRPs working on the same site interact? Can their clients prohibit or limit their interaction? In any case? To any extent? Totally? Can the contract so provide? Can an LSRP responsible for issuing an entire site RAO ever agree to such a clause? What if his or her firm did?

◊ 1.5.27. *{2018}* What if site use changes or is planned to change? Does it matter by whom? (Buyer? Tenant? The Municipality?) What if there is now or planned to be a school or day care center? What if there are going to be expansions? New equipment? New Processes? What if zoning changes? Can the LSRP prevent all changes?

◊ 1.5.28. How often do changes in receptors need to be assessed?

◊ 1.5.29. What is the real risk of NJDEP or Board review and audit? When does that risk as a practical matter go away? How can the risk be managed? Explained?

◊ 1.5.30. *{2018}*Have changes due to President Trump's policies and approach affected New Jersey, SRRA, PRCRs, NJDEP and LSRPs as yet? What about future changes? Consider, how will future USEPA decisions affect NJ and LSRPs?

◊ 1.5.31. *{2018}* How will Governor Murphy's administration and new NJDEP Commissioner (reportedly to be Catherine McCabe, currently of USEPA; see https://en.wikipedia.org/wiki/Catherine_McCabe) affect SRRA and LSRPs? Will NJDEP be stronger, more demanding or more skeptical then and thereafter? Will respect for, and deference to, LSRPs decline from before? Will there be more NJDEP enforcement? Will direct oversight be more vigorously implemented? Will there be a SRRA 2.0? Will funding for NJDEP and the Board increase? Will NJDEP capture what USEPA abandons? Commissioner-Designee McCabe's biography is heavily enforcement oriented, having served as assistant attorney general in New York, followed by the U.S. Department of Justice, attaining the position of Deputy Chief of the Environmental Enforcement Section in 2001, but moving to USEPA in 2005, eventually serving as Acting EPA Administrator at EPA headquarters and Region 2 Acting Regional Administrator.

● **1.6 This Article.** This 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 2018 version of this article, and those questions, from prior versions to focus somewhat more on more 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 or engender debate or critique. 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. On many questions or issues we have ideas, but on others our thoughts are quite preliminary and untested. Finding answers may be difficult or impossible: appreciating the issues and questions and discussing them, as relevant, yourself, and with the client and others, may be critical.

Feel free to e-mail us with comments, concerns, observations, objections or corrections: we want to improve next year's version.

● **1.7 Warning.** Use this outline with caution; it is not legal advice to anyone. Most questions are not answered. Answers may vary with facts and circumstances (and time). Clients differ, sites differ, NJDEP case managers differ and attorneys differ, as do LSRPs, their firms and their support. Opinions expressed herein are not certain, may be wrong, and may change with varying facts and circumstances (and the authors reserve the right to take different positions on behalf of our clients on different matters). Some of our thoughts are presented in order to provoke thought and responses, even if we may not share in the likely reactions of all or many. In many cases there are few certain "right ways" determinable in advance of action or dispute, although eventually Judges, juries, NJDEP 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 site and client strategy after careful reflection and discussion with the client. While there may be risks in many alternatives, a client, properly advised, may choose to accept the risks and uncertainties of some approaches, even those opposed by NJDEP. Some review, criticism and guidance from others may be important. Professionalism requires many factors be recognized, considered and addressed with clients; it does not require that everything be identified, made

certain and fixed. Clients need to know their choices and risks: informed consent may be critical. Each reader needs to account for his or her client's, and own, risk tolerance. We regret that even now there is significant uncertainty. Some error is likely; perfection impossible. Risk and change are certain.

LSRP's are understandably nervous they will be sued for being wrong or different. But professionals are not automatically liable for error, differences or mistakes. It is not malpractice to be wrong. Doctor's lose patients. Lawyer's advice proves wrong. LSRP's will make mistakes, as NJDEP did and does, as Judges and lawyers do, often determined only in hindsight with the benefit of the passage of time and then more current information. As to Lawyers, "whether a trial lawyer has committed an act of legal malpractice depends not on the outcome of the proceeding, but on whether the lawyer adhered to the appropriate standard of care in representing the client." Morlino v. Medical Ctr., 152 N.J. 563 (1998). LSRPs should be similarly judged, in our view. So, be professional. Exercise and document professional judgment. Use due care. But do not let fear dictate your approach. The risk of a claim or suit is one of the costs of being a licensed professional in a complex field.

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; *{2018}* we would argue that the rules should be different for innocent purchasers or foreclosing banks or those benefitting from RAOs or suffering DAP, for example) but NJDEP'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….") Please note: even though SRRA's definition of "person" includes the State, NJDEP evidently concludes that it is not obligated to use LSRPs for its remedial projects. This view may prove erroneous, but if correct adds to the logic of other implied exceptions from SRRA obligations.

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 NJDEP's prior no further action letter or a prior LSRP's RAO in this situation? Is or is not this situation likely to be eligible for a technical impracticability determination? Is an RIPW feasible despite the known existence of ongoing remedial issues with the prior party's efforts? 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 we 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 NJDEP's eyes) as well as a good result (in the PRCR's eyes), both long-term and short-term; a bad job with a good short-term 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 NJDEP 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. An initial majority judicial view can later become the minority view. 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 NJDEP and Board audits and reviews provide evidence of NJDEP 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 NJDEP), based on that evidence. It does appear that many LSRPs are requiring more work on some issues today than was thought likely in 2009. NJDEP is appreciative of this; PRCRs less so.

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 NJDEP 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 any new firm or new LSRP (third parties) to use and rely on their work? Is it ethical or professional to do so? Is it protective of health, safety and the environment? Is it respectful of the needs of the client? 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 the effect of contract provisions is that recourse against the prior firm and LSRP is limited or nonexistent? Is prior consent for reliance required? At what price? As another example, some PRCRs will experience that some of 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 readily follow the LSRP elsewhere? What if there is a conflict (the new firm has an LSRP acting in an adversarial manner to the client)? 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)? Is it ethical or professional to do so? 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. Failure to do so may be easier and cheaper in the first instance, but problematic later.

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 (including investigative, but perhaps not for pre-purchase due diligence) 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, such as professional engineers working on landfills, 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 and choice given the Board's extensive powers to regulate and license LSRPs and need and opportunity to geode and encourage its nascent professional field). At present, given the limited number of LSRPs, and the nervousness of Seller counsel in allowing use of LSRPs for buyer due diligence, and even of some 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. Except for the smallest, it would be a rare firm, in our view, that had all LSRPs and no non-LSRPs. But can non-LSRPs 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). At the same time, 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. *{2018}* And then there is NJDEP and its staff and contractors. Can the Board investigate NJDEP, its personnel and its contractors for not using LSRPs in its investigations and remediations? For NJDEP actions or practices impeding the performance by LSRPs? For failing to remediate State properties prior to expiration of deadlines?

Please recognize that some LSRPs, if you retain LSRPs then perhaps one of yours, are likely eventually to get in trouble with NJDEP and the Board, if not on your matters then on others, as has been the case with other licensed professionals under their oversight entity/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 and his or her counsel 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 NJDEP as remediation case managers; but they are not the NJDEP. They cannot do all that NJDEP 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 NJDEP but can and should proceed without prior NJDEP approval in most cases (perhaps not in cases of direct oversight). Contact with NJDEP will often still be needed or advisable (for example, to explore uncertainties or to reduce risks of enforcement), if NJDEP agrees to assist (which seems to be occurring less often [or at least less enthusiastically] as NJDEP resources become less available and NJDEPs "compliance assistance mode" of 2009-2012 fades away), most likely by technical consultation. As NJDEP still has the right to review and audit LSRP submissions, there will always be some risk to PRCRs and LSRPs that on review NJDEP may think differently, and/or require more, than the LSRP did: as a result some fear overly conservative decision making by LSRPs. Indeed, NJDEP threats against LSRPs have not been uncommon, and the past practice of NJDEP filing complaints against LSRPs to the Board seems aimed as much to other LSRPs as to the LSRP targeted by the complaint; NJDEP has not been particularly successful in this approach and there have been periodic reports that NJDEP is evaluating and pursuing other methods for dealing with its unhappiness with LSRPs and the Board. Will Governor Murphy's administration search for and find a more rigorous enforcement mechanism? Yet as experience accrues and LSRPs gain confidence, particularly in view of the stringent standards for NJDEP reversal of LSRPs' decision, many LSRPs have proven more sensible than expected, and in some cases less demanding than NJDEP at its worse, although others have experienced LSRPs revisiting both NJDEP prior decisions and even their own firm's prior decisions "to be sure." Experience supports the view that most LSRPs are faithful to the goal of being as protective as NJDEP at its best while applying professional judgment to improve efficiency. We would argue that the transfer of oversight from NJDEP to LSRPs has not resulted in less protection. Indeed, some circumstances have occurred suggesting that LSRPs may choose to be, or even be required to be, be more protective and conservative than NJDEP has been or might be, particularly given the recognition that NJDEP may have limited resources and conflicting priorities, whereas, at least hypothetically, an LSRP and his or her PRCR can apply unlimited resources. Nonetheless, we know some at NJDEP feel betrayed by the legislative empowerment of private consultants to make key decisions in lieu of NJDEP.

The relationship of an LSRP with his or her client can not be the same as the pre-SRRA relationship of a consultant and its client. Indeed, the relationship between LSRP and client today may differ from the relationship of client and others within the same consulting firm as the LSRP. 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 to his or her client and legal counsel, and preservation of confidentiality can 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 NJDEP 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). As noted above, in December 2017 the Board announced a guidance document entitled "LSRP Notifications to the Site Remediation Professional Licensing Board, the Person Responsible for Conducing the Remediation, and the New Jersey Department of Environmental Protection" collecting in one place all of the notifications that LSRPs are responsible for making. See http://www.nj.gov/lsrpboard/board/lsrp_notifications_guidance.pdf.

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 NJDEP 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 NJDEP and others, especially as it appears NJDEP 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 NJDEP'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 (leaving the PRCR without professional guidance, expertise and familiarity with the matter, and delaying completion of the remediation), and should be discouraged, in some cases, it may be warranted from any or all of the perspectives of NJDEP, the public interest and the LSRP him or herself. Faced with NJDEP complaints against LSRPs involving some such issues, the Board has not accepted NJDEP's view, at least as yet.

Environmental law is arguably harsh, generally imposing strict and joint and several liability scheme for most Persons connected to a site or discharge. There are few (not none) defenses to liability available for such Persons. Such a scheme can work unfairness in many cases in the effort to avoid foisting the costs of remediation on public taxpayers in favor of those in any way connected to ("responsible for") the site or discharge. 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, in comparison, may be the true responsible parties, at least if they exist and have resources to satisfy the obligation and when the costs of remediation can be financed and delay, and costs and risks of pursuing those responsible tolerated.

At least if the highest duty of an LSRP is to be met, sometimes arguably the LSRP of record must encourage the client to take certain steps to protect the public despite legal arguments (for example, installation of a mitigation system under protest despite defenses, or covering soils with contaminants in excess of standards to minimize actual exposure), and if the client will not, and people are actually at risk, the LSRP must consider how to meet his or her duties (assuming an LSRP is retained). 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 NJDEP'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 either or both retains 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 to the various participants potentially unclear (at least if the client is potentially some Person different that the Person hiring the LSRP- as, we think, happens). 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, NJDEP, USEPA and more. Does SRRA permit an LSRP to contractually disclaim all duties to all but the Person (its client) who contracts with him or her? Some consultant's and LSRP's contracts purport to do so, prohibiting reliance by third parties, potentially including successor LSRPs and NJDEP, on their

work product; better lawyers will ask that this be revised when appropriate. But are such provisions, left unchanged, reasonable or enforceable under SRRA? If asked, will the Board find such contracts to be reasonable and appropriate? Ethical? Professional? Or might such disclaimers be invalid or a breach of LSRP duties under SRRA, express or implied (because they do not protect the client or public health and the environment, and may threaten it)? 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, or before the Board, or both. 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, NJDEP, the public and potentially future LSRPs (who may need to rely on prior LSRP work-product, particularly if not reproducible). 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, NJDEP 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 NJDEP 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 many experienced environmental 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, some 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. Also, LSRPs may misadvise clients about the client's status as PRCR and obligation to retain an LSRP and initiate remediation, sometimes with potentially disastrous effects (e.g., arguable waiver of an innocent purchaser defense). Some limit must apply to the right of LSRPs to interpret client legal obligations (as they cannot practice law, not being licensed to do so). *{2018}* An LSRP may even advise a client that it has a duty to either or both report and remediate an event involving hazardous substances or wastes when it may not (and thereby create a point of conflict with NJDEP for the client, perhaps unnecessarily). And we think it relevant to note that LSRPs, NJDEP 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, at least with covenant not to sue, and a prior RAO, has or have legal significance and 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, and the law is determinative, not the opinion of NJDEP. *{2018}* Consider, for example, that an escape of hazardous substances confined to interior space of a building and not entering the lands or waters of the State may not be reportable or remediable. Yet NJDEP personnel might not so confirm and might suggest or require that an LSRP and PRCR report such as a discharge or potential discharge, immediately creating a pressure in favor of an LSRP retention and investigation ending in an RAO, even though not required by law. Nonetheless LSRPs must do their job, which necessarily is heavily entangled with complex statutory and regulatory requirements and NJDEP interpretations of same, which may or may not be right, but likely cannot be readily ignored by LSRPs, at least without the care and assistance of counsel. 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 client's counsel, or their own, and any protections that consultation may provide, particularly when circumstances require fast action, yet have to be determined, which determinations most likely await judicial reviews and decisions. And how and when will such occur? As part of NJDEP and Board decisions? Perhaps. As part of NJDEP enforcement against PRCRs? Perhaps? As part of PRCRs' suits against any or all of NJDEP, 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?

LSRPs are empowered to use their professional judgment in a number of circumstances. Arguments can be made that they are always required to do so. Increasingly, LSRPs and NJDEP are engaged in discussions about if

and when an LSRP is empowered and authorized to act based on his or her professional judgment in a way not necessarily fully blessed by or comfortable to all concerned at NJDEP. See discussion at this Article § 3.4.18.

● **2.3 NJDEP/Board Role for LSRPs.** NJDEP 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 NJDEP among the highest in priority in the Remedial Priority Scoring System ("RPS"), anticipated to be available eventually [see http://www.state.nj.us/dep/srp/srra/rps/]), but now available only as the information available through DataMiner (at https://www13.state.nj.us/DataMiner) as the Known Contaminated Site List ("KCSL"), without indication of NJDEP's priorities. 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. NJDEP has three years (in certain instances, likely more) to audit a final LSRP response action outcome ("RAO") for a site. NJDEP shall invalidate a RAO if it is not protective; arguably if an RAO is protective it should not be invalidated (but NJDEP has a more demanding view of what is protective than many others). Under Executive Order #140, NJDEP shall post on an internet site all audit findings. Is this yet occurring? Not that we know.

But as noted above, NJDEP announced in its 9/10/2014 listserv blast e-mail that NJDEP 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, NJDEP feels, many intermediate issues and questions should be resolved and thus, it hopes, 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, and apparently NJDEP's current recommendation, particularly on risky or expensive or practically irrevocable choices, is to seek advance technical consultation with NJDEP and document the inquiry and the result, with at least some morally binding effect of future NJDEP reviewers in some period thereafter. The reaction of others is to be more conservative than before. Few feel better about this change and only experience will show if NJDEP efficiency comes at increased risk and cost to PRCRs and LSRPs. And the risks to third parties (such as lenders, buyers, developers, new residents of buildings built on sites ruled clean and children attending newly licensed child care facilities) may prove in hindsight unacceptable. *{2018}* We note that we are prepared to argue that NJDEP should not be allowed to benefit, and LSRPs and PRCRs should not be allowed to suffer, by reason of NJDEP's self-made inability to review and respond to filings earlier than now occur. In our view NJDEP cannot have it both ways: it cannot say it has inadequate time, personnel and resources to act quicker, but should have the right to do so later when the cost, consequences and damage from its delayed review may be more deleterious.

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 or defendant in court, NJDEP'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 NJDEP itself, particularly to the new Governor's administration and to the new Commissioner. And it is right to fear the likely uproar arising from the first major error or deficiency hereafter identified as brought about by errors, omissions or outright malfeasance by one or more LSRPs. For the moment, NJDEP 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 than others. Whether NJDEP'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, remains to be seen.

Notably, NJDEP does not perceive itself obligated to use LSRPs for its own remediations, likely relying on an implied statutory exception (and arguably an express regulatory exemption it adopted for its own protection, likely of little precedential effect if the issue is ever raised to a court) against such obligation for Persons not otherwise liable under the Spill Act. Yet in our view no such exception can be implied. There is no express exception in SRRA and the State is expressly included within the definition of "persons" subject to SRRA. The State's failure to recognize and address the issue is, in our mind, a serious impediment to any future effort of the State to accuse others of conducting remediation outside of SRRA: if the State can do so because it is not a discharger, for example, so can other non-dischargers.

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 Board regulations provide limited insight. Published decisions on complaints enable readers to develop some insights, but the notable delay in resolving several older complaints suggests the Board has faced some more difficult issues and cases, perhaps with less confidence as to how to proceed, but with such being handled with commendable care and caution. 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, relying on the advice of NJDEP staff and advisors from the Attorney General's office, watch how the behaviors and practices of LSRPs, PRCRs and NJDEP mature and evolve. Perhaps in an effort to be more proactive, as we suggest, hereafter the Board will consider adopting or providing:

◊ 2.3.1. Meaningful guidance on a wide range of issues faced by LSRPs (for example addressing relationships with their clients, with other professions [such as lawyers], with neighbors and with NJDEP), 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.

◊ 2.3.2. 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.

◊ 2.3.3. Meaningful guidance on a wide range of issues faced by non-LSRPs (for example, what can they do and what can't they?). When must an LSRP be used? When can an LSRP not be used if there is remediation?

◊ 2.3.4. Clarifications on ambiguities and contradictions, if and as created and maintained by NJDEP or the legislature, or evolving practices. For example, what affiliations or relationships between LSRPs and others are prohibited or, at least, to be undertaken with higher care? Is the test for affiliations the same as, or different than, that used in securities' law contexts (i.e., those controlling, controlled by, or under common control with another are treated as being affiliated with that other).

◊ 2.3.5. A clearinghouse for recording and publication of relevant LSRP or NJDEP decisions and precedents (particularly if NJDEP itself declines to do so). The ability and attempt of and by a professional association to do so is not a suitable substitute because the contributors to such a professional association database likely can only be the LSRPs themselves, who may be under a duty of confidentiality, whereas the Board and NJDEP are under duties of disclosure and transparency in many cases.

◊ 2.3.6. Advice when LSRPs, PRCRs, NJDEP 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 NJDEP 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 by NJDEP as a tool for ISRA clarification, to the detriment of NJDEP and the public).

◊ 2.3.7. 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.

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

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

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

○ Note, in October 2016 the Board issued a "document" entitled "A New Jersey Property Owner's Guide to Hiring Licensed Site Remediation Professionals" intended to assist any responsible party, but especially home owners and small business owners who are responsible for conducting remediation, when hiring a LSRP, including important considerations for hiring an LSRP. See www.nj.gov/lsrpboard/board/licensure/lsrp_hiring_guide.pdf. LSRPs and their firms should review this document and consider whether the document suggests that certain changes to their contracts, and their relationships with clients, are appropriate or required (for example, as to project budgets). While the Board did not purport to impose an obligation on LSRPs to themselves address budget and contract issues as "suggested" in this document, it can be anticipated that a client, perceiving wrong in some alleged mistreatment by its LSRP, may so assert to the Board and in court on the basis of a deviation from the Board's guidance. In this regard consider: why did the Board feel compelled to issue such detailed guidance to those it does not regulate (clients) while at the same time declining to

provide guidance to those it does (LSRPs) on a wide range of topics of concern to the Board, LSRPs, NJDEP, clients and the public?

- This guidance included the following advice: "The contract with your LSRP should include all of the following: Clear remediation objectives. A provision to address an audit by the Department that determines the RAO is not protective. Specific actions that will be taken to investigate and remediate the contamination. Proposed schedule for completing work. A budget, specifying: 1. Fixed costs, either as a lump sum or as unit prices for each item; and 2. Items to be charged (e.g., laboratory work, equipment and materials, labor hours). How changes in the project will be handled. Specific dates or a periodic schedule for when the LSRP will provide a status update. Specific deliverables and the dates they are due, including the final deliverable or end point. All applicable remediation timeframes and how you will be informed of your progress toward them, if those timeframes are unlikely to be met, and the consequence of missing them. Identification of the working documents and/or final reports to be provided by the LSRP should they, or you, decide to terminate the contract prior to the issuance of an RAO."

- Do your contracts comply with these views? Should they? Might it be advisable to ensure that you address these topics, as relevant, with future clients? Will your failure to do so one day be treated as unethical or unprofessional.

- If you represent a client seeking the services of an LSRP, can you ignore these suggestions?

- What did the Board miss? Insurance? Disclaimers? Indemnities? Warranties? Reliance? Assignment? Recourse? ADR or Arbitration? Rights to go to the Board? Use of Fixed Fee Contracts? Use of incentives for speedy or low cost results? Conflicts between the LSRP, its firm and the client?

◊ 2.3.11. Dispute resolution guidance or procedures when LSRPs differ with each other or NJDEP. Consider, for example, whether the Board could adopt a rule or guidance document allowing for arbitration of various issues, which rule could allow a safe harbor against enforcement by the Board, at least. And if it can, should it?

Unfortunately, there is little evidence that the Board yet has much interest, or perhaps in fairness the time and resources, to undertake many, if any, of the above tasks, at least in the short term, or even that it shares our priorities. But the Board's newly proposed regulations, largely repetitive of SRRA, do endeavor to provide limited guidance on a few known issues. See this Article § 3.3.4(C) below.

● **2.4 NJDEP/Board Role for PRCRs.** PRCRs are affected by how their LSRPs fare in audits, reviews and resolutions of formal complaints to the Board. Other Persons will also be affected. If an LSRP is investigated by the Board then by statute all RAOs of that LSRP can be examined by NJDEP, arguably even after expiration of the 3 year limit (at least in egregious circumstances; we would argue that impliedly review after the three year period should require a higher level of protection against NJDEP action to the LSRP and his or her clients than an earlier review). N.J.S.A. 58:10C-2. *{2018}* As best we are aware, no such post-three year period review by NJDEP has been undertaken. But other SRRA provisions may prove more important to PRCRs, the public and others in the regulated community. For example, under SRRA NJDEP was given the right to set presumptive remedies (and has done so, 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 NJDEP), NJDEP has the power (and some would argue the obligation) 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 NJDEP specifies for the remediation, and requiring the PRCR to post cash to secure remediation. See this Article § 3.8.2. Under SRRA, LSRPs may not have the final word: PRCRs are subject to added review of NJDEP, both for decisions made for and remediation at their sites and for the quality and propriety of their LSRP's work, potentially on any site. While to-date NJDEP seems reluctant to direct PRCRs or compel performance under SRRA, except in the most egregious circumstances, and seems to be proceeding cautiously (likely due to inadequate resources and uncertain priorities), NJDEP powers may eventually, *{2018}* perhaps as soon as in 2018 with a new Governor and Commissioner and potentially increased resources, be wielded very differently than by NJDEP in 2017 (for example, as one would expect upon the first major deviation by an LSRP and PRCR that misses a serious threat to health, safety or the environment). Importantly, on most occasions NJDEP articulates that its rules for direct oversight should be considered by PRCRs and LSRPs, and presumably lawyers, as self-executing. Yet it appears many do not agree and relatively few have self-reported: many await NJDEP express direction. See Attachment C.

Many sites and their PRCRs have failed to act as NJDEP interprets SRRA to require (indeed as most interpret SRRA). For example, many known or suspected contaminated sites, in NJDEP's view, involve PRCRs who have not retained LSRPs. Absent defenses, such PRCRs are in NJDEP's view in breach of SRRA (and today subject to direct oversight, absent some defense). Yet as of the end of 2017, NJDEP has faced few of them in direct confrontation, and the prospect of confrontation with all recalcitrants in 2018 seems low, although increased enforcement seems likely in 2018. Eventually NJDEP will face many in 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, and only as resources then allow, rather than pursuing blanket expensive, resource consuming and time consuming enforcement. Some effort in this regard began in 2013 by NJDEP enforcement against a limited number of PRCRs who failed to retain LSRPs for their sites by May 2012, and continued thereafter 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? Further effort in this regard followed after the May 2016 deadline for completion of the RI stage for those who sought extensions. 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 NJDEP 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 NJDEP 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 who have died, dissolved, filed in bankruptcy, disappeared or become hard to find: as hard as NJDEP may try, the odds of getting effort, 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 final strategy, on what priorities, with what resources, and when, NJDEP will dedicate itself to addressing these sites and pursuing such persons or entities: for the moment NJDEP's approach appears fairly limited. The past is full of instances of NJDEP threatened or initiated enforcement (penalties, directives, liens, treble damages, treble damage assignments, NRD claims and suits), with fewer successes than NJDEP would like to have under its belt (although enough to intimidate poorly financed or weak opponents; as to Exxon see https://www.nytimes.com/2015/02/28/nyregion/exxon-mobil-settles-with-new-jersey-over-environmental-damage.html?_r=0). However, historically NJDEP 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 NJDEP 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 NJDEP efforts. Absent extensive funding for public enforcement or remediation, undoubtedly new NJDEP strategies will be needed for such orphan, recalcitrant or defiant sites to be resolved, absent which NJDEP 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) until they die or disappear with the passage of time, 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.

{2018} While struggling to create and implement a sensible and effective enforcement strategy in 2017, NJDEP has agreed to allow unrelated purchasers of some sites to assume remedial obligations under a pre-purchase ACO and thereby obtain new deadlines for the site, thereby achieving compliance for some sites. See http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_pre_purchaser_aco_1213.pdf. NJDEP also has agreed to allow certain PRCRs arguably subject to Direct Oversight to sign an ACO allowing the PRCR to earn better treatment that strictly required in Direct Oversight, thereby avoiding expensive confrontation and giving the PRCR a second (or perhaps third or fourth) chance to achieve compliance. See http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_earned_adjusted_do_aco_1213.pdf. As of yet, a small number of sites have benefitted from these initiatives.

● **2.5 NJDEP Roles for All.** While under SRRA NJDEP 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 NJDEP involvement (see this Article § 2.6), at least absent direct oversight, to the dismay of some, NJDEP 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. NJDEP also has the right to punish violations and violators of SRRA, a potentially broader group of targets. These rights, and similar rights of the Board, may not be limited to PRCRs or LSRPs or even sites under remediation, although efforts by NJDEP or the Board to go beyond those limits and clear jurisdiction may be strongly resisted, with some merit. Exercise by NJDEP 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 as to the liabilities and obligations of non-LSRPs in conducting investigations, and the continued effects of prior NJDEP decisions and NFA Letters [particularly those with express or implied covenants-not-to-sue]). NJDEP 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: indeed the practical ability of the Board to function independent of NJDEP may be limited.

Not surprisingly, to date there is little evidence of NJDEP using such powers in any way philosophically or substantively different from the past exercise of NJDEP enforcement authority. "NJDEP's core mission is and will continue to be the protection of the air, waters, land, and natural and historic resources of the State to ensure continued public benefit." See http://www.nj.gov/dep/commissioner/vision-priorities.pdf and N.J.A.C. 7:1-1.1.

● **2.6 Work.** In NJDEP'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 NJDEP directives, at least if there have been discharges within New Jersey for which they are responsible under applicable law. They must remediate within the rules and time periods provided by SRRA and NJDEP. Since May 2012, and immediately in all new cases, PRCRs must act without NJDEP approvals or oversight, relying on an LSRP to plan and direct with the required remediation, often with no or minimal advance consultation with NJDEP. 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 sew…, 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; …." {Emphasis supplied}. *{2018}* Please note, however, that the above statutory list of Persons required to so proceed does not match the definition of PRCR, in one key respect: NJDEP regulations and SRRA itself include as a PRCR "…Any other person who is remediating a site". See N.J.A.C. 7:26C-1.3 and N.J.S.A. 58:10C-2.

This SRRA requirement already appears to have accelerated remediation, or at least investigation, at a number of long-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 previously extended May 2016 RI Deadline) and current remedial action deadlines.

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? Is every Person arguably fitting the definition or PRCR and conducting activities arguably fitting the definition of remediation, bound to do so using only an LSRP and following NJDEP rules and guidance? As lawyers, it seems to us the broadest possible interpretations are clearly not the right interpretations. There must be implied exceptions. We would argue, despite the absence of clear language supporting our view, that SRRA should not be interpreted, for example, that a Person 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, or a non-liable Person taking protective measures [including the State itself]), by those actions is exposed to NJDEP enforcement and liability if it identifies or addresses known or suspected contamination without full compliance with SRRA. *{2018}* In this regard we note that SRRA's definition of PRCR seems to have some expansive effect, but does not specify that any and every PRCR must remediate to conclusion. We would argue, therefore, that while remediating an otherwise non-liable Person (a volunteer) may be subject to some obligations as a PRCR, but such a volunteer can nonetheless terminate remediation, even after beginning, without being exposed to enforcement, because N.J.S.A. 58:10B-1.3 does not require it to continue and complete remediation, and no other provision imposes such liability. Regrettably, NJDEP views on this are uncertain (although reportedly NJDEP is working on a policy statement of some kind on the issue). We further believe NJDEP should determine that this should be the case even if such Person uses an LSRP to so proceed (as to rule otherwise discourages such Persons from using LSRPs- except if non-LSRPs themselves have liability for proceeding in such cases), and suggest that NJDEP should consider allowing such a volunteer to "remediate", to some extent, without use of an LSRP. Indeed as best we are aware, neither NJDEP nor the Board has said formally that it is a violation for a Person to conduct an investigation, for example of DAP, without using an LSRP. In this regard we note that NJDEP has not interpreted SRRA strictly so as to impose on itself a duty to use LSRPs for its own remediation. See e.g. See http://www.nj.gov/dep/srp/. While no such advice has been given, and arguments exist against doing so, and NJDEP itself has not been consistent in interpreting SRRA strictly, there is reason to be concerned that NJDEP and the Board may yet so assert, at least against LSRPs, non-LSRPs and PRCRs, and we would be hesitant to advise a Person or consultant seeking to investigate a site, other than for purchase due diligence, that use of an LSRP is optional. 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 NJDEP or third party enforcement and claims that such violates SRRA, even if it can articulate some defense to liability. And an actor addressing (and therefore arguably "remediating") actual or suspected contamination on a site, even with a defense to liability, may face real risk of NJDEP, Board or third party enforcement and claims that such violates SRRA if it proceeds without use of an LSRP and compliance with all applicable NJDEP rules and guidance (although this is untested, and arguments exist to the contrary). *{2018}* I a Person wants to proceed using an LSRP, without admission of liability, how can it preserve the right to change its mind? And how far can the LSRP proceed, or alter the ordinary remedial process and deviating from the ordinary rules, accepting his or her client's and lawyer's assertion of a defense, and remain in compliance with his or her duties as LSRP? For example, can an LSRP design a basic cover system, protective of those otherwise walking on contaminated soils, without fully investigating the AOC, requiring a deed notice for the cover system, applying for an RAP, or issuing an RAO, all on the theory that something is better than nothing? Importantly, NJDEP 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). What advice can or should an LSRP or other advisor give a potential client considering so proceeding? What can a non-LSRP do or say? 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. NJDEP's issuance of some advice, particularly if providing flexibility, may prove critical.

A lawyer may face similar challenges. Consider that under SRRA an innocent owner may report pre-existing contamination, but assert a defense to liability, and then face the absence of a clear NJDEP response (we think NJDEP's typical form letter response is unhelpful). While waiting for the substantive NJDEP response, that likely never comes, how should the lawyer respond to a client's inquiry on the client's duties? Can the client hire an LSRP for a new separate discharge or condition, one for which it may be or is liable (to which the innocent purchaser defense does not apply), 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 and therefore ignores the pre-existing issues? *{2018}* Or is the best that can be done a narrow AOC-only RAO, noting the existence of the other known area as unresolved? And can the PRCR find an LSRP who will fully agree and cooperate? What of the areas commingle in some way? What will NJDEP or the Board do or say about such an LSRP approach? And when? It remains to be seen what LSRPs can or will do in such cases, and what NJDEP or the Board will do in response. Clearly some LSRPs will be reluctant to face NJDEP and

Board review of an RAO involving such a defense (assuming the LSRP can find a way to issue such an RAO using NJDEP's template language).

Is it clear that mere suspicions of a discharge (say due to a test result or observation, of from a construction project waste classification result) or condition (historic fill? Historic pesticide use? DAP?) always require present discharge reporting, LSRP retention, LSRP reporting or remedial work? Despite NJDEP frequent assertions otherwise, we thing the statutes do not support NJDEP views that suspicions must be reported and investigated in all cases. But 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 NJDEP 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 agricultural uses, or mapping of the site as having historic fill, or waste classification results)? And if, as we think, many suspicions or fears do not (at least outside of ISRA), how much of a suspicion of an actual discharge must be investigated? Only a sample result? A mere fear, concern., or suspicion? Staining? What about the presence of some 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? What about an environmental group's accusations? A failed deal, with Seller suspicions but not proposed Buyer's data, as to why? Or an investigation or waste sampling 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, why must it use an LSRP? And whether it does or does not use an LSRP, does it become liable as a PRCR (even if not otherwise liable) to finish what it starts? Has it arguably waived its defenses by doing something? 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 similar 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 NJDEP'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? Our view is that the legislature in adopting SRRA did not intend to grow the universe of PRCRs and sites subject to remedial obligations. If it had intended to require LSRP retention on mere suspicions it could have said so, and did not. Therefore, in our view mere suspicions (an admittedly uncertain concept) do not automatically require SRRA compliance. We also believe it arguable that absent a legal obligation to comply with SRRA, some degree of investigation and remediation can be conducted at and about a site without automatically thereby becoming a PRCR or obligated to use an LSRP, at least if an RAO is not needed: this might be, for example, for an owner's or contractor's pre-construction purposes or for a potential or actual plaintiff or defendant to prepare for or pursue or defend litigation or for a current owner or property manager to protect present or future lenders, buyers, tenants or occupants. We believe the State's own behaviors in proceeding with remediations without use of LSRPs supports our view. If LSRPs are required for all remediations by any and every Person, then the State should be using LSRPs; as best we are aware it does not.

Importantly, there is no mechanism in SRRA, or at NJDEP or the Board, by which the legal or factual issues associated with a Person's assertion of non-liability, or exemption from a need to use an LSRP, can be tested (or even preserved), before or during the initiation and conduct of remediation (as most broadly defined), except perhaps only if solely based on technical conclusions or later assertion in and against enforcement actions, such as for fines or treble damages or violations of SRRA. There is no method, using NJDEP's website or forms alone, to fully and clearly self-disclose some remedial effort while noting, asserting, and reserving defenses while proceeding with some work using LSRPs but would a mailed letter so explaining and reserving defenses, and reserving the right to terminate an LSRP retention without prejudice to those defenses, be effective to protect the client and LSRP against later NJDEP or Board criticism that such waived defenses and accepted liability as a PRCR, and therefore breached SRRA by the failure to complete such remediation?. This uncertainty may be unfair, but differs little from the position of a pre-SRRA NJDEP Spill Act directive recipient disputing liability as a discharger: such a recipient can return to NJDEP 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 NJDEP believes it need not reply to any 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 with some risk to NJDEP 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 the regulated community needs, in our view, some MOA-like process, or flexible policy and form, that would allow for more remedial work without admissions or confrontation and without exposure to LSRPs and non-LSRPs doing such work. Specifically, we believe NJDEP's policy decision eliminating MOAs and the voluntary cleanup program should be reversed, or an alternate approach adopted, as soon as possible so as to encourage and permit actual remediation.

Of course, owners and operators are not the only Persons 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? And if it tested "clean" does the result differ? Why? What of the contractor's principal? Is such activity "remediation?" Does the contractor (or his principal) have to use an LSRP for such work? When? In our view, 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, and the removal, recycling, disposal, filling or reuse, are not, in our view, remedial activities. We would argue, for example, that the placement of landscaping materials or planting of vegetation, even if serving as a barrier to exposure to known or suspected underlying contamination, should not automatically require use of an LSRP. 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 some would expect NJDEP to take aggressive positions, as they have in the past, at least hereafter in a less "business-friendly" culture, as to the existence of a discharge upon the discovery of conditions and the reportability of such condition, at least if not fully and properly and likely immediately remediated. Generally, NJDEP 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, debris, paint) is, in our view, not itself a discharge (and we are not aware of a case clearly holding otherwise). As best we are aware, NJDEP 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), or allow stormwater runoff to take PAHs to, and allow unremediated accumulation of PAHs adjacent to, the many roads and highways of the State. NJDEP 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. NJDEP has not yet held or warned (likely because it cannot) that landscapers are remediating subject to SRRA when they spread dirt or mulch or plant over known or suspected areas with environmental conditions (e.g., historic fill; next to roads; in urban environments likely impacted by lead paint debris). So we and others would argue that the lawful and inevitable consequences of such uses should not serve as a basis for NJDEP asserting the affected owners and contractors have a legal obligation to remediate using LSRPs., or have breached SRRA for failure to do so. And, in general, we believe NJDEP is not likely to soon pursue most Persons in such circumstances.

Does all soil sampling, for example, (other than for non-owner non-discharger "all appropriate inquiry" site investigations [expressly exempt under N.J.S.A. 58:10B-1.3.d.(2)]) require use of an LSRP? Does precautionary sampling? Does NJDEP's own sampling? Where has NJDEP advised the regulated community of such (as the Board says NJDEP must)? The most conservative approach (and perhaps if strictly construed, the approach arguably 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. This would arguably entrap NJDEP's own efforts. A more reasoned approach (particularly as NJDEP 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…"), perhaps because some are not "necessary," or, perhaps alternatively, remediation can be conducted by any Person not liable under ISRA or the Spill Act to remediate without full or any compliance with SRRA (as the State must conclude as to its own remedial activities). Consider, for example, whether, despite NJDEP views articulated in 2014 (but not in 2009), 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? Originally NJDEP said not, and we agreed with that view then. So what changed?) 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? (Note: See August 2016 NJDEP Proposal re Landfills discussed at this Article §3.7.3(H)). Certainly based on the current forms available on NJDEP's website, and NJDEP'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 breach and required remediation. 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 a drying agent on the material and dig out a circle of dirt so that all visibly contaminated materials are 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 most conservative approach for a PRCR, and those counseling the PRCR, would be to hire an LSRP.

But even in cases of clearly known and significant contamination, is it so clear as to when a Person 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 NJDEP? By a court? By a lawyer's written opinion? By a defense letter to NJDEP? 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? The most 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 NJDEP priorities, however determined, may divert NJDEP resources to far more significant issues and sites an courts likely will continue to be unwilling to allow pre-enforcement review). *{2018}* Perhaps proceeding on an AOC specific basis might work at some sites. But can a Person even use an ordinarily conservative LSRP to assist as to issues or conditions for which the Person asserts a defense to liability if the LSRP is uncertain? Indeed our experience is that 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 as NJDEP has concluded as to itself that SRRA and ARRCs do not apply to NJDEP publicly funded remediation, or potentially to other State activities. See http://www.nj.gov/dep/srp/.) Such logic, however, may excuse others from such requirements as they are not PRCRs, perhaps allowing an LSRP to listen to the same arguments and make the same decisions NJDEP could previously, perhaps relying on reasoned opinions of the PRCRs or its own counsel: but can the LSRP issue an 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, on the issues for which a defense is asserted, 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 allegedly finds a plume migrating from or through the 1st purchased site to the 2nd borrower site, but of uncertain age (e.g., if the plume predated the 1st site owner's purchase then the preliminary assessment was wrong, but if post-dating the purchase there may be a new discharge or a migration from an upgradient site), is the owner of the 1st permitted to deal with issues at its site based in part on its status as an innocent purchaser? Is it required to act without regard to its defense? Is it required to address suspicions and address uncertainties? Must it prove what is going on in groundwater and disprove any chance of a new on-site discharge? And, need it use an LSRP for all such efforts? Beginning when? From the moment it receives the lender's report (is assessment of that report remediation?) And why?

● **2.7 Non-LSRPs.** The long-term role of consultants for clients and on remediations who are not LSRPs, and separate and apart from LSRP supervised remediations, is unclear. Some have argued that market and regulatory

forces may require that more, and maybe 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. Certainly non-LSRPs can work under LSRP direction and supervision. And non-LSRPs can conduct due diligence activities for purchasers. And they can work outside of New Jersey. But can they otherwise remediate in New Jersey? Ever? For NJDEP? For USEPA? For the Corps of Engineers? For NJDOT? For Conrail? For a Municipality or County? 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 NJDEP 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, which is expressly exempt) without LSRP overview, is he or she in breach of SRRA because he or she is acting as an LSRP without being licensed? NJDEP has not provided such guidance as yet.

Many Sellers (and their lawyers), 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, sometimes in confidentiality agreements) potential Buyers from using LSRPs (whether formally retained as such or not) for pre-purchase due diligence on the Seller's site. 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 some situations generates the possibility of that LSRP independently and without warning reporting something to NJDEP (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 any or all of the project team, resources, sounding boards and advocates (for example, on issues or matters where there is a fear or perception that discussion with the LSRP may not fulfill client interests or when use of an LSRP is not required [such as for certain interior conditions- ACM or transformers or PCB containing caulk]). 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 example, 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 NJDEP and NJ Division of Law (Attorney General) decisions, guidance, consultations 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 NJDEP 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 NJDEP with LSRPs, including the results of NJDEP 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, and the costs of preparing or handling same (if unreimbursed by clients), 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. We would resist such attribution.

But also of interest will be whether and how non-LSRPs can safely counsel or advise a PRCR who fails to remediate as NJDEP seems to require, or chooses to remediate even if there is no obligation to do so, without facing NJDEP claims that such non-LSRP and PRCR proceeded in violation of SRRA. If the risk of NJDEP or Board 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 NJDEP and the Board have no jurisdiction over them), have a risk of being accused of a violation of law (SRRA) if they assist a PRCR to proceed with remediation (perhaps by mere sampling; but what about by visiting a site or using a HNU?), or accept their PRCR's failure to remediate and arguable failure to meet deadlines, without an LSRP, or, in NJDEP's eyes, to otherwise violate SRRA? Is that advisor himself or herself in violation? Is that advisor "aiding" or "abetting" the PRCR violation? What about the lawyer for that PRCR? Is that lawyer assisting the PRCR to violate? 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 lawyer advise an out-of-state corporation, with a presence in New Jersey, on a New Jersey legal question, such as under SRRA, without being a NJ licensed lawyer?) These issues need to be faced in real life before much accurate 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 NJDEP or the Board, or both, 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 timely legal advice is appropriate. As always, the ultimate arbiter will be the Courts.

● **2.8 Key Terms Have Changed; Contracts have changed.** Prior, existing and future contracts may need to address new SRRA processes and terms differently than pre-SRRA, 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? Consider, if a seller is finishing ISRA compliance with its own LSRP, should the sale agreement address the possibility of the buyer triggering ISRA before Seller finishes (and, if so, how? How easy will it be for Seller and Buyer to agree on such rules in advance?) And should different LSRPs be permitted or required? How should disputes between successor LSRPs be handled? RAOs are the new goal of remediations but new contracts may call for FRDs (which include RAOs) instead of NFA Letters. Remediation certifications can 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 LSRPs in the fear that NJDEP 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 NJDEP's distanced review, will not suffice to protect their own interests. Multiple levels of protection may be needed (RFS, Escrows, Guaranties). 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 NJDEP 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- e.g., "It is intended by the parties to the maximum extent permissible that the future costs, responsibilities and liabilities associated with environmental conditions at and about the Property shall be borne by Buyer and its heirs, successors and assigns, jointly and severally as against Seller, from and after Seller's receipt of an FRD or equivalent, restricted or unrestricted, for the Property without limitation those for or by reason of engineering and institutional controls and the like then or thereafter used at and about the Property."

● **2.9 Program Changes Continue.** Like it or not SRRA changes to remedial practices and requirements, and changes in and from other NJDEP programs implicated by remediations, are ongoing and will continue hereafter as long as SRRA itself exists. *{2018}* Since adoption there have been many procedural, 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, http://www.nj.gov/dep/wms/bears/Appendix_Table_1.htm, and http://www.nj.gov/dep/wms/bears/Appendix_Table_2.htm. NJDEP has formed committees, usually including stakeholder representatives, considering further changes. See http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_tech_guidance_1213.pdf. *{2018}* New legislation (rumored SRRA 2.0, for example) can be expected eventually (at least correcting errors, and perhaps addressing complaints of NJDEP, the regulated community and the environmentalists on various issues, but not, it is thought by many, likely to involve radical changes). New problems and solutions will be identified and considered by PRCRs, LSRPs and NJDEP, particularly as the program settles into a more routine system for newer and resolved cases, leaving the most complicated to be completed. The approaching deadlines for completion of remediation may pose serious challenges for many PRCRs, sites and their LSRPs, absent relief in SRRA 2.0 or by new NJDEP policies. New enforcement against violators, actual and alleged, will occur. What you think you know today, may differ hereafter. Are there likely to be changes to the central tenets of SRRA? Absent a major problem with or from the LSRP program, or a new Governor or Commissioner adverse to LSRPs, not in our view. For example, it seems quite unlikely that LSRPs will be eliminated, even if several significant instances of LSRP errors are found by NJDEP, 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, particularly in discussions with clients. 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 FAs 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? Likely not. Also, future cleanup standards are unlikely to be static or less demanding: what is clean today may not be clean in ten years. *{2018}* And reportedly, further changes to standards can be expected to be proposed in 2018. 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 despite recent changes allowing some pesticide issues to be postponed, at least at golf courses and agricultural use sites). 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 NJDEP or LSRPs in the future, *{2018}* particularly under a new Governor and Commissioner, exposing hundreds of sites, maybe more, to reassessment and remediation of filled areas (although rumors have long been that a better solution, perhaps to be provided in SRRA 2.0, would be to treat most historic fill as outside the SRRA remedial process). In this regard, we note that the recent NJDEP rule driven by the legacy landfill law, and the definitions therein, may have effects on remedial decision making at non-landfill sites, even though that proposal was minimally changed when adopted to recognize the separate requirements for remedial matters. Sites thought clean with prior NFAs or RAOs examined under more stringent guidance hereafter (such as due to newly raised in 2016 dioxane or PFAS issues, or 2017 announcement of more stringent standards for six contaminants [Biphenyl, 1,1-, total cyanide, Hexachloroethane, Nitrobenzene, Pentachlorophenol, Trichloroethene] [and other changes]) may discover problems long existing but now required to be addressed, some of which may not be 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, records and data may have disappeared). New issues and concerns may arise (twenty years ago vapor intrusion, historic fill, pesticides, NRD, PFAS and dioxane were less often discussed; what new issue will arise hereafter?). So, in view of the chance (or likelihood) of future 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 for getting a deal done 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. But how much of that risk will be shared by LSRPs and others, who failed to fully advise their clients of such risks? Likely some. We think licensed professionals have added duties to explain and ensure client understanding. Doctors need to prove they had a patient's "informed consent" to planned medical procedures. Lawyers have to prove their client understood legal advice and consequences. Courts are likely to impose similar obligations on LSRPs.

● **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), NJDEP 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 NJDEP's conceptual model for remediation or NJDEP'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 NJDEP 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, if 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], what is the result if the required identification is untrue as a matter of client intent, fact and law? How can the discrepancy be addressed and the issue preserved?); (ii) an explanation is appropriate but the form does not allow for such (particularly if filed on-line in form not able to be notated, amended or supplemented [as opposed to a modified PDF]; the practice of marking up mailed or e-mailed forms likely does not work well for on-

line submissions, 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, do so and include the clarifying comments or explanations in the attachment, (2) a note can be entered in any text box (or address box or in an attachment or explanation) that refers the reader to a separate document or statement, attached or to be provided, or explains an objection to an earlier statement (we believe even if the note is clearly irrelevant to the modified field, NJDEP cannot safely ignore the reference), (3) a separate letter (delivered by certified mail, overnight, telecopy) or e-mail can be sent explaining the issue (but then the correction also may have to be included in later filings referencing the original- such as a disk of documents supporting the final RAO, do the "complete" file includes the explanation). But NJDEP sometimes says it will not accept same (see, for example, the instructions for the 2014 2-year RI Extension form) and NJDEP itself may not officially include same in its own formal NJDEP file (in our view with liability of NJDEP for the consequences, as we think it clear that it is NJDEP's fault, not the LSRPs or PRCRs, that NJDEP's file is untrue, inaccurate and incomplete). In our view NJDEP runs serious risks in refusing to accept, review, or file actual information submitted to it; self-inflicted ignorance is not permitted to the regulated community or NJDEP. NJDEP also runs a risk by forcing all submissions to fit one size, an approach not likely to obtain sympathetic judicial review, that errors or omissions can rightly be explained away as due to NJDEP fault in such choices. In our view if the submitter has a valid good faith reason for submitting different information than NJDEP wants to accept, and tries, or is forced to shoe-horn its response into an NJDEP mandated "one-size-fits-all" submission, the refusal of NJDEP to accept, process or review same should not be held against the submitter in any way, and should be held against NJDEP for refusing to face facts. We believe both the United States and New Jersey Constitutions require this result. *{2018}* A law or regulation or administrative practice that sometimes requires only an untruthful response to be responsive cannot be constitutional or enforceable as a matter of due process and fundamental fairness. We believe there is a reasonable prospect that most Judges would agree with this view. Government by computer-input-restrictions may be convenient for NJDEP 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 NJDEP must have constitutional values as its values. NJDEP rarely considers this, but it is a central part of our government, and indeed is a cornerstone of our judicial system providing checks and balances against amazingly powerful and sometimes unrestrained bureaucratic action. Practices that are driven by administrative efficiency, data management, bureaucratic convenience, job preservation and fees, will likely be subject to considerable judicial scrutiny when harm arises from, or enforcement threats are driven, by such practices and deviations from them. *{2018}* These goals do not permit NJDEP to insist that the question "when did you stop contaminating the site?" be answered with a response that mirrors the question, if an explanation is appropriate. Nonetheless, LSRPs, PRCRs and their advisors need to be practical, and act in good faith, towards the goal of meeting the intent of the applicable laws and properly adopted bureaucratic practices, to the extent reasonable. Simple refusal or recalcitrance to comply also will be met with judicial skepticism, particularly if by perceived bad actors.

III. Key SRRA Details- A Reference and Discussion:

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

- **3.2 Temporary License Program:**

■ 3.2.1 NJDEP previously issued licenses 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 had been expressed by NJDEP 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 NJDEP 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. With the passage of time since this is, hopefully, of minimal concern today. *{2018}* However, it is somewhat indicative of NJDEP's own view of its power, and perceived need, to invalidate RAOs: as the temporarily licensed LSRPs did not obtain permanent licenses, those LSRPs were unable to

correct the deficiencies and NJDEP did not believe that another LSRP could cause correction so as to preserve the original RAO. Many disagree with this view.

- **3.3 The Board:**

■ 3.3.1 The Site Remediation Professional Licensing Board ("Board") was established to consist of 13 members (at least it has 13 members exclusive of resignations): the NJDEP 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. *{2018}* Occasional vacancies have occurred and exist today. The Board has continued to perform despite such. On certain matters, most notably review of complaints, particular members of the Board have had to recuse themselves from proceedings. To date, members of the Board affiliated with or employed by NJDEP itself have not recused themselves from complaint proceedings brought by NJDEP.

■ 3.3.2 The Board is in NJDEP but not of it. It is supported by NJDEP 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 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).

◊ *{2018}* Absent a quorum, the Board meeting is adjourned. This happened in November 2017. See http://www.nj.gov/lsrpboard/meetings/20171120_minutes.pdf

■ 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). In early 2016 the Board adopted its 2015 proposed Board Rules, 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 NJDEP 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 much such guidance. Interestingly, the Board has chosen to do so only in two instances: (1) guidance for those hiring LSRPs and (2) guidance to LSRPs as to their reporting and notification obligations. See this Article at § 2.3 and § 1.2.35. 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 future rounds of exams will be easier, although the exams may change in form and content (in part as a different vendor is now involved).

○ 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. Essentially candidates are not permitted to report on the details of the exam they took. A Board Complaint involved this issue: See this Article § 3.3.6(A) noting the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/004DEP2013_summary.pdf.

◊ 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. Certain of these requirements are sometimes collectively referred to as the Code of Conduct for LSRPs. See this article at § 3.4.2.

○ N.J.A.C. 7:26I-6.15: An LSRP shall cooperate in an investigation by the Board or NJDEP. 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 …; 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." It is not clear whether a former LSRP can avoid some or any of such requirements (such as remedial continuing education requirements) by surrendering his or her license.

○ 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. To assist LSRPs, in May 2016 NJDEP issued guidance and a new form. See http://www.nj.gov/dep/srp/guidance/srra/lsrp_timeframe_req.pdf and http://www.nj.gov/dep/srp/srra/forms/notice_to_comply_form.pdf?version_1_0.

- 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." This response may support the view that an LSRP's breach of this requirement because of the inability to determine timeframes accurately, perhaps due to complex or legitimate legal issues, is not a violation of SRRA or these 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."

- Note that the rule limits an LSRP communicating erroneously when doing so "knowingly."

- Should or must an LSRP honor a third party request by providing copies, in any form, of materials filed with NJDEP or other regulators? Should or must an LSRP honor a third party request by providing copies, in any form, of materials not yet prepared or not yet filed with NJDEP or other regulators, even if specifically requested (such as a map of a plume)? If copies are to be provided, need they be provided at the LSRP's or client's expense, as opposed to at the inquirer's expense? We would argue that, in the case of materials filed with NJDEP, referring an inquirer to pursue OPRA sources should suffice. We also think that a blanket request to the LSRP for all documents should be so addressed as to filed materials, and rejected as to others. We do not believe an LSRP has to prepare a document solely to respond to each and every inquirer. And we believe most LSRPs and PRCRs decline to provide information or materials not yet filed with NJDEP except if clearly is important to the inquirer to know in order to protect their or other's health and safety Further, the LSRP should never be required to provide documents to the inquirer if either the PRCR has no such obligation or NJDEP itself would have no such obligation (such as documents prepared for or in anticipation of litigation). The LSRP does not work for the inquirer. 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. Perhaps the Board can consider some process whereby LSRPs can seek and rely on advice on such matters, if they choose to do so. Further, if the LSRP should provide 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.

> *{2018}* Lest we be misunderstood, the preceding discussion related to obligations. It is a different question as to whether, in the absence of an obligation, the LSRP or a PRCR should do more in response to a particular inquiry. Sometimes the PRCR will be better protected, and the public interest better served, by allowing the LSRP, at least if well-spoken and used to such communications, provide a better response. And if such is not the LSRPs expertise, perhaps the PRCR would be better served retaining a separate community relations expert to speak for it. And some cooperation may be far better than no cooperation. For example, if electronic forms of responsive documents are available, sometimes e-mailing them is a reasonable response and low cost. Such a response may improve a relationship. A refusal to respond may hurt, and potentially have severe consequences (opposition to, or denial of, a permit or approval; demands for damages; lawsuits). As another example, in representing a Board of Education we asked a PRCR seeking to address potential VI issues to send its LSRP to meetings with the Municipality and that Board of Education. (Interestingly, although invited to do so, the LSRP declined to provide a written communication to be sent to parents). A refusal by the PRCR and LSRP to attend the meetings would have created problems in the community. And although the Board had its own experts, by attending those meetings the PRCR and the LSRP had better control over the messages and explanations. If the LSRP had not attended, the messages would have been delivered to potentially hostile audiences, by neutral to unhelpful experts, with potentially bad results for the PRCR and LSRP.

- 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." When and why should the client so choose? (Maybe when there is pending, or significant risk of future, litigation. Or perhaps the LSRP is under attack. Or perhaps the LSRP is not as effective a communicator as others. Or perhaps the client wants to manage communications itself or with professional public or community relations personnel. Or perhaps the media are likely to be involved.)

- 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?

- Can an LSRP knowingly communicate potentially or known false, inaccurate, misleading or incomplete information or materials, in any circumstances? For example, what if the information or material sought, and responsive to the request, was thought true, accurate, not-misleading or complete when created, but is no longer? What if the LSRP provides disclaimers or explanations at the same time as

the information or materials? What if the LSRP simply does not know if the sought information or materials are true, accurate, complete or misleading (for example, potentially having been prepared by a third party, such as NJDEP or a prior consultant): is he or she under an obligation to find out before replying, or to explain the uncertainties? If the foregoing are dangerous, whether to the LSRP, the LSRP's client or the recipient, can the LSRP decline to answer or stay silent? At what risk? *{2018}* And if any explanation or materials are provided and later found to be flawed, is there an ongoing duty to correct?

○ N.J.A.C. 7:26I-6.28: An LSRP shall cooperate with NJDEP 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 NJDEP specifies. In our view if NJDEP 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 or new 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? Do such intents matter?

◊ 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.). A problem being evaluated by the Board is that the cost of the exam may be relatively expensive today given the lower number of applicants. Should fees be increased? How can costs be reduced?

◊ 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 LSRPs have already had to reconsider some of their past practices for employees, at least for their LSRPs. Can the firm's contract guaranty not to change 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 § 3.4.14discussion of N.J.A.C. 7:26I-6.27).

○ Who will tell the client, when and how? Note that the LSRP may have his or her own 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? (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 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? Client materials? Materials generated after his or her departure? Materials generated before his or her retention? *{2018}* Is the departing LSRP required, by virtue of his or her professional duties, to assist the replacement LSRP or the client as to what he or she did before departing? To provide explanations as to decisions beyond documentation not prepared at the time of departure? Is the departing LSRP entitled to be paid for such support? If professional obligations do not include such support, can the firm's contract

with the LSRP require it? What recourse does the client have if the firm and former LSRP are at odds with each other?

○ 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 some consulting firms have done so. Are such restrictions at risk under the LSRP Code of Conduct or other SRRA provision? 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.) Guidance from the Board or NJDEP on such issues is limited to nonexistent.

○ Can the PRCR obtain extensions of time for remediation due to changes in the status or condition of the LSRP or the LSRP firm, voluntary or involuntary? (Death; Illness; Disability; Termination; Maternity Leave; Family Leave; office casualty [e.g., Hurricane Sandy]; lost or destroyed records; other force majeure events). Delays may be expected by the need to find and replace the expertise and knowledge (and perhaps records) 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 may take to find an acceptable, experienced, and available team and then it will take additional time for 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, NJDEP enforcement would be unfair, arbitrary and capricious. In our view equity should intervene to excuse even express statutory requirements (which is what equity is, after all, about). 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 NJDEP may be appropriate. We note that, at present, it appears that NJDEP is not likely to initiate any enforcement action against PRCRs and their LSRPs who, in NJDEP's eyes, are struggling in good faith to act reasonably in response to matters legitimately not in their control.

■ 3.3.6 Enforcement.

◊ 3.3.6(A) When the Board, on the basis of available information, finds that a person has 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 NJDEP, the Board can act as outlined below (N.J.S.A. 58:10C-17.a.(1); P.L.2009, c.60 §17.a.(1)).

○ *{2018}* In October 2017 it was reported to the Board that: the Board has received 56 complaints since 2011, 9 of those were in 2017. 27 complaints have been dismissed or withdrawn. The Board has found violations in 11 complaints. The Board has suspended the license of 1 LSRP. The Board has issued 1 permanent injunction.

○ The Board's powers include that 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 decision, originally referenced in the minutes of a Board meeting of November 2, 2015 with respect to Complaint 001-2014, originally available at http://www.nj.gov/lsrpboard/meetings/20151102_minutes.pdf and now at http://www.nj.gov/lsrpboard/board/prof_conduct/001-2014_complaint.pdf, in which the Board concluded that a named LSRP violated multiple requirements, resulting in imposition of $12,000 in fines and a suspension of not less than 12 months, most notably for submission of documents which failed to comply with the Tech Rule, with deficiencies so serious and numerous as to merit such action. The Board also imposed a condition that the LSRP obtain 24 continuing education credits in addition to, and not counted towards, the 36 continuing education credits required for license renewal, and then present himself to the Board for examination of his knowledge and understanding of the Tech Rule and ARRCS, and presumably applicable guidance, by oral and/or written questions or fact scenarios, on passage of which reinstatement will be considered and on failure of which permanent license revocation will be considered. After a hearing was requested by the LSRP a settlement was reached reducing the penalty to $5,000 plus reimbursement of certain Board document review costs (at about $105/hour not to exceed $500 per document reviewed), a suspension of 6 months, and a requirement for 12 continuing education credits.

-- Note: It is unclear when the particular LSRP, or any of his or her clients, were notified of this decision prior to the request for hearing and settlement. Certainly there was some delay from the Board's decision to notice. Consider the issue of potential or actual adverse effects on clients arising from interim decisions of the LSRP on matters of concern for its clients if the LSRP continued to work on matters pending resolution without warning them. *{2018}* Of course, it is fair to note the other side of the issue: consider the adverse effect on the accused, perhaps strongly denying any wrongdoing, if he or she warns clients of

the pendency of the matter prior to resolution. From the Board's perspective, what is the right result? From the client's?

○ The Board 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." This matter was later settled. See http://www.nj.gov/lsrpboard/board/prof_conduct/KorabOrder.pdf.

○ 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.)

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/004-2014_complaint.pdf in which the Board concluded (i) the LSRP did not submit a notification of retention in a timely manner, as required by N.J.S.A. 58:10C-16.d. (ii) the LSRP failed to exercise reasonable care by not obtaining written reports documenting the conditions of the USTs at the Site for which he was responsible, but only oral reports and (iii) did not notify the Department of a discharge, as required by N.J.S.A. 58:10C-16.k., despite his specific knowledge that there was a sharp increase in the levels of benzene in ground water monitoring well, and imposed a $3000 penalty.

- Other decisions have been made, although the summaries have not been posted in time for this review, resulting in penalties of various amounts (Complaint 008-2014- $7,000; complaint 010-2015- $7,000.) See http://www.nj.gov/lsrpboard/meetings/20161017_minutes.pdf

- *{2018}* See the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/005-2015_complaint.pdf in which an LSRP was assessed a penalty, but has required a hearing. The Board found that the LSRP failed to properly notify the Department and terminate himself when he changed employment (On March 15, 2015 he sent an email to the client-complainant stating that he was transferring employment. However, he did not dismiss himself as LSRP until August 3, 2015, after he learned about the complaint).

- *{2018}* See the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/008-2015_complaint.pdf in which an LSRP paid $1,000.00 for violations by issuing an RAO when fees to NJDEP were unpaid and wells had not been decommissioned.

- *{2018}* See the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/001-2017_complaint.pdf in which an LSRP paid $1,000.00 for violation of N.J.A.C. 7:26C-6.2(a)3 (issuing RAOs when fees to NJDEP were unpaid).

○ 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 NJDEP and other agency costs of investigation of violations.

- See http://www.nj.gov/lsrpboard/board/prof_conduct/001-2014_complaint.pdf, discussed above.

○ 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 (broadly defined in SRRA) who violate SRRA (which hypothetically could include PRCRs, other persons and entities, non-LSRP consultants and even NJDEP 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; *{2018}* the Board may however, even if willing to recognize the disciplinary jurisdiction of another government authority over other professionals (e.g., the Supreme Court of New Jersey as to attorneys) either ask that authority to look into alleged violations either or both of SRRA or other Law, or even seek permission to render discipline under its own authority. See also N.J.A.C. 7:26I-7.3 (which allows any person [including NJDEP] 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, NJDEP 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 NJDEP 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 NJDEP itself).

- Is the Board currently considering action against any non-LSRPs? Perhaps. See http://www.nj.gov/lsrpboard/board/prof_conduct/006-2014_complaint.pdf ("The Board determined not to find the subject in violation of N.J.S.A. 58:10C-11 due to the fact that the circumstances that resulted in the subject conducting the work at the site without the oversight of an LSRP were created by his company, and possibly the attorney for the company's client. Consequently, the Board has decided to refer this matter to the Professional Conduct Committee to pursue investigation of other persons involved in the matters covered by Complaint 006-2014.") and http://www.nj.gov/lsrpboard/meetings/20160307_minutes.pdf ("Motion by Joann Held to direct the Professional Conduct Committee to pursue investigation of other parties involved in the matters involved in Complaint 006-2014.").

○ 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, , 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)

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/005-2013shortsummaryforWeb(Redacted).pdf dismissing the complaint in that the Board was not the proper forum for resolution of conflicting views as to different parties' responsibility for contamination.

- *{2018}* See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/006-2013shortsummaryforpostingredacted%20(2).pdf dismissing the complaint in that the incomplete RI was not a violation and there is no evidence to suggest that the LSRP inappropriately deferred a vapor intrusion investigation that was necessary to protect public health and safety.

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2013shortsummaryforpostingredacted.pdf in which the Board found that the former LSRP's failure to remove his designation as an LSRP from his Linked-In profile and company website after the date his temporary license expired was not an attempt to falsely advertise himself as an LSRP in violation of N.J.S.A. 58:10C-11, but rather, was an oversight.

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/002-2014summaryforWeb(Redacted).pdf in which the Board determined that the client's complaint against the LSRP in connection with the posted sign and failure to seek an RI extension were without merit.

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/003-2014_complaint.pdf in which the Board determined that (i) actions or statements made by the LSRP, or documents authored or certified by the LSRP, prior to the date that he obtained his temporary license are outside of the Board's jurisdiction, (ii) the LSRP did not made representations that were incorrect, or that were only appropriately made by someone having required expertise or license, as to certain water, floodwater and stormwater issues, (iii) although there had been numerous interactions between NJDEP and the LSRP on certain issues and documents, and although certain NJDEP reviewers remained unsatisfied, the LSRP had not violated his duty to correct deficiencies, (iv) the representation by an LSRP of one major client, as to a cap design approved by NJDEP, did not constitute a violation, (v) certain differences between a redacted report provided to NJDEP for public use and the unredacted report for NJDEP use were not material and were not a violation of LSRP duties, (vi) the LSRP did not violate by failing to notify that more capping materials was being placed than authorized by the RAW, (vii) the LSRP's role in connection with an allegedly dishonest client's self-guarantee application was not a violation, and (vii) alleged LSRP statements contained in a press article as to the fill were not a violation.

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/005-2014_complaint.pdf in which the Board considered the claim that the subject of the complaint completed remediation activities required to have been completed by an LSRP, specifically, a vapor intrusion investigation, in violation of SRRA. The Board noted that at the time the subject conducted the remediation activities he did not hold an LSRP license, although approximately one year later he did obtain an LSRP license. The Board determined that the subject did not violate "…due to the subject's low level of involvement with the project and the fact that the circumstances that resulted in the subject conducting the vapor intrusion investigation without the oversight of an LSRP were created by his company, and possibly the attorney for the company's client. Consequently, the Board has decided to refer this matter to the Professional Conduct Committee to pursue investigation of other persons involved in the matters covered by Complaint 005-2014."

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/006-2014_complaint.pdf in which the Board determined that the subject person did not violate SRRA "…due to the fact that the circumstances that resulted in the subject conducting the work at the site without the oversight of an LSRP were created by his company, and possibly the attorney for the company's client. Consequently, the Board has decided to refer this matter to the Professional Conduct Committee to pursue investigation of other persons involved in the matters covered by Complaint 006-2014."

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2014_complaint.pdf in which the Board (i) the LSRP was not in violation of any provisions of the SRRA due to the LSRP, having been advised by a representative of the current owner of the results of a VI investigation conducted for that owner, called the telephone hotline and reported the IEC, indicating the current owner as the Incident Source/Responsible Party, but not thereafter filing the IEC form, the LSRP made proper notifications and had no responsibility to conduct the remediation, (ii) the LSRP was not in violation of any provisions of the SRRA in that based on the evidence provided, LSRP's beliefs, per NJDEP policy, and per Department guidance and requirements, that the Remedial Investigation was completed, were not contradicted by technical support in the complaint to the contrary and his decisions were within the scope of the

LSRP's professional judgment, and (iii) the LSRP was not in violation of any provisions of the SRRA regarding further vapor intrusion investigations after determinations made in a prior VI RIR. Note: The authors were involved in this matter. This matter is believed related to complaint 005-2014, 006-2014 and other matters.

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/009-2014_complaint.pdf in which the Board determined that the subject LSRP, employed by a consulting firm whose president is also the officer of the company that owns the site for which the LSRP was retained to conduct remediation, is not in violation of N.J.S.A. 58:10C-16(y).
- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/002-2015_complaint.pdf in which the Board determined that (i) the LSRP did not fail to timely conduct a VI investigation because access to do so had not been obtained and (ii) the delay in the LSRP dismissing himself while awaiting the results of efforts to obtain access, despite interim inactivity, did not violate SRRA.
- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/003A-2015_complaint.pdf in which the Board determined that (i) the LSRP took the actions that he was required to take as LSRP to investigate and remediate the site, informing the client of the activities that needed to be done, potential violations they might incur by not conducting activities, but then received no authorization to proceed, with additional complications due to the deaths of key personnel and (ii) there was no evidence that an immediate environmental concern existed on the site, and (iii) although "[t]he Complainant stated that "LSRP was reluctant to call the Hotline during our inspection after viewing the conditions at the site and had to be directed to do so. From my perspective conduct unbecoming an LSRP", the Board cannot find a violation of the SRRA based on an LSRP's attitude. The LSRP did make a notification to the Department Hotline, although there is no evidence that there was in fact a discharge to the environment.
- *{2018}* See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/003B-2015_complaint.pdf in which the Board determined that (i) even though the LSRP was negligent in characterizing the hazardous wastes at the site, he did not do so in his capacity as an LSRP, but in his capacity as a responsible party. and (ii) even though the LSRP failed to notify NJDEP of a discharge, he did so not in his capacity as an LSRP, but in his capacity as a responsible party, and (iii) there was no evidence that an immediate environmental concern existed on the site. The Board notes that there was separate enforcement by NJDEP.
- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/003B-2015_complaint.pdf in which the Board determined that (i) even though the subject LSRP was negligent in characterizing the hazardous wastes at the site, he did not do so in his capacity as an LSRP, but in his capacity as a responsible party, (ii) similarly even though the Subject failed to notify the Department of the hazardous discharge, he did so not in his capacity as an LSRP, but in his capacity as a responsible party and (iii) there was no evidence that an immediate environmental concern existed on the site. Note: NJDEP initiated separate enforcement as to these matters.
- *{2018}* See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2015_complaint.pdf in which the Board, with some hesitation, determined not to proceed with a complaint by a later owner that an LSRP improperly investigated a site, missing alleged dumping, and issuing an RAO (later withdrawn at NJDEP direction). The review found that there was no evidence that the LSRP deliberately excluded material dumped on the site as an Area of Concern or was negligent in identifying material dumped on the site. The complainant withdrew its complaint, but the Board initially declined to follow suit.
- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/009-2015_complaint.pdf in which the Board determined that the activities the subject of the complaint are activities of closure, i.e. physical removal of a tank, and not activities the responsibility of the LSRP.
- *{2018}* See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/002-2016_complaint.pdf, involving a remediation at a utility substation, in which the Board determined that the issued RAO-AOC did not require a Preliminary Assessment and Site Investigation, and that multiple lines of evidence that supported the LSRPs conclusion that PAHs found on the Complainant's property were not from the discharge at the substation.
- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/006-2016_complaint.pdf, involving a UHOT, in which the Board determined that no facts supported the Complainant's allegation that the LSRP's firm falsified sampling results

- See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2016_complaint.pdf in which the Board determined that activities of asbestos removal from inside of a building are not the LSRP's responsibility.

- *{2018}* See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/002-2017_complaint.pdf in which the Board determined that the Board does not have jurisdiction over the amount of time an LSRP takes to complete tasks, or the amount the LSRP charges, when the client complains about excessive charges (although the Board's staff reviewed records and determined that the LSRP's billings were not fraudulent).

○ 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 N.J.A.C. 7:26I-7. The following is an overview of the enforcement process.

- 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, as SRRA includes NJDEP within the definition of person, this right (to file a complaint) extends to NJDEP.

- N.J.A.C. 7:26I-7.4: In general, the complaint process appears to function, in some respects, on a "blind" basis. *{2018}* An updated April 2017 flow chart is posted on the Board's website at http://www.nj.gov/lsrpboard/board/prof_conduct/complaint_flow_chart.pdf. The Board staff refers the matter associated with a redacted complaint to the Professional Conduct Committee who, if warranted, can refer the matter to a Complaint Review Team (and if unwarranted so reports to the Board). The person subject of the complaint is notified of the complaint and asked to make a response. *{2018}* At this point the complainant cannot withdraw the complaint. Note: Clearly, each subject of a complaint (perhaps not a true defendant or target) should seek legal assistance immediately to ensure the appropriateness of each response; in some cases an insurance carrier should be notified; in others the client should be as well. 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 report 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 (including as to the identity of the subject of the complaint) 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 (monetary or otherwise) 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, most likely through the State Office of Administrative Law, conducted by an Administrative Law Judge (formerly known as a hearing officer; not a Judge serving as part of the judicial branch of government).

- 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 subject of a complaint recuse himself or herself? And if he or she does recuse himself or herself, how is the proceeding truly "blind" and "confidential?" Must a Board member previously employing the subject of a complaint, or previously a partner or shareholder in the same firm, or otherwise friendly with or unfriendly towards the subject (or a partner of the subject), recuse himself or herself? Apparently the Board staff decide this for the Board Member in advance, but it is unclear as to the extent of consultation. Yet, how do other Board members react when they learn of the recusal by a Board Member? Do they speculate as to the reason for the recusal? Does exclusion of a Board member damage the idea of a blind discussion and review? How should the Board minutes reflect this recusal? Must a NJDEP employee serving on the Board (such as the chairperson) recuse himself or herself if the complainant is also employed by NJDEP? (Apparently not). How is the requirement of a quorum affected by those who recuse themselves, especially if seats are vacant and unfilled?

- 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…."

- There is no established period for resolution of a complaint. We are aware of at least one matter that took over sixteen months to resolve. Consider the adverse effects on the LSRP, his or her firm and clients and practice, and his or her family, as the subject LSRP is exposed to the uncertainty and risks inherent in the compliant process.

○ 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. Note: Under some policies the carrier will provide a defense with counsel of its choice.

- Notice to clients may be required by relevant contracts or by the facts and circumstances of the matter, regardless of professional or ethical requirements. This may extend to more than the client most directly affected by the complaint. Silence may be problematic. But confidentiality of the proceedings should be maintained.

-- In many cases, but most notably when NJDEP is the complainant and the issue is the propriety of a decision or LSRP Work for a particular client, it may be appropriate to evaluate use of joint defense arrangements between the LSRP and the client most affected by the subject of the Complaint. It may be possible for the client to intervene. Some of the cost of defense can then be shared, even if the LSRP-client contract does not provide for such defense or costs to be provided or reimbursed by one to the other (or if the contract does so provide, if the benefitted party elects not to pass some or all such costs on to the other, the joint defense may nonetheless achieve certain efficiencies to the benefit of both). Even if the client requests one, a stay of proceedings may not be possible.

- 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 by hearing request, if only to preserve flexibility for settlement options.

○ Please note that there are practical limits to the time, energy, money and other resources available to the Board. It is logical to assume that the Board will likely limit its efforts to only the most significant matters and issues. The fact that the Board has the power to do more, does not mean that the Board or its staff will choose or be able to do more. In this regard, recall that many of the Board members have other jobs, and are uncompensated for performing their role as Board members. Despite their dedication and professionalism, as with NJDEP itself, there are limits to what they can do and be expected to do.

◊ 3.3.6(B) The Board and NJDEP 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 NJDEP, 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 assertions of 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, in some instances, a regulatory basis that itself is justifiable. Our constitutions, state and federal, 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, NJDEP 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? Verizon's offices where cell phone records are kept? Hypotheticals aside, realistically what will be the most likely targets for entry? Likely - 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 some of such sites, if only to inspect or seize records. But are there any limits to this Board power if and when they choose to so proceed? Yes. But most likely reason will govern the decisions of the Board and its staff (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's offices 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? Can the Board seize a laptop or phone? Will the Board ever likely try? Perhaps there are circumstances in which the Board could obtain a warrant for such an entry. Those circumstances more likely will involve serious 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 most lawyers to resist any such efforts directed against him or her, vigorously, and at least force the issues before a court so as 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 from their lawyers? 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 the Governor, NJDEP 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 require PRCR preservation of attorney papers "that relate in any way to the contamination at the site" (seemingly thereby, and arguably erroneously, asserting jurisdiction over attorney papers without regard to attorney-client and work-product privileges). The rules allow that NJDEP 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 NJDEP, and perhaps the Board unless, perhaps, the documents can be delivered subject to a preserved claim of privilege, the availability and effect of which is, in our view, presently uncertain.

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

◊ 3.3.6(C) If the Board or NJDEP 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 the face of such accusations can a non-subject LSRP safely continue to associate with the subject LSRP? Consider N.J.S.A. 58:10C-16.p.; P.L.2009, c.60 §16.p. and N.J.A.C. 7:26I-6.14. See this Article § 3.4.2(I).

◊ 3.3.6(D) If the Board finds a violation then 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 against, on or requiring such action. The Board shall cause notice of each order, and of the results of proceedings, to be given to the NJDEP in order to enable NJDEP 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.

○ This enables NJDEP to react to a Board finding of a violation after investigation. But how should NJDEP react to an actual or potential complaint brought to its attention? Well, as the complaint review process is confidential we would argue that NJDEP should not know of or react to a complaint before the Board, even though Board staff are NJDEP personnel, and NJDEP personnel serve on the Board. However, what if NJDEP is investigating a complaint or is the complainant? Can or should NJDEP personnel address subject LSRPs and their clients differently? *{2018}* For example, can or should they refuse to meet the accused or the accused's client on a related matter? An unrelated matter? We would argue likely not, except maybe in the rarest of circumstances (e.g., perhaps if an LSRP is being investigated or accused of fraudulent submissions on multiple matters threatening health, safety and the environment in material ways.) But there is experience suggesting that NJDEP believes that it should alter its behaviors based on the mere existence of such investigations and complaints, without regard to, at least pending, the result. For example, for one client, NJDEP has declined to meet the client and its LSRP as to issues concerning the site in view of NJDEP's own pending investigation of an alleged LSRP violation of SRRA.

◊ 3.3.6(E) Should the Board initiate enforcement, even in response to NJDEP or third party complaint, in every case, or indeed in any case, when an LSRP fails to induce its client to full compliance? Does a client violation of SRRA, alleged or actual, somehow taint the LSRP? Is such the LSRP's fault? No. Indeed, we think the Board would do well to clarify for LSRPs, NJDEP and PRCRs that the LSRP cannot be held responsible for client breaches if he or she has timely passed along NJDEP requirements to a PRCR. It is the PRCR decisions, indecision, delays, budgets, needs, weaknesses, attitude, lack of resources, interpretations or disagreements that prevent the LSRP from meeting NJDEP demands. LSRPs we know are worried about such circumstances; we suspect at least one complaint to the Board has involved such issues, likely more. We believe NJDEP 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. We note that LSRPs lack enforcement power under SRRA.

- ○ The Board itself, however, seems to disagree. See Board Adoption Response to Comment 51, discussed above at this Article § 3.4.2(D).
- ○ But the Board's actual decisions seem to support our view. See Board decision at http://www.nj.gov/lsrpboard/board/prof_conduct/003A-2015_complaint.pdf.

■ 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 over 600 LSRPs (for a list see https://www13.state.nj.us/DataMiner/Search/SearchByCategory?isExternal=y&getCategory=y&catName=Site+Remediation) 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.

◊ *{2018}* The Board's forms were updated in November 2017 and are posted on its website. See http://www.nj.gov/lsrpboard/board/audit/audit_process.html

◊ Some observations:

○ The identity of those being audited is not disclosed during the audit. After the audit, their names are published on the website.

○ 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 NJDEP 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.

○ *{2018}* The Audit Selection procedure has been modified so that each month a mixture of LSRPs picked randomly and on a non-random basis (i.e., numerous deficiencies in submissions, etc.) are selected for audits. See http://www.nj.gov/lsrpboard/meetings/20170807_minutes.pdf

◊ Note: The consequences of a poor audit on a prior transaction or remediation are not clear, absent reversal of a decision of the LSRP. A complaint to the Professional Conduct Committee is a possible result.

◊ Note: The Board's report on completed audits is available at http://www.nj.gov/lsrpboard/board/audit/audit_selection_report.pdf

■ 3.3.8 NJDEP may recommend to the Board that an investigation of an LSRP be conducted based upon the result of a NJDEP 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 NJDEP to file a complaint.

◊ *{2018}* The change in the audit process to focus more on LSRPs with notable deficiencies may reflect discussions between NJDEP and the Board on concerns with performance of certain LSRPs. See this Article at§ 3.3.7.

■ 3.3.9 Other notable provisions of the Board's rule 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 to Board or NJDEP inquiries? Are there circumstances (such as an illness or vacation, timing, breadth or complexity of the request or issues, other personal or professional circumstances [maternity leave, family leave, impending client or NJDEP deadlines, workload]) 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. If the facts and circumstances suggest that this short period applies unreasonably in particular circumstances, then a request for extension should be made and we believe it likely the Board or its staff, or a court, would provide relief.

● **3.4 LSRP Role & Responsibilities:**

■ 3.4.1 Most interpret SRRA as requiring 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). When engaged for remediation, SRRA requires that the responsible LSRP shall certify as part of its preparation and submission of reports to NJDEP 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… [NJDEP]." (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 NJDEP. (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). In brief, the LSRP is assigned a critical and essential role in the PRCRs compliance with SRRA.

◊ When required to use an LSRP, the PRCR also shall certify all documents submitted to NJDEP 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.

○ *{2018}* Increasingly this may occur by electronic on-line certifications.

◊ Note: Is it clear, as used here, when a PRCR initiates remediation and therefore is obligated to use an LSRP? The SRRA 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 since 2015 that NJDEP 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 known 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 seen as 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)? Work by NJDEP itself? Work by NJDOT or Conrail? Work by innocent purchasers or others not liable under the Spill Act? Compliance by an Owner or pre-sale or pre-permit application investigations for owners or operators (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 or caused, or a basin or culvert has, accumulation of contaminants, or whether a past or suspected sewer line leak left contamination)? What if an affiliated entity, but not a site owner, conducts the investigation? Some question whether the SRRA definition of PRCR should be construed more narrowly than written, and in particular whether those not liable under the Spill Act need use LSRPs for all remediation (or even any), perhaps because of an implied exception to SRRA. The State itself seems convinced that it need not comply with SRRA by using an LSRP for its investigative and remedial work, perhaps because of such an implied exception. See http://www.nj.gov/dep/srp/ Given the breadth of SRRA's language, absent clear guidance otherwise by NJDEP, a decision by a Person 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 resulting data shows a discharge, it is then reported and an LSRP is promptly retained for further work, the risk of enforcement by NJDEP will be low, at least under current priorities. Further, we think a court will be troubled by any interpretation of SRRA that imposes liability on those excused from liability under the Spill Act, particularly in circumstances where NJDEP acts similarly without using an LSRP. How to reconcile SRRA and the Spill Act is not self-evident, although NJDEP may argue otherwise.

○ 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. However, it applies only to discharges.

◊ *{2018}* The issue of whether and when accumulations of legally applied or naturally existing concentrations of hazardous substances become discharges is beyond the scope of this Article to address. But there continue to be debates between NJDEP and others as to such issues.

○ 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 likely 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. Guidance is limited to nonexistent. Consider: is a non-LSRP in violation of SRRA if he or she samples for vapor intrusion? Removes or covers a few cubic yards of lead contaminated soils, likely remaining from former lead paint, or perhaps resulting from DAP? What if the potential for an IEC is identified by a non-LSRP, and not addressed by that non-LSRP or the client? 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 legally weak in view of the definitions, all equities aside) can also be made that if either there is no known discharge being investigated or the Person conducting the investigation is not before that investigation a PRCR (as it arguably should not become a PRCR simply by sampling or otherwise remediating), use of an LSRP is not mandated (for to hold otherwise arguably penalizes non-liable parties for, and deters them from, taking steps to protect health, safety and the environment, presumably a result not sought by either the legislature or NJDEP, *{2018}* especially if, as it appears, the ability to use an LSRP, have the LSRP recognize the defense [something, in our experience, LSRPs have been loath to do], and adjust the investigation or remediation to be less than typically required under the Tech Regs and ARRCS [also, in our experience, resisted], may be limited to non-existent. [Consider: can an LSRP assist in a partial remediation, not meeting NJDEP guidance, and not require a deed notice and RAP if an RAO is not requested? Or will that LSRP be subject to enforcement for not following applicable guidance?]). 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 uncertain of the validity (and perhaps the longevity) of this view. Nonetheless, we are not aware of any clear statement by the NJDEP, 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 NJDEP and the Board). But do not be surprised by a future statement of position by NJDEP that the rules and statutes as now written are clear enough. As noted earlier, the Board may now be examining if and when LSRP usage is required. See http://www.nj.gov/lsrpboard/board/prof_conduct/006-2014_complaint.pdf and http://www.nj.gov/lsrpboard/meetings/20160307_minutes.pdf.

○ Note: It may be advisable that if a Person learns of an environmental problem or condition and then files a document or a report with NJDEP 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 potentially 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 as a licensed professional, (ii) a Person seeking to preserve innocent purchaser or other defenses, or (iii) a stranger to the property, including a neighbor, a potential buyer or a potential lender. Other arguments may be possible. Failure to document a good faith rationale may expose the filer to NJDEP investigation or enforcement if remediation fails to follow the report; in our view including such an explanation may encourage NJDEP to exercise enforcement discretion against prosecution, even if it disagrees with the filer's logic or conclusion. Note" innocent purchasers under the Spill Act may not have to remediate a newly discovered preexisting discharge (although NJDEP guidance on this is minimal to nonexistent) but preexisting discharges as to which an innocent purchaser defense is asserted must be reported to preserve defenses. See, e.g., the pre-1993 defense at N.J.S.A. 58:10-23.11g.c(3).

○ LSRPs and PRCRs have been comfortable in using NJDEP 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 NJDEP increases its use of true electronic forms and deliverables, filed only through the NJDEP gateway, sometimes without ability to include an attachment or make alterations or provide explanations, (and since 2017 emphasized to be of "readable" forms only, not mere scans), it remains to be seen whether the notation practice will 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, inadequate or arguably erroneous or incomplete choices, or denies the ability to explain answers and positions. As a minor example, the early forms noting retention of an LSRP required an index reference to an open NJDEP case: but if ISRA compliance begins earlier than an ISRA trigger, on a site with no environmental history, and if an LSRP is required to be used, or elected to be used, how is the form to be completed? (Note: In 2016 the authors faced this circumstance more than once: after consultation with NJDEP, who offered no solution, the LSRPs filed a copy of the old manual retention form, which was accepted by NJDEP without comment, and then filed electronically again when ISRA was later triggered. Reportedly NJDEP then connected the later electronic filing and new case number to the earlier mailed submission.). *{2018}* Reportedly this weakness is being corrected. In our view individual explanations and supplementary submissions must be allowed and tolerated, as experience has shown that NJDEP has not in fact yet been (and likely never will be) 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 NJDEP (and therefore in our view with limited to no liability on the filer dealing with a defective form). 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 adhesion 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 we advise that if a form is believed to be so inaccurate, if a "readable" form cannot be submitted with accurate or altered fields or attachments, then 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 addressed by that field] to refer to that separate filing; and if such notation is not possible, filing a separate submission anyway, worst case by certified mail). It is our belief that NJDEP cannot properly ignore information that comes into its possession in other ways than through its forms and portal, even if it in fact does ignore such, or fails to file same, or even discards same on receipt, so long as sent in good faith. We believe 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, even for administrative convenience, and then punish those so forced for errors and omissions resulting from the absence of viable alternatives, studiously blinding itself to larger truths. At a minimum constitutional principles (e.g., fundamental fairness and due process), in our view, require more of our government (e.g., NJDEP).

○ 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. *{2018}* Note, however, that this updated guidance does not speak to all issues of concern to those seeking to perfect innocent purchaser status and, therefore, is less helpful than it should be. (For example, should the guidance not explain if and when a pre-purchase preliminary assessment is required to be updated after initial preparation, if ever, and how? Or is the ASTM approach also appropriate in New Jersey? See ASTM E1527-13 (a Phase I which meets or exceeds the ASTM standards and was completed less than 180 days prior to the date of acquisition of the subject property is presumed to be valid. Between 180 days and one year, the Phase I needs to be updated. Beyond one year the Phase I is no longer presumed to be valid.)

○ Can NJDEP itself conduct a remediation without use of an LSRP? What in SRRA so provides? Isn't NJDEP (a/k/a/ the Department) a Person subject to SRRA? (The definition in SRRA is: "'Person' means an individual, public or private corporation, company, association, society, firm, partnership, joint stock company, the State, and any of its political subdivisions or agents.") We believe that strict interpretation of SRRA requires NJDEP to retain an LSRP in every instance when other Persons muss do so. As NJDEP does not so interpret SRRA, it can be only that either or both NJDEP interprets SRRA to exclude non-liable parties under the Spill Act from the definition of PRCR in SRRA, even when undertaking remediation, thereby supporting equivalent exclusions for other Persons or that somehow, despite the plain language of SRRA, as an enforcement instrumentality of the State it is exempt from obligations to comply with SRRA (a troubling, and potentially unconstitutional view, particularly in view of the above cited legislative choices of language). NJDEP's own declaration (discussed at this Article § 3.8.7) is not likely determinative, and perhaps is not evidential (as self-serving).

◊ It appears that NJDEP recognizes the need of the LSRP to authorize some activities formerly subject to NJDEP 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 NJDEP 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 NJDEP 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).")

○ Also, consider the recent 2016 changes to NJDEP Flood Rules. One new regulation depends heavily on LSRP review and certification, and may obligate NJDEP to act by issuance of a permit if the requirements are met, but does not allow the LSRP himself or herself to issue the required permit for remediation.

- N.J.A.C. 7:13-11.1 provides at (r):

"The Department shall issue an individual permit for the investigation, cleanup, or removal of hazardous substances …, and/or pollutants, …which is conducted in accordance with … *N.J.A.C. 7:26C*, and which results in clearing, cutting, and/or removal of riparian zone vegetation, only if: 1. The applicant demonstrates, or provides a certification from a [LSRP]… pursuant to [ARRCS]… that the area of riparian zone vegetation to be cleared, cut, and/or removed is the minimum necessary for compliance with the [Tech Rule]… and [ARRCS]… This demonstration or certification shall include: i. An exploration of all feasible alternative remediation methods acceptable under [the Tech Rule and ARRCS]… and ii. The identification of any remediation methods that would result in less area of riparian zone vegetation to be cleared, cut, and/or removed, with an explanation for why these remediation methods were not chosen; and 2. The applicant provides mitigation, in accordance with N.J.A.C. 7:13-13, for the total area of vegetation that is cleared, cut, and/or removed."

- N.J.A.C. 7:13-12.17 provides at (b):

" The Department shall issue an individual permit for the investigation, cleanup, or removal of hazardous substances only if the Department determines, or a [LSRP]… pursuant to [ARRCS], certifies, that: 1. The project complies with the [Tech Rule]… and [ARRCS]… 2. In order to minimize the potential that hazardous substances will be transported offsite by floodwaters during the conduct of site remediation activities, all material necessary to facilitate the investigation, cleanup, or removal of hazardous substances is stored and stockpiled as follows: i. Outside any floodway; ii. As far as practicable from any regulated water; iii. Where practicable, within flood-resistant containment areas; and iv. Where such material does not meet the Residential Direct Contact Soil Remediation Standards at *N.J.A.C. 7:26D*, above the 10-year flood elevation; 3. In order to minimize the potential that hazardous substances will be transported offsite by floodwaters after the completion of site remediation activities, the following requirements are satisfied: i. To the maximum extent practicable, all material permanently placed within a flood hazard area meets the Residential Direct Contact Soil Remediation Standards at *N.J.A.C. 7:26D*; ii. To the maximum extent practicable, the permanent placement of any material that does not meet the Residential Direct Contact Soil Remediation Standards at *N.J.A.C. 7:26D* is limited to areas situated outside any floodway and above the 10-year flood elevation; and iii. Any material that does not meet the Residential Direct Contact Soil Remediation Standards at *N.J.A.C. 7:26D* is stabilized and/or covered with suitable material such that the material will not be eroded, displaced, or transported offsite during the flood hazard area design flood."

○ 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 NJDEP involvement, often slowing down remedial processes. If LSRPs have the authority and skill to issue RAOs, it is difficult to understand why they cannot handle these and other matters. NJDEP 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. If NJDEP will not do so, then the legislature should. *{2018}* Some involved in the rumored SRRA 2.0 have suggested that changes to SRRA may include increased permit authority to LSRPs and perhaps others (professional engineers ("PE")? A new class of licensed land use professional?)

■ 3.4.2 SRRA and the new Board adoption of N.J.A.C. 7:26I specify a "Code of Conduct" to be followed by LSRPs in providing remediation services. Many refer to the Code of Conduct as set forth in those provisions.

◊ 3.4.2(A) An LSRP shall make decisions to meet: health risk and environmental standards under N.J.S.A. 58:10B-12, NJDEP 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 NJDEP rules and guidance. For example, if an LSRP follows NJDEP vapor intrusion guidance and determines that there is no IEC, but others disagree or question his or her view, or even if he or she has his or her own doubts, has the LSRP satisfied all his or her duties by complying with NJDEP rules and guidance? Or

must he or she do more (to meet his or her highest duty)? We would argue that "mere" compliance with NJDEP rules and guidances satisfies the LSRP's duties (essentially providing a safe harbor against claims otherwise) unless, perhaps, there either is clear and convincing evidence of an actual threat not addressed by those NJDEP rules or guidance or future Board or NJDEP guidance explains when mere compliance with existing guidance is not a safe harbor. 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 NJDEP rules and guidance, requires repetitive reexaminations of supportable LSRP conclusions. We admit, however, concern when dueling LSRPs disagree about IECs.) We further acknowledge that the degree of doubt felt by the LSRP *{2018}* as to the facts and circumstances as then perceived might also be relevant *{2018}* (an LSRP who feels more should be done may be at more risk than an LSRP who is sure nothing more is required). Exercise of professional judgment does not require certainty, and often is accompanies by some level of uncertainty or doubt. At some point, uncertainty or doubt. may suffice to require more than blind adherence to documents without exercise of judgment. See this Article at § 3.4.18 as to Professional Judgment. *{2018}* But a disagreement between professionals, or an LSRP and NJDEP, or even the Board and an LSRP, is not proof (and perhaps is not evidence) of a deficiency in meeting the highest duty.

○ Note: This statement of the LSRP's highest priority is in our view the most critical guideline for future behavior of LSRPs, PRCRs and their advisors, and as well as future assessment of LSRP deviations. It is to be expected that most complaints against LSRPs before the Board will claim a violation of this duty at the same time more specific allegations are made against the targeted LSRP. In particular this high standard negates (or weakens) the use of many previously significant factors available 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 factors, in the event of a conflict with this new SRRA stated priority: attorney-client or other privileges; trade secret, contractual or other confidentiality needs or requirements; costs, prices, rates, estimates, projections, budgets, account balances, costs or profit; vacations, holidays, evenings, 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 NJDEP 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 or should do to correct the situation? Should he or she have: resigned? Notified the PRCR or other PRCR officials or the PRCR counsel or Board of Directors? Notified NJDEP? (At least in some cases, this is now required. See this Article at § 3.4.2(G)). Notify the Board? Sue? Write e-mails, letters or memos? Conduct and 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 NJDEP rules and guidance automatically full and complete satisfaction of the LSRP's highest duty? Is it protection against third party (or NJDEP or Board) 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, particularly in the face of his or her own doubt, even if not based on work consistent with or meeting NJDEP 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 perhaps or obviously seeking to manipulate the LSRP and PRCR into expensive or self-serving work), may be relatively easily dismissed by the LSRP, no matter how strident or seemingly supported by some data or work (at least when the work generating that data was not conducted by an LSRP or in accordance with NJDEP 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 PEs. 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, particularly if there is a gap in applicable codes. However, we note that there is no similar statutory or regulatory statement of a PE's highest priority in the statute for PEs, 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 NJDEP 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 NJDEP's summary of remedial 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 NJDEP 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); an LSRP cannot interpret the law for a PRCR, particularly if the PRCR's lawyer has a contrary interpretation (although the LSRP can explain if and when the interpretation does not match the LSRP's understanding of NJDEP's own views). 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. 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 or decisions on Complaints 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, or delay 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 NJDEP 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 NJDEP 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).

- And as to the LSRP's duty to report certain deviations see this Article at §3.4.2(G).

○ There is already substantial available and appropriate NJDEP technical guidance. See http://www.state.nj.us/dep/srp/guidance/. More guidance arrives every year, and more is likely. SRRA provides that NJDEP 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)). NJDEP has done so and is doing so.

- Although NJDEP seems not to agree, we believe that post-SRRA legislation provides some limits on the promulgation of NJDEP 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 NJDEP use of statutorily authorized technical manuals; but, in our view, this exception does apply to SRRA guidance documents.

○ 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. See this Article at § 3.4.18.

- 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.

○ *{2018}* We note that many LSRPs feel constrained by this and related obligations to accept at face value NJDEP instructions, guidance, e-mails and conversations as to legal and other requirements applicable to situations, sites and clients, despite contrary views of lawyers for their clients. This is, perhaps, understandable, but nonetheless troubling, especially as NJDEP views have been and often are wrong or subject to considerable debate and uncertainty. In such instances we have urged the LSRPs to seek independent advice of counsel. In some cases we have been able to suggest approaches that reduce the LSRP's perception of risk and yet preserve key legal positions. We remind all that neither NJDEP nor LSRPs have the required licenses to interpret the law (although the Attorney General's office, as advisor to NJDEP, does).

◊ 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 any obligation 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 NJDEP 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 or she 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 NJDEP, 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 NJDEP, 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, NJDEP, 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 NJDEP any facts, data, information, qualifications, or limitations the LSRP knows that do not support the conclusions. See this Article at § 3.4.18.

○ 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. When is something a "professional judgment?" How does one go about forming it? When is it independent, and when not? We feel this was a missed opportunity of the Board to assist LSRPs and others understand what is required of LSRPs. See this Article at § 3.4.18.

○ Note: The LSRP's duty to report such non-supportive facts, data, information, qualifications, or limitations to NJDEP is another instance where the LSRP loyalties are directed towards NJDEP and not primarily to its client. It should be clear that an LSRP will have a hard time defending his or her own professional judgment to NJDEP, the Board and others if the LSRP does not look for, and consider, the presence or absence of non-supportive facts, data, information, qualifications, or limitations. Blind or inattentive decision-making may fail the requirements to be found to be "professional" (recognizing, nonetheless, that mistakes and misjudgments can happen and not be determinative of a breach of duties). *{2018}* Documentation at the time of such consideration and decision may be critical if a complaint is filed.

○ 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 (and then only in some extraordinary way, as the mere economic incentive of being retained by a client who pays for an LSRP's time and services, cannot itself be viewed as an improper dependence), as we suspect the Board and legislature intended LSRPs and NJDEP to read the provision? Might it also be a requirement to be independent of the Board, NJDEP and other LSRPs and consultants? Is it explained somewhat from the context and examples set forth in SRRA, as discussed below? (N.J.S.A. 58:10C-16.i.; P.L.2009, c.60 §16.i.)

○ 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 NJDEP technical guidance concerning site remediation. See www.nj.gov/dep/srp/srra/guidance. When there is no specific NJDEP technical guidance or in the judgment of an LSRP NJDEP 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 NJDEP 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 NJDEP 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 NJDEP, the Board or others?

- Note the absence of any express place in the hierarchy for past NJDEP 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.

- *{2018}* Are prior precedents, practices of the now-LSRP as a mere consultant, decisions for other clients or consultants, prior NJDEP decisions on other matters, relevant? Despite NJDEP's seeming loss of memory or confidence (or both) in prior decisions, we think those prior decisions and practices can still be relevant and that they should not be dismissed as outdated or irrelevant simply because of either the passage of time or SRRA. Obviously if there is a superseding rule, Law or guidance, prior presidents may be outdated. But otherwise, we think them relevant.

○ 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 or merely on what he or she is told, even by the client or its lawyer. Independent investigation and effort is required to verify relevant information. Do the enumerated examples serve as explanations of, or limitations on, the Board's requirement for independent decision making under N.J.A.C. 7:26I-6.8 above?

- *{2018}* Again, documentation of the effort to comply with this obligation may be critical to a defense if something turns up after the fact.

○ 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.

○ As to professional judgment, see this Article at § 3.4.18.

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

○ An LSRP shall explain in documents submitted to NJDEP, 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 its employer or its staff in confidence by others? Or what if given by a client or affiliate (a client's non-LSRP out-of-state consultant) hypothetically? Does it matter if the LSRP has no actual personal knowledge himself or herself? 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 other information, collected more consistently with NJDEP 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 assembled without LSRP supervision and involvement (perhaps in violation of SRRA), perhaps in context apparently intended by an adversary to complicate the effort by the PRCR and LSRP to proceed before NJDEP, or perhaps for intended for litigation purposes and prepared at the direction of counsel, or perhaps isolated

from other client LSRPs by those conducting the work for that client? Further, given NJDEP'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 answers likely depend on all the facts and circumstances; but undoubtedly it will be more risky for an LSRP to safely withhold any arguably relevant information from NJDEP and the Board than perhaps had been the case pre-SRRA in such and other circumstances before NJDEP. 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.

○ *{2018}* How should multiple LSRPs working on the same or related sites for different PRCRs work together? Need they be concerned with consistency of approach or reaching the same conclusions? If they differ in approaches or conclusions, how should that be addressed?

- Similarly, how should clients and their lawyers address situations Need they consult with each other at all, or can they each do their own separate jobs without consultation? involving multiple LSRPs? What can be done to improve the odds of success?

- In what circumstances can a client or its lawyer instruct one LSRP not to talk to another? Can an LSRP always abide by such instructions. Does it matter if the LSRP is instructed to work only as to a particular AOC as opposed to the entire site? Does it matter if the LSRP is not engaged on the site under NJDEP records?

○ Issue: Should the existence of dueling (or differing or adversarial) LSRP views be expressly disclosed or addressed to or before NJDEP? 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 or misjudgments by the other LSRP. Must the alleged errors still be identified and disclosed to NJDEP 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?

- *{2018}* Does it matter if the discovering LSRP is not of record for (responsible for) the site before NJDEP? 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 NJDEP get involved-only after the RAO?

- How will dueling LSRPs and divergent (perhaps irreconcilable) opinions be handled by NJDEP 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 NJDEP and resolved (especially as sometimes reasonable professional judgments can validly differ)? What if neither LSRP expressly identifies the contradiction or its source (perhaps unknown to both)? How will NJDEP thereafter identify that there is an issue if not called to NJDEP's attention? When? If NJDEP does later learn of the conflict, 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 NJDEP audit rights expire? Does the passage of time somehow make both LSRP decisions right or uncorrectable? Certainly, LSRP decisions can be shown to be wrong after the fact, and the proper facts cannot be ignored merely because one (or more) LSRPs have decided differently than the later-understood facts(s) even if legally the prior decisions cannot be undone. The law may protect those who relied on an improper understanding of the facts, but the law cannot change the facts.

- If one of the LSRPs learns of such a conflict, before or after his or her RAO, what must he or she do? *{2018}* If he or she has confidence in his or her own work, must he or she consult with the other, review the other's work, and determine whether he or she is still right? Must the difference in view, and explanation of the final conclusion, be reported to NJDEP? Disclosed to clients?

- 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? Is of record?

- And if anyone goes to NJDEP what should he or she say? What should NJDEP do? What if NJDEP declines to rule between conflicting LSRPs: who will?

- If in the exercise of due diligence a bank or a buyer and its or their consultant(s) identifies the conflict in LSRP decisions, or a new third party LSRP identifies the conflict, what happens? Does NJDEP have to be notified? Does it matter if the bank or buyer used an LSRP? That the consulting firm used has LSRPs? Is owned by an LSRP? What does protection of public health and the environment require? Will a buyer who buys despite the conflict, relying on an RAO with which its consultant disagrees, qualify for an innocent purchaser defense?

- It is not yet evident how serious the issue of dueling LSRPs is or will be. Certainly some 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 would hope, if possible, that the PRCRs, if not the LSRPs, would endeavor to resolve such issues between them whenever possible, without confrontation and without NJDEP involvement, perhaps rationalizing the seeming discrepancy by finding common cause against others or in explanations minimizing the discrepancies. This may be more likely if NJDEP itself seems disinclined to referee such disputes, as the Board has already shown itself to be, and various statements of NJDEP management suggest has been NJDEP's approach. Indeed, NJDEP has indicated that when it has identified conflicts, it has called them to the LSRPs attention, asking them to resolve the conflicts. We do not, however, yet have enough evidence of NJDEP's response to enable good predictions. And we are certain that this will not occur at many sites. Further, absent actual NJDEP 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).

- Will the Board ever take a role? If a Landlord files a Board complaint against the tenant LSRP, what should the Board do? If NJDEP complains? Should the Board appoint an arbiter or expert? 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? Substitute its own professional judgment? We think not. At present we think the Board agrees.

- *{2018}* Can parties to a transaction anticipate and address the possibility of conflicts between their experts? Can they have a contract that: allows for duplicate, alternative or verifying sampling to protect one party's interests, with or without use of a formally retained LSRP? Determines that the decisions of one LSRP are binding on all? Denies a right to go to NJDEP or the Board, or maybe even to court? Requires arbitration and binds all, including the LSRP, to mediation or arbitration? Make the Board or NJDEP the decision maker? While we have experience with some of these in actual contracts, and have experienced negotiations about most, we are doubtful that either NJDEP or any LSRP can agree to be bound by another's decisions (except those of a Judge).

- Consider an LSRP's obligation to report non-supporting information under N.J.A.C. 7:26I-6.8. See this Article at § 3.4.2(F)

○ N.J.A.C. 7:26I-6.9: An LSRP has a responsibility to report to NJDEP (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 NJDEP 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."

-- *{2018}* Thus the Board itself recognizes that an LSRP, not of record for a site, may have the same, but therefore arguably in other situations, not the same duties, as an LSRP of record.

- Again, what is meant by the requirement for the LSRP exercise of independent judgment? One thing it likely means is that if another LSRP or NJDEP form a contrary view, even if known to the deciding LSRP, the deciding LSRP is not bound by such views and must form his or her own independent judgment. See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2014_complaint.pdf.

○ 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." Does this suggest that an LSRP may be retained in other circumstances and not have such duties?

- 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 NJDEP in writing of client actions or decisions which are deviations from a remedial action work plan or other report (presumably as filed with NJDEP) 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 to provide access or sign a deed notice refuses to do so? What if a government entity rescinds or modifies a permit? What if a permit violation occurs? Or a permit is not obtained? 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 NJDEP approved reports, or other consultant's 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 NJDEP promptly in writing of the discovery of new material facts, data or information, after a report has been submitted to NJDEP, 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. See this Article at § 3.3.9.

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

○ The LSRP shall notify NJDEP and the PRCR if a deadline is going to be missed. See N.J.A.C. 7:26I-6.8(b) and (c) and N.J.A.C. 7:26I-6.18(b). In May 2016 NJDEP posted the "Licensed Site Remediation Professional (LSRP) Timeframe Communication Requirements" as an administrate guidance document and created a form to be emailed to NJDEP (srpnotifications@dep.nj.gov) entitled "Notice of Failure to Comply with a Mandatory or Expedited Site-Specific Remediation

Timeframe." See http://www.nj.gov/dep/srp/guidance/srra/lsrp_timeframe_req.pdf and http://www.nj.gov/dep/srp/srra/forms/notice_to_comply_form.pdf?version_1_0.

◊ 3.4.2(H) Sometimes an LSRP is under a regulatory 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 NJDEP'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 NJDEP 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). It does not address conflicts in different disclosure v. confidentiality requirements. *{2018}* It also does not address potential conflicts that may arise if a contract between the LSRP or the LSRP's firm imposes a duty of confidentiality potentially more demanding that the duty imposed by the rule.

○ 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).

- Is a contract provision sufficient? (e.g., consider the following clause: "The LSRP and his or her firm shall honor and protect the confidentiality of any and all materials provided to him or her by the client and its agents, servants and employees, including counsel, to the maximum extent possible under applicable law. Further in the event of any uncertainty or conflict in the LSRP's and firm's duties, or any third party demand to the LSRP or his or her firm for delivery or inspection of confidential information, the LSRP and his or her firm shall promptly consult with counsel for the client and follow instructions of such counsel absent an order of a court of competent jurisdiction to the contrary, on breach of which obligation the LSRP and firm shall be liable for any and all resulting costs, losses and damages.")

- Are client or counsel instructions in a meeting or call alone sufficient?

- Consider the effect of the following direction, inserted by client counsel 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 to LSRP: Review and Comments in this and accompanying or related documents and communications (such as e-mails or drafts) are attorney-client and work product privileged and confidential. I am authorized for our mutual client [_____] to hereby advise you [as][and] its LSRP and consulting firm to maintain all such documents, communications, excerpts and all copies as attorney-client and work product privileged and confidential. See N.J.S.A. 58:10C-16.m & N.J.A.C. 7:26I-6.12. If there are now or hereafter any questions or concerns about confidentiality of, or there occur any regulatory or third-party demands or requirements for disclosure, review or production of, any such documents, communications, excerpts and copies, please contact me immediately for instructions, in all events before responding to such demands or requirements. Thanks."

- Is an instruction to the LSRP, or the LSRP's firm or staff, that all such counsel communications are to be segregated from the decision file of the LSRP, and not delivered to NJDEP as part of that file, necessary? Advisable? Effective?

○ The rule's exception (except as authorized or required by law) is likely to create conflicts in the future (for example, if a Board or NJDEP audit is conducted and the Board demands "all e-mails" from counsel): we believe that 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 so proceeding 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: The terms ”associate” and “business venture” are undefined. The terms are subject to uncertainty and interpretation.

- 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 he or she leave the firm, so as to “disassociate?” If the firm litigates and loses? Or is some more severe default required (such as alteration of data or field notes?) If the firm fires the bad employee. Does this eliminate the issue (or is the firm still tainted?) And when must the LSRP 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? The day after?

- Similarly, what should a firm, or other LSRPs at a firm, with multiple LSRPs do if one LSRP is the subject of a compliant and under investigation by the Board? Found to have violated by the Board? By the Administrative law judge? By the Appellate Division? Punished by the Board? When? Only after final resolution? What if there is a pending appeal or hearing request? Should the firm investigate the issue itself? The LSRP? Act itself? When should the firm act to suspend or change the targeted LSRP’s practice earlier than resolution? How long can an LSRP wait? Should any or all clients be advised? Websites changed? If the targeted LSRP surrenders his or her license, can other LSRP’s thereafter associate with him or her? Do the terms of the surrender matter? What if the Board terminates or suspends the license? When, if ever, should the LSRP be terminated? Will the firm or other LSRPs face claims if it or they do act? If it or they do not? However the firm or other LSRPs act, do such actions serve as evidence in any later malpractice claim by a client? In the underlying Board matter? In future Board or NJDEP matters?

- *{2018}* Does the degree, nature or source of fault matter?

○ 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 NJDEP. 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.

- Does it require early notice of a Board investigation or complaint? See N.J.A.C. 7:26I-6.21 discussed below.

- *{2018}* Please note that there are many circumstances raised above where we ask if the LSRP has a duty to notify the client as to some event or circumstance. This rule suggests that in many of those cases, the answer should be “yes.”

○ 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, and would be better interpreted as referring to, a reasonable person standard (an “objective” standard under the law- not your view, or mine, or a particular LSRP, or even the Board’s).

○ 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? What about similar issues of his firm?

◊ 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(a))

- 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.

-- *{2018}* Recently we were requested to assist one client's LSRP, a tenant's LSRP, resolve certain disputes between the Tenant and Landlord, and the Landlord's own LSRP, where both LDSRPs were formally engaged before NJDEP because of successive ISRA triggers, the last of which required a remediation certification. After significant discussions we prepared a conflict disclosure and consent form to be signed by the surviving LSRP (the other withdrew) and the Landlord and Tenant.

- 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, at least without clear prior documented consents and disclosures of all concerned. We suspect the Board will eventually express concern with these and other conflicts.

-- *{2018}* We caution that there are likely some circumstances where conflict waivers may not be permitted or, even if permitted, may be dangerous or unwise, even if different people are involved within the same firm. LSRPs and their firms should be cautious about the possibility of inevitable and irreconcilable conflicts. An example, for lawyers is that a lawyer cannot represent both a driver and a passenger in a car accident. Consider similar concerns for representing two criminal defendants in the same event or a husband or wife in a divorce or a buyer or seller of a piece of real estate.

-- *{2018}* We also caution that the capacity of a client to consent to a waiver should be carefully considered as well. For example, in New Jersey a lawyer cannot obtain a waiver from a government authority he or she represents in one matter to take an adverse position in another (even if different lawyers from the same firm handle each separate matter and the files nod personnel are "screened" from each other. Can an LSRP represent a buyer buying a properly from a municipality separately re[presented by the same firm, even if not on the same matter?

○ 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(b))

- 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 NJDEP and the Board. We believe even non-salaried relationships with PRCRs may need to be carefully evaluated, and sometimes 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, but to date the Board has elected to be largely silent. But see this Article at § 3.3.6(A) and the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/009-2014_complaint.pdf in which the Board

determined that the subject LSRP, employed by a consulting firm whose president is also the officer of the company that owns the site for which the LSRP was retained to conduct remediation, is not in violation of N.J.S.A. 58:10C-16(y).

- 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.

- What does the use of the concept of "remediation services" modify? The PRCR or the related entities? Does it matter?

- What is a related entity? Is it the same as an affiliate (often defined by law as a Person controlling, controlled by or under common control with another Person)? Without a better definition, is it likely that it includes relative in-laws? Second cousins? In a corporate tree, it could be interpreted as those corporations or other entities filing consolidated tax returns. But are corporations or LLCs having any shared owners automatically related? It seems arguably not. See the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/009-2014_complaint.pdf.

-- *{2018}* We are aware of a pending Board complaint by NJDEP in which NJDEP felt that the indirect affiliation of relationship of an LSRP to a company owned by an officer of the LSRP's employing firm was a prohibited affiliation. After the LSRP resigned, NJDEP offered to withdraw the complaint, but the Board declined to terminate its investigation.

--- *{2018}* Please note that in this case NJDEP refused to meet representatives of the client of the LSRP until and unless the relationship with the LSRP terminated. NJDEP articulated that it felt that otherwise it was ignoring improper LSRP behaviors and it could not so proceed. We felt this approach unwarranted and inappropriate.

- Note the difference in terminology from the prior prohibition affecting associated business ventures discussed at this Article § 3.4.2(I). (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 also the difference as to restrictions as to "any ownership interest, compensation, or promise of continued employment, of the LSRP or any immediate family member" discussed immediately below .

○ 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(c))

- Note: The clear restrictions here for either or both other business or employment relationships as not limited to salaried employment supports the view that the narrow restriction in SRRA at c.60 §16.y for salaried employment and other relationships 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. This is a sensible distinction. If evidence shows that improper decisions are made because of a relationship, then discipline is justified; absent that, restrictions are really addressing a mere appearance of impropriety and, in our view, those should be narrowly construed.

■ 3.4.3 An LSRP must notify NJDEP 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, but likely not other retentions of an LSRP? A consultant who is an LSRP working as to a site, for example (i) in support of pre-acquisition due diligence for a buyer, or (ii) supporting on one or more efforts an LSRP of record, or (iii) serving in a review, QA/QC, or second opinion role, or (iv) acting as an expert witness does not, it appears, have a duty to send a notice that it is acting as an LSRP of record for the site. But see discussion elsewhere as to the need of a PRCR to use an LSRP, presumably formally engaged as such, 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. See this Article at § 2.6.

○ *{2018}* In cases where there are multiple LSRPs serving for the same site, perhaps for different AOCs, roles or clients, do NJDEP forms allow for sufficient explanation of the limitations on the respective LSRP roles? Will NJDEP be able to distinguish the differences and avoid making claims that a more limited ole LSRP has duties not accepted by the LSRP and his or her client?

◊ Note: Is there an implied condition to this obligation that the LSRP retention has to be for a PRCR's remediation the subject of SRRA? We believe so. Can an LSRP work out- of-state for a client without advising NJDEP? 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 NJDEP in every instance. 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? For investigation or remediation of some kind at a site of an innocent owner, foreclosing lender or other non-liable Person?) Such services should be possible in our view without implicating retention as an LSRP, *{2018}* except only, perhaps, if NJDEP and the Board clarify that an LSRP so retained is not subject to obligatory and full compliance with all guidance ordinarily applicable to remediations (for example, if composite sampling is not permitted in certain circumstances, can the LSRP nonetheless use such techniques? If a full cap or cover is required to remediate, with a deed notice and RAP, in a residential area, nonetheless if the LSRP's client has limited money and no liability, can the LSRP plan and supervise a remediation that is partial, incomplete or inadequate, so long as it does not issue an RAO?) Unfortunately, if an LSRP works on sites for which the LSRP is not formally 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 NJDEP 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, then 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? Need it be reported? Does the informally retained LSRP have a duty to deal with a suspected or actual IEC? How? Would it be better for the client to hire a non-LSRP? Will the non-LSRP have liability for acting in such instances?). What if NJDEP 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? What if NJDEP or the Board later finds out a non-LSRP was involved in arguably remedial activities? Do they have jurisdiction over non-LSRP activities? Can the LSRP be disciplined as an LSRP, even though not engaged as such? Can the non-LSRP be disciplined for not being or retaining an LSRP but engaging in such activities? 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. Nonetheless, we believe that SRRA should be interpreted not to impose LSRP duties on LSRPs not formally engaged as such by a PRCR for a site and further believe non-LSRPs have a role in some remedial activities not requiring LSRPs. We think NJDEP's own behaviors in remediating sites without using LSRPs supports our view. *{2018}* We think the Board has been, will be, and should be restrained in extending duties and obligation to those not formally engaged before NJDEP for a site's remediation.

◊ 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, even though each is responsible for entire site RAOs for the relevant periods). 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 NJDEP (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 NJDEP 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 NJDEP or the Board be bound by such? Perhaps; but we would hesitate a great deal before pursuing management of site remediation by such a method.

○ 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, particularly under ISRA? The PRCR? NJDEP? The last LSRP? Counsel? Where is there any NJDEP or Board guidance or rule that speaks to this? We believe that statements by NJDEP that one particular LSRP must eventually issue an entire site RAO in some circumstances, for example under ISRA, are legally flawed and inconsistent with prior NJDEP practices and unsupported by SRRA changes. We believe the PRCR may have the obligation to address all AOCs at the entire site such that none remain unaddressed, but the aggregate of multiple FRDs can suffice to prove this has occurred. We do not believe NJDEP can force any particular LSRP to determine that the PRCRs view of the assemblage of various NJDEP and LSRP determinations, particularly if not reviewed or supervised by that LSRP, are complete, particularly under NJDEP practices and guidances at the time of that review. We do not believe NJDEP can insist that a case or matter remains open and unresolved, and that one LSRP review all work, subject to the vagaries of NJDEP changes, pending one holistic entire site FRD by one reviewing LSRP. We see no support in SRRA for this view. *{2018}* We would resist it and defend against any enforcement proceeding brought by NJDEP based on such demands.

◊ 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 NJDEP 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 NJDEP 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, NJDEP knows it can exercise any of a wide range of powers to cause or conduct remediation. In fact, NJDEP now states that in some of these cases, without any notice, PRCRs may become automatically subject to direct oversight. Whether and how the NJDEP's exercise of such powers and positions will in fact work, given past NJDEP failures with ample resources and weapons in similar circumstances, remains to be seen. But once any LSRP has terminated or been terminated, does the disengaged LSRP have any liabilities for post-termination events? Probably very few (e.g., making reports and correcting deficiencies as SRRA requires even after termination). We believe, for example, that the LSRP need not continue to operate a vapor mitigation system or groundwater treatment system of a bankrupt PRCR, even if harm to health, safety and the environment will arise from non-operation: NJDEP has the resources, power and authority (and perhaps the obligation) to act in those circumstances, the LSRP does not.

■ 3.4.4 An LSRP must notify NJDEP 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. In our view it follows that an LSRP who has not given notice to NJDEP of its retention of record need not give notice of any termination.

◊ It remains to be seen how various other events, which alter the relationship of an LSRP either or both to a PRCR 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 [*{2018}* Note: See the Board's reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/005-2015_complaint.pdf]); 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- are such unenforceable as to LSRPs?]); 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 to NJDEP and the Board. 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 NJDEP after learning of the event. These same situations may then raise other issues under SRRA (for example, NJDEP previously ruled that RAOs with deficiencies when the issuing LSRP lost his temporary license could not be corrected by a new LSRP but had to be invalidated as not protective [a position with which we disagreed]: will the same logic apply as to deceased LSRPs?).

◊ 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, NJDEP clearly thinks that the RAO issuing LSRP continues with respect to the site and its client until someone files a termination (a determination arguably wrong, but hard now to ignore as a matter of practice). 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 did not match the original expectation of either the LSRP or the client, or frankly positions of NJDEP at SRRA's adoption. Today, we would suggest that each should consider terminating the LSRP formally in order to avoid surprise obligations and responsibilities.

○ Note that NJDEP 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." NJDEP argues 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, apparently of the belief that remediation is ongoing (a position we think is arguably inconsistent with SRRA and the effect of an RAO), except that RAPs largely repeat this requirement today. Arguably, this NJDEP position 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 NJDEP. We do not believe such is necessarily "remediation" as defined by the SRRA Act requiring use of an LSRP. Nonetheless, we concede that as a practical matter PRCRs and LSRPs most often will act to satisfy NJDEP's view.

■ 3.4.5 An LSRP must notify the Board or NJDEP 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). See, e.g., this Article at §§ 3.4.2(G) and 3.4.6. 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 NJDEP in the period allowed by NJDEP 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 NJDEP will review documents filed by the LSRP, sometimes minimally, sometimes in detail (although if NJDEP'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 NJDEP). 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 [see the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/002-2015_complaint.pdf]), 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 impliedly including reference to the relative powers and responsibilities of the Persons involved. Presumably NJDEP 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 have been NJDEP complaints to the Board in which issues of this kind suggest that NJDEP feels that an LSRP does have liability for decisions its PRCR client makes, and its client's actions and omissions; in a few instances 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 isolated LSRP to resign from working for the failing PRCR (or to revoke an approval or contact NJDEP)? 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 repeat 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 NJDEP or Board enforcement. But otherwise, even if there is a breach after a NJDEP demand, we think better 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 and thereby better protect health, safety and the environment than may be the case by resignation. Indeed, in many cases it will be in the interest of the State to encourage such continuing involvement and curative efforts, and NJDEP 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 since SRRA's adoption, NJDEP 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, and NJDEP resources will be stretched more thinly.

◊ Note: SRRA does not address what are, or how NJDEP 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 NJDEP has acted itself in the past. Presumably such periods should account for workloads and resources, including of LSRPs. Unfortunately on occasion NJDEP has been known historically to conclude that relatively brief periods should suffice; in recent times, however, NJDEP has been more forgiving. *{2018}* Will the new Governor and Commissioner bring a different attitude to NJDEP? Will NJDEP return to a more enforcement-oriented, less business-friendly, approach?

○ The Board may have set seven days as the relevant period for corrective action, absent other express time periods. 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 either or both NJDEP or any 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 NJDEP, particularly when NJDEP 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 through use of such techniques. There is reason to hope that NJDEP sees the advantage in a free good faith exchange of questions, answers, concerns and alternatives, at least in good faith situations, despite the reported recent end of "compliance assistance mode" that governed earlier SRRA efforts, *{2018}* and will do so hereafter despite the new administration. However, without doubt NJDEP will be wary of those (*{2018}* PRCRs, consultants and lawyers) 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 NJDEP 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 NJDEP 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 NJDEP has cautioned that the LSRP has authority to act, but based on the available information NJDEP will scrutinize the decision with great vigor and, if then deemed inappropriate, rescind the RAO and refer the matter to the Board). Yet how?

○ Note: *{2018}* The LSRPA, as the notable LSRP professional association, has a process for seeking second opinions or consultations, not necessarily formal or extensive, that might help bolster a particular LSRP decision against later attack. This process is relatively new and untested.

○ Would the opinion of USEPA matter? The County or Municipality?

○ In appropriate cases should NJDEP 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 NJDEP's tentative current view right, that the last one standing should hire its own LSRP, fix any and all issues, and then sue whoever it wants, with minimum expense to, and help and input from, NJDEP?

◊ Note: it is not clear how the existence of LSRPs and SRRA will affect judicial review of NJDEP 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, enforcement action, license revocation, permit denial or reversal of an LSRP decision). Can an LSRP apply to NJDEP for a permit, variance or waiver, which if denied or not responded to, then serves as a basis for a PRCR or the LSRP going to court, particularly if NJDEP guidance, official or unofficial, interferes with true independent application of the LSRP's professional judgment? *{2018}* How often, and in what circumstances, will NJDEP agree that its decisions should be subject to a hearing, challenge or appeal?

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

◊ Issue: It may be that different LSRPs disagree with each other about particular sites or regional conditions. NJDEP may identify the disagreement 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? Of course, it may be as possible, perhaps more, that NJDEP simply ignores the issue. What happens then and thereafter if the issue resurfaces, perhaps due to action of a third party or further LSRP?

◊ Issue: What if an actual or potential deficiency is identified after the three year period for NJDEP 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. Does the last one standing deal with it, or ignore it as well?

■ 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 NJDEP in the timeframes specified by NJDEP. (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)). (Presumably the LSRP has a similar duty as to deficiencies that he or she identifies on his or her own review.) 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 NJDEP in writing of those: is such notification all that is required? (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 NJDEP in writing of those: is such notification all that is required?. (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 NJDEP, 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 NJDEP, before accepting responsibility for supervising remediation of the site (i.e., in our view before filing the retention form with NJDEP 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. Some 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 NJDEP to consider if NJDEP lacks resources to enforce or remediate such troubled sites and PRCRs and LSRPs are willing to proceed only with relief from ordinary requirements. *{2018}* However a similar technique can be used by a third-party purchaser seeking a pre-purchase direct oversight ACO providing some relief as to post-purchase compliance. NJDEP likely could act similarly in other circumstances. See this Article at § 1.2.37.

◊ 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 NJDEP communications and approvals. However, this has already posed interesting issues for LSRPs, as it has for PRCRs and NJDEP, as to how to treat work conducted under earlier rules, guidance, practices, especially if there were NJDEP 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 NJDEP 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 NJDEP itself could and did rely on such approvals in issuing NFAs prior to SRRA? Would it matter if the NJDEP decision was evidenced in a no further action letter with

covenant not to sue? Can an LSRP rely on NJDEP's past approval of a remedial action selection report without full review of that report and the basis for NJDEP'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 NJDEP 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 NJDEP 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 NJDEP decisions or approvals, but rather that NJDEP 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 LSRPs to reexamine all work and decisions that went on before, as if they had not occurred, 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, *{2018}* to accelerate completion, not delay it by revisiting all prior work. NJDEP past silence, missing reviews and many delays at many sites were why the legislature decided that LSRPs were needed to correct the NJDEP caused backlog; but when NJDEP has spoken in the past we believe that LSRPs should not be forced by NJDEP to reopen and reexamine the NJDEP's basis for NJDEP's decisions. Perhaps future NJDEP 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 NJDEP and (y) notify NJDEP 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 NJDEP'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 clear NJDEP 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 NJDEP. How many real problems have occurred is uncertain, but problems seem likely not to be widespread.

◊ Note: Is a suspected IEC, or a suspicion of an IEC, or IEC 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 in the face of such suspicions 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 at least 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 NJDEP by calling the hotline (now (877) 927-6337). The PRCR is also separately responsible for notifying NJDEP. (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 NJDEP'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, NJDEP's current rules and guidance seem 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 NJDEP 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 NJDEP 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, NJDEP has not made a clear 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 NJDEP (*{2018}* and perhaps the legislature) 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 NJDEP 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 NJDEP 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 NJDEP 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. NJDEP 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 NJDEP rules). However, ongoing discussions with NJDEP raise the possibility that evolving new guidance will clarify that NJDEP 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 NJDEP 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 or report. 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 NJDEP 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 NJDEP 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."

◊ How does this apply to other prior PRCR or consultant work or decisions, or even of NJDEP, not conducted by any LSRP, but reviewed (but not, perhaps, periodically) by the current LSRP and found reliable? Does this not apply to such?

◊ 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 NJDEP 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 on in some other way? *{2018}* Should all be dismissed or discarded? Should they be repeated?

◊ 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. NJDEP's view on the appropriateness of the solutions used by PRCRs and LSRPs facing these issues may await the later NJDEP review after filing of the final RI report, pursuit of any RAP 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, or NJDEP rules or guidance, 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 NJDEP 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 NJDEP 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 (see this Article at § 3.3.6(B)) that NJDEP may have a right of access to more than those documents the LSRP elects to file with NJDEP. Certainly data and work records not yet filed with NJDEP, but certain to be later filed, seem clearly within the realm of appropriate demands. Further, materials required to be filed with NJDEP by rule and omitted accidentally or intentionally from actual filings also may be required to be available. But is it so clear that all meeting notes, e-mails, drafts, notes, and memos, of the LSRP and his or her firm, potentially including client confidential information or attorney-client privileged information, especially those not in the remediation files, are able to be sought by NJDEP.

○ 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 the system and requirements function with respect to prior work or work not conducted by or under the LSRP's supervision?

◊ Must an LSRP fully and solely comply with NJDEP restrictions on the use of NJDEP forms and electronic gateway, including by delivering only unaltered "readable" forms? See discussion at this Article §2.10 above. We strongly recommend that in certain situations when NJDEP'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 NJDEP. 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 NJDEP attention and advice on the issue, if appropriate (including calls, memos to the file, e-mails, telecopied, mailed and Certified Mail letters, perhaps 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 NJDEP for sound management of the SRRA system and protection of health, safety and the environment. It must occur only in good faith (For example, 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 NJDEP 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, particularly as a protective measure given the uncertainties of the need for LSRP retention for certain work by non-liable Persons) 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 NJDEP 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 NJDEP uses terms or words that cannot mean literally what NJDEP says, and some common sense construction is appropriate, necessary and not worthy of separate comment or reservation. Consider, for example, NJDEP'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 by NJDEP).

■ 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. See e.g., this Article at § 3.3.6(B).

■ 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 NJDEP 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 NJDEP previously issued NFA Letters. Any other result will arguably be a failure of the new SRRA system to accomplish the goals of the legislature. LSRPs were given prior NJDEP authority because they could act more quickly than NJDEP did; if NJDEP prevents this, then NJDEP is ignoring, and impeding the accomplishment of, the legislature's goal in adopting SRRA. Our analysis supports opposition to NJDEP 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 NJDEP for NFA Letters did not require proof or a determination of full compliance with all applicable laws (by the applicant or NJDEP). One can imagine past sites and remediations that received no further action letters from NJDEP 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)? Advice of counsel? Whose? Does

materiality matter? Does the protectiveness of prior decisions and work avoid or mitigate concern for 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 NJDEP 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 or a court (the only licensed New Jersey professional authorized to practice law). In practice, this may prove a small burden for most LSRPs at most sites, as NJDEP 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 NJDEP [such as a wetlands or other land use 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, for practicing outside his or her licensed professional, and not held to a less stringent standard of a deviation from professional care within the profession of LSRPs, 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 NJDEP 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 as a lawyer and without adequate support for its decision, 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 on, or must a buyer hire its own LSRP to review, the original LSRP's RAO and underlying documents to assess their worth? (Who watches the watchers? Who guards against the guards?) What if a non-LSRP preliminary assessment or site investigation questions the validity of a prior LSRP decision, particularly under new NJDEP 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 NJDEP 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 NJDEP added another notice to address Historically Applied Pesticides Not Addressed (posted 20 June 2014). *{2017}* And in April 2016 NJDEP issued an administrative guidance document entitled "Issuance of Response Action Outcomes (RAOs)." See http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf. In November 2016 NJDEP announced a change to its RAO template allowing LSRPs to issue an RAO for a site with contaminated sediment migrating from an off-site source. See http://www.nj.gov/dep/srp/srra/listserv_archives/2016/20161121_srra.html We believe this is consistent with applicable law.

■ 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 (presumably on disk) of the records shall be submitted to NJDEP at the time the RAO is filed with NJDEP. (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, citing this rule? Perhaps.

○ 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? In certain instances, the failure of the Board to address such legitimate interests may subject the rule itself to challenge.

○ 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, NJDEP, 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). Might not the same apply to the firm or client? Do copies equally protect everyone? Why does the LSRP get the originals?

○ 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 (or a copy) 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 (or copies) by the LSRP or his new firm, or would such violate this rule? What if the contract in effect before the rule did so? 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.

○ Is it possible that there can be duplicate electronic originals that suffice for all purposes?

◊ 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 NJDEP 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).

{2018} Note: There is uncertainty as to whether particular records, any records, or materials segregated from the LSRP's own remedial decision making file, can be excluded from delivery to NJDEP, either at the time of the RAO or later upon request of NJDEP or the Board. We believe there are cogent arguments that not all such records need be provided. But that view is untested and supported only somewhat by the express language of the Statute and rules and the overall sense of SRRA's scope and intent, particularly in view of the recognition of some duty as to confidentiality and the separate Court mandated protection of attorney-client confidential privileged materials (and as to such we would vigorously oppose delivery in breach of a privilege).

◊ Note: There is a requirement of submission of three copies of "the records" to NJDEP. 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 NJDEP 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 NJDEP be subject to release to the public on request to NJDEP 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 NJDEP? 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. In our view, such privileged and confidential materials (such as, but not limited to, counsel's markup of drafts) 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 NJDEP requires simultaneously to NJDEP 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 NJDEP that direct oversight has been triggered required? (Many would argue that it is; NJDEP says not.) Are only actual submissions required to be so transmitted, or drafts? (It says submissions; but NJDEP feels it too narrow a reading to limit it to only actual materials submitted to NJDEP, as then why have the clause? So likely it means submissions to NJDEP being sent to the PRCR for review.) Does it extend to other materials: Outlines? Proposals? Budgets? Invoices? 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.

◊ How does this affect the handling of responses by PRCRs and their counsel to LSRPs for site sunder direct oversight? Need the LSRP provide any responses to LSRP drafts to NJDEP?

■ 3.4.17 Note: It is to be remembered, however, that LSRP obligations and 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 obligations and liability can be broader than SRRA itself specifies.

◊ An LSRP is prohibited from committing 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. These requirements are not aimed at LSRPs, but nonetheless apply to them.

◊ An LSRP cannot legally forge documents or signatures. He or she cannot steal. He or she cannot trespass. Doing so subjects the LSRP to punishment, likely even by the Board.

◊ 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. Insurance may protect the LSRP's economic interest, but does not excuse the tort.

◊ An LSRP cannot safely commit "malpractice": breach of a professional duty of care to someone to whom he or she owes that duty. Insurance may protect the LSRP's economic interest, but does not excuse the tort.

○ Does the New Jersey Affidavit of Merit statute apply to malpractice cases against LSRPs? By its terms perhaps. Does it require that the affidavit of merit be provided by a plaintiff's expert LSRP? Perhaps 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." The issue is as yet untested, as best we are aware.

■ 3.4.18 Observations on "professional judgment." What is it? How should it be formed?

◊ 3.4.18.1:

○ It is better for all that every LSRP exercise of professional judgment be defensible and then even much better if every LSRP professional judgment ultimately proves to be correct. The second seems unlikely to prove to be the case- some professional rendered LSRP judgments are likely to be proved wrong, in hindsight. Despite this, erroneous judgments nonetheless can be defensible as meeting the standard of care for an LSRP (not being malpractice, though wrong). Doctors and lawyers have often properly reached judgments that are proved wrong later; Judges on multi-judge panels (such as the Supreme Court) may disagree with each other. Such "errors" and "disagreements" do not prove that anyone acted unprofessionally.

○ A cautionary note: The professional judgment we discuss below is not the preliminary judgment or view sometimes expressed by qualified experienced professionals without full review and consideration. Those preliminary views and judgments of professionals are often sought by clients, lawyers, consulting team members and others, and can be valuable as a practical matter. Presumably no such preliminary view or judgment will serve as the final basis for important technically and legally significant LSRP decisions to be binding on RCRs and others and subject to review by NJDEP. Accordingly, the discussion below is not aimed at such preliminary views and judgments – except to say LSRPs should be cautious in expressing even them, and do so only with appropriate warnings and disclaimers (and recordkeeping as well).

○ Certainly, the experience and expertise of an opining LSRP are relevant to the formation of his or her professional judgment, whether preliminary or final. But such experience and expertise is not determinative, as much more needs to be involved.

- A relatively new or inexperienced LSRP can form appropriate professional judgments within the licensed field of remediation. He or she may be able to do so without direct or complete expertise and experience, and even in opposition to the views of more qualified or experienced professionals, so long as within the field for which he or she holds a license. Indeed he or she may be required to do so in certain circumstances. He or she may be able to do so better than those more experienced. Conversely, a

relatively senior or experienced LSRP can form inappropriate or erroneous professional judgments within the licensed field of remediation. Experience and expertise can be invaluable, but sometimes can distort the proper approach or result.

- Diligence, investment, and care are required. Professional judgment is not rendered hastily, thoughtlessly, effortlessly, automatically or carelessly. Use caution.

-Support, including of other experts or specialists, may be required to meet the standard of care. An LSRP may not know all topics, but can still exercise professional judgment with good support and care.

- The LSRP's license can limit his or her right and ability to form a professional judgment outside the licensed field of remediation. For example, the LSRP's license does not allow the LSRP to practice as a professional engineer or as a lawyer. An LSRP who forms a professional judgment outside the sphere of his or her experience, expertise and license may not be automatically liable as having committed malpractice (deviating from the standard of care), but is likely to be subject to a more stringent review and assessment in court. Arguably he or she may be held strictly liable for an erroneous judgment rendered outside his or her expertise, as opposed to having limited or no liability for being wrong, but having properly reached a professional judgment later proved wrong.

○ Professional Judgment itself can not be or depend on a mere assertion by an LSRP that "I know it [the conclusion] when I see it." More is required than assertion, observation or conclusion.

- Some experienced professionals react to situations based on their experience, having seen similar or the same situations before. Obviously this is a risky endeavor, and is to be discouraged and avoided, as really based on assumptions.

- Experienced professionals may recognize when a fellow professional exercised or did not exercise professional judgment, even if they agree or disagree with the judgment. So may inexperienced professionals or professionals in other fields.

○ Professional Judgment goes beyond objective facts or data. It is not rote. It is not formulaic.

- It may not be a proper professional judgment to merely recite or observe or act on data: to say "the data shows that much of the soil column in AOC A-1 between these 12 samples is contaminated with PCBs, and therefore we know enough." The statement instead may be a true recitation of facts, but perhaps not the only relevant facts, and the conclusion based on true data yet may be unsupported and, therefore, even if right not the proper exercise of professional; judgment. Judgment can be based on review and assessment of facts. But pursuit of enough of the relevant facts is part of the process of reaching a proper professional judgment.

- It can be the proper exercise of formation of professional judgment to say "based on the available data, and the XYZ Model, we have enough information to stop further remedial investigation for the ABC Pharmaceutical site and hereafter proceed with remedial design, even though we do not have a clean downgradient sample." However, in certain circumstances this may not be the proper professional judgment. Further, it may not be in the best interests of the client, or the protection of health, safety and the environment.

○ Professional Judgment should occur only by undertaking a thorough well-documented and well-reasoned process resulting in a reasoned and supported judgment.

- A thorough process followed by an irrational or unsupported judgment is not likely reflective of the exercise of professional judgment. But, again, formation of a wrong professional judgment may not be a deviation from the standard of care required of an LSRP.

- A judgment reached after little to no reflection, even if likely correct, may not be the proper exercise of professional judgment: it may be more a guess or intuition, lucky or unlucky, potentially valuable, but not sufficient as proper professional judgment. While a professional can be aggressive and imaginative, and, for example, have strong gut instincts, pursuit of best practices and conservative analysis, and documenting/disclosing deviations and reasons for deviations, can be critical. Hiding the facts, assumptions, deviations and reasoning has a high probability of being seen as unprofessional.

- A judgment reached after reflection, supported somewhat by facts, but without documentation of the effort and analysis, may not be adequately repeatable, reviewable or defensible. Contemporaneous documentation can be critical, both to the process as it occurs, and to the proofs later necessary to show others that a process was followed, that it was professional in method, reasoning, scope and extent, that limitations and assumptions were identified and addressed, that disclosures occurred appropriately, that care was taken, and that after-the-fact rationalization and defenses are not occurring. Further, with the passage of time memories fade, people depart and skepticism grows. The absence of contemporaneous proofs may prove fatal on

review by the NJDEP, Board, a Court or a Jury of whether or not proper professional judgment was formed. Good documentation is wise, and often essential.

- It can be helpful to consider as models for your behavior as an LSRP those whom you have seen act in highly professional ways, whether LSRPs or other professionals than your own (e.g. good lawyers, good engineers, good scientists or good doctors): does a particular professional judgment of a particular LSRP generate the same impression of professionalism in his or her decisions?

- What approach will you as an LSRP, your fellow LSRPs, and your firm, follow? Have you and your firm established a process or view on how to approach the need for exercising professional judgment? Do you have a policy, or procedure, or consultative/review process? What documentation is required? Should you? Do you have appropriate resources for the task? Can you get them?

-- Most law firms, forever, distinguish between the ongoing process of advising clients, and formal third party opinions (written firm opinions on which third parties, not just clients, can rely). The process often requires (i) use of a specific form of written opinion, (ii) prior review by an opinion committee, (iii) conformance to a set of policies as to topics on which the firm will not render opinions, and (iv) appropriate documentation. Attorneys who act without following the process may not be binding the firm, may be sanctioned, and may act without benefit of the firm's insurance coverage.

- If you want to consider formulating a disciplined approach, there are materials available on-line to review and assist in preparing your approach. Taken as a whole, they suggest that professionals in various disciplines, seeking to formulate a proper professional judgment, often approach the effort in a disciplined way.

○ In most circumstances, professional judgment must be formulated and supported so that it is "independent." The Board may have broadened the requirement for independence in its new rules. See N.J.A.C. 7:26I-6.8 discussed at this Article § 3.4.2(F) above, and quoted below at § 3.4.18.2.The precise requirements for a judgment to qualify as independent are unclear. They may include:

- Independent search for, identification, collection, assembly, review and verification of necessary or helpful information, facts and data. Reliance on the efforts of others is not prohibited, but if the LSRP's view is solely dependent on others, improperly, then it may not be independent.

- Freedom from undue influences of clients, firms, other consultants and team members, third parties and, we would argue in some cases, NJDEP itself. All these Persons may be consulted and their views considered. But true independence suggests that they cannot be determinative nor can they have disproportionate influence. So what is undue or disproportionate influence? This is not clear, but will be determined from the facts and circumstances. In some cases threats may suffice to prove undue influence; in others rewards may. Ordinary business and other relationships are not, in our view. For example, we do not believe that any or every relationship or affiliation of an LSRP with a client prevents independence.

○ Professional Judgment is not a new or unique concept. There is analogous guidance out there in other fields. There are books, articles, courses. Just do an internet search: "what is 'professional judgment'". And ask other professions and advisors in those professions. You will find that:

- Financial Aid officers use professional judgment in determining financial aid eligibility for college applicants.

- Medical Professionals use professional judgment in making diagnoses and formulating treatment plans.

- Accountants use professional judgment in preparing financial statements.

-- Review of various accounting training materials suggest they may have greater concern for using "Professional Skepticism" (to address and prevent fraud from affecting their reviews and reports).

-- What should an LSRP do as to fraud (or misinformation)? Well, perform "enough" due diligence of independent source materials, minimizing reliance on things the client tells you, or rumors, or the absence of information, helps.

-- Accounting materials that can be found on the topic from an internet search are extensive. But, as examples, look for and review "Professional-Judgement-Framework-Report-ICAS.pdf" and "KPMG_ProfJudgment_Monograph.pdf" (with due credit to the organizations and authors of those materials for the insight on a process and approach potentially of value to LSRPs by analogy).

- Lawyers use professional judgment in much of what they do. While some statutes and rules appear to provide objective standards, lawyers are often asked to assess the validity of the words in statutes and rules under constitutional law, common law, principles of general equity and in the face of

conflicting statutes and rules. Regulatory guidance, forms and websites may be important, but are rarely determinative, especially if contradicted by other materials of greater relevance (such as the words in a statute itself). Differences of opinion among lawyers are commonplace. Lawyers also have an advocative role. So the issue of whether a lawyer is advocating or providing professional judgment can become confused, except perhaps if the lawyer is providing a third party legal opinion. Case law, usually written in the context of malpractice claims against defendant lawyers for improper judgments and advice, can provide analogous guidance to LSRPs.

- Regrettably, despite hundreds of years, if not thousands, of professionals exercising professional judgment, often some judgments are proven wrong, often only in hindsight, but also sometimes even when rendered (by comparison, for example, with the diverse professional opinions sometimes expressed by adverse, but sometimes aligned, licensed professionals in debating or arguing the meaning and effects of various laws and regulations), for example, when disparate views cannot all be right or reconciled. Consider, for example, a 5-4 decision of the Supreme Court: often political views and biases had little to no effect and were irrelevant, and in some cases no particular Supreme Court Justice had any individual need for an issue to be resolved in a particular way, yet after decades of education and experience, and many hours of effort, research and reflection, and often with the highest level of professionalism, respect and discussion, sometimes different Justices end up with totally opposing views, voting accordingly, with the majority view prevailing, at least for a time, but perhaps still not being "right" in all views or for all time. In such cases, all Justices rendered their best professional judgments, even though one or more were "wrong." Consider that many people seek a second medical opinion on whether a particular surgery, drug or treatment regime recommended by their first physician will be effective, is the right path, or even the only path. Some of those patients find themselves with little comfort as two or more licensed and experienced professionals, all acting in good faith, differ dramatically on the recommended approach for the patient in the best of their respective independent professional judgments. Their professional judgments may be irreconcilable, and in hindsight one may prove to have been more right than the other, but all may have been properly given, and been fully professional and independent, when made. Again, the obligation to apply professional judgment is not breached merely if the professional judgment is wrong or proved wrong when made or thereafter. *{2018}* The obligation to apply professional judgment is not breached merely if later data or facts show the professional judgment was wrong when made, at least if there was enough of a basis supporting the judgment when made.

○ The Board could help LSRPs and others (NJDEP) by adopting real guidance on the topic: it is not likely to do so, at least in any foreseeable short-term period. But if and when it does, such guidance can not readily be ignored by LSRPs or NJDEP.

- *{2018}* But in May 2017 the Board approved a "Statement of Interpretation 2017-01: Independent Professional Judgment, " "… intended to clarify provisions… regarding the conduct of …[LSRPs] with respect to applying Independent Professional Judgment." See www.nj.gov/lsrpboard/board/ind_prof_judge_statement_int.pdf. In general the Board agrees with our views, but provides few, if any, suggestions as to the process and proofs for exercising professional judgment: except, importantly, the Board warns that such judgment should be documented. See this Article at § 1.2.18.

○ The LSRP Professional Association also could do so. It might be useful for many if it did. But any guidance it issues may not be binding or even helpful, at least for some time. And does every LSRP want it to do so?

○ NJDEP could do so- but it may not be binding on LSRPs, the Board or any Court, as NJDEP jurisdiction over LSRPs is arguably limited. And do you want them to do so?

○ In sum, we belief every effort to render a professional judgment, opinion or decision, independent or not, must proceed methodically in a proper order. Begin at the beginning. Don't skip steps. Most times an LSRP will start by identifying and understanding the issue(s) to which he or she seeks to provide a professional judgment in its or their resolution. Then the LSRP should gather and review the relevant facts (including data). Research as needed. (What is the applicable NJDEP guidance? What data does the LSRP need to address the issue? Is the data and information now assembled sufficient and reliable?) Do so independently to the extent required. Supervise appropriately all who assist. How can data gaps be addressed? By more work? Assumptions? Modeling? Then perform the required analysis and evaluation. (How does the applicable NJDEP and other guidance apply to the issues, available data and information? What are the information and data gaps and key assumptions? What can be done about problems? Should these be now, hereafter or periodically re-examined or dealt with? Can they be dismissed, ignored, assumed away or otherwise resolved? What are the reasonable alternative paths, conclusions and solutions?) Note: Repeat the foregoing as needed; sometimes several iterations of thought are required. When ready, formulate your professional opinion or judgment. (What is your conclusion based on the review and analysis? Does the conclusion make sense, particularly in light of the relevant data, information

and circumstances [site operations and history; regional setting], guidance, ARRCS, Tech Rule, SRRA and other applicable law?). If an LSRP is comfortable with his or her view (judgment), he or she is not yet done: he or she must document the decision, opinion or judgment, and how he or she reached it. This must be done lucidly and well. (Is the documentation sufficient to support the decision? Can another professional (or NJDEP or the Board) understand how the decision was reached (including why alternative approaches or decisions were rejected)? Has the LSRP addressed or ignored points of weakness, contention or disagreement? Have biases and dependencies been addressed and neutralized to the extent required? Has the LSRP identified and addressed contrary evidence? How will a reviewer view the decision and documentation? For the sake of argument, we urge the LSRP to take a different perspective: how can his or her decision be attacked? How will it be attacked? Can the decision be well defended? Is the defense prepared and documented? Should it be? Is the LSRP comfortable with the decision and effort and documentation? Has enough been done? Consider the value of a peer review effort. If performed, document same to the extent useful. Note: If the decision is certain to be attacked, then proper care and preparation likely require more than if the decision is likely to be accepted with little review or debate.

- Note: The authors acknowledge the value of a particular one page flow sheet prepared by and used by Ernst & Young in its training on the application of professional judgment by those in its accounting audit practice. You as LSRPs might benefit from reviewing it and preparing something like it for your use. Using an internet search engine try searching for "ey-faculty-connection-issue-45-professional-judgment-framework.pdf" and you may find it. But our presentation above does differ from that document in several respects, but not the essential elements. Why? Because, as stated in the beginning, the approach to applying professional judgment, whether for accountants, lawyers or LSRPs, is not so novel or restricted as to require a different approach from that followed by accountants or auditors. The approach must be logical and careful. And if the approach is not these, then it is not likely to result in a true, proper, and defensible professional judgment. Absence a proper approach, Board, NJDEP, LSRP and Court deference to a particular decision are unlikely.

○ Some factors in such efforts are further emphasized below.

- Identify and manage potential biases and distortions (yours and others).

-- Avoid hasty or premature actions, decisions or opinions. Take precautionary steps to minimize reliance or damage from these.

-- Consider various possibilities and different points of view and alternatives. In particular consider the views of NJDEP (official and unofficial), the community, your client and advisors, the Board and other LSRPs.

-- Identify and address (and understand) incentives for and disincentives against particular outcomes. Consider the impacts of actual or potential threats and rewards. The goal is to avoid undue effects from such.

-- Can peer or associated professional review help with this? Yes. Do you have resources available to you to obtain such? If so, use them. If not, consider seeking them. (Friends; Colleagues; Staff; Professional Associations; lawyers).

- Evaluate and manage the risks of material error (facts, assumptions, analysis). Consider uncertainties. Consider curative measures. Remember your first priority- protect health, safety and the environment first and foremost.

-- Get the facts. Minimize assumptions. Identify uncertainties. Consider known and unknowns. Don't guess. Consider what more is needed and how to get it. Some degree of conservatism is usually appropriate; but certainty is not required, and rarely required in the real world. Professional judgment is used to draw the line between too much research and data collection, and too little.

-- Consider the risks associated with the different kinds of objective (quantitative) and subjective (qualitative) criteria and limits relevant to the problem and its solution.

-- Assess the relative (and sometimes absolute) importance of various risks (error; uncertainties; exposure to harm; nature and extent of potential harms; costs; probabilities), and their relevance to the interests of various stakeholders. Consider potential consequences and exposures to, and degrees of, potential harm from conclusions and errors or deficiencies. The greater the risks, arguably the more care that is required.

-- Consider the future: things change. Site uses will change. Owners and Occupants of sites change. NJDEP will change. SRRA and Rules will change. MDLs will change. Standards will change. How should present professional judgment account for these possibilities and changes? Can the risk of change safely be ignored? Can it be neutralized by limitations or conditions on the judgment? At a minimum some discussion with the client may be appropriate, particularly if the risk of change in the particular facts

and circumstances seems of particular probability, concern or effect. A professional judgment which is limited to only current conditions may, especially in hindsight, prove flawed and not be sufficiently protective. Imagine, for example, the consequences of failing to account for the possibility of future migration of contaminants in reliance on static data points. Imagine, as another example, the consequences of deciding based on current known commercial uses when the municipality wants, or a buyer plans, demolition, new construction and a licensed day care use.

- Consider the LSRP's own personal limitations, experience and expertise, and the resulting need for (or fact of) others' involvement, currently and in the future. Proceed accordingly.

-- What steps are being taken to address weaknesses from same? Peer Review? Pursuit and assistance of additional expertise? None?

-- What will be the degree of participation or oversight provided by the LSRP for the efforts of others? How much need the LSRP understand? Question? What deference, if any, is due from the LSRP to such experts? Or the other way? How does the LSRP effectively supervise another expert? *{2018}* Can the LSRP assume the other is acting with proper expertise? Will NJDEP or the Board accept such?

-- Consider how to communicate to and from others in seeking assistance. Is a simple phone call to a friend or colleague enough? Is an e-mail sufficient? Is a meeting useful? Is a formal report or opinion advisable? This may be more than an issue of proper documentation: the right methodology can influence the quality of the advice sought and obtained. Proper communications bring discipline to the effort that disciplined approach can be part of formulating and defending professional judgment. In our experience, funny things can happen when a judgment, or its rationale, is to be put on paper. Often mistakes and weaknesses are identified (and then can be addressed).

-- Who else will be involved? Lawyers. NJDEP. USEPA. Board. Other LSRPs or Consultants. Client. Occupants/Tenants. Neighbors. Public. Municipal Officials. Buyers/Lenders. A Court. A Jury. What will each need from the LSRP to demonstrate that he or she formed a proper professional judgment? Is the LSRP's planned decision and documentation likely to be persuasive? Is it strong? Convincing? Or weak? What can be done in advance to help get the desired result?

- Establish and maintain appropriate professional distance and skepticism. Don't get too personally involved or engaged. Be careful about economic incentives, investments or entanglements. They exist- acknowledge them and act to protect against improper effects. As an LSRP recall that there are many pitfalls from conflict of interest issues.

-- If independent judgment is required, how is it assured?

-- Pursue verification as needed or appropriate; ask questions; test assumptions; seek multiple lines of evidence. Don't be too trusting. Don't assume reliability or unreliability.

-- Objectively evaluate the facts, address inconsistencies and corroborate data, facts and assumptions. Develop and use a proper and defensible Conceptual Site Model. Ensure that your exercise of professional judgment is applied consistently, including with the CSM.

-- Be watchful for the effects (and indicia) of third party agendas, biases, error or fraud. These happen. Don't be the fall-guy or gal.

-- Style counts (but is not determinative). Be and look professional.

- Know what you can about the SRRA reviewers (NJDEP and the Board [RAPs; RAOs; audits; complaints]). Consider other review and approval processes (USEPA, NJDEP, municipalities, and third parties [Permits; waste reports; Conflicts/Suits/Challenges]. Know what they will look for and expect. Ignore or defy expectations at peril. Anticipate their concerns.

◊ 3.4.18.2: Resources.

○ There are a number of provisions of SRRA that expressly or implicitly speak to professional judgment, sometimes expressly stated to be required to be independent. (Does the absence of the term "independent" in some of the provisions indicative that independence is not there required? Arguably yes: but we caution more thought is necessary before such a decision is reached.)

- N.J.S.A. 58:10C-14.c.(4): "When there is no specific requirement provided by the technical standards for site remediation adopted by the department, and guidelines issued by the department are not appropriate or necessary, in the professional judgment of the licensed site remediation professional, to meet the remediation requirements listed in paragraph (1) of this subsection, the licensed site remediation professional may use the following additional guidelines to make decisions regarding a remediation,

and shall set forth justification for such use, in the relevant submittal: (a) relevant guidance from the federal Environmental Protection Agency or other states; and (b) other relevant, applicable, and appropriate methods and practices that ensure the protection of the public health and safety, and of the environment."

- N.J.S.A. 58:10C-16.f. "A licensed site remediation professional may complete any phase of remediation based on remediation work performed under the supervision of another licensed site remediation professional, provided that the licensed site remediation professional: (1) reviews all available documentation on which he relies; (2) conducts a site visit to observe current conditions and to verify the status of as much of the work as is reasonably 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 workplans and reports related thereto."[3]

- N.J.S.A. 58:10C-16.i. "A licensed site remediation professional shall exercise independent professional judgment, comply with the requirements and procedures set forth in the provisions of P.L.2009, c.60 (C.58:10C-1 et al.), 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 for which he is responsible 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 licensed site remediation professional deems necessary. The licensed site remediation professional shall disclose and explain in any document submitted to the department any facts, data, information, qualifications, or limitations known by the licensed site remediation professional that are not supportive of the conclusions reached in the document."

- N.J.S.A. 58:10C-16.j. "If a licensed site remediation professional identifies a condition at a contaminated site that in his independent professional judgment is an immediate environmental concern, then the licensed site remediation professional shall: (1) immediately verbally advise the person responsible for conducting the remediation of that person's duty to notify the department of the condition; and (2) immediately notify the department of the condition by calling the department's telephone hotline."

○ Some NJDEP rules and guidance that provide, or allow for, insight.

- N.J.A.C. § 7:26C-1.2(a): "The person responsible for conducting the remediation shall conduct the remediation in accordance with the following:… 3. By applying any available and appropriate technical guidance concerning site remediation as issued by the Department. The Department's technical guidance can be found on the Department's website, www.nj.gov/dep/srp/srra/guidance. When there is no specific technical guidance issued by the Department or in the judgment of a licensed site remediation professional the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements of (a)1 and 2 above, the licensed site remediation professional may use the following additional guidance, provided that the person includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements of (a)1 and 2 above, and justifies the use of the guidance or methods that were utilized: i. Any relevant guidance from the U.S. Environmental Protection Agency or other states; 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." Note: this is not directly aimed at an LSRP.

- Typical LSRP certification on NJDEP forms (per N.J.A.C. 7:26C-1.5):

> I certify that I am a Licensed Site Remediation Professional authorized pursuant to N.J.S.A. 58:10C to conduct business in New Jersey. As the Licensed Site Remediation Professional of record for this remediation, I: **[SELECT ONE OR BOTH OF THE FOLLOWING AS APPLICABLE]:** [_] directly oversaw and supervised all of the referenced remediation, and\or [_] personally reviewed and accepted all of the referenced remediation presented herein. I believe that the information contained herein, and including all attached documents, is true, accurate and complete. It is my independent professional judgment and opinion that the remediation conducted at this site, as reflected in this submission to the Department, conforms to, and is consistent with, the remediation requirements in N.J.S.A. 58:10C-14. My conduct and decisions in this matter were made upon the exercise of reasonable care and diligence, and by applying the knowledge and skill ordinarily exercised by licensed site remediation professionals practicing in good standing, in accordance with N.J.S.A. 58:10C-16, in the State of New Jersey at the time I performed these professional services. I am aware pursuant to N.J.S.A. 58:10C-17 that for purposely, knowingly or recklessly submitting false statement, representation or certification in any document or

[3] For ease of publication, separate paragraphs of quoted materials have been consolidated without reference to the deletion of paragraph markers or formatting.

information submitted to the board or Department, etc., that there are significant civil, administrative and criminal penalties, including license revocation or suspension, fines and being punished by imprisonment for conviction of a crime of the third degree.

- N.J.A.C. 7:26E-1.5: "(b) Any person conducting remediation pursuant to this chapter shall apply, pursuant to *N.J.A.C. 7:26C-1.2(a)*3, any available and appropriate technical guidance concerning site remediation as issued by the Department, or shall provide a written rationale and justification for any deviation from guidance. The Department's technical guidance can be found on the Department's website at www.nj.gov/dep/srp/srra/guidance." Note: this is not directly aimed at an LSRP.

- N.J.A.C. 7:26E-1.6: "(b) The person responsible for conducting the remediation shall include, in each remedial phase workplan and report, the following information: … 4. A list of: i. All variances from the requirements of this chapter submitted pursuant to *N.J.A.C. 7:26E-1.7*; and ii. All rationales submitted for deviations from any technical guidance pursuant to *N.J.A.C. 7:26C-1.2(a)*3…." Note: this is not, by its terms, directly aimed at an LSRP.

- N.J.A.C. 7:26E-1.7: "(a) Except as provided in (b) below, the person responsible for conducting the remediation may vary from the technical requirements in N.J.A.C. 7:26E-1 through 5 provided that person submits the following technical information, and a variance form found on the Department's website at www.nj.gov/dep/srp/srra/forms, prior to varying from any technical requirement: 1. The regulatory citation for the technical requirement; 2. A description of how the proposed variance deviates from the cited regulatory requirement; and 3. The rationale for varying from the cited technical requirement that includes supporting information as necessary to document that the requested variance will: i. Provide results that are verifiable and reproducible; ii. Achieve the objectives of the cited technical requirement; and iii. Further the attainment of the purpose of the specific remedial phase. (b) The person responsible for conducting the remediation shall not vary from any of the following applicable requirements: 1. A regulatory timeframe, site-specific expedited timeframe, or mandatory timeframe; 2. A requirement to obtain or comply with a permit; 3. A requirement to submit a document; 4. A requirement to comply with a remediation standard; 5. A requirement to comply with a quality assurance laboratory requirement; or 6. A requirement to obtain the Department's prior approval." Note: again by its terms, this is not directly aimed at an LSRP.

○ NJDEP Training guidance says:

- "When conducting the remediation of a contaminated site, any person (Licensed Site Remediation Professional (LSRP) or non-LSRP environmental consultant) may vary from many of the technical requirements specified in regulation and guidance. The decision to vary from a technical requirement must be technically sound and based on best professional judgment, must be documented and adequately supported with data or other information provided to the Department."

- Further "The Department recognizes that rules and guidance do not appropriately apply in every site specific situation. Consequently, the person responsible for conducting the remediation and their LSRP (or environmental consultant) must make some site-specific decisions based on best professional judgment. These decisions allow a person to vary from a specific rule requirement or guidance but must still meet the intent of the rule or guidance and the result must be protective of human health and the environment. Decisions based on best professional judgment must represent a good faith effort to comply with a rule requirement or guidance and be based on a reasonable effort to identify and obtain relevant and material facts, data and other information on which to support the decision."

- And "The Department will look at the following factors when evaluating a decision based on best professional judgment. Does the decision, or the resulting action based on the decision, meet the overall intent of the regulatory requirement or guidance? a. Is the decision based on all available information? Has that information and all supporting documentation been submitted to support the decision? b. Was the rationale provided for making the decision clearly described and reasonable? Was the decision made in good faith? c. In your opinion, is the resulting action protective of human health and the environment? Now and in the future?"

See http://www.nj.gov/dep/srp/srra/training/matrix/important_messages/variance_and_bpj.htm

○ Board rules are critical; they apply to every LSRP. Arguably NJDEP should follow them.

- N.J.A.C. 7:26I-6.3: "(a) An LSRP shall know and apply the applicable statutes, rules, regulations, and appropriate technical guidance concerning the remediation of contaminated sites including, but not limited to, the remediation requirements set forth at N.J.S.A. 58:10C-14.c…. (b) An LSRP shall apply any available and appropriate technical guidance concerning site remediation as issued by the Department. (c) When there is no specific technical guidance issued by the Department, or in the judgment of the

LSRP the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements listed in (a) above, the LSRP may use the following additional guidance provided that the LSRP includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements listed in (a) above, and justifies the use of the guidance or methods that were utilized: 1. Any relevant guidance from the U.S. Environmental Protection Agency or other states; and 2. Any other relevant, applicable, and appropriate methods and practices to ensure the protection of public health and safety and the environment. (d) 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. (e) 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."

- N.J.A.C. 7:26I-6.7: "(a) An LSRP may complete any phase of remediation based on remediation work performed under the supervision of another site remediation professional, licensed or not, provided that the LSRP: 1. Reviews all available documentation on which he or she relies; 2. Conducts a site visit to observe current conditions and to verify the status of as much of the work previously performed as is reasonably observable; and 3. Concludes, in the exercise of his or her independent professional judgment, that there is sufficient information upon which to complete any additional phase of remediation and prepare workplans and reports related thereto. (b) An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, shall correct all material deficiencies in a document submitted by the previous site remediation professional including, but not limited to, those the Department identifies, in accordance with timeframes the Department establishes. (c) An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, before the issuance of a final remediation document, and who learns of material facts, data, or other information concerning any phase of the remediation for which a report was submitted to the Department and the material facts, data, or other information were not disclosed in the report, shall promptly notify the LSRP's client and the Department in writing of those material facts, data, or other information and circumstances. "

- N.J.A.C. 7:26I-6.8: "(a) An LSRP shall exercise independent professional judgment and comply with the requirements and procedures set forth in the SRRA and any rule, regulation, and order adopted or issued pursuant thereto. (b) An LSRP shall notify the person responsible for conducting the remediation in writing when in his or her professional judgment based on site history any one or more applicable regulatory timeframes referenced in N.J.A.C. 7:26C-3 is unlikely to be met. (c) An LSRP shall notify the person responsible for conducting the remediation and the Department in writing when in his or her professional judgment based on site history any one or more applicable mandatory or expedited site-specific timeframes referenced in N.J.A.C. 7:26C-3 is unlikely to be met. (d) 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 for which he or she is responsible that are in the possession of the owner of the property, the Department, or that are otherwise available, and identify and obtain whatever additional data and other information as the LSRP deems necessary. (e) An LSRP shall disclose and explain in any document submitted to the Department any facts, data, information, qualifications, or limitations the LSRP knows that do not support the conclusions reached in the document."

- N.J.A.C. 7:26I-6.9: "(a) If an LSRP identifies a previously unreported condition at a contaminated site that in his or her independent professional judgment is an immediate environmental concern, the LSRP shall: 1. Immediately verbally advise the person responsible for conducting the remediation of the condition and of that person's duty to notify the Department of the condition; and 2. Immediately notify the Department of the condition by calling the Department's telephone hotline at 1-877-WARNDEP."

○ Note: Although SRRA itself does not expressly so provide, in the views of most lawyers, an LSRP may rely on prior NJDEP decisions if and as permitted or required by law. This conclusion is supported by various aspects of (i) prior and continuing statutory law, (ii) various provisions of the United States and New Jersey Constitution, (iii) case law, common law and principles of general equity, (iv) express and implied provisions of no further action letters and covenants not to sue, (v) various provisions of the Spill Act and Brownfields Act, particularly as to innocent purchaser status, lender immunity, municipal immunity, and reliance on no further action letters and the like, and limitations on the ability of NJDEP to reopen prior decisions (such as in cases of a less than order of magnitude change or when an approved engineering or institutional control remains protective). At times NJDEP seems less convinced than others of this view. Eventually a court will clarify.

● 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 NJDEP's and the Board's powers? For example, can his or her office be invaded, records inspected and seized by the Board or NJDEP, 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 NJDEP or Board review under SRRA? Some would argue that if a lawyer was acting as such then the Board lacks jurisdiction over the lawyer's actions and omissions, but instead the Board can refer the matter to the proper disciplinary arms acting for the Supreme Court (having exclusive power to regulate the practice of law in New Jersey), at least if there is legitimate position that the lawyer was acting in the scope of his authority and responsibility as a licensed lawyer for his or her client in proceeding as the Board alleges wrongful for a non-LSRP. But contrary arguments can be made if the lawyer intruded on the jurisdiction of the Board and its regulation of LSRPs, particularly if acting outside his or her role as a legal advisor and advocate. 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 NJDEP 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; NJDEP instead issues a NFA.

◊ Thus NJDEP still has the power to issue NFAs. Can it do so in other circumstance? Seemingly not under the express terms of SRRA, to the extent SRRA applies? *{2017}* But can NJDEP issue a no further action letter as to sites remediated by NJDEP itself not subject to SRRA and not using LSRPs? .

● 3.6 NJDEP Roles

■ 3.6.1 NJDEP supports the Board. (N.J.S.A. 58:10C-3.a. & e; P.L.2009, c.60 §3.a. & e.) NJDEP Staff provide the Board with necessary services (as in practice so does the Attorney General's office). In view of this, it is fair for the regulated community to question how separate and independent the Board will be from NJDEP. Certainly it will be separate enough to avoid being forced by NJDEP 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 NJDEP filing complaints to the Board, investigated by the assigned complaint review teams, provided significant support by the NJDEP's staff assigned to the Board, and assisted by the Attorney General's office (itself having a conflict of interest in representing the NJDEP generally, the Board when acting, and the NJDEP when complaining to the Board about LSRPs). But does the Board have the ability and interest to act without NJDEP support (e.g., over NJDEP opposition or intransigence)? Does it have the funds to hire independent advisors or counsel if it deems the conflicts in its own staff and support real? Perhaps not. As a practical matter, we believe NJDEP can have and does have a disproportionate impact on the Board.

◊ Could the Board seek and obtain assistance from volunteers? Perhaps. Will it ever? Not likely.

◊ Can third parties make suggestions to the Board? Yes.

■ 3.6.2 NJDEP 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.). NJDEP 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.)

◊ Does this provision support a view that NJDEP can investigate and remediate a site, under the Spill Act for example, without using an LSRP? We think not.

■ 3.6.3 NJDEP 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 NJDEP 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 indeed may lack experience and expertise important to a proper review, and therefore any inspections is arguably going to have material 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. It appears that in some cases, NJDEP is not inspecting submissions in any material respect. NJDEP has announced it is no longer more fully reviewing submissions until after issuance of the RAO. See NJDEP's 9/10/2014 listserv blast e-mail. See http://www.nj.gov/dep/srp/srra/listserv_archives/2014/20140910_srra.html Interestingly, the nature of NJDEP complaints to the Board suggests that NJDEP is inspecting some submissions more substantively than others.

○ *{2018}* We remain surprised by this choice. Together with NJDEP's request 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, NJDEP's ability to influence remedial decision making is less, and the information available to the public is less, together impeding a current understanding of many suites and the progress toward completion.

◊ 3.6.4(B) NJDEP 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 NJDEP 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 LSRP). We believe NJDEP will justify any challenge to this behavior by rationalizing the topic of concern to NJDEP as somehow falling within the legislature's tests.

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

◊ 3.6.4(C) NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 hereafter ranked by NJDEP as more significant. In view of the increased scrutiny and costs likely to be borne by PRCRs for such sites, if in fact NJDEP undertakes such, will there be enough incentive for challenges to NJDEP's RPS system?

○ Whether NJDEP intended the result or not, it does appear that NJDEP's new policies (discouraging LSRPs from interim filings before the RAO and allowing NJDEP 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) NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP, the PRCR and the LSRP may continue to conduct the remediation while NJDEP so inspects or reviews. (N.J.S.A. 58:10C-21.e.; P.L.2009, c.60 §21.e.) NJDEP 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 NJDEP 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, NJDEP staffing may make it impractical for NJDEP to undertake reviews of a large number of sites. NJDEP 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 NJDEP 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 NJDEP'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 NJDEP either or both the LSRP or the PRCR may have surrendered to NJDEP 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 NJDEP 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 NJDEP that an LSRP has been out of compliance with SRRA on one site may allow NJDEP to provide additional review of the filings by that LSRP on other sites. It is not expressly stated that this may occur beyond the three year period allowed for NJDEP review, but it appears NJDEP can and will argue that it may.

■ 3.6.5 NJDEP shall act to invalidate a RAO or NFA Letter if NJDEP 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 reducing the number of sites at which NJDEP can so proceed. However, if a presumptive remedy is not implemented as required, but NJDEP determines the remedial action is as protective of the public health, safety, and the environment as the presumptive remedy, NJDEP 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 NJDEP to determine, not merely the LSRP. *{2018}* But how this should occur is unclear.

○ Does this new SRRA provision 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, NJDEP 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. NJDEP 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 NJDEP's demands, before any modification or rescission takes effect? Can NJDEP 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) as to either NJDEP's requirement or the LSRP's action? Is there a right of the LSRP to a hearing as to NJDEP's requirement? Certainly the consequences of NJDEP's exercise of this power may be quite significant, on the PRCR, the LSRP, and many other parties. And constitutionally the NJDEP cannot ignore its obligations to provide notice, fundamental fairness and due process (much as it may want to do so). But do such apply at all to the LSRP? We believe NJDEP 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 NJDEP to terrorize LSRPs act in circumstances when NJDEP itself would be restrained, should be addressed cautiously and skeptically.

◊ Note: It is not clear how such a determination can be challenged. Is it possible that it cannot be challenged at all? That there is no remedy? This seems unlikely, but cautious counsel may seek relief through every route imaginable. 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? The current owner and operator? The next LSRP? Others? We believe all whose rights are adversely affected have rights to protect their own interests, particularly as the NJDEP 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 statutory claim to void the transaction? See N.J.S.A. 13:1K-13. 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, NJDEP 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 NJDEP demands are too severe. Equity requires a right to challenge such power and dictates.

■ 3.6.6 NJDEP 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 NJDEP staff have become significant sources of complaints to the Board. We believe that NJDEP is the source of more complaints than others. Remember that other NJDEP staff assist the Board in evaluating the merits of those NJDEP complaints. Remember that NJDEP officials sit on the Board.

■ 3.6.7 NJDEP shall not audit an RAO more than three years after the date the LSRP filed the RAO with NJDEP, 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 some of the above 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 NJDEP. 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 NJDEP 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 NJDEP'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 NJDEP to direct the LSRP to act after those three years?

■ 3.6.8 NJDEP 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 NJDEP 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. NJDEP 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.

◊ Does this mean that if in 2018 current management of a PRCR learns of a potential discharge, or an AOC that might be investigated by an LSRP for a discharge if subject to SRRA, older than 20 years ago, perhaps at a present site, perhaps at a former site, never then previously known to be documented, reported, investigated or remediated, for which an LSRP has never been retained, then on discovery, reporting and retention by the PRCR of an LSRP to investigate same (leaving aside if the PRCR is obligated to do so, or why the PRCR might do so regardless of obligation), the PRCR and the site the subject of that discharge are automatically and irrevocably subject to direct oversight? Does it matter if the suspected discharge is not confirmed? What would you advise the PRCR to address this?

○ If the current owner or operator elect, or are induced, to address this site, is direct oversight by the prior owner/PRCR avoided (because as to them the case is a new case)? Apparently not.

○ Can an administrative consent order be sought and obtained by the PRCR to avoid a harsh result? Without admission of liability? Apparently yes. See this Article at § 1.2.37.

○ Will NJDEP exercise discretion to not enforce against a nice-guy-PRCR in such a matter? Apparently yes. To not insist on direct oversight? And who at NJDEP should be called to accomplish this? See this Article at § 1.2.37.

○ Does SRRA include an implied exception for late discovery? We would argue so in some circumstances.

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

◊ Evidently NJDEP 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 NJDEP is not acting to enforce the law (e.g., arguably if NJDEP 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 NJDEP'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 NJDEP'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 NJDEP has other rights and powers, including to make threats and to file complaints with the Board.

◊ In a recent unreported decision the Appellate Division upheld NJDEP's imposition of $40,500 fines for a failure to proceed with timely remediation. See NJDEP v. Hood Finishing Products, Inc. (N.J. Super., App. Div, 2016 DOCKET NO. A-3955-14T1).

■ 3.6.12 NJDEP 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 NJDEP (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 NJDEP 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 NJDEP 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 NJDEP needs to focus on the LSRP if its thoughts turn to enforcement. In our view an LSRP is not liable whenever a PRCR breaches.

■ 3.6.13 NJDEP has power and authority under the Spill Act, and other laws, to initiate and complete investigation and remediation of sites. These other laws do not expressly require that NJDEP use of LSRPs under SRRA. Nor do they excuse NJDEP of the obligation. Arguably SRRA does require NJDEP to use LSRPs for its remedial efforts. Yet NJDEP does not use LSRPs, presumably interpreting SRRA and these other laws to impliedly excuse NJDEP from using an LSRP for any site for which it is not the discharger or otherwise responsible person under the Spill Act. NJDEP's interpretation is untested.

● 3.7 PRCRs & the Regulated Community.

■ 3.7.1 A PRCR shall provide any data, documents or other information as requested by NJDEP to conduct NJDEP'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 NJDEP 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 NJDEP. (And given NJDEP'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 NJDEP). After submission to NJDEP, non-confidential records submitted by the LSRP for the PRCR should be available from NJDEP 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 NJDEP). 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). No, at least not expressly, and at least prior to a NJDEP 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 issues relating to attorneys, 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 NJDEP 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, NJDEP, 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).

◊ *{2018}* This provision does not expressly prohibit a PRCR from firing an LSRP with whom the PRCR is unhappy. It does not prohibit an attorney from advocating that an LSRP be dismissed. Well.. at least if the reasoning is outside these provisions- e.g., it is not in support of an illegal activity. For example, an LSRP can be fired for not listening or responding, for not honoring his or her contract, for charging too much, for not allowing the client to make lawful choices in remediation.

◊ 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 NJDEP 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, perhaps by requiring confidentiality except only in the most egregious circumstances? 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 NJDEP unilaterally, at least when not obligated by law or rule to disclose to the Board or NJDEP? Can the LSRP be required to preserve attorney-client confidential materials, no matter what, 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 NJDEP 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.)

◊ Are there circumstances in which NJDEP itself, or one or more of its personnel, is or are taking, or threatening to take, improper retaliatory action against an LSRP, in violation of this prohibition? Consider when an LSRP exercises professional judgment in a manner unappetizing to NJDEP or its personnel: if they threaten or file a complaint to the Board, costing time and energy to defend, is that retaliatory action prohibited by this provision? In any circumstance? If they do so repeatedly? If they harass an LSRP and his or her PRCR after an unfavorable Board decision or a controversial LSRP decision? If they refuse to meet a PRCR while represented by a particular LSRP? If they deny a PRCR petition based on the LSRP's identity or decisions? If they refuse to meet because of some allegedly improper decision, qualification, identity or relationship of an LSRP? While in some circumstances this may occur, it is likely that the NJDEP and its personnel will be allowed considerable leeway, and this provisions will be narrowly construed, before considered to have violated this provision. But in our view, NJDEP and its personnel take retaliatory actions against LSRPs and PRCRs that arguably may be improper.

■ 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) <u>shall</u> 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) <u>Post-SRRA Cases</u>: 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 NJDEP of the name and license information of the hired LSRP; (3) conduct the remediation without the prior approval of NJDEP, unless directed otherwise by NJDEP; (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 NJDEP fees and oversight costs; (6) provide access to the contaminated site to NJDEP; (7) provide access to all applicable documents concerning the remediation to NJDEP; (8) meet the mandatory remediation timeframes and expedited site specific timeframes established by NJDEP 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 NJDEP 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 NJDEP 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 NJDEP, unless NJDEP 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 NJDEP.

○ 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.

○ Other deadlines apply. See, e.g., this Article at § 3.8.6.

○ See this Article at § 3.6.9 above as to issues potentially posed by a current PRCR discovery of an actual or potential discharge, older than 1999 but never then previously documented, reported, investigated or remediated, at least in the PRCR's current knowledge, for which an LSRP has never been retained, as exposing the PRCR and the site the subject of that discharge to NJDEP direct oversight, unless there is an implied exception that treats such an event as a new discharge and not an old discharge. See also this Article at § 3.8.2. There is limited information to permit an assessment of NJDEP's treatment of such circumstances. Perhaps an administrative consent order could be sought from, and negotiated with, NJDEP that would allow for a more reasonable result than full direct oversight.

◊ 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 use LSRPs or proceed with remediation without NJDEP involvement. In that period NJDEP theoretically should have continued its then existing oversight system to process such existing cases. But in reality, except for the easiest or luckiest cases, those closest to completion, or those cases economically or politically significant which few cases were able to maintain sufficient NJDEP attention and resources to finish (by receipt of a NFA letter), all other cases languished without NJDEP oversight, seemingly to induce earlier retention of LSRPs. All must be using LSRPs now.

○ What about prior administrative consent orders ("ACOs") and Remediation Agreements? NJDEP 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 NJDEP 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, *{2017}* at least prior to a new violation (as might occur if a site under an older ACO or remediation agreement then fails to meet obligations and ends up subject to direct oversight, theoretically exposing the ordered party to the worst of both worlds [pre-SRRA and post-SRRA]).

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

○ MOAs? Abolished. And, in NJDEP'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 fear that doing so may convert them into PRCRs, perhaps forever (because the definition includes those who remediate; at least absent clear guidance that use of an LSRP or conduct of remediation by those who have a defense to liability, for example, do not thereby become PRCRs as having waived their defense) 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, rarely taken by NJDEP across the board, may convert those who retain LSRPs into PRCRs without the option to revert to prior status, a view potentially more troubling in the absence of NJDEP guidance otherwise.

- We are aware of an instance where an owner, asserting an innocent purchaser status, engaged an LSRP, notifying NJDEP, and shortly after receiving a bill from NJDEP for the fees chargeable in such cases and learning of the LSRP's views of the requirements of that innocent owner, arguably then a PRCR, to address the subject conditions in accordance with the Tech Rule and ARRCS, dismissed that LSRP seeking to restore the status quo. That innocent owner then asserted to NJDEP that its original retention was not a waiver of any defenses, so far without NJDEP consequence. Can that owner proceed with corrective measures using non-LSRPs? Can the former LSRP continue to act for that owner, perhaps recommending corrective measures, after dismissal in the same manner as a non-LSRP, without exposure to NJDEP or the Board? What obtains the better protection of health, safety and the environment? Inducing the PRCR to do nothing? Having the PRCR act itself without any or proper advice?

○ Restoration of the pre-SRRA voluntary cleanup program would allow some sites to be remediated that now languish waiting for NJDEP enforcement, which may never come, for example to test the validity of defenses to liability or the scope and validity of direct oversight. This delay is not in the public interest and can be easily and cost efficiently resolved by such restoration, at least in cases when someone will volunteer: the program worked before and can again. The absence of a NJDEP 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 NJDEP 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 NJDEP, as to relative liabilities and defenses; or at sites where people would be better protected by correction of exposure pathways, even if on an temporary basis). Those who believe that they have a bona fide defense that may protect them from inaction, and will not abandon such, likely choose to do nothing, while NJDEP lacks sufficient resources to pursue all (and maybe most). Others who believe they may escape attention or prioritization, and fear that, even if willing to act, doing so may bring themselves to NJDEP attention, weaken their defenses, encourage NJDEP or others to attack, and indeed constitute a voluntary acceptance of SRRA liability and responsibilities (and waiver of defenses), decide to stay hidden. We believe the scarcity of NJDEP enforcement resources, and the large number of sites and parties potentially requiring attention, and the difficulties faced by NJDEP in adequately prioritizing and enforcing against enough parties in any given year to make a meaningful difference, cries for a solution that achieves more remediation with less NJDEP effort. In our view NJDEP should re-create some program, like the now abolished MOA program, that would allow for such efforts, likely under LSRP oversight and with minimal NJDEP involvement, rather than rely on guilt, fear, deterrence and punishment to drive compliance. Such a program would have to excuse LSRP's from strict compliance, at least if not issuing any RAO, and allow PRCRs to avoid arguable deadlines by remediating, reserving however the right of NJDEP to challenge assertions of defenses or pursue otherwise existing enforcement rights (and the alleged PRCR to assert defenses and oppose such enforcement) outside the thus revived MOA program. For the moment, absent such a program, in appropriate matters, assuming NJDEP 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 who undertake remediation <u>using</u> an LSRP have lost the ability to terminate their efforts without liability? And if the LSRP alters the approach in view of the asserted defense to liability (for example by not compelling the allegedly liable party to meet deadlines), is he or she liable under SRRA for not doing his or her job? We would hope and argue not but we confess concern that NJDEP 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 who undertake remediation <u>without using</u> an LSRP, voluntarily but in fear that LSRP retention is a waiver, are automatically in violation of SRRA? And is a non-LSRP who assists (hypothetically, by covering a lead exceedance area, to cut off a pathway of exposure, or disconnecting a contaminated water

fountain, or installing a point of service treatment device) also in violation? We would hope and argue not but we confess concern that NJDEP 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 NJDEP 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.

○ We acknowledge that the specificity of the exceptions allows NJDEP and others to argue that there are no other exceptions. But in reply we ask: where is the exception for NJDEP remediation of sites without an LSRP? It is not expressly stated there either? Therefore there must be other exceptions arising impliedly from other circumstances or aspects of New Jersey Law, or else NJDEP is itself violating SRRA (which may be, but is not likely to be admitted by NJDEP, or readily accepted by a Court).

◊ 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 NJDEP 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 suggests a relatively narrow universe of potential targets.

○ See also N.J.A.C. 7:26C-9 for detailed provisions allowing for NJDEP 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.

○ *{2018}* Consider whether or not 2018 will see a return to prior Democratic administration strategies for strong enforcement by issuance of notices of violation and assessment of penalties?

◊ 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. *{2017}* An RAO for an AOC will provide the covenant not to sue for that AOC but not others. 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 NJDEP. 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 2007 because of an ISRA trigger (a sale of the site and business by "OldCo" to "NewCo"). Assume the 2008 PA promptly performed identified 30 hypothetical AOCs, of which only 1 AOC later required investigation and remediation. Completion occurs by Mid-2015 and the entire site RAO issued 9/1/2015. If NewCo triggers ISRA for the same site on 12/1/2016, does the NewCo LSRP examine site operations only as they existed since the 9/1/2015 RAO? Likely no.

In our view, the scope of the 9/1/2015 RAO is determined not merely by the date of the RAO but by the 2007 date of the triggering event as reviewed by the work, including the 2008 PA, leading up to the RAO. *{2018}* We do acknowledge that many consultants' practices deviate from our view- using the date of the RAO as the relevant start-date for any new review. If after the OldCo 2007 triggering event, and even the 2008 PA leading to the 2015 RAO for OldCo, NewCo continued operations in a number of the older AOCs, and perhaps in new ones, we think that NJDEP expects (and should expect) that the new LSRP for NewCo must look at NewCo's operations since that older 2008 PA because the post 2007 triggering event operations likely were not considered in the prior ISRA case. If proof exists otherwise, great.

○ It remains to be seen if the NJDEP'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. We believe NJDEP acted outside of, and in a manner inconsistent with, SRRA in so proceeding.

- *{2018}* Consider whether or not 2018 will see a return to prior Democratic administration strategies for multiple threats, and initiation, of actual, NRD suits. If so, will NJDEP look at RAO recipients as potential targets, relying on this rule for support? And if they do so, will the statutory scope of the covenant not to sue trump the rule?

○ In our view this provision supports the practice of NJDEP 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 practice (multiple LSRPs) to be potentially 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 if it limits the roles of one or more LSRPs: who will assess whether or not all SRRA requirements have been met when there are multiple LSRPs? A particular LSRP? All LSRPs? Any LSRP? (At a minimum, DEP and the PRCR). Specifically, if under ISRA the PRCR is obligated to remediate all AOCS as of 1/1/2009 and fails to obtain NJDEP NFA Letters and LSRP RAOs addressing each and all of those AOCs, then the PRCR has not fulfilled its obligations under ISRA and may find itself under direct oversight, or worse, as to omitted AOCs. (Remember, under ISRA a failure to comply with ISRA allows the transferee a right to void the transaction, at least in certain circumstances, and seek other relief as well.)

◊ 3.7.3(F) NJDEP 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 NJDEP's instructions to forms used for submissions, and other guidance for such submissions and the work covered by such submissions. They are not identical to those applied by NJDEP prior to SRRA.

○ In our view, a growing issue under SRRA is the ability of NJDEP to force LSRPs and PRCRs to limit their submissions to the precise forms prepared by NJDEP, particularly as to those forms that can be submitted only through the electronic gateway. While on the one hand it is understandable that NJDEP wants to improve efficiency and consistency, on the other hand NJDEP 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 adopted by NJDEP in its drafting. For example, if NJDEP does not allow a party to alter the LSRP retention form to reserve the party's assertion that it is not acting as a PRCR or RP by retaining an LSRP, thereby admitting liability or waiving defenses, does the form have the result, potentially intended by NJDEP, of being a waiver? And if the party and its counsel are nervous about something in the form, what can be done if the form cannot be modified on-line?

- At a minimum, we believe submitting separately a physical corrected submission to NJDEP, perhaps by certified mail or hand delivery or telecopy, e-mail or overnight service, may suffice to preserve the party's positions, even if NJDEP declines to review the materials on receipt, or rejects them, as improperly submitted, or even if NJDEP discards them or returns them unread. In our view, it is doubtful that NJDEP can disclaim knowledge of what has been sent to it, merely if it elects not to review or understand, at least in many instances. In our view, a court will likely find such a dismissive cavalier attitude by NJDEP to be arbitrary and capricious and violative of the requirements for proper and fair regulatory action.

◊ 3.7.3(G) NJDEP imposes specific requirements for addressing LNAPLs under NJDEP'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 NJDEP on a NJDEP 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 NJDEP. See N.J.A.C. 7:26C-3.3 and N.J.A.C. 7:26E-1.10(c).

◊ 3.7.3(H) NJDEP 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 from NJDEP. See N.J.A.C. 7:26C-2.3.

○ As noted earlier, in August 2016 NJDEP published its Landfill Proposal, largely to codify and implement the provisions of the Legacy Landfill Law, That proposal notes that a "legacy landfill," is a landfill that ceased operations pri.13or to January 1, 1982, and received for disposal either solid waste or waste material that would meet the definition of hazardous waste under RCRA but received prior to RCRA's enactment on October 21, 1976. As noted at this Article Section 1.2.25 NJDEP adopted its proposal. It is beyond the scope of this Article to review that adoption in depth. A cursory summary follows.

- Legacy landfills were constructed and operated at a time when there was limited or no regulation over the disposal of solid waste. The Solid Waste rules' existing requirement to prepare Closure and Post-Closure Plans applies only to a landfill operating on or after January 1, 1982 (see existing N.J.A.C. 7:26-2A.9(d)). The existing requirement was a result of the passage of the Sanitary Landfill Facility Closure and Contingency Fund Act, (P.L. 1981, c. 306) (the Closure Act), N.J.S.A. 13:1E-100 et seq., amending the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. The Sanitary Landfill Facility Closure and Contingency Fund Act was approved on November 25, 1981, and provided at section 8 that the law would "take effect on the first day of the second month following enactment," which was January 1, 1982 (enabling then operating landfills time to close and cease taking wastes, so as to avoid the new requirements under these laws). Therefore, when the rule requiring a Closure and Post-Closure Plan was promulgated in 1983, NJDEP applied it only to new sanitary landfills and sanitary landfills that were in operation as of the effective date of the Sanitary Landfill Facility Closure and Contingency Fund Act. (See 14 N.J.R. 883(a), 15 N.J.R. 894(c)), but not sanitary landfills (sometimes called "dumps") that had ceased operation prior to January 1, 1982.

- The legacy law at N.J.S.A. 13:1E-125.5 and 125.6 requires the owner or operator of a legacy landfill or closed sanitary landfill facility that accepts recyclable material, contaminated soil, wastewater treatment residual material, or construction debris to establish and maintain financial assurance to pay for all closure costs and an escrow account to pay for post-closure costs. So NJDEP proposed to extend the existing rules' Closure and Post-Closure Plan requirements to all landfills from the time a landfill accepts any type of material, as indicated in the amendments to N.J.A.C. 7:26-2A.9(a), including, as at N.J.A.C. 7:26-2A.9(d)2 if the owner or operator undertakes a closure activity, constructs any site improvements, or accepts, for any reason, solid waste, recyclable material, contaminated soil, cover material, wastewater treatment residual material, dredge material, construction debris, or any other material. Under the Proposal, before any of these activities begins, the owner or operator must have DEP-approved plans to close the sanitary landfill, pay for that closure, and pay for any controls until such time as the controls are no longer needed to protect human health and the environment.

- To create the required Closure and Post-Closure Care Plan in such instances, NJDEP asserts that there likely will need to be an assessment of the sanitary landfill and its surroundings so that NJDEP can evaluate whether the plan's proposed environmental controls, maintenance, and monitoring measures meet the requirements of the Solid Waste Management Act, Sanitary Landfill Closure and Contingency Fund Act, and Legacy Landfill Law (but, not expressly, SRRA) The assessment includes development of baseline data about conditions at the landfill that may have an impact on public health and safety and the environment, as well as information about nearby receptors potentially affected by the landfill. It also includes information about the landfill's operation, ownership, and existing and future uses.

- Notably, if information for the assessment is not already available, the owner or operator of the landfill must investigate. This may require the owner or operator to obtain a sanitary landfill disruption approval under N.J.A.C. 7:26-2A.8(j) before investigating conditions within the landfill itself. Under certain circumstances, the proposed rule requires municipal site plan approval as part of the Closure and Post-Closure Care Plan for closure activities at a legacy landfill. There is no discussion of the need for an LSRP.

- Also, many feel that the adoption does not integrate well with SRRA, ARRCS and the Tech Rule. There is little to no role for an LSRP. Indeed, the role of the professional engineer is extended by NJDEP to remedial activities (confirming that even NJDEP itself is uncertain of the role of LSRPs in every instance). It does so by distinguishing various landfill activities from remediation, noting that if remediation of discharges is required, than use of an LSRP is required. Otherwise, as before, the rules rely heavily on professional engineers, including for certification of engineering drawings, specifications, and reports. Further, NJDEP amends N.J.A.C. 7:26-2A.9 to apply this Law's requirements with regard to licensed professional engineers to all sanitary

landfills, whether they are operating, or are legacy landfills or closed sanitary landfill facilities and to oversee all disruption activities at sanitary landfills, and certify the quarterly reports and final reports related to the disruption. Actual practices to follow are uncertain. Consider: is a professional engineer exposed to liability if he or she supervises the conduct of remediation, as defined in SRRA, without also being an LSRP? We suspect in most cases, not. NJDEP seems to feel that there is an implied exception in SRRA to the disruption or closure of a landfill in accordance with the Solid Waste laws and rules? Such appears not to be remediation in NJDEP's mind.

- DEP's adoption included some changes in definitions arguably relevant to LSRPs and PRCRs. "Contaminated soil" at N.J.A.C. 7:26-1.4 means soil, soil-like material, or mixtures of soil with other material containing concentrations of one or more contaminants that exceed the most stringent direct contact soil remediation standards as set forth at N.J.A.C. 7:26D, Remediation Standards. NJDEP deleted the definition of "clean fill" from both the Solid Waste rules at N.J.A.C. 7:26-1.4 and the Recycling Rules at N.J.A.C. 7:26A-1.3. NJDEP amended the definition of solid waste at N.J.A.C. 7:26-1.6(a) to clarify that processed or unprocessed mixed construction and demolition debris, including, but not limited to, wallboard, plastic, wood or metal, are solid wastes. At new N.J.A.C. 7:26-1.6(a)6, NJDEP exempted non-water-soluble, non-decomposable, inert solids, such as rock, soil, gravel, concrete, glass, clay, or ceramic products from the definition of solid waste, provided these materials do not contain contaminant concentrations exceeding the more stringent of the residential or non-residential direct contact soil remediation standards.

- The impact of these proposals on remediations cannot yet be assessed.

◊ 3.7.3(I) NJDEP imposed new PRCR requirements for remediation of IECs including: to provide immediate notice to NJDEP; 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 NJDEP 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 NJDEP'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, NJDEP 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 NJDEP'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 NJDEP 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 NJDEP's position is or will or may be, what the rules and statute say and what the PRCR needs to do to satisfy those NJDEP 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 NJDEP 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 NJDEP demands for form/IEC responses and certifications in its forms any guidance. Also recall NJDEP's and Board's views as to the duties of the LSRP to report a likely failure of the PRCR to meet any required deadline. See N.J.A.C. 7:26I-6.18 and this Article at § 1.2.4.

○ 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 NJDEP 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 NJDEP 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) NJDEP 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 NJDEP 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) NJDEP 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 NJDEP 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) NJDEP 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 NJDEP'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 NJDEP'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 NJDEP'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 NJDEP on request. N.J.A.C. 7:26C-1.7.

◊ Industrial establishments have a statutory obligation to report suspicions of discharges. See N.J.S.A. 13:1K-16: "An owner or operator of an industrial establishment, or real property which once was the site of an industrial establishment who knows or suspects the occurrence of any hazardous discharge on-site… shall, within 10 days of obtaining any information leading to this knowledge or suspicion, make an inspection thereof and file a written report concerning this hazardous discharge with the governing body of the municipality in which the industrial establishment or real property is located and the local board of health. The report shall include: the types and quantity of hazardous substances involved in the hazardous discharge if known; the location of the hazardous

discharge; and any actions taken by the owner or operator of the industrial establishment to contain the hazardous substance."

- **3.8 SRRA Changes to the Pre-SRRA Remediation Program**

  - 3.8.1 Engineering and Institutional Controls

    ◊ SRRA required NJDEP 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. NJDEP has done so. In such permits NJDEP 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; NJDEP has chosen to issue individual permits. (N.J.S.A. 58:10C-19.a.; P.L.2009, c.60 §19.a.) NJDEP 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.) NJDEP 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.).

    ○ NJDEP has implemented these requirements at ARRCS Rule at N.J.A.C. 7:26C-7 (addressing deed notices [and purporting to address older declarations of environmental restrictions {at least to the extent NJDEP has the power to unilaterally change the rules governing these declarations, which NJDEP power is subject to question under prior law, covenants not to sue and recorded instruments}] and CEAs), -4.5 & -4.6 (RAP fees) and -5.2 (FA).

    ○ Permittees may not be limited to one express Person. They can include each owner, operator and PRCR. See ARRCS Rule at N.J.A.C. 7:26C-7.4. They can include, for example, each tenant (being a "statutory permitee") (although presumably only tenants with rights and obligations for a leasehold subject to ECs and ICs, and arguably no other tenants: consider, does a second floor retail tenant have to be a statutory permittee as to a RAP for a CEA over part of a site's parking lot?). 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 (RAPs) are required and are obtained pursuant to detailed requirements for specified remedial actions: CEAs; a recorded deed notice or, by rule, a declaration (N.J.A.C. 7:26C-7.5); EC or IC; and obligations for monitoring, maintenance and evaluation of a remedial action. Pursuit of a RAP requires submission of NJDEP application forms to NJDEP for review and approval; RAPs are not issued by LSRPs. See N.J.A.C. 7:26C-7.3 &7.5. 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.

    - Note: 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. We note some uncertainty as to the validity of NJDEP's decisions for such properties.

    ○ RAPs 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 NJDEP 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. *(2018)* This appears to be a disappearing practice.

    - Since 2016 we have seen some NJDEP personnel looking more carefully, and more skeptically, at the calculations of future costs for FAs under RAPs. Depending on our client, we have expressed concerns that under-calculation of the proper amount for an FA may result in inadequate protection

of non-liable parties, to their detriment, and potential liability of the LSRP providing the cost calculation to NJDEP. We also believe future NJDEP personnel will be less generous and tolerant in their review of FA calculations in the future, than they have been in the past. So decisions based solely on the basis of current calculations of FA amounts may be unwise.

○ Permits should be transferred to new owners or operators by at least 60 days prior notice to NJDEP and the transferee on the NJDEP'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 NJDEP 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. In some cases it may be possible to avoid ownership or leasehold rights of portions of a site burdened by an EC or IC and RAP.

◊ "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).

○ Current NJDEP policies make it very difficult for third parties to draw against FA and RFS, despite defalcations of liable Persons, at least to finance current corrective measures.

◊ Is NJDEP itself ever obligated to obtain and comply with RAPs?

■ 3.8.2 Mandatory NJDEP Oversight of Remediation

◊ NJDEP shall undertake direct oversight (over the preferences and control of a PRCR and its LSRP) of a remediation of a contaminated site if and when: (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 NJDEP 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.). The language suggests the absence of NJDEP discretion and a requirement for NJDEP to act. NJDEP seemingly interprets this provision differently.

○ 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 NJDEP 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 Persons failed to exercise their right to extend. Furthermore, while arguments can be made otherwise and NJDEP has announced at SRAG and other meetings (e.g., SRIN) that it has accepted those other arguments, the words in this enactment do not expressly alter any other mandatory deadline (such as those for completion of actual remediation; although NJDEP appears to have concluded that the remedial deadlines also extended). 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 a number of conditions have been met. For further guidance and forms see http://www.state.nj.us/dep/srp/timeframe/extension.html. At this date, all RI's for older cases subject to the extended RI deadline should have been completed.

- Is NJDEP itself obligated to complete its own RI by this date for each site for which it itself is conducting remediation? Where is the statutory support for a view that it is not so bound?

○ See this Article at §3.6.9 above as to the consequence of a current discovery of a potential discharge occurring before 1999, never then documented, reported, investigated or remediated, for which an LSRP has never been retained, as exposing the PRCR and the site the subject of that discharge to direct oversight.

○ Note: The nature, extent and effect of NJDEP direct oversight, when it is to occur, is in practice for most PRCRs and LSRPs still somewhat uncertain and unexplained. But see N.J.S.A. 58:10C-27.c. Consider, for example, how NJDEP oversight is implemented if no LSRP is willing to become responsible for the remediation of such a site under NJDEP oversight. Is the PRCR in breach due to the LSRP's unwillingness? Can NJDEP pick its own LSRP? Force an LSRP to act? Also, many thought NJDEP 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 NJDEP's stated view has been that the provisions are self-executing, although eventually NJDEP is expected to reach all exposed to (or "in") direct oversight. Those subject to direct oversight are, and they should each comply with the requirements without demand, in NJDEP'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 NJDEP can take direct oversight of "a site, area of concern or site condition" when NJDEP determines that a mandatory deadline is missed and thereby prevent the PRCR and its LSRP from proceeding without NJDEP oversight. But when and how will NJDEP direct oversight work in such instances? NJDEP 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 NJDEP has appointed case managers in many such cases.

○ Note: We have previously asked does "shall" really mean "shall" or does NJDEP have any discretion? To forgive violations? To allow cure? To prioritize its efforts? To apply scarce resources? To enter into consent orders or settlement orders? *{2018}* NJDEP's new policies suggest that NJDEP believes it has discretion to provide favorable treatment to those who sign ACOs. We think that correct. We also think that this is not the limit of NJDEP's power to use enforcement discretion.

○ Note: Does this really mean, as NJDEP seems to now assert, that it is not for NJDEP to take direct oversight, instead it is for the PRCR and the LSRP to provide it to NJDEP? Are courts likely to accept NJDEP's view? We think not. *{2018}* In any event, we think there are many who, as a practical matter, disagree with NJDEP.

◊ We previously suggested that NJDEP 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 NJDEP brings to the issues the range of past imagination and flexibility that has sometimes tempered its positions. For example, NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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).

○ *{2018}* NJDEP has presented that there are limited options for some to obtain better treatment than otherwise for Direct Oversight. Those include unrelated site purchasers (see http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_pre_purchaser_aco_1213.pdf) and certain PRCRs prepared to sign an ACO to earn that better treatment (See http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/2017/srag_cvp_earned_adjusted_do_aco_1213.pdf). See this Article at § 1.2.37.

- Those who are "bad actors" need not apply.
- Breach of such ACOs carries added exposure.

◊ When is the RI Completed? In June 2013 NJDEP provided critical guidance on key issues at http://www.state.nj.us/dep/srp/timeframe/policy_statement.pdf (seemingly deviating from NJDEP'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 NJDEP staff seem to have received, read or agree with the above. Subsequent staff reviews of data and submissions suggest that some NJDEP 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. At least one prior NJDEP complaint to the Board involved such an issue; future conflicts and complaints seem certain. See Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2014_complaint.pdf.

◊ Note that NJDEP 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 monitor and attain full compliance (e.g., a clean downgradient well).

◊ What is the measure of whether a site and PRCR (and LSRP) misses the mandatory deadline for remediation? See this Article at § 3.8.6. Under N.J.A.C. 7:26C-3.3, the PRCR must complete the remedial action and submit the remedial action report, with required form, by the date which is two years after the regulatory timeframes established pursuant to the Tech Rule. But what does completion of the remedial action require? As to groundwater, is establishment of a CEA sufficient? (Perhaps). Is application for a RAP sufficient? Or need an RAO issue? (Apparently not)

◊ As to what professional judgment is, see this Article at § 3.4.18.

■ 3.8.3 Permissive NJDEP Oversight of Remediation

◊ NJDEP 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) NJDEP 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 NJDEP'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 NJDEP in the highest priority pursuant to the RPS established (when it is) 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 NJDEP 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) NJDEP 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 NJDEP 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 NJDEP's Ecological Screening Criteria; or vii. Pesticide soil contamination exceeds one mg/kg for any given pesticide.

■ 3.8.4 Effect of NJDEP Oversight

◊ The consequences to the PRCR of NJDEP 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 NJDEP's mind except if otherwise expressly provided, the requirements apply automatically without new NJDEP demand. Under these provisions the PRCR shall:

1. Proceed with the remediation as NJDEP directs, including retaining an LSRP;
2. Conduct and submit a FS to NJDEP for approval;
3. Implement each remedial action the NJDEP 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 NJDEP's prior approval before making any disbursements from the RFS;
8. Ensure that all LSRP submissions concerning the remediation are provided simultaneously to the NJDEP and the PRCR;
9. Submit a proposed public participation plan, with a schedule, to the NJDEP 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 NJDEP-approved public participation plan.

○ Note: Thus, in cases of direct oversight NJDEP 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 NJDEP review and approval of far too many submissions. However, NJDEP seemingly 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 NJDEP actual review and approval (in order to avoid or minimize after-the-fact NJDEP criticism)?

○ 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: NJDEP's power to choose the remedy is potentially both powerful and damaging, although as a practical matter perhaps only rarely so. 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 NJDEP determine that health and the safety would be better protected by an unrestricted remedial action instead? Arguably it can. 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 political pressure if there are opposing municipal or neighborhood uses or preferences? Can it ignore then existing contract rights (for example preexisting owner consents)? Litigation seems sure to follow if NJDEP 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. *{2017}* NJDEP may, as a practical matter in view of scarce resources, elect to minimize confrontational remedy-selection. Note that if pre-enforcement review is denied to challengers of NJDEP decisions in direct oversight, 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 *{2017}* (also thereby creating strains on NJDEP resources in the face of uncertain and expensive postponed confrontations and judicial decisions). In view of these constraints, how often will NJDEP in fact elect to spend excessive amounts on remediations it chooses over PRCR objection (when cost recovery is in doubt and delayed)? Also, consider how a court is to respond to an unlicensed NJDEP personnel selecting a remedy over the objection of both the PRCR and the LSRP? What qualifies that NJDEP personnel to make that decision? (In some cases properly adopted regulations may allow for a choice; but in others, can NJDEP 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 NJDEP 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 NJDEP and PRCRs and complex very contaminated sites may result in very aggressive NJDEP 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 NJDEP's right to this remedy, at least by refusing to pay, and perhaps by seeking an administrative hearing. We are aware of one such case now. Again, if pre-enforcement review is denied, then constitutional requirements may affect the efficacy of this statutory approach. Can NJDEP otherwise force PRCR payment due to direct oversight without an adjudication of liability and constitutionality? It seems unlikely.

- Further, it may be impossible for many PRCRs to comply (for example because they have inadequate or no cash to do so). What will NJDEP do if the PRCR indeed cannot post funds? Cannot find an LSRP willing to serve? Does NJDEP have any discretion?

○ Note: To comply with this mandate must the PRCR use exactly the form required by NJDEP 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 NJDEP direction without notice to the PRCR and opportunity to object? *{2017}* Is the PRCR entitled to a hearing on the terms of the RFS?

○ Note: When NJDEP has direct oversight, various documents must be provided by the LSRP to NJDEP and the PRCR at the same time. Apparently this is to allow NJDEP 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? *{2017}* Or does it apply only to final drafts in form and substance ready to be finalized for submission, subject to final review and approval of the PRCR and NJDEP? Can there be pre-draft drafts? Or drafts that are privileged and confidential prepared in anticipation of litigation, followed by drafts for NJDEP review? Informal and incomplete drafts that are prepared by non-LSRP consultants for LSRP and client and counsel review? Drafts that are prepared by non-LSRP consultants for client and counsel review first without LSRP review? Drafts that are prepared by third parties (such as a non-LSRP consulting firm, perhaps retained by PRCR counsel) and submitted to the LSRP and not NJDEP for discussion? Drafts that are prepared by client staff and submitted to the LSRP and not NJDEP for discussion? Meeting or call outlines or agenda that are prepared by client staff, non-LSRPs and counsel and shared with the LSRP for discussion in a meeting or call prior to preparation of drafts? Documents or outlines that are prepared by the LSRP and then rejected by the PRCR or PRCR counsel?

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

◊ *{2018}* See this Article at § 3.8.2 above as to the use of ACOs in certain situations to vary these requirements.

■ 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 NJDEP 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, *{2018}* and is expected to occur to some extent hereafter.

○ By its terms this provision seems not to apply to post-SRRA litigation and settlements. Is this an oversight? Or does this provision now limit the effect of future settlements? Or is more broad language unnecessary in that NJDEP has often settled disputes in ways at odds with strict statutory provisions? In general, we think the last.

○ Is this relevant to pre-SRRA ACOs? Post-SRRA ACOs? Direct Oversight ACOs?

■ 3.8.6 Timeframes

◊ NJDEP 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 NJDEP to effectuate timely remediation. (N.J.S.A. 58:10C-28.a.; P.L.2009, c.60 §28.a.) In establishing these timeframes NJDEP 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 NJDEP is to increase its review, monitoring and auditing of sites with groundwater issues. NJDEP 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.

○ NJDEP 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; that extended date is now past. 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.

○ See below as to mandatory direct oversight for missing a timeframe set in the statute.

○ 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 NJDEP 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 NJDEP 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.

◊ So, for older sites, what is the deadline for completion of a remedial action? NJDEP has advised that: "Remedial actions for sites subject to the statutory timeframe must be completed by May 7, 2017, for soil only remediation and May 7, 2019, for the remediation of soil and other media." See its deadline training matrix at http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf. NJDEP has informally advised that these deadlines were extended by two years if the PRCR took advantage of the statutory extension of the original May 2014 deadline for completion of the RI. Note, again, that the precise parameters of what constitutes such completion are unclear.

○ Can NJDEP's due dates, as shown in DataMiner, be assumed to be right? Should they be checked by the LSRP? If wrong what should be done?

◊ And newer sites? Deadlines depend on the facts and circumstances peculiar to each site.

○ *{2018}* We strongly recommend that those charged with meeting deadlines check NJDEP's DataMiner site to assess the dates for performance included there by NJDEP. We have seen some errors. Early correction is appropriate. Further, even if accurate, a client and its LSRP should be aware of NJDEP's expectations and deadlines.

○ *{2018}* What sites are subject to "statutory timeframe?" (We believe this means sites having deadlines after which NJDEP is required by SRRA [at N.J.S.A. 58:10C-27] to take direct oversight- or otherwise as established by NJDEP). Although NJDEP imposes a deadline for completion of a remedial action, as required by SRRA (at N.J.S.A. 58:10C-28) we do not believe the deadline so imposed need be so stringently interpreted. What exactly did NJDEP mean by the requirement for completion of a remedial action? (We are prepared to argue based on the table of deadlines that meeting reporting requirements may suffice).. Will approval of a RAWP alone suffice? Arguably not?

○ *{2018}* If extensions are available, then do the necessary to obtain them.

○ *{2018}* Watch for more news and possible changes in SRRA 2.0.

◊ NJDEP shall grant an extension to a mandatory remediation timeframe as a result of: (1) a NJDEP 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.) NJDEP 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 NJDEP 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 NJDEP 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. NJDEP 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. NJDEP 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 NJDEP. (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).

○ We note that the requirement for a complete permit application to NJDEP, as a condition of an extension, has historically, in many NJDEP land use permit programs (e.g., wetlands), and in the view of many applicants and their advisors, been used to avoid the mandatory 90-day clock for permit issuance applicable to those programs. We nonetheless feel that NJDEP cannot use this limit to deny extensions of remedial deadlines if the applications were substantially complete, particularly if NJDEP demands for more information are not consistent with applicable laws, NJDEP rules and guidance.

○ 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 NJDEP direct oversight.

○ N.J.A.C. 7:26C-3.5 adds that NJDEP 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 NJDEP 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 NJDEP 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 prior NJDEP decisions? We believe so. But can other LSRPs assume the same result at new sites? It appears NJDEP has given inconsistent information by phone and e-mail in recent times. 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 NJDEP decisions? We hope and believe so: as we have said before, we do not think SRRA was intended to increase delays, and a contrary interpretation to ours seems destined to have that result).

○ *{2018}* Note that such delays do not relieve the PCR of its obligations to pay annual fees and RFS surcharges, at least expressly. We do believe if an RAP application has been filed, has been delayed by NJDEP review, and once issued an RAO is likely to issue, sometimes NJDEP can be asked, and may consider, providing some relief as to same.

■ 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, express 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 NJDEP's likely aggressive enforcement position, if not immediate then eventually (including by Direct Oversight requirements), 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 against the advisor later if NJDEP does enforce. Perhaps those who are innocent purchasers are not so liable. Perhaps those who are bankrupt can escape their liability. Perhaps those who are not dischargers or responsible Persons under the Spill Act are not liable (as evidently the State itself believes as to itself). But professionals, both LSRPs and counsel, must use great care to fulfill their professional obligations and avoid malpractice and other claims (such as from the Board) from faulty or incomplete advice. Will NJDEP eventually enforce? Yes. Against everyone? Likely not; likely they will prioritize sites and targets, perhaps under the RPS, and allocate scarce resources to get the optimal results, at least in NJDEP's own view. But can any of us foretell accurately NJDEP's enforcement priorities now? *{2018}* As Governor Murphy's administration moves in?

○ Does this affirmative obligation apply to all remediations? For example, to landfills? Perhaps not. See discussions below and at this Article §§ 3.7.3(H) and 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 NJDEP pursuant to N.J.A.C. 7:26E-1.5. See discussion at this Article §3.7.4 above.

◊ According to NJDEP "…[t]he 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/. This self-interested declaration may not comply with SRRA itself. The basis for this interpretation is not provided. *{2018}* At least a few may be due to federal preemption issues.

◊ 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 NJDEP 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 http://www.state.nj.us/dep/srp/guidance/srra/capping_remediation_sites.pdf. See this Article §3.8.13(H) below.

○ But as to the recent legacy landfill rule see this Article § 3.7.3(H).

■ 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 NJDEP in rare circumstances). (N.J.S.A. 58:10C-14.d.; P.L.2009, c.60 §14.d.). Originally under SRRA, NJDEP's right to issue NFA Letters with covenants not to sue was limited; this has been corrected, but it appears NJDEP does not now expect to be issuing many NFA Letters (e.g., except for UHOTs). NJDEP does not issue RAOs; it has no license or authority to do so. But if NJDEP hired an LSRP, its LSRP could issue an RAO to NJDEP. 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, in NJDEP's view with a final RAO for the entire site or all remaining AOCs to follow on conclusion. In order to protect against changes in NJDEP rules and standards, on complex sites there may be significant advantages for PRCRs to have LSRPs issue multiple RAOs. (Note: in some cases there are requirements for an RAO for the entire site [e.g., a new school]; NJDEP 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, of a site, but only those to which the receptors being protected (students or children) may come into contact. Is that right? If so, does the precedent affect other statutory and regulatory provisions addressing an entire site?)

○ *{2018}* Are there other circumstances under which NJDEP can issue a NFA Letter or the like? Perhaps. JCP&L issued many NFA Letters for many years without express statutory authority (first occurring in 1993). Might some clients want NJDEP issued NFA Letters? Seemingly so. Some are uncomfortable with relying on LSRP RAOs which are subject to NJDEP review for three years post issuance and ask for NJDEP assurance. To date we are not aware of this option: but consider- if Amazon agreed to relocate its corporate headquarters to New Jersey if NJDEP issued an NFA Letter or some other "no action" letter (as the USSEC does and, sometimes, USIRS does)? We suspect something would be done.

◊ After an LSRP issues an RAO or NJDEP issues an NFA Letter to the PRCR, the PRCR 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 NJDEP 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 RAPs, even though, by NJDEPs own interpretation, such constitutes a new remedial requirement [thereby in NJDEP's mind also requiring use of LSRPs for example, and potentially reopening the previously closed case if the LSRP reaches certain conclusions], 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 itself. The covenant remains effective only for as long as the real property continues to meet those conditions of the RAO. Upon a finding by the NJDEP that real property no longer meets with the conditions of the RAO, NJDEP shall provide notice of that fact to the person responsible for maintaining compliance with the RAO; NJDEP may allow a reasonable time to come into compliance. If the property does not meet the RAO conditions and if NJDEP 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.).

- Is there a deadline by which an LSRP must issue, and a site and PRCR receive, an RAO? (Apparently not). N.J.S.A. 58:10C-27 requires NJDEP to exercise direct oversight if mandatory deadlines it sets in rules are missed. NJDEP's regulations do not include an express mandatory deadline for issuance of an RAO. See the training matrix, missing any such requirement, at http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf There may be good reason for this.

- Can NJDEP impose conditions in an RAO, by forcing all LSRPs to use its template, and thereby arm itself with the ability to revoke later, as it elects, an RAO for non-compliance with a condition (such as a change in tax lot and block, without prompt notice to NJDEP), even if such condition does not clearly impact health, safety and the environment? Evidently NJDEP believes it can. We have our doubts: we think revocation was intended by the legislature to be a rare and serious event, not to be undertaken lightly or for non-material events. If NJDEP uses failures of relatively immaterial conditions in an RAO, absent actual material threats, to revoke an RAO, we think, if challenged, courts will likely reject NJDEP's revocation.

- Note: While the effect of a revocation of the covenant is not explained, presumably it means NJDEP (and others) can then 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. Its language is, nonetheless critical to provide protection to successor owners and operators. Still, even they will feel the effects of a revocation on the marketability and utility of their site, and perhaps even their future obligations under ISRA, if thereafter triggered (as ISRA does not respect any innocent purchaser defenses).

- Note: Revocation of the covenant not to sue may permit reopener of a wide range of issues beyond the problem causing the revocation. For example, can NJDEP (and the new LSRP) require additional sampling or remediation or both, or pursue natural resource damages, under post-revocation then current rules and practices? Presumably it can. If standards have changed, even though by less than an order of magnitude, can new sampling and remediation be required to delineate? What time frames apply- the same as previously applicable? If applicable time frames are missed, does revocation immediately expose the site and liable PRCR to direct oversight? Must the new-LSRP reexamine the entire file? 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? When? The answers may depend on precise contract language and future case law, as answers are not provided in statutes, rules or guidance.

- Note: The effect of a revocation of the covenant not to sue is not limited to the breaching person. It likely can extend to the original PRCR, if alive, 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 as part of the case for which the RAO is issued. 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 NJDEP, 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 NJDEP orders additional remediation, except that the covenant shall bar such a claim if NJDEP 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 NJDEP RAO template purporting to reserve NRD claims? See this Article §3.7.3(E). We would likely be willing to argue it to be invalid.

○ 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 not to sue if it is or was prior to the RAO a liable person without the defense (as many are)? (That interpretation seems unlikely as it 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 NJDEP and others will acknowledge the broad scope of the covenant not to sue set forth in the statute, particularly if and to the extent NJDEP'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: in view of SRRA's purpose to accelerate cleanups and provide increased confidence and finality, we favor the view that the covenant not to sue automatically extends to (bars) NRD claims.

■ 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 NJDEP (not merely by an LSRP). 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 NJDEP 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 NJDEP to enforce a right of subrogation, NJDEP 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 NJDEP 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."

◊ *{2018}* We caution that that older agreements, and even newer agreements (which at least may now have more clear language on the issue), both should be carefully assessed for the possibility, as recently experienced by a client, that funding might be denied in a performing (tax collections as projected) redevelopment brownfield site of a share of costs for ongoing groundwater remediation, because NJEDA determined that it today has better uses for the money, the original budget for remediation (not used as a contractual cap in the agreement) has been expended and "no-one could expect to receive funding forever." Some new developments are less likely to proceed with this understanding.

■ 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 NJDEP 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 NJDEP'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).

○ Note: LSRP practices sometimes do not include the LSRP's express approval or certification of plans or other submittals. *{2018}* Many reports and forms do not state the report or form as having been "approved" by an LSRP. We suggest they should expressly so state. We acknowledge and agree that approval can be implied; but why allow arguments as to whether the implication has the same effect as an express statement?

◊ N.J.S.A. 13:1K-9 allows the LSRP to file the RAO with NJDEP 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 response action outcome should be able to proceed immediately upon and after receipt of the RAO, if alone or together with other FRD for the entire industrial establishment, 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 NJDEP 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 NJDEP approves a negative declaration by issuing a no further action letter. However, NJDEP 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 NJDEP 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 NJDEP 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 NJDEP a remediation certification (replacing the former application for, and receipt of a remediation agreement, signed by NJDEP): "(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 NJDEP as a remediation certification is available at: http://www.state.nj.us/dep/srp/srra/forms/remediation_certification_form.pdf

○ The use of a remediation certification, which is self-executing without need for a NJDEP signature or approval, 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 NJDEP 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 NJDEP'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 NJDEP disagrees.

○ *{2018}* Note: What if the RFS posted for and with the remediation certification relies on an LSRP's post-PA calculation, rather than default amounts, and NJDEP feels the calculation erroneous? Or what if the RFS posted assumes no-groundwater issues, but NJDEP disagrees? Is the remediation certification on which the closing occurs invalid? Voidable? We think NJDEP may have recourse to demand an increased RFS but, absent fraud, any such closing is valid and not-voidable.

◊ 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 NJDEP 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 NJDEP as to the approach selected for remediation (although NJDEP 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 NJDEP 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 NJDEP is to increase its review, monitoring and auditing of sites with groundwater issues. How it can do so without regular interim filing of groundwater monitoring data, now discouraged by NJDEP, is unclear.

◊ Alternatively, by its terms ISRA still allows that the remediating party may seek and obtain NJDEP review and approvals. (N.J.S.A. 13:1K-9.f, g. & i.; P.L.2009, c.60 §34.f. g. & i) However, NJDEP 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 NJDEP prior approval and then elected to await review. A court should find the conflict difficult to resolve in NJDEP's favor if NJDEP insists that SRRA overturned a process expressly retained under SRRA, allowing delay for NJDEP review (except in Direct Oversight). However, we are not aware of any PRCRs in situations meriting or considering making such an argument.

◊ It is unclear whether the power of the NJDEP 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)

◊ NJDEP initially relocated and altered the de minimis quantity exemption in its regulations as an alternate approval process. See N.J.A.C. 7:26B-5.9. NJDEP's first alteration of the tests previously required that the industrial establishment seeking to use this alternate approval process not be "contaminated above any standard set forth in the Remediation Standards, N.J.A.C. 7:26D" but such requirement has since been overturned in a court challenge. But NJDEP approval is still required. An LSRP is not expressly involved in pursuit of this exemption, except in the foundational preliminary assessment or RAO for other AOCs. On occasion post-SRRA NJDEP delays in processing alternative compliance applications have been more lengthy than they were pre-SRRA. Some are unavailable by NJDEP processes; see below.

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

◊ NJDEP 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 (under SRRA) to remediate. See N.J.A.C. 7:26B-3.2(c). Thus if an LSRP's preliminary assessment after an ISRA GIN identifies that there are AOCs requiring a site investigation or remedial investigation (e.g., because of actual or suspected discharges, perhaps even due to pesticides or historic fill), NJDEP's position is that termination of the transaction originally triggering the need for ISRA compliance, and withdrawal from ISRA, likely does not terminate the need under SRRA to address and "remediate" those AOCs. While in the case of AOCs with actual discharges of hazardous substances NJDEP's position is likely correct, at least absent some other defense to liability, it is unclear if NJDEP is right as to, and whether the PRCR is obligated to conduct, further investigation of AOCs as a result of mere suspicions: many would disagree with NJDEP.

◊ Certain of the alternate processes for seeking an authorization letter from NJDEP 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 NJDEP rules for new ISRA triggering events. This is inconsistent with the statutory provisions of ISRA itself, which expressly retain this option. See N.J.S.A. 13:1K-11.2. But NJDEP believes that an LSRP can conduct a PA and issue a RAO faster than NJDEP could undertake this process itself, thereby saving NJDEP scarce resources. However, as NJDEP's approach is inconsistent with the statute, it may be that a future court case will reverse this NJDEP decision, made clearly in disregard of the statute and legislature's directives. However, if NJDEP is right about the time and cost to proceed by LSRP alone, and in many cases NJDEP will be right, is it worth going to court? Likely not.

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

◊ While unrelated to SRRA, letters of nonapplicability are still unavailable, in our mind without reasonable basis. They should be restored as a meaningful and valuable, and self-supporting process.

■ 3.8.11 Spill Act

◊ The Spill Act includes a new term "final remediation document" ("FRD") which means either an NFA letter issued by NJDEP under N.J.S.A. 58:10B-1 et seq., or an 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 NJDEP 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.). As noted earlier NJDEP issued administrative guidance entitled "SPILL ACT LIENS AND THE PROCEDURES FOR A PROPERTY OWNER TO CONTEST A SPILL ACT LIEN" which outlines the process by which the owner of property may challenge the filing of a Spill Act lien by NJDEP against that property. See http://www.nj.gov/dep/srp/guidance/srra/spill_act_lien_guidance.pdf.

◊ The Spill Act innocent purchaser defense available for those who rely on a NFA letter now allow such protection for those who rely on a FRD (including a RAO), despite later discoveries. (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 (sometimes used by brownfields developers) 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 NJDEP 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 NJDEP. There shall be public access to reports from the database on NJDEP's internet website. (N.J.S.A. 58:10-

23.16; P.L.2009, c.60 §39). NJDEP has missed this deadline, as it has many times before. We are not aware of an accurate projection of a date in 2017 or later by which the RPS is expected to be available for public use and review.

○ Note: A site's ranking on this list may allow NJDEP 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).

◊ NJDEP 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 NJDEP 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 NJDEP published criteria and standards (if they can figure them out), and interpret the absence of same as allowing more leeway, with less concern for NJDEP initiated abrupt changes and unforeseen interpretations? Perhaps; time will tell. But certainly the legislature meant to require more from NJDEP by this change than it has demanded of NJDEP before. NJDEP 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 NJDEP 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 NJDEP doing so far? Generally well, but with occasional flashes of old-style conservatism, bureaucratic behaviors, and reluctance to let go, particularly by staff if not by management.

◊ A person who performs a remedial action in the manner prescribed in NJDEP rules, and who certifies this fact to NJDEP, 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 NJDEP's refusal to issue NFA letters after similar compliance, but were left with no practical remedy other than to await NJDEP action or surrender to NJDEP demands. Many waited for NJDEP, and lengthy delays ensued, often without success (receipt of the NFA Letter). Many surrendered to NJDEP 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 (an RAO) than NJDEP 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 NJDEP. Absent clear error, efforts by NJDEP 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 NJDEP and less compelled to blindly defer to NJDEP (because SRRA suggests LSRPs are equal to the task of remediation, at least if they follow NJDEP 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 NJDEP 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, NJDEP 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 NJDEP. Lack of clarity may be construed against NJDEP, if alternative interpretations by LSRPs are reasonable. For the same reason, while NJDEP can be expected to review LSRP decisions carefully, and sometimes even skeptically, NJDEP 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

then the legislature, PRCR and LSRP will take more of the blame than NJDEP 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 NJDEP by other State departments or agencies. (N.J.S.A. 58:10B-2.1; P.L.2009, c.60 §42).

◊ The obligation to post an 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 NJDEP 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 NJDEP 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).

○ Note: As to RFS placed before SRRA, the terms of the governing instrument may not allow for some of these events, at least prior to an amendment to the instrument (e.g., a trust) made with NJDEP consent.

○ 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…" NJDEP or certified by the LSRP and PRCR. N.J.A.C 7:26C-5.3(a)1. Annually thereafter the PRCR shall submit to NJDEP a detailed cost review of past costs and estimates of future costs on NJDEP'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 NJDEP'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.

- Note: Prior to issuance of the RAP for an EC (which necessarily includes posting of an FA or conversion of part of an RFS to an FA), NJDEP's most recent position is that the amount of an RFS should include the estimated cost to operate, maintain and inspect engineering controls.

◊ A letter of credit (LC) can be used again as an RFS, except of course when NJDEP 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 NJDEP 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. NJDEP also no longer permits calculations of eligibility to include intangible assets, as it did for some period until recently. These changes make self-guarantees less available than before SRRA. Unfortunately Self Guaranties are unavailable as FAs and in cases of direct oversight (although this may be something for which relief can be provided in a Direct Oversight ACO).

◊ NJDEP 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).

○ NJDEP can also approve a petition by a third party for use of an RFS of another. See N.J.A.C. 7:26C-5.13(d). But experience is that it rarely does so, even when it makes sense to do so, unless, based on conversations with NJDEP, to reimburse the last dollars resulting in an RAO.

◊ When NJDEP 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), if the RFS instrument terms so permit, to fund costs for remediation, but only 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 limit to essentially quarterly draws is not supported by statutory provisions or requirements; evidently it has its source in NJDEP convenience. Plan accordingly.

◊ The 1% annual surcharge due 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 NJDEP 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 NJDEP) 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 NJDEP 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 NJDEP). 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) NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP's website, for review. See http://www.nj.gov/dep/srp/guidance/srra/presumptive_remedy_guidance.pdf. This was updated in late 2013. Some SRRA guidance has been relatively novel, never having been proposed or used by NJDEP before then. Some differed 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, NJDEP 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 NJDEP 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 NJDEP'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 NJDEP 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 pre-SRRA remediation was conducted without approval of a RAW or issuance of a NFA letter, as an IRM or "at-risk" remediation, and the remediating party later post-SRRA approves a deed notice reflecting and

consistent with that implemented remedy as the final remedy, with an RAP and RAO to follow, can NJDEP disapprove the RAP or RAO if the owner is seeking approvals to build a residential development because the prior remedy does not meet presumptive or alternative remedy guidance? In our view NJDEP guidance suggests that if remediation started soon enough, the later presumptive remedies guidance need not be applied.

○ Note: There is no guidance defining, or 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? Prisons? Environmental Justice areas? Churches? Parks? Athletic or recreational facilities?).

- Can an LSRP be the subject of a Board or NJDEP complaint for relying on present NJDEP guidance to avoid further effort for unspecified potential sensitive populations (because such arguably failed his first priority- protecting health, safety and the environment), or is the absence of more express and direct NJDEP and Board guidance as to requirements for other sensitive populations, and the absence of identifications of such populations, a defense to such claims? Does the LSRP's stated highest duty under SRRA ever require that an LSRP and his or her client do more than NJDEP and Board rules and guidance now specify? What if, for example, the LSRP believes that, in his professional judgment, the unrestricted standard for a compound set and adopted under NJDEP rules is not sufficiently protective? In our view, the existence of NJDEP rules and guidance that speak to an 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 [realistic examples of which we are unable to identify now, even hypothetically]- and, even then, we believe the LSRP should not be subject to punishment and discipline that he or others concluded or should have concluded that more was required.

○ NJDEP'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.

○ NJDEP'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, at least if NJDEP concurs. 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. For groundwater such may be sought due to: hydrogeological conditions or complex (e.g., highly heterogeneous) sedimentary deposits; low permeability strata; fractured bedrock contaminant conditions; non-aqueous phase liquids (NAPLs) (particularly dense non-aqueous phase liquids {DNAPLs}); or remedial technology limitations. A successful application may depend on prior efforts to address the problem: how much of an effort will be debatable. Cost can be a supplemental consideration, but not the primary reason for seeking a TI determination. Such a determination requires special efforts to protect receptors. There is yet no guidance yet as to soils. Under the applicable guidance, an approval based on current technical impracticability (such as the presence of a structure) is subject to reexamination periodically and, if the basis for the original determination no longer exists or controls (the building has been removed), the remedy may be reopened. Review will likely occur as specified in a RAP, at least every 5 years or as otherwise stipulated in the RAP. Earlier review can be compelled in certain circumstances by NJDEP. Obvious potential problems arise with this approach: How can an LSRP's or NJDEP's decision on the need for a reopener be challenged? Who has the responsibility to conduct new remediation? What if the owner, operator and PRCR all disagree? What if the intended corrective action or review does not occur?).

- On what basis can NJDEP decline to approve an LSRP's recommendation as to technical impracticability? What are the LSRP's and PRCR's rights if NJDEP does deny such application?

- If NJDEP previously made a TI determination for a site, can the site's LSRP rely on same?

- How will soils guidance on TI vary from groundwater guidance?

- *{2018}* NJDEP expects that prior TI decisions will be regularly reexamined. How will that work? Who is responsible to schedule and conduct that reexamination? How will a future reviewer develop the expertise and knowledge to expertly review and re-consider the prior TI decision? By doing so,

does the reviewer obtain special liability? On how much of the prior record (work? decisions? arguments? approvals? absence of disapprovals?) can the reviewer rely? What if it is not reexamined?

○ NJDEP 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 NJDEP 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.

○ How and when will NJDEP approve the PRCR's choice? After audit review and by silence?

○ Is it really the PRCR's choice?

◊ 3.8.13(C) NJDEP 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? Does it have to be totally unusable (consider wetlands taking law: a court once held that a regulatory taking has not occurred if a site can still be used for an economically significant activity- such as growing and harvesting salt march hay). What if no user has yet shown up willing to use the site in an arguably possible way (a cell phone tower or sign; a tree farm; a small office; a Dunkin Donuts), but may hereafter? What if a minor variance is needed for a use? A major variance? What if factors not directly related to, or the result of, 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 (e.g., of CAFRA, Pinelands, Highlands, D&R Canal, wetlands or transition areas); soil disturbance permitting or limits; lender requirements; a temporary treatment structure; wells; vents; pipes?). Does NJDEP have to come up with guidance or rules concerning usability 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 NJDEP simply states the LSRP and NJDEP 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 NJDEP provides guidance. But absent such guidance, how do the LSRP and PRCR protect themselves against NJDEP second guessing? Compare, however, N.J.S.A.58:10B-12g.(7) which clearly authorizes the LSRP and NJDEP to make the required evaluations while N.J.S.A.58:10B-12g.(1)speaks only to NJDEP: is this difference support for the view that this is a NJDEP power, right and responsibility, but not that of an LSRP? Obviously not in NJDEP's view.

○ Note: This subsection does not explain if there are restrictions in the process or timing for NJDEP to exercise this right. Arguably NJDEP should only be able to so act in the same manner as it reviews 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. Yet it may take many years for the issue of usability to be identified, particularly if resulting from local land use adoptions or interpretations.

○ Note: If a municipality complains after issuance of an RAO that it believes the remedy selected makes a property unusable (e.g., hypothetically, due to a deed restriction against occupancy by anyone under 65 years of age), can NJDEP reopen the RAO for that reason? When and how? Only after audit? 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 RAO) 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 NJDEP (and the courts) would not permit municipal manipulation of circumstances to negate sound remedial measures. And even if NJDEP can lawfully consider such 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 in all or many respects (e.g., by relying on a fence and signs, and expressly preventing any and every realistic use)? 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 NJDEP 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 statutorily inconsistent and constitutionally deficient (violating requiring due process and fundamental fairness and limiting interference with a contract).

◊ 3.8.13(D) NJDEP 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 NJDEP 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, and hopefully eliminate or mitigate the issue, particularly if and after NJDEP 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 NJDEP guidance, can an LSRP safely rely in his or her own judgment?

- 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, NJDEP 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 NJDEP power, right and responsibility, but not any power, right and responsibility of an LSRP?

◊ 3.8.13(E) Property that does not meet unrestricted use criteria often can still be used for residential use (at least absent an express restriction imposed as an institutional control or some other restriction [such as by zoning]), essentially on the same logic as before (that controls may suffice to protect residents), but now only if there is compliance with a NJDEP presumptive remedy or implementation of a NJDEP 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 NJDEP 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.

○ Does this mean that a remedial action that can be implemented in a reasonable time frame without jeopardizing public health, safety or the environment is to be selected over a remedy that either cannot be implemented in a reasonable time frame (say one that will take 30-60 years) or can be implemented but only at increased threat to public health, safety or the environment (say from excessive traffic or dangerous excavations or excessive dewatering?).

◊ 3.8.13(G) NJDEP 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 NJDEP, 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: This arguably supports the practice of some PRCRs to divide responsibility for some AOCs or sites amongst multiple LSRPs.

○ *{2018}* Note: Does this imply that NJDEP can deny such permission?

◊ 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 requirement unexplained. Some such uses exist today, both with and without such controls. It is not clear that this new 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 and NJDEP 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: This applies, by its terms, only to remediations of landfills. But many activities occur at landfills involving disruption permits of and for landfills and closure plans, addressed as engineering problems and not remediations. See also the recently proposed legacy landfill rule, discussed in this Article at § 3.7.3(H). How does this policy interact with those existing practices and the legacy landfill rule *{2018}* (which does not treat landfill disturbances as remediations, but rather as engineering projects)? Is it clear whether and when construction on known landfill sites (for example, for a new municipal building or retail mall, or for a solar array), pursuant to a NJDEP approved closure plan or disturbance permit, perhaps resulting in a new or a revised deed notice *{2018}* (to reflect updated as-built conditions, and perhaps more current sensibilities and forms), 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 a post-disturbance deed notice require biennial certifications certified by LSRPs? Arguably not. Certainly the NJDEP 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 NJDEP 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]", the provisions mandating remediation and use of LSRPs do not expressly reference SWMA. See N.J.S.A. 58:10B-1.3 and discussion at this Article § 3.8.7 above.

- However, NJDEP 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 NJDEP 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 or being an innocent owner. 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 NJDEP 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).

○ Regrettably, regardless of the logic of this requirement, it is statutory and NJDEP is merely repeating the provision adopted by the legislature (admittedly at NJDEP's suggestion).

◊ 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) NJDEP 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 NJDEP disagrees with the LSRP decision. (Of course, if NJDEP 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 attack the decision, LSRP or PRCR?) And given the nature of conditions imposed in the RAO template, might NJDEP search for other means to endure an RAO and thereby require more?

◊ 3.8.13(M) The prior inability of NJDEP 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, NJDEP 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 NJDEP requires completion and submission of NJDEP's Alternative Soil Remediation Standard Application form for use of an Alternative Soil Remediation Standard. N.J.A.C. 7:26D-7.4. Further, NJDEP 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? We would argue that it does. See N.J.A.C. 7:26E-1.5 (c).

○ *{2018}* As noted elsewhere periodic changes to historic remediation standards have occurred previously and are expected to occur hereafter. Cautions LSRPs, lawyers and PRCRs will account for the possibility of changes in planning their work and negotiating their transactions and agreements.

○ *{2018}* It is to be noted that with a few standards having become less stringent, some sites may face reduced demands for investigation and remediation. Further, some sites already having received RAOs based on deed notices may be able to receive some relief, perhaps by an amendment or elimination of a deed notice if the only contaminant was of the kind and at a concentration now meeting the most stringent applicable standard.

◊ 3.8.13(O) N.J.A.C. 7:26E-1.7 addresses variances from NJDEP requirements. Prior NJDEP 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: NJDEP 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 NJDEP's prior approval. NJDEP 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 NJDEP. NJDEP 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. Of course, there is room for flexibility in its attachments.

○ Variances appear also not to be available to the text for RAOs under the template, although NJDEP itself does not feel bound from allowing variations without adopting new rules.

○ NJDEP 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, as of July 2017 set as $890 for 0 to 1 AOCs, $1,7860 for 2 through 10 AOCs or any number of USTs, $9,790 for 11 through 20 AOCs or a landfill, or $19,580 for more than 20 AOCs. See http://www.nj.gov/dep/srp/guidance/srra/fee_guidance_document.pdf and this Article at § 1.2.19. 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 $1,585 for each of groundwater, surface water sediment and groundwater discharging without a permit to surface water. See http://www.nj.gov/dep/srp/guidance/srra/fee_guidance_document.pdf

○ 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 NJDEP will send invoices. The obligation alters after NJDEP 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); a confidentiality claim fee is $500; a Discharge to ground water proposal fee is $350. See http://www.nj.gov/dep/srp/guidance/srra/fee_guidance_document.pdf

○ Under N.J.A.C. 7:26C-4.5 & -4.6 there will be remedial action permit fees (also subject to change, and having changed significantly from when first implemented), payable when invoiced: for a soil remedial action (i.e., for an engineering or institutional control) soil permit application fee ($1,175), soil modification fee ($780), soil transfer fee ($520) or soil termination fee ($1,175); for a groundwater natural attenuation RAP application fee ($1,565),groundwater modification fee ($1,175), groundwater transfer fee ($520) or groundwater termination fee ($1,205); for a groundwater active remediation RAP application fee ($1,955), modification fee ($1,565), transfer fee ($590) or termination fee ($1,720); for an annual soil RAP fee of a deed notice without engineering controls - $255.00; or a deed notice and engineering controls- $255.00; for an annual

ground water RAP fee of natural attenuation- $255.00; and for any other ground water remedial action- $255.00. It should be noted that annual fees are payable annually until the RAP is terminated. See http://www.nj.gov/dep/srp/guidance/srra/fee_guidance_document.pdf

○ Under N.J.A.C. 7:26C-4.7 oversight costs will be due to NJDEP 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 NJDEP 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 NJDEP 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.

- *{2018}*. As noted earlier (at this Article § 3.1.9) be aware that funding might be denied in a performing (tax collections as projected) redevelopment brownfield site of a share of costs for ongoing groundwater remediation if NJEDA determines that it then has better uses for the money, the original budget for remediation (whether or not used as a contractual cap) has been expended and "no-one could expect to receive funding forever." Some new developments are less likely to proceed with this understanding.

■ 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. NJDEP 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 damages); 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 all discovered conditions (routinely rejected; the owner retains its right to sue for conditions that are not fully remediated); 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; increased risk of toxic tort or stigma damage suits; and impaired or lost 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 a fee or expenses; 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 failed. Most such resolutions occur without suit or preparation of a complaint, at least when competent and experienced counsel are involved. The rest often occur promptly after suit is filed or the meeting with the Judge is scheduled or occurs. Remarkably few suits result in court orders.

○ A recent decision, unreported, in PPG Industries, Inc. v. Mid-Newark LP, Docket No. HUD-C-137-15, allowed for access over the owner's objections, but left various issues as to the reasonableness of conditions for the access to be resolved in a hearing.

■ 3.8.16 Municipal Land Use Law

◊ SRRA did not alter the provisions of the municipal land use law addressing the local municipal use of zoning powers to regulate remediations.

◊ But there is debate as to the authority of municipalities to require site plan applications, variances and other approvals (e.g., construction permits, soil disturbance, removal and excavation permits) for remediations, particularly if and when above surface structures are planned. Some PRCRs routinely seek such approvals; others rarely seek them. *{2018}* Some have courtesy meetings with officials, or make courtesy presentations to the Council or a Board, or have neighborhood open houses. But applications run the risk of denials or unacceptable conditions, and delays, particularly if the reviewing Board or official questions the actual remedy. Case law does not exist.

○ *{2018}* Be careful to review municipal ordinances. Each municipality may have unique requirements, ranging from the authority of the municipal engineer to issue same on his or her own, or a requirement for a presentation to or approval of the planning board or municipal council.

◊ The 1993 N.J.S.A. 40:55D-66.8 provides:

> a. The siting of a structure or equipment required for a groundwater remedial action approved by [NJDEP] … pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.), shall be deemed to be essential to the continuation of an existing structure or use of a property, including a nonconforming use, or to the development of a property, as authorized in the zoning ordinance of a municipality. A groundwater remedial action subject to this section, including any structure or equipment required in connection therewith, shall, therefore, be deemed to be an accessory use or structure to any structure or use authorized by the development regulations of a municipality; shall be a permitted use in all zoning or use districts of a municipality; and shall not require a use variance pursuant to subsection d. of section 57 of P.L.1975, c.291 (C.40:55D-70).
>
> b. A municipality may, by ordinance, adopt reasonable standards for the siting of a structure or equipment required for a groundwater remedial action subject to subsection a. of this section. The standards may include specification of the duration of time allowed for the removal from a site of all structures or equipment used in the remedial action upon expiration of the term of the discharge permit or completion of the remedial action, whichever shall be sooner. Nothing in this subsection shall be deemed to authorize a municipality to require site plan review by a municipal agency for a groundwater remedial action, but an ordinance establishing siting standards may provide penalties and may authorize the municipality to seek injunctive relief for violations of the ordinance. …

◊ The 1993 N.J.S.A. 40:55D-66.9 provides:

> If, for any of the reasons set forth in subsection c. of section 57 of P.L.1975, c.291 (C.40:55D-70), a variance is required under that subsection c. for the siting of a structure or equipment to be used in a groundwater remedial action subject to section 3 of P.L.1993, c.351 (C.40:55D-66.8), a variance for the remedial action shall be deemed necessary to avoid exceptional and undue hardship on an owner, lessee or developer of a property for which a variance application is made; however, a zoning ordinance may authorize the zoning board of adjustment or planning board, as appropriate, to establish reasonable terms and conditions for issuance of a subsection c. variance. The zoning board of adjustment or planning board, as appropriate, shall review and take final action on an application for a subsection c. variance for a groundwater corrective action at the next meeting of the zoning board of adjustment or planning board, as appropriate, occurring not less than 20 days following the filing of an application therefor, unless the zoning board of adjustment or planning board, as appropriate, determines that the application lacks information indicated on a checklist adopted by ordinance and made available to the applicant, and the applicant has been notified, in writing, of the specific deficiencies prior to expiration of the 20-day period.

◊ SRRA did not expressly provide that decisions of LSRPs are the equivalent of decisions of NJDEP for these purposes, although that is arguably the better conclusion as, in most cases, NJDEP is not involved in many reviews and approvals.

◊ The above municipal land use provisions do not address the result if the municipality fails to address remediation installations expressly, but tries to apply generic standards, as might apply to buildings or structures or fences within so many feet of the property boundary: *{2018}* when asked, we tend to argue that absent express reasonable remedial provisions, generic requirements cannot be applied. Unfortunately many consultants see this as a mechanical issue and proceed to satisfy local concerns without legal advice. This can be problematic if the municipality threatens or makes unanticipated demands, imposes conditions or denies the requests.

◊ Neither the above municipal land use provisions nor SRRA nor the Spill Act address the result of application of a municipal requirement as denying to the PRCR the ability to proceed with an LSRP approved remediation, at least without variances. In our view, the municipality cannot use its zoning and land use powers to prevent a remediation properly pursued in accordance with NJDEP laws, rules and guidance. In our view, in the event of a conflict, NJDEP rules and guidance must govern and apply.

◊ However, in some instances prudent community relations will require either an actual application for an approval from the Planning Board or Zoning Board, or a courtesy presentation to one of those Boards or the municipal council. Sometimes resistance is futile.

■ *{2018}* 3.8.17 2017 UHOT Proposal

◊ NJDEP's July 2017 UHOT Proposal (See this Article at § 1.2.24) purports to address primarily UHOT's, a subject matter arguably of limited significance to PRCRs and LSRPs under SRRA. However, NJDEP used the rule proposal as an opportunity to conveniently address timely non-UHOT issues, as discussed below and elsewhere. As of the date of this Article the Proposal has not been adopted as a rule.

◊ Without limitation, the UHOT Proposal proposed changes to ARRCS, the Technical Regs, NJPDES rules, UST rules, and ISRA rules, supposedly to "…further streamline and simplify the implementation of the licensed site remediation professional (LSRP) program or provide additional clarity to those rules."

◊ "N.J.A.C. 7:26F, Heating Oil Tank System Remediation Rules, …address the closure of heating oil tank systems, and remediation of discharges from those systems. For purposes of this rulemaking, "heating oil tank systems" are residential above ground heating oil tank systems; small, non-residential above ground heating oil tank systems [e.g., small (2,000 gallons or less) non-residential heating oil tanks and their associated piping]; and "unregulated" heating oil tank systems, which are underground storage tank systems." "The Department does, however, regulate the remediation of discharges from heating oil tank systems…. The majority of heating oil tank systems are owned by homeowners. The Department proposes to amend and consolidate the remediation requirements to make them easier for the homeowner to understand." "…[T]he remediation of a discharge from a heating oil tank system begins with the discovery of the discharge and immediate notification to the Department, and the retention of an environmental professional to oversee the remediation. Thereafter, the rules address closure and removal of the heating oil tank system, removal of any free product, investigation of the extent of the contamination, and remediation of the ground water and soil to an appropriate standard. At the end of the remediation, the rules require the environmental professional to submit to the Department a remedial action report that shows that the remediation activities meet the rule requirements. The final document indicating that the remediation is complete is the "heating oil tank system no further action letter" that the Department issues." "Proposed N.J.A.C. 7:26F-1.2(d) gives the owner the option of combining the remediation of the heating oil tank system with the remediation of the other areas of concern at the property. If the owner chooses this option, the proposed new heating oil tank system remediation rules will not apply; rather, the owner will be required to follow ARRCS and the Technical Requirements, including the requirement to hire an LSRP. Because the remediation will include more than the discharge from the heating oil tank system, the LSRP will issue a response action outcome for the site or contaminated areas of concern, including the heating oil tank system." "The proposed new chapter will not apply if the heating oil tank system is located on a property to which the Industrial Site Recovery Act (ISRA) Rules at N.J.A.C. 7:26B apply." "If the discharge … is less than 100 gallons and does not reach surface water or ground water …, proposed N.J.A.C. 7:26F-1.2(b) allows the owner to remediate the discharge under the oversight of local authorities, rather than by meeting the requirements of the proposed new rules; however, the Department will not issue a heating oil tank system no further action letter (discussed below) unless the owner remediates the discharge in accordance with proposed new N.J.A.C. 7:26F. … [T]he owner must remediate in accordance with proposed N.J.A.C. 7:26F-3 and 4…." "… [Under] N.J.A.C. 7:26F-1.11(a), the owner of a heating oil tank system is required to hire either a certified subsurface evaluator or a licensed site remediation professional (LSRP) to

remediate a discharge … [w]ithin the first 48 hours after discovery of the discharge, pursuant to proposed N.J.A.C. 7:26F-2.1…."

◊ "Expanding the universe of persons who may use the permit-by-rule will increase the efficiency of these remediations because no one who is conducting remediation of a discharge from a heating oil tank system will be required to come to the Department for an individual NJPDES permit." "Proposed new N.J.A.C. 7:14A-7.5(c) lists the types of discharges to ground water that are eligible for such permits-by-rule."

◊ "… [P]roposed N.J.A.C. 7:26F-1.6 requires the owner to notify the Department when a discharge is discovered, whether the owner discovers the discharge, or a person that the owner hires to service the heating oil tank system discovers it; and requires the owner to comply with the notification requirements of ARRCS at N.J.A.C. 7:26C-1.7(j). N.J.A.C. 7:26C-1.7(j) requires notice to the Department if contamination has migrated to another property, or if the owner discovers new contamination or an immediate environmental concern. See also proposed N.J.A.C. 7:26F-5.1, which requires the owner to notify the Department and take action under ARRCS and the Technical Requirements if, in the process of investigating a discharge from a heating oil tank system, the owner discovers that there is a discharge from another source. If a discharge from a heating oil tank system impacts any environmentally sensitive natural resource, the owner must take immediate action, as outlined in N.J.A.C. 7:26F-6.4"

◊ "… [P]roposed new N.J.A.C. 7:26F-3.7 provides the owner three options for leaving residual contamination in place: (1) traditional deed notice; (2) heating oil tank system (HOTS) deed notice; and (3) small quantity exception. … the HOTS deed notice (N.J.A.C. 7:26F-3.7(b)2) and the small quantity exception (N.J.A.C. 7:26F-3.7(b)3), are unique to the proposed new Heating Oil Tank System Rules, N.J.A.C. 7:26F; ARRCS does not contain comparable provisions. Both apply only to residential properties…. These two options are available to an owner only when: (a) the discharge has not migrated off-site; (b) excavation or treatment of contaminated soil is impeded or is otherwise impracticable; (c) impacts to receptors are mitigated; (d) the ground water is not contaminated above applicable standards; and (e) the residual contamination does not and will not pose a threat to the public health and safety and the environment. …. The small quantity exception allows an owner, with the agreement of the property owner, to leave less than 15 cubic yards of residual contamination under a residential building on the residential property where the discharge occurred, with neither a deed notice, nor a soil remedial action permit, under specific circumstances."

◊ "The Department also proposes to amend ARRCS at N.J.A.C. 7:26C-1.4 to state more clearly when liability attaches to a holder of a security interest in a site, an underground storage tank system, or a heating oil tank system in the event of foreclosure."

◊ "The Department proposes to amend the DPHS [Spill Act] Rules at N.J.A.C. 7:1E-5.7(a)2 to restore the option of responding to the discharge according to either the discharge cleanup and removal plan or according to ARRCS and the Technical Requirements."

◊ "…[T]he Department proposes to require, in new N.J.A.C. 7:14B-9.5(c), that the owner or operator submit an RAO, prepared pursuant to ARRCS at N.J.A.C. 7:26C-6, to the Department along with the site investigation report, if the owner or operator concludes in the site investigation report that no further remediation is required."

◊ "The Department proposes to amend the ISRA Rules at N.J.A.C. 7:26B-3.4(a)1 to require that proof of a remediation funding source be submitted within 14 days after the Department's receipt of the remedial action workplan, and to delete the reference to prior Department approvals."

◊ "The Department has observed that buildings are being constructed on landfills throughout the State, without the Department's having issued a final remediation document or a solid waste approval for the landfill. Such construction is in circumvention of ARRCS. In order to ensure the protection of the public health and safety and the environment, and to close this administrative loophole, the Department is amending N.J.A.C. 7:26C-1.4(c)2i to require persons remediating landfills to comply with ARRCS, if the redevelopment of the landfill includes a building."

◊ "The Department is adding to the definition of "person" at N.J.A.C. 7:26C-1.3 the sentence, "'[p]erson' shall, for the purpose of enforcement, also include a responsible corporate official, which includes a managing member of a limited liability company or a general partner of a partnership." The Department is making this amendment to clarify the responsibility of certain business officials who have the actual responsibility for the condition or act resulting in a violation but neither prevents nor corrects the violation. This amendment will help ensure that these business officials understand the potential consequences if they fail either to prevent a violation or to correct a violation when it occurs."

◊ See this Article at A3.4 as to a change in the certification language.

■ 3.9 Presumptive Remedies & Alternatives

◊ NJDEP 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. NJDEP 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. NJDEP 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 essentially never runs in our lifetime? 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 NJDEP it can.

IV. Some Questions and Answers:

Q1. Program Effects:

● **Q1.1:** What happens pending SRRA's full effect and full transition to LSRP oversight?

A1.1: The question is now moot. LSRP Oversight is now the norm, except for NJDEP direct oversight. Indeed, NJDEP and others expect that LSRPs are to be involved in all remediation: is that the law?

● **Q1.2**: Is there a continuing opportunity to influence NJDEP's initial and continuing efforts under the SRRA?

A1.2: ◊ NJDEP 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 2018. See http://www.nj.gov/dep/srp/srra/stakeholder/tech_guidance_committee_rd_2.pdf. NJDEP 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 NJDEP (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.

◊ See this Article at Q9.6.

● **Q1.3:** Is compliance under SRRA saving remediating persons time and money?

A1.3: ◊ 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 NJDEP 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. *{2018}* Faced with continuing NJDEP complaints to the Board about LSRPs failing to meet their obligations, at the same time as developing a growing confidence in their own decision making, and seeing that more than a few prior decisions by NJDEP and mere-consultants may have had serious flaws, in the past year we have seen LSRPs and their firms demanding more than NJDEP did before. Clients faced with such behaviors often experience higher costs.

◊ LSRPs have found it necessary to review in detail many historic activities and decisions, and in some cases question prior NJDEP approvals, most notably on older cases (particularly when work performed decades ago fails to meet current approaches). *{2018}* But even on cases not relying on prior decisions (because of the passage of time) sites entering the system for the first time or anew seem to be reviewed with a fair degree of skepticism.

◊ *{2018}* More PRCRs (and LSRPs) are experiencing the phenomenon of multiple LSRPs working on the same site. This occurs often because of successive ISRA triggering events, occasionally decades apart. Sometimes it occurs because of different discharges of hazardous substances. Sometimes those LSRPs experience a period of debate, disagreement and potential confrontation. Other times, the discourse results in sharing of information and exploration of mutually satisfactory solutions. Lawyers may be significantly more involved than in other cases, perhaps because of the requirements of underlying agreements (such as leases). Sometimes these interactions can occur between an LSRP of record (say for a gas station) seeking access to a third party site, represented by its own consultant who happened to be an LSRP. While similar interactions occurred pre-SRRA, sometimes there is a perception that these interactions post-SRRA are more difficult and expensive than before.

◊ Also NJDEP's new preference for submission of many forms has resulted in a number of efforts not previously experienced by PRCRs. NJDEP fees and charges are not, at many sites, minor. Many fear these fees will increase as NJDEP maintains a significant staff, audits and reviews become more involved and time-consuming, and NJDEP 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 NJDEP involvement.

◊ Of course, changes in NJDEP 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?

A1.4: ◊ *{2018}* In many respects, but not all, it has worked. Future events, and the actions and omissions of many, can help it to succeed or, if too many act poorly, to fail. NJDEP itself has had opportunity to pursue success, and institutionally it has. But not all NJDEP personnel have embraced SRRA, and sought to help it to work, as many of NJDEP's senior officials seem to have done. In our view there may need to be continued shifts in NJDEP attitudes, particularly at staff levels. We acknowledge concern about the Program's future in Governor Murphy's administration.

◊ Some feel the program must work, as no other appetizing alternative exists. Others likely embrace a return to pre-SRRA NJDEP roles, although the costs for same, and the serious problems in seeking restoration of the old program, seem to make it unlikely to encourage full restoration.

◊ Others fear that some at NJDEP 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 NJDEP!). Of course, our past includes a number of instances where the public has required reexamination of environmental policy, with somewhat unpredictable results. It could happen again.

◊ Certainly early skeptics have to admit that NJDEP 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 more time (and perhaps decades) to fairly evaluate SRRA: LSRP, PRCR and NJDEP 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 NJDEP and the legislature is quite likely, particularly in the new Democratic party regime. And if LSRPs find themselves the victims of a search for perfection, whether by NJDEP, the Board, their clients or the public, they themselves may decline to pursue the demanded role, perhaps even to the point of the remaining LSRPs being unable to meet demand for services. What will happen then is unclear. Public resources are limited. The State's economy has not improved enough as of the end of 2017 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), although Governor Murphy's proposed new taxes and budget increase may dismiss such concerns. USEPA is unlikely to provide added resources and support in President Trump's

administration's efforts sin the next three years. We note that NJDEP's and the legislature's threats of all-out enforcement have never worked previously, even in better and more aggressive times.

◊ Are there any scenarios under which NJDEP power and authority will be largely or fully restored and LSRPs abolished? While it seems unlikely, perhaps. Strong professional behavior and performance by LSRPs, and good progress by PRCRs at many sites, can make this more unlikely.

● **Q1.5:** Does all sampling and remediation in New Jersey require use of LSRPs?

A1.5: ◊ 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 in order to obtain an RAO. But what if an RAO is not desired?).

◊ 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). But does any degree of suspicion, intuition, concern or caution require that result? And what exactly is a suspicion? Does a conservative decision to take a sample in the absence of evidence either way, automatically and always amount to being a suspicion? Or might there be suspicionless investigations? *{2018}* We believe that it is likely that NJDEP will limit enforcement against those who investigate without full compliance, at least if when the results are bad (finding a discharge) the discharge is promptly reported and an LSRP is promptly retained. Of course, the most stress exists if the report is made but a defense is asserted and an LSRP is not retained and remediation does not occur.

◊ We also believe, despite NJDEP contrary views, that 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 in the face of NJDEP's view, who can afford to argue? And if argument is preferred, perhaps there are better ways than simply disregarding NJDEP guidance?

◊ Similarly, we think investigation in the absence of a known or strongly suspected 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 NJDEP or LSRP interaction.

◊ We think cogent arguments can be made about remediation-like work or disturbances or disruptions at or for landfills as not requiring LSRPs.

◊ We think minor correction of deficiencies in ECs, site conditions or remediation also may not (again NJDEP seems to disagree).

◊ We believe remediation which is voluntary by non-liable parties should not (as to which 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 NJDEP should restore some voluntary cleanup program like that previously available under MOAs. See discussions at this Article § 2.6 above. *{2018}* We note that in a 2017 discussion with senior NJDEP officials about the ability of an innocent owner to use an LSRP to protect itself by sampling, NJDEP advised that the LSRP should be formally retained in NJDEP's system, using the liable party's and site's PI number, so as to avoid confusion (thereby resulting in two LSRPs for the site). In our view some explanatory filing should be made to be clear that by hiring the LSRP the non-liable PRCR was not waiving its defenses.

● **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?

A1.6: ◊ While more is known today in 2017 than in 2009, change continues, sometimes threatening stability of past and future decision making. Many known issues continue to fester (e.g., clean fill; historic fill; dueling LSRPs). Important NJDEP guidance was issued in 2014-2017 and more can be expected in 2018. Case law is non-existent. Board enforcement, and NJDEP and Board audits, have occurred and are continuing, and as Board decisions are made and published such enforcement and audits will affect LSRP and PRCR behaviors, and potentially even reopen prior decisions.

◊ But harder cases are taking too long for the Board to decide. Public information about many actual important decisions and behaviors is limited. A good database of key decisions made by LSRPs and NJDEP

does not exist (but should be created). Statutory and regulatory change seem likely, and major change through a new Governor is possible, but difficult to predict (in part because of possible political implications and effects). NJDEP occasionally ignores its own rules and the law (many examples are provided above), often for good purpose.

◊ Key issues remain uncertain, *{2018}* even if some updated guidance has been made available, at least from a long-term perspective (technical impracticability; historic fill; clean fill; DAP; pesticides; impact-to-ground water standards; ecological standards; grandfathering of standards; delineation and modeling limits; deadlines; presumptive remedies; alternative standards and remedies; NJDEP 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.

◊ *{2018}* The advent of changing standards and emerging contaminants threatens stability even further, as does the prospect of major changes in SRRA 2.0 and from the new Governor's administration.

Q2. LSRP-Client Issues:

● **Q2.1**: Who hires the LSRP?

A2.1: ◊ Likely the person responsible for conducting the remediation (the PRCR) or a volunteer (who in at least some senses, arguably in NJDEP's view, thereby may become 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 NJDEP 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 NJDEP's view, likely to include NJDEP (although perhaps it could be- for example, if NJDEP exercises direct oversight and wants an LSRP to be involved but the PRCR does not retain an LSRP [posing the question if NJDEP can remediate without an LSRP in such cases]; or perhaps when NJDEP uses public funding to remediate, at least if it 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 hiring the LSRP does not want to be treated as 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 NJDEP 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?

A2.2: ◊ There is no definition of this term ("client") in SRRA or NJDEP 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 NJDEP. 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?")

○ *{2018}* Consider the possibility of successive ISRA triggers (say tenant by closing down, and landlord for a sale), with each liable party hiring its own LSRP (perhaps because that is what the lease required,

but perhaps because of distrust and paranoia). Assume thereafter with the almost completion of two PARs, and discourse between the two LSRPs, that it becomes clear that no further sampling is required and the site is eligible for one or more RAOs. Can the Landlord and Tenant agree that one LSRP should be terminated, and the remaining LSRP issue the RAO for both triggering events? Can the remaining LSRP do so? How? Who is the remaining LSRP's client?

- We caution that in this instance the surviving LSRP might be well served by preparing and having signed a conflicts waiver letter setting forth the terms and conditions of the old and new relationships, and documenting consents.

◊ 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 NJDEP).

◊ 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?

A2.3: ◊ 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 (as NJDEP now appears to believe). 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 NJDEP'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 NJDEP nor the courts should hold such persons as "guilty or "fully liable" or "responsible" 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 NJDEP 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 NJDEP has the right to remediate a contaminated site and impose a super-lien, whether the owner is assetless or well-heeled).

○ *{2018}* However, if some effort is made to manage exposure by proceeding in this manner, what are the liabilities of the non-client participants? Is the lawyer or consulting firm so proceeding liable for violating SRRA? We suspect 2018 may find some insight on the issue.

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

A2.4: ◊ At a minimum an LSRP owes duties to his or her client and to those with whom he or she (or his or her firm) contracts.

◊ For some purposes the LSRP owes duties to those to be protected by his or her efforts (The public? Tenants? Occupants?). Are they not the equivalent of intended third party beneficiaries to whom the LSRP owes duties. Yet some LSRP/firm 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 NJDEP (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 his or her 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 or her 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 NJDEP, the PRCR and others. Indeed, if the original LSRP learns of some deficiency relevant to efforts of the PRCR and the new LSRP, and the original LSRP stand mute and not disclose same?

○ *{2018}* And if the prior LSRP disclaims such duties, what must the new LSRP do? Disregard all prior work? Seek help from the client, NJDEP, the Board, the courts?

◊ And the LSRP may owe duties to future owners and operators who are entitled to rely, and may even be bound, 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.

● **Q2.5**: Should every owner or operator whose site has been or is suspected, in any respect or by anybody, of having contamination, have hired an LSRP by now? Should every owner or operator whose site hereafter is suspected of having contamination, or found in fact to have any contamination, hire an LSRP promptly? *{2018}* If a seller loses a deal and fears it was due to Buyer's test results, not shared by the Buyer with Seller, does the Seller have any duty to investigate?

A2.5: ◊ NJDEP's answer today to such questions is likely to be yes, although it has answered differently before, after SRRA was adopted. Certainly NJDEP, 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 NJDEP 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 of concern may be migrating onto their site from offsite. It is to be hoped that any targets of future NJDEP enforcement will have received prior warning from NJDEP and had some opportunity to respond. And, if they did, they would have been well counseled to provide a good faith response to NJDEP that may alter NJDEP actions (or perhaps provide a defense to the

highest penalties, or even any penalties, NJDEP may seek if a confrontation for failure to engage an LSRP arises), and hopefully did so.

◊ Certainly as NJDEP enforcement occurs hereafter 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 NJDEP 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, particularly in the absence of the voluntary cleanup program. 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 NJDEP 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 NJDEP 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 NJDEP to preserve scarce time, personnel and monies for use at other sites. Unfortunately, to date, as best we are aware, NJDEP 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, NJDEP 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 NJDEP priorities, impending mandatory deadlines, or Environmental Rights Act plaintiffs.

◊ We note that a regulatory focus on mere suspicions can be difficult to apply. We also think it misplaced as a matter of public policy, if applied broadly and not surgically. When is a fear a suspicion? Are preventative measures proof of suspicions? Is every hint of an issue sufficient to qualify as a suspicion? Is every discussion about or planning for a possibility proof of a suspicion? Is every audit based on a suspicion? Indeed, is every suspicion, no matter how unsupported or paranoid or fleeting, enough of a suspicion to require regulatory action as a matter of law? In our view, not all suspicions are worthy of equal treatment. We believe some suspicions require action to protect health, safety and the environment. Others merely require a good night's sleep. We note, however, that some might disagree with our view.

◊ *{2018}* As to the loss of a sale, most such events could be for many reasons, none articulated. We would argue that in most cases a Seller's mere suspicions do not require retention of an LSRP and site investigation.

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

A2.6: ◊ 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 NJDEP 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 for and 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 either or both a preliminary assessment under state law 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. But see this Article at §§ Q9.6.

◊ 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 working 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 NJDEP 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 NJDEP (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 NJDEP 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, *{2018}* particularly in NJDEP's own behaviors in investigating and remediating without use of any LSRP). 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 NJDEP 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 NJDEP 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 is there a way for an owner, perhaps an innocent owner, to retain a contractor (a non-LSRP) to undertake a corrective measure (such as putting down a landscape barrier covered with soil or mulch) that has the effect (and maybe the purpose) of reducing or eliminating any potential exposure pathway to contaminated materials below the barrier? And are there risks of doing so (e.g., will NJDEP or the Board deem such actions, and the consultants and contractors participating in 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.

○ *{2018}* We believe NJDEP and the Board should hesitate in examining and challenging such activities. The result of a strong attack on them will be counter-productive, in our view- deterring them.

◊ 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 engaging in this discussion, both above and elsewhere, we do not seek to provide legal advice on which anyone can rely, nor to suggest any particular answer or approach, nor to encourage anyone to violate any Law(s). We only raise the possibility that good lawyers might not agree with likely NJDEP or Board positions on many of the above and other issues. And in any event that there may be good reasons separate from the purposes regulated by SRRA to consider alternate approaches than those suggested by NJDEP or seemingly obvious.

● **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 NJDEP decisions, approvals and NFA Letters? **Q2.7.3:** Should different PRCRs at the same site use multiple LSRPs or just one?

A All: ◊ Any 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 NJDEP), inhibiting such an approach, at least as yet.

◊ *{2018}* In debating this, a critical question to be considered is the permissible level of interaction between multiple LSRPs. It has been suggested that some PRCRs prohibit interaction between multiple LSRPs and their staffs. We think such practices raise a higher level of professional concern, although we acknowledge it is

possible that some reasonable rationale may exist for such limitations in certain circumstances (e.g., as a cost containment measure where differing LSRPs are handling differing AOCs, each with sufficiently distant and disparate locations, problems and contaminants, and requiring different knowledge and expertise).

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 or expert, as undoubtedly some will be. Conversely, use of only one LSRP may pose risks if that LSRP is audited, with resulting problems before NJDEP 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.

◊ Please note that 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 NJDEP 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 NJDEP need not do so {although PRCRs may feel otherwise}]). Further note that a PRCR may legitimately believe it has reduced obligations because of prior NJDEP 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 by and for the PRCR in certain remedial cases (for example ISRA subject sites) to ensure that the sum of the decisions of all LSRPs, together with prior NJDEP decisions, in fact address all AOCs; failure to do so can present multiple risks and complications, including of NJDEP 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 NJDEP) 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 NJDEP 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 NJDEP and the Board in assessing a NJDEP complaint as to the responsibility of an LDRP for an alleged IEC in the face of prior NJDEP decisions, a limited retention and new accusations or suspicions.

A2.7.3: ◊ *{2018}* As to the last situation, the risk of conflict between different PRCR may suggest a higher level of control, planning, confidentiality and protection against conflict by use of multiple LSRPs. Further, the situation may be dictated by underlying contract documents. In any event, as noted earlier, if only one LSRP is to be used, the LSRP and his or her firm should seek and obtain a consent and conflict waiver letter to avoid or control future criticism or attach, including by NJDEP and the Board.

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

A2.8: ◊ 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 every instance of 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. at 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 NJDEP 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 NJDEP 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 NJDEP 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 as a precautionary or planning measure? Any and all site conditions?

◊ *{2018}* Can a PAR due diligence effort begin for an ISRA industrial establishment, initiated to anticipate a triggering event, without a formal and prior LSRP retention? Can an inspection occur? Can letters be sent to agencies? Can PAR drafting begin? Can a then non-engaged LSRP be involved anticipating he or she will be engaged later (so he or she can later say he or she supervised the work when the PAR is complete and RAO issued)? (There is no clear answer; we would argue yes). If we are wrong, is the consultant who inspected the site, wrote the letters, or prepared the draft, in violation of SRRA by doing work not under the supervision of an LSRP? (If we are wrong in our view, perhaps; we think the NJDEP and Board should not deter such behaviors, however, and worst case rule that the earlier deficiency can be cured after the fact by a late retention; but what if there is never any retention- because, perhaps, the triggering event never occurs?)

◊ 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 working on a site, perhaps for a common client, and yet seek to compel another LSRP, perhaps acting for a non-client on that site, to act?

◊ The actual facts and circumstances, and future NJDEP 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 these answers, 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 NJDEP and the Board both 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 NJDEP should restore the voluntary cleanup program and MOAs to allow for some of such work.

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

A2.9: ◊ By now critical contracts should have been reviewed to assess if there are or were issues under SRRA in view of the changes. PRCRs should have considered seeking amendments to clarify the issues in advance of need or conflict. 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 contract language does not use SRRA terminology, such as if required deliverables are no longer possible (such as a NJDEP NFA Letter or a letter of nonapplicability- abolished by NJDEP as part of SRRAs implementation), 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 Pre-SRRA contracts given SRRA's new approaches?

A2.10: ◊ In many cases likely yes there will be. It should be noted that the passage of time since SRRA's adoption does not mean that most such issues have been faced or resolved. Conflict identification and resolution in the environmental arena can take decades to mature.

◊ 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 NJDEP 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, or an inability to agree on how to address NJDEP's audit and revocation rights), may insist on performance as written in older contracts: litigation may result. 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 NJDEP 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 NJDEP for a NFA Letter? Does the tenant have to appeal a NJDEP 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 NJDEP requires withdrawal of an RAO, or material revision of the RAO, is holdover rent then due? Retroactively?

◊ How will a court resolve these issues (likely fairly under all the facts and circumstances, at least in the Court's eyes, but that does not enable a sure prediction today of any particular result). The answers likely depend in part on the precise wording of the document (in the above example, 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; so perhaps a Court crafts a remedy that addresses that eventuality differently than either party bargained- by an escrow, indemnity or guaranty, for example).

◊ 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 NJDEP's NFA] the escrow agent will likely be cautious and, if in doubt, either await further agreed instructions or deposit the funds or documents into court for a judicial determination. Why should an escrow agent take any other risk?). 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 NJDEP as including in the contract language allowance for "any similar approval or document" of NJDEP or any other government or other authority), can the Escrow Agent in fact hold the funds or property because of doubt or objection? 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]).

◊ 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 post-SRRA matters? (On this there is great uncertainty. The parties and a Court will undoubtedly argue about how the pre-SRRA contract allocated costs and future risks. If the contract was silent, a Court may hesitate to make a deal for either party that they did not make for themselves. But if the contract has enough indication that one or the other was to bear future risks, then the Court may assign new risks, not expressly addressed, to that party, even over the objection that if the new risk had been then understood that party would not have agreed to accept them.)

◊ *{2018}* What about SRRA 2.0? We think it advisable that contracts being prepared today (in early 2018) recognize the possibility of further change under SRRA 2,0, if it becomes a reality. We acknowledge this may be difficult, but we think the articulation of key principles may assist in a reasonable and acceptable resolution between parties as to what was to be done in the event of SRRA 2.0 becoming law.

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

A2.11: ◊ Like consulting firms, LSRP's will differ, as will their contracts. Some contracts will be minimal in their scope. Others will be lengthy. Yet depending on the stakes, we do not advise all clients that every contract needs to be fully negotiated (even though they should be understood): the cost may not be worth it, so long as the client accepts the risks and uncertainty (and if not, then the client may need to pay a disproportionate amount for added protections). Otherwise, 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 mere insurance coverage certificates are arguably of little to no value, by their terms expressly conveying no rights); quality of work product; ownership of work product and equipment; disclaimers of and warranties of quality and utility; client, and sometimes counsel, 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 of rights and liabilities and rights of 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 NJDEP 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 NJDEP 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).

● **Q2.12.1**: When should a PRCR or client fire an LSRP? **Q2.12.2**: 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 this Article at § 3.7.2). 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 may fire an LSRP if the two become philosophically opposed to each other. A PRCR or client may fire an LSRP if the LSRP fails to follow instructions (sometimes even if not material), commits a major error or breach (such as telling a municipal official, a neighbor or an adverse lawyer or LSRP something problematic), shows itself unable to address a key need of the client (for example providing proper budgets and forecasts, anticipating issues or communicating effectively, timely or responsively), learns of or develops a conflict of interest (e.g., if the same firm represents two clients with claims against each other, or if the firm advocates for one result for one client, and the opposite for another, even if at different sites) or otherwise lets the client down in a material respect (e.g., promising and then not delivering). A PRCR or client may fire an LSRP for ignoring the client's and its counsel's interpretation of the law (for example, as to an assertion of a defense to liability).

◊ 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 (as opposed to is the source of) bad news, or is appropriately 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 NJDEP 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 NJDEP (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. Other circumstances also may merit termination.

◊ 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) (but how and when should the LSRP determine this is the case: on his or her own judgment? After discussion with the LSRP's own counsel? After discussion with the PRCR or client and its counsel? On NJDEP assertions?). We urge any LSRP faced with such concerns seek advice from competent counsel, for example of the consulting firm itself.

◊ 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 NJDEP 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. In the event of a future confrontation, appearances matter. Clients should be protected against adverse effects of termination, as much as possible. Don't be vindictive.

◊ *{2018}* There may be reason to hesitate quitting merely because the client is heading for financial difficulty, at least if there is a IEC or similar concern.

● **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 NJDEP, likely with minimal concern and exposure for the limitations of the LSRP's license.

◊ Certainly, each LSRP should endeavor to know and understand NJDEP's (or the Board's, if relevant) own views if such are available publicly (in published rules or guidance or decisions for example), and sometimes, but only with great care and often only with PRCR or client, and their counsel, consent, after consultation with NJDEP (and likely others). While we sometimes are of the view that NJDEP interpretations, and even those of the Attorney General's office, are wrong or incomplete, we nonetheless often (but not always- for example, if there is no chance of a useful discussion, or added risk to the client from a discussion) seek to learn, evaluate and understand those interpretations, because doing us often enables us to test our own, understand risks, consider alternatives, strategies and tactics, and better counsel the client on its risks and alternatives.

◊ Certainly, each LSRP should endeavor to know and understand the critical rules and statutory requirements. *{2018}* This is not the practice of law. Ordinary citizens can be so obligated. In view of the professional requirements applicable to LSRPs, a higher than ordinary level of understanding is required. If this is difficult, seek help.

◊ 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 NJDEP itself could consider the advice of both the PRCR's lawyers and those of NJDEP and DOL. Clearly neither the decision of the NJDEP 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 with supporting documents clearly articulating the issues and decisions or assumptions, which then will be subject to a different risk and different kind of NJDEP 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 issues but explain that the owner or operator is not obligated to remediate such issues but nonetheless is entitled to an entire site RAO on all other issues? We would argue it can, and recent experiences suggest some LSRPs will so proceed. If NJDEP then wants to challenge that conclusion or assumption, NJDEP 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 NJDEP's RAO template allow for such?

◊ Does NJDEP's own authorized deviations from its own RAO template, supposedly not to be varied from, support an argument that an LSRP can deviate? Will it be safe for an LSRP to do so? Will any LSRP do so? We think not.

◊ 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 NJDEP?). 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 have been involved in a few, some posing serious concerns for client and LSRP. We suspect there will be more instances requiring mutual 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 (arguably including of NJDEP and its 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)? At a minimum, cautiously.

◊ To date neither NJDEP nor the Board have provided any useful guidance on such issues. NJDEP 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 NJDEP is not always right (or, in fairness, 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 NJDEP will allow that an LSRP can make decisions based on its legal judgment, or legal advice it receives, as it reasonably determines, without professional liability [as opposed to consequences flowing from the error itself) for being wrong, it will not surprise anyone if most LSRPs elect to duck, ignore, or assume away legal issues (as NJDEP often does) or, perhaps worse, stick to what NJDEP tells it to do or say.

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 complied with or satisfied? Whether a municipal site plan approval is needed for remediation?

○ 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)?

○ Whether a landfill is being properly disturbed, restored, developed, used or remediated in compliance with 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 by its client or violators? 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? Does it matter if NJDEP knows but has not acted? Does it matter if there is pending litigation?

○ Whether a potential PRCR or client has a defense to liability, or some other position, such that it need not remediate a site, despite possible NJDEP and other party arguments to the contrary?

○ Does a PRCR's liability extend to a new discharge, a newly discovered condition or a new standard?

○ Does a client have to hire an LSRP to deal with a known condition?

○ 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 pre-SRRA Declaration of Environmental Restrictions, Deed Notice or CEA does or does not require someone to conduct biennial inspections and reports or seek and comply with a RAP?

○ Whether a potential remedy will prevent use of a site? Whether an actual past remedy does prevent use of a site?

○ How to interpret ambiguities in NJDEP rules and guidance? How to interpret NJDEP internal disagreement with its own guidance and rules, or conflicting aspects in and between its own guidance and rules? How to interpret NJDEP refusal to assist in interpreting NJDEP rules and guidance?

○ How to address or interpret implied or express NJDEP or other threats?

○ When and when not to seek advice of NJDEP, the Board or others?

○ 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; No Further Investigation Letters: Permits; Approvals; Correspondence; E-mails; NOVs; NODs; Demands; Directives; Suits) by NJDEP 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 NJDEP itself and the Board accept NJDEP's own prior approvals as valid and proper? *{2017}* Will all personnel and branches of NJDEP itself and the Board accept all of NJDEP's own current approvals and interpretations as valid and proper? Will all present and future NJDEP staff accept and rely on interpretations, advice and decisions of current NJDEP management, or even documented technical consultations? Will NJDEP and the Board defer to, question or reject the LSRP's decision to accept and rely on them.

○ How should past, or even current, 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 NJDEP resists or threatens that it may be wrong?

○ How does the LSRP protect itself and its client when the Board undertakes an audit or advises that a complaint has been filed? How much can the LSRP work with the client and client's counsel? Is there insurance coverage? Can the LSRP protect itself without separate LSRP counsel?

○ Must a prior LSRP consent to reliance by a new LSRP on its work? What conditions, if any, can it impose on such reliance? Is a current LSRP liable in some way if it seeks to rely on prior decisions or work without express permission?

○ How to respond to requests of NJDEP or the Board for information, documents or access?

○ How to respond to third party and public requests for information, documents or access?

○ What should letters and communications to employees, neighbors, buyers, municipal officials, county officials and others say?

○ Is the LSRPs insurance adequate? Is it available in particular circumstances? When and why should notice of a claim be given?

○ Are the LSRP's contract and subcontracts adequate? Are they too detailed or glib? Are they ethical under all relevant Law(s) and requirements? Should they be revised?

○ 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? How should the LSRP document his or her decision?

○ Is compliance with NJDEP rules and guidance enough? Does it constitute a "safe harbor" against NJDEP 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 NJDEP requires? As his or her own lawyer, or the PRCR's lawyer advises? As a court decrees?

● *{2018}* **Q2.14.1:** Can a client not liable for a discharge (an innocent purchaser; a site owner affected by an upgradient plume) conduct activities, seemingly within the definitions and scope of investigation or remediation (such as confirmatory VI sampling or covering an area of historic fill) without using an LSRP? **Q2.14.2:** If it uses an LSRP must the client and the LSRP act in full conformance with NJDEP remedial steps and requirements? **Q2.14.3:** Can the client using an LSRP stop remediating, once started?

A2.14.1: ◊ The authors believe the answer should be yes, admittedly not with express statutory support, and with some uncertainty. It would seem logical that if use of an LSRP is preferred or required, and an RAO will not be sought, significant deviations and variances from ordinary approaches, should be permitted so long as in pursuit of better protection of health, safety and the environment, and particularly if a possible result of ruling otherwise is continued maintenance of a problem uninvestigated, misunderstood and unresolved. .

A2.14.2: ◊ The authors believe this answer also should be yes, again without express statutory or regulatory support, and with some uncertainty. But to rule otherwise would be to deter investigations and remediations by such clients. That result would seem inconsistent with public policy. See § A2.14.1

A2.14.3: ◊ The authors believe this answer also should be yes, again without support, and with some uncertainty (specifically, the definition of PRCR includes one who remediates; a PRCR is seemingly required to finish by getting an RAO). But to rule otherwise would be to deter investigations and remediations by such clients . That result would seem inconsistent with public policy. A potential interpretative solution would be to interpret the definition of PRCR as having a time element: a client retaining an LSRP is a PRCR during the time period of that retention, and to that extent, but not thereafter. Such an interpretation treats the retention not as an assumption and waiver, but instead as a preservation of the status without regard to the retention.

Q3. 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 appears that in many cases there has been more sampling in and for the same circumstances than was the case under NJDEP 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 occurred in the effort to meet the May 7, 2016 deadline.

◊ 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, or choose to be, more cautious than mere consultants pre-SRRA, and perhaps even than NJDEP itself, because arguably LSRPs have a license exposed to loss if NJDEP 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 ("CSM"), actual data manipulation and 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.

◊ And the exercise of professional judgment has, on occasion, resulted in less testing than before, at least at some sites.

◊ But the need to reexamine the validity of prior decisions, the need to delineate, the need to address changes in standards (e.g., of dioxane, and perhaps hereafter PFAS) has, in our experience, at least in some cases, resulted in extensive and expressive further rounds of soil and groundwater sampling in the effort to meet standards. In this regard see the March 2016 guidance entitled "SITE REMEDIATION & WASTE MANAGEMENT PROGRAM IMPLEMENTATION OF NOVEMBER 25, 2015 INTERIM GROUND WATER QUALITY STANDARDS". See http://www.state.nj.us/dep/srp/guidance/srra/srwmp_implementing_11-25-15_interim_gwqs.pdf .

A3.1.2: ◊ Originally we thought it more difficult to assess whether and when LSRPs would revisit past decisions and require more sampling when NJDEP did not. It has occurred, but prior to 2015 our experience was that such did not occur often and, when it did occur, the revisitation seemed to occur with appropriate support and concern.

◊ But our prediction now is that revisitation will happen more often hereafter. Certainly we have heard more often in 2016-2017 than before, including from individual Board members, that every prior NJDEP decision, and even some prior LSRP decisions, needs to be substantively reviewed and reconsidered (news we have found hard to accept as fully justified). *{2018}* We have seen an LSRP's 2015 PAR virtually discarded in 2017. We have seen a 2012 RAO viewed with suspicion in 2017, less deference being given by the 2017 LSRP than we expected. We predict more instances when an LSRP will feel that under then current rules and practices, likely to continue to evolve hereafter, more work will be required than previously was performed. Likely there will be more instances when an LSRP may feel that then 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 or livelihood against NJDEP or Board attack). Put bluntly, different LSRPs perceive gradations in the quality and practices of others.

◊ 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 NJDEP deference (for example, the discovery of an area of contamination missed in a prior NJDEP 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? And will the LSRP accept a mere lawyer's determination as to the validity and effect of a defense to liability (particularly in the absence of any NJDEP comfort, or perhaps even in the face of contrary NJDEP statements)?.

◊ Likely there will also be more cases when the LSRP's current judgment actually or potentially differs from prior judgments: when must or should the LSRP defer? Should the LSRP engage in a partial or full review, or undertake confirmatory or new work? Should the new LSRP consult with the old? With NJDEP? With the PRCR? With counsel? It appears possible that the answer will depend on the particular LSRP's then professional

judgment under all the facts and circumstances, for an LSRP likely has some discretion to act in many cases in many ways.

◊ It is to be hoped that NJDEP 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.

◊ We do believe that an LSRP identifying the possibility of such issues, particularly if significant to the client, should promptly identify same to the client and its counsel, in each case well in advance of the LSRP determining how to resolve the issue. Failure to do so is sure to damage the relationship of the LSRP to the client and counsel. And the client and counsel may be able to assist the LSRP in its analysis and resolution.

● **Q3.2**: If there are technical issues as to NJDEP interpretations and requirements, or with the LSRP's view of NJDEP's view, can one still go to NJDEP or elsewhere?

A3.2: ◊ Apparently to a lesser extent than previously, and to an uncertain extent hereafter, potentially yes, an LSRP can go to NJDEP when it faces issues (at least if the PRCR allows and if NJDEP priorities and resources incline them to help- seemingly less today than in 2012). And if he or she does go to NJDEP, can the LSRP afford to ignore NJDEP demands, even if believed to be wrong? Or, once consulted, will NJDEP then insist on its own way, perhaps attacking a seemingly defiant LSRP as being willfully wrong, either on later audit or before the Board? *{2018}* It is to be noted that NJDEP does make available some assistance in alternate dispute resolution, in some cases of great value; such is not arbitration of a binding nature as against NJDEP, but rather mediation (governed by the Uniform Mediation Act, N.J.S.A. 2A:23C-1 et seq.), with potentially binging agreements reached between the parties (and cannot involve: (i) Direct challenges to DEP rules, regulations or policies or (ii) Disputes solely between private parties. See http://www.nj.gov/dep/odr/. But can a PRCR seek NJDEP review against LSRP demands (particularly if there is a disagreement between the PRCR and the LSRP) and effectively obtain aid from NJDEP? And if NJDEP provides added guidance, is all of NJDEP bound? Forever?

◊ The lack of available full speedy advance consultation with NJDEP poses an obvious dilemma and added risk for both LSRPs and PRCRs. Despite NJDEP assertions otherwise, investigation and remediation are rarely "cook-book" or formulaic. Judgment is essential, if not critical. And reasonable professional minds can disagree, posing concern for each LSRP that a different group of professionals (whether of the Board or at NJDEP) might judge his or her particular professional judgment as faulty. NJDEP's view of an LSRP's right and requirement (as stated in SRRA itself) 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 NJDEP and proves right in hindsight). How should an LSRP or PRCR proceed if NJDEP 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 NJDEP guidance is unavailable or unhelpful. *{2018}* Participation in such organizations, and discourse between professionals can prove helpful, if only in assuring that the range of concerns and variables have been properly identified for consideration. Perhaps one day there will be a clearing house of decisions created by NJDEP itself (seemingly unlikely), the Board (also seemingly unlikely), or professional organizations. *{2018}* The LSRPA has provided at least some assistance in this regard, although perhaps of limited precedential value. 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 in a manner already acceptable to other LSRPs despite the absence of NJDEP assurances, including potentially at other sites of that PRCR, a PRCR may have little recourse but to dismiss the LSRP. Such a decision may come at significant cost, and requiring that the PRCR find and retain a new LSRP more suited to its needs and beliefs, if one can be found. In such cases we do not view that dismissal, without more, to be improper "retaliation" prohibited by SRRA. If NJDEP 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 NJDEP requirements, , (ii) or for defiance of NJDEP requirements in and with a supporting LSRP final decision or RAO, or (iii) delay in proceeding with further remediation in the absence of either an LSRP decision or NJDEP assistance?. *{2018}*-This is

unclear, but likely at some point judicial review can be obtained. The first might occur perhaps by submissions to NJDEP 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 NJDEP 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 NJDEP 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. The second might occur after carefully lawyered and articulated submissions or demands or defenses to support it, perhaps with less prospect of amicable revision on NJDEP 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. The third proceeds in the hope that passage of time somehow favorably alters the parties positions, but 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 NJDEP 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 the PRCR wants to maintain maximum choice?

A3.3: ◊ 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. The same view, for example, usually applies to seeking legal advice from a client's lawyers: strong relationships and the best advice on the law come from open relationships. Yet in some circumstances some might also disagree with such. *{2018}-*And experience suggests that occasionally such consultations can have results not predicted or sought by the PRCR. All licensed professionals can, in some instances, have duties higher than to protect or honor the client.

◊ 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 than the LSRP may allow the PRCR to obtain a better appreciation of alternatives, probabilities or risks without the compelled result, at least at first.

◊ As noted above, 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]; *{2018}*–also a criminal defense lawyer, knowing his client is guilty, cannot allow his client to perjure himself by testifying in a way known to the lawyer to be false). Client hesitation is understandable.

◊ In such cases consultation with an independent advisor, *{2018}*–for example with other experienced advisors (such as consultants or lawyers, perhaps out-of-state), 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. Such may also allow for the creation of an agenda or hypothetical to permit actual discussion with the LSRP or his or her staff, at reduced risk.

◊ *{2018}-*Less often, a blind call, perhaps made by a person not affiliated with the PRCR, LSRP or site, to an appropriate NJDEP or Board official may be of help. Caution is appropriate as sometimes a meaningful question can connect back to the site then or later. In addition, while to some, relationships with NJDEP officials are less important, to others a strong credible relationship with officials is critical to long term success. No one likes to be set up; care should be taken to reduce the chances of that result and perception.

◊ 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.

◊ *{2018}* Consider, though, what occurs when conflicting advice or opinions are obtained? The issues posed by dueling opinions are often faced in other fields (what happens when the proverbial second medical opinion recommends a different course than the first? IS a third opinion sought?). Sometimes confusion or chaos results. Sometimes receipt of the desired view is not as comforting as might be thought. Who is to be believed? Who is right? Eventually the LSRP of record must be consulted and NJDEP may learn of the issue.

● **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?

A3.4: ◊ 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 if the information relates to unchangeable facts. 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. *{2018}*–No member of a site team should be willing to accept any "material" risk of harm (leaving to each the obvious issue of what level of harm is or is not materials [it being assumed that there is no way, and no requirement, to protect against every possible harm]?).

◊ 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. (GIGO) Real problems may be missed or mishandled by the LSRP with an inaccurate or incomplete understanding. *{2018}*–Time may make the issue more serious (as the problem worsens, more are exposed, site conditions change, rules and guidance change, costs increase).

◊ 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 or one of its officers 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.

○ *{2018}* Note the UHOT proposal (See this Article at §§ 1.2.23 and 3.8.17) includes a change to the required certification that creates troubling concerns for those certifying documents, if adopted (at proposed N.J.A.C. 7:26C-1.5(c) - ""I certify under penalty of law that: -- I have read, understand, and have followed the applicable rules and instructions for this form; -- I have personally examined and am familiar with the information

submitted on this form and all attached documents, and that based on my inquiry of those individuals responsible for obtaining the information; -- I believe that the submitted information is true, accurate, and complete; -- I have the authority to prevent a violation of the Site Remediation Reform Act, N.J.S.A. 58:10C, or of the Administrative Requirements for the Remediation of Contaminated Sites, N.J.A.C. 7:26C, as well as to correct any such violation should one occur;-- I am the person required, pursuant to N.J.A.C. 7:26C-1.5(b), to sign this form for the persons responsible for conducting the remediation; and -- 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 that I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute or regulation, I am personally liable for penalties."). Some objections were made to this proposal.

◊ 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 NJDEP 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?

A3.5: ◊ Consider NJDEP's view on the requirement to enter direct oversight, if a deadline has been missed. And if it has, consider discussions with NJDEP about an administrative consent order. Waiting for NJDEP to call may prove costly.

◊ Know the applicable deadlines. And whether a deadline has been missed or not, get and stay busy. The clock has been running on existing cases PRCR's who have, or should have, retained an LSRP. If RI deadlines have not passed, a PRCR must act to timely complete the remedial investigation in the near future. For others a remediation deadline approaches: "Remedial actions for sites subject to the statutory timeframe must be completed by May 7, 2017, for soil only remediation and May 7, 2019, for the remediation of soil and other media." See its deadline training matrix at http://www.nj.gov/dep/srp/srra/training/matrix/new_responsibilities/timeframe_req.pdf. See, this Article at § 3.8.6. Failure to act within the specified mandatory periods increases the risk of NJDEP asserting direct oversight and/or asserting a violation of SRRA. That should be avoided if possible.

◊ Again, if remediation (including delineation) is in progress but will be delayed for reasons that are arguably 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.

◊ Hereafter, exercise care in pursuing further sampling efforts and consider legal requirements that may apply to or by reason of same. Sampling for remedial design, remedy implementation and monitoring purposes should pose limited, if any risk. But, consider what happens if today, after filing of an RI complete form for a site, additional sampling is required for a contaminant subject to a new standard (e.g., PFAS) or if there is an unanticipated discovery of an old contaminant in a new location. And what if there is an older site with issues, old and new, newly discovered by a PRCR, what deadlines apply and, if missed already, what can be done legally to manage possible risks, costs and deadlines?. Further, consider whether depending on the results of new sampling, is the delineation no longer complete or past-due? In such cases, is the site subject to direct oversight? In this regard, carefully review and consider the guidance provided by NJDEP as to dioxane at http://www.nj.gov/dep/srp/regs/gwqs/srwmp_implementing_11-25-15_interim_gwqs.pdf. Further, suggest that the PRCR consult with counsel, if the PRCR has not done so already. After-the-fact consultation may be too late.

● **Q3.6:** What happens hereafter when there is uncertainty about whether or not to sample a particular area of concern? In the past, NJDEP'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 NJDEP that there be no sampling (to see if NJDEP 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 NJDEP 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?

A3.6: ◊ 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 on the same site before, although our actual experience to date has not seen that result very often.

◊ As different NJDEP personnel themselves often came to different judgments in similar circumstances at different sites, 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 but different sites (or even sometimes the same sites), 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.

◊ The decision to sample is often 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 NJDEP 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 NJDEP 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 or at least should 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP be involved?

A3.7: ◊ At present LSRP flexibility on these issues does not appear expressly to be as extensive as NJDEP'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 NJDEP 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

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 NJDEP itself did before SRRA, and to the extent that NJDEP 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 NJDEP personnel, necessarily biased towards managing uncertainty less confidently and bureaucratically.

◊ Although NJDEP 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.

◊ *{2018}* NJDEP is exercising its authority to issue RAPs as an appropriate moment of time to substantively examine and question decisions of LSRPs and PRCRs as to the remedial actions conducted to date. Many doubt the appropriateness of this review. At the moment, NJDEP is largely unchallenged in this approach. A result of NJDEP's approach is growing delays in issuance of RAPs.

◊ We need to experience if and how LSRP decisions on such matters are made and thereafter survive NJDEP scrutiny on permit issuance, review and audit. At this very moment, the interest in anticipating and assisting LSRPs in such issues appears minimal: on some issues NJDEP 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 NJDEP feel less secure? Some fear that, absent express NJDEP 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?

A4.1: ◊ It is to be hoped, and largely accepted, that RAOs will prove at least as reliable as NFA Letters have been. They in fact may eventually be more so because many LSRPs may prove to be more cautious, consistent and comprehensive than NJDEP personnel have sometimes been. Some buyers and lenders, for example, have hesitated to rely blindly on NJDEP NFA Letters, especially when granted speedily on complex sites. Perhaps more will rely willingly on RAOs, although some care and restraint is likely still justified. *{2018}* Others, however, have felt less secure with the absence of an actual NJDEP ratification and the risk of post-RAO review for three years hanging over them.

◊ As noted, under SRRA RAOs are expressly subject to NJDEP review and reopener. That is potentially very problematic, particularly if NJDEP 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. Some parties hesitate to consider RAOs as valuable.

◊ 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.

◊ As a practical matter, to date few RAOs have been invalidated, although more have been withdrawn by LSRPs, usually at NJDEP insistence. Feel better?

◊ Perhaps more importantly, PRCRs and others may find themselves at less risk from later audit and review of an RAO after and resulting from issuance of RAPs, given NJDEP's relatively rigorous review of the LSRP's basis and logic for seeking an RAP.

● **Q4.2:** Is an RAO "better" for a buyer, seller or lender than reliance on "innocent purchaser" status?

A4.2: ◊ Yes. In some instances we have urged potential buyers to obtain an LSRP RAO in advance of their purchase in order to obtain better protection against later discoveries. Without an RAO a buyer has a mere legal argument that it performed an adequate PA/SI; with an RAO a buyer has stronger express statutory protection. See N.J.S.A. 58:10-23.11gd.(2)(e); P.L.2009, c.60 §38.

5. NJDEP Oversight of LSRPs and Sites:

● **Q5.1**: How exactly does NJDEP direct oversight work?

A5.1.1: ◊ All sites that missed the May 2014 RI deadline and did not extend for an additional two years to May 2016, and all sites that have failed to retain PRCRs, as well as those that miss applicable mandatory deadlines hereafter, are subject to mandatory direct oversight by NJDEP. How many is that? What in fact is transpiring at those sites? *{2018}* Information suggests that NJDEP is struggling to address the large universe of those subject to direct oversight.

◊ At some sites not much has changed: the PRCRs have done nothing for a while and are still doing nothing, while NJDEP marshals its resources and assesses its priorities. For a small subset of these sites, NJDEP has initiated enforcement. For others it has threatened. At others, "violators" have sought (or been offered) more favorable treatment than the statute seemingly allows, and NJDEP seems to be tolerating this, at least if the violator is actively proceeding to remediate, in a few cases signing administrative consent orders (ACOs) requiring that the violator earn relief from direct oversight requirements. See this Article at §1.2.37. If we were retained by a client exposed to direct oversight, inadvertently, through inattention, or due to resource issues, we would actively engage in discussions ASAP with NJDEP in an effort to find a customized solution, likely using an ACO. We do not know whether or not such approach will be available in every instance: we suspect not.

◊ On sites where NJDEP is engaged in a confrontation with a suspected PRCR, or a PRCR is engaged with a confrontation with third parties or other PRCRs, now or hereafter, we don't expect the direct oversight process to work well or easily. Direct Oversight almost compels confrontation, if it is to work at all against or between recalcitrant PRCRs or at difficult sites, at least in many cases, unless NJDEP and third parties find and encourage techniques (like ACOs or dispute resolution) to convert the process into something less intrusive than the legislature (or the draftsperson for the legislature, largely DEP itself) 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 who are dead and without resources may have no choice but to fail to comply, but NJDEP's response may be of little concern (as no one can get blood from a stone). Those PRCRs who are strong and willing to fight NJDEP may find themselves acting hereafter substantially as they have before, in the face of NJDEP threats but for the moment at least with little (but seemingly increasing) NJDEP action, at least until the Courts begin reviewing such cases and deciding if direct oversight can be used as SRRA itself provides. Indeed if NJDEP acts incautiously, the intransigent regulated community may have more defenses against NJDEP than before. (For example, the judicial hesitance against pre-enforcement review may disappear if NJDEP demands creation of an RFS as part of direct oversight, as SRRA requires): there will certainly be challenges to NJDEP decisions, process, rules and perhaps even the very constitutionality of the system as direct oversight is implemented.

◊ We expect to see more NJDEP enforcement of and through direct oversight in 2018, likely increasing in years to come. *{2018}* But we also expect to see use of ACOs at more sites than at present.

A5.1.2: ◊ Of course by its terms the SRRA statute is relatively clear. NJDEP can take charge of picking the remediation. To support same the PRCR and LSRP must prepare a feasibility study. NJDEP 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 NJDEP control. See this Article §3.8.2.

◊ A failure to so comply subjects the PRCR who is not acting under direct oversight to fines and other enforcement, both for the original failures and for the failure to enter and observe direct oversight. In the environmental, world,

◊ We are unsure of how many sites, with viable PRCRs, are in fact so proceeding in the direct oversight program as of the beginning of 2018: we believe few of those who failed to retain an LSRP at all in 2012 or since, or those who failed to complete their RI in 2014, or those who failed to complete their extended RI in 2016, are behaving as NJDEP says they should- but not none. For available NJDEP statistics, see the last page of Attachment C.

◊ *{2018}* We expect more sites to pursue ACOs if and as available to reduce the adverse effects on PRCRs of Direct Oversight. We applaud NJDEP's flexibility in allowing PRCRs to earn some relief.

● **Q5.2**: Will it be a fun experience to have NJDEP take over direct oversight?

A5.2: ◊ Fun for whom? PRCRs? We suspect not at least for sites where NJDEP actively and inflexibly exercises its rights, although it is appears that at some sites NJDEP is willing to 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 NJDEP undertakes direct oversight, NJDEP seems to be less aggressive in its approach and demands than

for sites where NJDEP perceives that remediation has languished for decades, in the face of known serious issues, or where the PRCR is, in NJDEP's view, a known or suspected recalcitrant or violator, we believe NJDEP will proceed with relatively direct and demanding oversight. The recalcitrant will have earned NJDEP's full attention. In our experience, having NJDEP's full attention is rarely fun.

◊ We suspect that if direct oversight is upheld when challenged, as it will be, and if it works as designed, it will be fun for NJDEP and its manager, as they direct remediation with the PRCR's funds. But we are also sure that few at NJDEP will enjoy the lengthy process of litigation likely to be faced by NJDEP, at least initially, if and as well funded recalcitrants attack NJDEP decisions and interpretations using hard-ball litigation tactics. Reportedly some challenge(s) and appeal(s) are pending now. When will we know the result? Maybe never: many cases before Judges and Administrative Law Judges (formerly hearing officers) are settled, sometimes reluctantly, and then public information about the settlement is scarce. If not settled, it can take years to reach a final result. It can take years for a judicial reported decision, if written, to become available.

● **Q5.3:** When, if ever, has a remedial investigation phase been clearly completed so as to reduce the risk of NJDEP taking direct oversight for a failure to complete the RI? Is it possible that a PRCR, LSRP and NJDEP may disagree about whether the RI is complete, or new information may be found showing that a prior RI was incomplete, such that a case may be identified for direct oversight later?

A5.3: ◊ Whether an RI has been properly completed may be uncertain at sites where NJDEP, and perhaps some LSRPs hereafter, have and pursue a seemingly insatiable desire for more samples and more wells, in more places, depths, and directions than previously conducted. Obviously in and after 2017 NJDEP can disagree with the views of PRCRs and their LSRPs. Further NJDEP may disagree with its own prior view that the RI stage was completed long ago. Arguably at some sites NJDEP may determine that the remedial investigation has not finished and indeed cynics may be concerned that it may never finish. *{2018}* Indeed, it is possible that many years after a reported RI completion some new data or anomaly, perhaps on a different site or in a different direction, leads NJDEP to question an RI.

◊ 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 NJDEP 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 guidance issued in 2013, it appears NJDEP agrees. See this Article §3.8.2.

◊ Of course, NJDEP requires submission of a form as a clear articulation by the LSRP that the remedial investigation for the site is complete. Absent the form, NJDEP believes the RI is not complete (a position potentially debatable). 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 NJDEP 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.

◊ Reportedly, some NJDEP complaints to the Board have involved attacks on the subject LSRP having wrongly formulated, in NJDEP's view, the professional opinion that an RI is complete. See e.g. the Board reported decision at http://www.nj.gov/lsrpboard/board/prof_conduct/007-2014_complaint.pdf. It certainly appears to us that NJDEP, in good faith, will often be able to argue that there is not enough data to be sure that the remedial investigation, and conclusions about delineation, for a site are appropriate 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 NJDEP complaint, that a mere disagreement between NJDEP and an LSRP, a mere difference of opinion, is not a basis for an attack on the LSRP's decision).

◊ Further, if additional sampling is conducted after reporting 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 NJDEP 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 NJDEP approach and judicial conclusion.

◊ So what should a PRCR or LSRP do if such an event occurs? At a minimum we are of the view that there needs to be careful discussion about the issues and possible solutions between the PRCR, LSRP and counsel. Perhaps the finding can be treated as a new discharge or case? Perhaps it can be treated as a remedial issue

and not a remedial investigation issue. For example, consider the result if a new owner retains an LSRP to deal with the newly-discovered older-origin event or condition, perhaps under an economic indemnity or reimbursement by the prior owner: is there an argument that direct oversight is irrelevant in the new case by the new PRCR, and it is either avoided, postponed or moot as to the older PRCR and case? Alternatively, if oversight seems inevitable, will self- identification of the issue to NJDEP obtain some better treatment by NJDEP than other approaches (such as under an ACO?)? Consider, e.g., answer to Q3.5 above.

● **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?

A5.4: ◊ It is to be hoped that eventual changes at NJDEP will reduce unnecessary delays. As of yet this has not fully occurred.

◊ Some relief under N.J.S.A. 58:10C-28.c.; P.L.2009, c.60 §28.c., may be available to a PRCR and LSRP attentive to events and circumstances after notice to NJDEP. See discussion at this Article § 3.8.6. 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 NJDEP rules or court intervention.

◊ Further, to the extent that NJDEP rules establish time periods for remediation, those rules should be adjusted to further account for such issues. We would suggest that consideration be given to NJDEP 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.

◊ *{2018}* Perhaps SRRA 2.0 will address this.

● **Q5.5**: Do the rules for residential development stay the same?

A5.5: ◊ No; but practices may ultimately prove similar to practices existing when SRRA took effect. We need to see future further NJDEP 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 NJDEP 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 NJDEP 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 NJDEP for remedial projects?

A5.6: ◊ NJDEP 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, and adopts and revises guidance documents, some of which will need regular intervention with NJDEP. It prepares and records forms. It reviews work product and submissions. It supports the Board. It responds to inquiries, at least in some cases. The PRCR and its advisors may be unwilling to rely on the LSRP as the sole point of contact with NJDEP (although on some issues it remains to be seen how tolerant NJDEP will be of discussions with both the LSRP and the PRCR or other advisors). If NJDEP 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 NJDEP is comfortable. Imagine how bad it would be to remediate a site, obtain a RAO, begin or complete construction and only then learn that NJDEP has serious problems with the remediation and construction and use. This can only be avoided, if at all, by early proactive interaction with NJDEP. Certainly there are and will be many instances when interaction with NJDEP is and will be essential.

6. Disputes:

● **Q6.1:** When there is a disagreement between the LSRP and another, who prevails?

A6.1: ◊ When two LSRP's disagree, at least in the first instance, the one LSRP responsible to supervise the remediation, as he or she has notified NJDEP, 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 NJDEP will have the advantage, at least as a practical matter, if the disagreement is not obvious to NJDEP at that time (suggesting that the second LSRP may need to

consider interfering as to the first's submission within NJDEP). *{2018}* Note that NJDEP has said it is up to LSRPs to resolve such conflicts as it cannot and will not intervene just because two LSRPs say there is a dispute.

◊ 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 NJDEP. *{2018}* Note that firing an LSRP may not mean the PRCR wins. If this occurs for improper reasons (the LSRP wants to obey the law and the PRCR does not), the Board may have a right to act for improper retaliation.

◊ When an LSRP and NJDEP disagree, more likely than not the NJDEP prevails, particularly in matters that do or may involve questions of IECs, unless NJDEP is acting improperly (and most LSRPs will not want to fight NJDEP at all costs, even if their client wants them to do so) or a Court intervenes. Indeed, a disturbing prior trend, perhaps less likely in 2017 and thereafter, was that seemingly NJDEP 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. Of course, if the timing of the disagreement occurs in response to an application for an RAP, as a practical matter NJDEP has considerable added leverage and may prevail, at least until and unless the LSRP and PRCR are opposed to NJDEP demands necessary to obtain the requested RAP and close the case and counsel can ascertain an available cost-effective route for obtaining judicial review. *{2018}* Note: We urge an LSRP in such a situation promptly seek assistance from the PRCR, the PRCR's counsel and its own resources, including counsel. Delay is inadvisable.

◊ When an LSRP, NJDEP 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 [most likely to ratify the prior decision of the Board and, if not, likely to be reversed by the Board so as to reinstate the Board's own prior decision, at least absent some new evidence or missing proofs]) and the Judge prevails (at least until some other Judge says otherwise). It remains to be seen how much deference the Courts (as opposed to most administrative law judges) will give to NJDEP and the Board, especially if the NJDEP or the Board try to enforce policies and rules that are unwritten, vague, unclear, and/or contradictory (and at the moment NJDEP and Board policies are in sync, even if NJDEP 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 factually wrong?

A6.2: ◊ 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 importantly, the LSRP license may be threatened and other cases before NJDEP 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 the proof that an RAO is wrong, and NJDEP and other reactions to same, may adversely affect the marketplace confidence in the particular LSRP, the particular PRCR, the site and all LSRP RAOs generically. We are not looking forward to the first material public confrontation about the propriety of an LSRP RAO. Generally, after much reflection, we join NJDEP and we recommend that all RAOs be right. And if not, we recommend the LSRP and PRCR each seek good advice from separate advisors on what to do next after an erroneous RAO is identified.

◊ We note that the longer the period that has passed since the original erroneous RAO issued may mean that there are many more Persons exposed to the consequences of that and, potentially, further erroneous RAOs. The particular concerns of those Persons may vary depending on the nature and extent of the error. For example, new owners and operators, new LSRPs, new tenants and lenders, neighbors and the municipality each may have very different perspectives and need their own advisors. In some cases, as time passes the sheer volume of affected Persons, and their disparate interests, may greatly compound the adverse effects of the error and limit the options available for dealing with its correction and consequences.

◊ Interim political changes, and the interests of third parties (such as the press or USEPA), also are potentially relevant. *{2018}* Whatever ultimately proves to be the philosophy and approach of Governor Murphy and his administration, the odds are high that they will diverge from those of Governor Christie and his administration.

● **Q6.3:** If NJDEP rejects (invalidates) an RAO and requires more work, will all the parties be returned to the *status quo ante*?

A6.3: ◊ Probably not, unless everyone (likely including NJDEP) is ready, willing and able to do so, including to take steps to seek restoration of that status quo. 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. There may be no uses and no users. A rejection of an RAO may not avoid the results of such changes.

◊ What happens in every instance, in every scenario, upon and from 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. Fixing it quickly may be the most cost-effective solution. In other cases, especially if appeals of NJDEP decisions are filed, or claims between disparate parties, against LSRPs and other processionals arise, the consequences may be experience, time-consuming and deleterious to many of the interests of the parties. Even if courts intervene, restoring the *status quo* may be impossible. Consider, for example, the return of escrows to selling shareholders on an RAO: it will be difficult and often impossible to capture those disbursements. Absent the funds, how can some problems be fixed? Absent a fix, the status quo fails.

● **Q6.4:** Will there be more court cases than before?

A6.4: ◊ Likely yes, at least eventually. We are aware of some new cases already filed and more threatened as NJDEP 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 NJDEP 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, at least absent generous settlements. The reaction of the LSRP's firms, clients, and insurance carriers may vary depending on the facts and circumstances. The reaction of the insurance market, and potential LSRP candidates, may be equally significant- absent adequate insurance and more LSRPs perhaps there will be fewer cases- because the LSRP model will be failing.

◊ Third, PRCRs have reason to ensure that decisions made by LSRPs are preserved and enforced. PRCRs are certain to defend themselves against NJDEP and third-party attacks. Will PRCR's attack their LSRPs if attacked by NJDEP or the Board: not likely in the first instance. We would expect to see more cases of joint defense, then cases where LSRPs and PRCRs , formerly aligned, attack each other ("divided we fall").

◊ Finally, we believe courts may be less deferential to NJDEP judgment as much as previously given the legislatively mandated roles specified for LSRPs and the Board and the obligations and limits on NJDEP, perhaps encouraging parties to seek judicial review when previously such would have been unavailable. This view is as yet untested.

● **Q6.5:** Are there limits to the Board and NJDEP's inspection, access, seizure and other rights?

A6.5: ◊ Yes. These powers will not be absolute, especially if the Board or NJDEP do not act narrowly and with respect for other values. 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, if such ever occur. There is, of course, reason to believe NJDEP and the Board will be cautious in demands to attorneys.

● **Q6.6:** Will any LSRPs and/or PRCRs suffer by reason of NJDEP reviews and/or audits?

A6.6: ◊ Yes. Mistakes by LSRPs are certain. Disagreements in the proper application of professional judgment also are certain. NJDEP 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. The reaction of the marketplace, including clients, insurers and employers is uncertain.

◊ 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 the fact and consequences of LSRP errors.

◊ Will the public? Will others? This remains to be seen. It is to be hoped, that if all proceed in good faith, errors will be able to addressed and corrected without catastrophic results.

● **Q6.7**: If NJDEP attacks, rejects or invalidates an RAO, thereby requiring additional work at the site, are there PRCR or client claims against the LSRP? If the Board (or NJDEP) attacks a PRCR's LSRP, does that expose the client or PRCR to harm? Does the LSRP have any claims against third parties in any such instances? Who pays for corrective measures if and when NJDEP or Board audits and more work occurs?

A6.7: ◊ Are there client or PRCR claims- perhaps. Did the LSRP violate a standard of care or NJDEP rules, policies or guidance? Or does NJDEP simply want more (assuming for the moment that NJDEP can so act)? Does the attack allege (or substantiate) bad decisions of the LSRP or PRCR?

◊ Are the LSRP and PRCR aligned with, indifferent of, or opposed to each other as to the issues and circumstances of the attack? Can the client or PRCR afford to divorce itself from the LSRP?

◊ What does the underlying contract between LSRP and client/PRCR say of relevance?

◊ Consider the possibility that an LSRP issues an RAO in the absence of sampling around a transformer pad and on audit NJDEP wants sampling: does the answer of relative claims and defenses depend on what specifically NJDEP rules, policies or guidance say about PCBs, transformer pads or such sampling? (I think so). Or it may depend on prior discussions on the subject matter between LSRP and client. In this case if NJDEP rules that the LSRP should have always required PCB sampling around the transformer pad, and the PRCR relied on the LSRP to get things right, then the PRCR may demand or expect the LSRP to address the added costs and consequences. Conversely, if the LSRP and PRCR both agreed and wanted to avoid further sampling, and together determined that they would take the position that the RI was complete, the LSRP believing that this was supportable in his or her own professional judgment (not just because the client wanted the result), even if both were aware that a more conservative approach could be argued or demanded by NJDEP, then if the NJDEP raises the issue and after debate NJDEP rules against the LSRP, or the LSRP and PRCR decide to acquiesce without fighting, then in our view the PRCR should have no claim. In our view the LSRP did nothing wrong, and the client wanted the LSRP to act as he or she did.

◊ In some cases will the answer depend on the results of added sampling? It may; and in any event the damages, costs and risks associated with favorable sampling results may be very different than those associated with post-RAO sampling that finds a problem- consider, for example, whether the first result can be pursued without revocation of the RAO, whereas surprise results likely force revocation or withdrawal of the RAO, with all that then entails- including, perhaps, immediately movement of the site into direct oversight.

◊ In general, one would expect a professional to avoid malpractice type liability if he or she exercised the judgment of an ordinary professional, even if in hindsight that judgment proves wrong. Malpractice is not being proved wrong: it is exercising improper judgment.

◊ Of course, it remains to be seen what NJDEP, the Board and the courts will say about LSRPs and their decisions in such cases 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. For the moment it appears the Board agrees with us.

◊ 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 NJDEP 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 practicing in corporate or LLC form (or is only his or her employer or insurance liable)? Should a candidate for LSRP fear individual liability?

A6.8: ◊ As with all professionals there is potential personal civil liability (and in rare cases criminal exposure) if something is done wrong (in violation of professional standards).

◊ The glib answer to practitioners' fears for such is that no one who does a good job need fear personal liability. The second glib answer is that each LSRP should get and rely on good insurance (but some will not, if it is not required).

◊ 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 having the existence of an insurance policy to protect them. Professional reputations and peace-at-night are valued by many. 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 contract clauses that disclaim such liability (which may prove to be unenforceable). 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 possibly 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, both in advance and at the time of a claim (notice of which must be given promptly to the insurance carrier, on failure of which the carrier may argue prejudice with loss of coverage), to see how much insurance helps and protects the LSRP and firm.

◊ Personally, as lawyers we face similar risks as well. While NJDEP has scant powers over our careers, the courts have substantial power over each lawyer and his or her license, including ours. Yet we could not imagine any other career for ourselves; we like helping clients; and we like (and seek) 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?). Attorneys usually do not fear that they and their advice may be spotlighted by regulators or others, or may be wrong. The focus is fine and we do the work as best we can, at least most of the time. We think LSRPs should think similarly as to their professional advice. If an LSRP believes in his or her own skills, qualifications, experience and abilities, if risks are well-evaluated and taken, and if judgments are made professionally, 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 NJDEP guidance, practices and rules, and with care to disclose relevant limits, and with adequate documentation of the decision making process and disclosures, then we think the exposure to LSRPs should be tolerable and manageable. We urge eligible LSRP-candidates so inclined to seek and maintain licensure and enjoy their role. PRCRs and NJDEP 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, NJDEP 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?

A6.9: ◊ Yes. First, for many sites it extends the statute of limitation so that claims can be brought by NJDEP 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, NJDEP's occasional past (now long past) practice of delaying issuance of an NFA Letter until NRD was resolved for the site will now disappear with LSRP issuance of RAOs (unless future NJDEP guidance about RAOs, perhaps under a new democratic party Governor, tries to force LSRPs into NRD enforcement), but possibly for some sites NJDEP will deem that it can undertake review of NRD automatically on submission of the RAO (relying on the exception in the RAO Template to circumvent the statutory covenant-not-to-sue).

◊ Third, RAOs may impede NRD suits by their very terms and the covenant-not-to sue (despite the RAO Template).

◊ Fourth, NJDEP 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 NJDEP's program for pursuing NRD claims is unclear.)

◊ *{2018}* Note: aside from SRRA itself, changes within the Governor's office and NJDEP may have more of an effect in the near future.

● **Q6.10:** How should an LSRP proceed if he or she learns of a potential complaint, of any nature, from any source, against him or her? What if the client is unhappy?

A6.10: ◊ Carefully: ignoring potential complaints is not advisable. At a minimum they are a source of concern. How to address them depends on the source (a client; a referrer; an adversary; the municipality; a government official; a neighbor; a lawyer; NJDEP; the Board) and the nature and extent of the potential complaint

and its consequences (is there a threat of an IEC?) and the corrective actions. So gathering and assessing relevant facts may be important.

◊ In some cases quick minor corrective action may suffice to reduce future concerns. Consider the advantages of so proceeding.

○ Especially as to a client, it is important to understand the source, nature and extent of the complaint. Is the client unhappy because the LSRP is forced to deliver bad news? Is the client unhappy with the results (of what? Sampling? An innovative Technology?)? Is the client unhappy with the costs? Is the client unhappy with the schedule, delays, results, responsiveness? Understanding the circumstances may permit a response from LSRP to client that preserves a relationship with the client, even when the news is bad. Being defensive, or counterattacking, may be counterproductive. Every professional can lose the trust and business of an unhappy client, even when right. The best professional-client relationships can depend on more than being good or right.

◊ Consider the need for coordination and communication to your firm, your client and others. Don't keep it to yourself. One or more may be entitled to early warnings. They may have a perspective that is important. What is happening may not be as isolated as it appears. They may be able to help. You may benefit from the help, and reduce the chance of mistake or prejudice.

◊ Sometimes an e-mail or written communication can be helpful or even be required. Ensure that the communication is effective and appropriate. Your firm, your lawyer, your client and your client's lawyer may need to be involved, and you may benefit. Failure to involve others may be dangerous, and your communication may not be as effective or protective. You don't want to make inappropriate, unnecessary or unwarranted admissions of fault, fact, law or liability: but you do want to correct mistakes quickly and efficiently and minimize harm. You want to maintain good working relationships. And in some instances an apology can be effective.

◊ In some cases you will need legal advice- probably more than you realize. Get it. It may seem expensive, but failing to do so can cost you more. And doing so with the right lawyer, may not be as costly as you think. If you don't have a lawyer, find one. Can you rely on the client's lawyer? Perhaps. But he or she does not represent you. Indeed, it is possible he or she may have a very different perspective than you have or need: it's not paranoia if they really are out to get you.

◊ In some cases, notice to an insurance carrier may be needed. Failure to timely notify a carrier can prejudice your coverage. *{2018}* Can you rely on the carrier's lawyer? To a significant extent, yes. But he or she may not represent you in the same way as other lawyers might. Consider seeking independent advice, even if at added cost, if you are concerned. It may be worth it.

◊ Don't alter or destroy potential evidence; preserve them. Be careful about firm record retention and e-mail deletion policies. These may hurt you. Also, be careful about after the fact memos and e-mails. If in doubt, talk to (don't e-mail) your lawyer first.

◊ Obviously official action requires official response. A Board complaint, a lawsuit, a threatening letter require more of the foregoing to occur, and usually require a formal response.

◊ Billing disputes should not be ignored and should not be lightly dismissed. They can mature into other matters. Be careful and attentive.

◊ Settlement discussions can be useful, but need to proceed appropriately. Use your lawyer. Coordinate with your client and client lawyer when appropriate. Be careful. Engage in them the right way. Be cautious of admissions against your interest. Resolve them so they are effective.

◊ Prevention should be considered. What can you do today to minimize or prevent future claims. Review your matter intake and your billing practices. Look at your contracts. Consider how you communicate with clients and others.

7. NJDEP Processes:

● **Q7.1:** Will, as a result of SRRA, there be more or less reporting to the NJDEP Hotline?

A7.1: ◊ Experience suggests likely more. In a few cases, at least if strictly construed, the rules require that both the PRCR and LSRP must make several calls and file several forms. Historic conditions appear to be reportable more often. Express exemptions for previously reported conditions are poorly drafted, uncertain or nonexistent, although past practices suggest multiple reports are not needed.

○ Compare N.J.A.C. 7:26C-1.7(d) (The PRCR "… shall notify the Department in writing, on the Confirmed Discharge Notification form available from the Department at www.nj.gov/dep/srp/srra/forms, within 14 days after the occurrence of any of the following events: 1. A discharge of a hazardous substance, or the discovery of a discharge of a hazardous substance pursuant to *N.J.A.C. 7:1E-5.7..."*) with N.J.A.C. 7:26C-1.7 (b) (The PRCR "… shall immediately notify the Department hotline at 1-877 WARNDEP or 1-877-927-6337 when either of the

following is identified at a site: 1. Contamination that has been caused by a discharge that is not already known to the Department…").

◊ 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, and their lawyers often oppose, NJDEP's view that if the LSRP has reported a discharge the PRCR then must automatically address it, obviously starting with investigation and delineation. Case law may support the view that if NJDEP is to penalize for noncompliance it may bear a burden to prove more than a mere suspicion of a discharge. PRCRs may also resent any NJDEP or LSRP view that if the PRCR, and perhaps any third party, has reported a discharge then the PRCR thereafter must use an LSRP to address it, starting with investigation and delineation. Lawyers may be willing to argue with NJDEP over this view, at least in some facts and circumstances (e.g., if the reported condition is subject to a Spill Act defense to liability). LSRPs may help their PRCRs and lawyers by using appropriate language in their reports: if in doubt work with experienced PRCR counsel.

◊ *{2018}* In a recent matter involving an interior release, reported as a precautionary matter, and to which local emergency response forces responded, NJDEP eventually conceded that the site operator having had the release might be exempt from having to retain an LSRP to prove the absence of a discharge, generally acknowledged from the available records as having been fully contained inside, but asserting that the reported event would remain on NJDEP's data bases as reported, uninvestigated and unresolved, until an LSRP in fact issued an RAO. Consider the implications of this position, particularly as memories fade, records are lost, and the threat of Direct Oversight looms.

● **Q7.2:** Are MOAs dead?

A7.2: ◊ **NJDEP** has made MOAs unavailable for new cases. So right now you can't get new MOAs.

◊ As to old MOAs NJDEP acts as if they are no force. But they have not been terminated and may still have legal significance (such as if put in place to obtain amnesty). Compare NJDEP's position as to ACOs and Remediation Agreements. See http://www.state.nj.us/dep/srp/guidance/aco/index.html

◊ We believe NJDEP 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 to the State and health, safety and the environment significant. Regrettably, we are not in charge and often NJDEP does not care what we think. We are aware of some lawyers exploring the possibility of some similar arrangements with NJDEP, at least in some circumstances. *{2018}* The pre-purchase Direct Oversight ACOs available to some purchasers have some features of the MOA program, but in our view are inadequate to achieve the purposes of the MOA program.

● **Q7.3**: Some companies conduct audits before they proceed with remediation. Some formerly did so as a tool of corporate management and focus on environmental compliance. Sometimes they try to do so confidentially. Is this still possible?

A7.3: ◊ Conducting a confidential site audit has always been challenging for clients and lawyers in New Jersey (and sometimes elsewhere) because an audit cannot be used to evade the law. Many environmental issues trigger self-reporting (such as observations of a discharge of hazardous substances, in NJDEP's view sampling results (likely in NJDEP's and LSRP's views including waste classification results for soil disposal from construction sites) showing the presence of an exceedance of cleanup criteria or otherwise finding proof of a discharge of hazardous substances or wastes, or observations of a sheen on a waterbody, or observations of a release of hazardous substances above USEPA reportable quantities), at least for owners and operators, particularly in New Jersey. Many environmental discoveries in audits pose issues of continuing violations of law (and clients and lawyers may have reporting obligations for continuing violations of laws that they do not have for past violations).

◊ Some PRCRs have tried to use attorneys and attorney-client privilege, or the sometimes debated self-critical analysis privilege, to shield audits, at least of preliminary assessment or compliance type audits, although shielding actual data 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.

◊ *{2018}* While we would be prepared to give it further thought, on initial and hasty reflection we think the rare practice of certain larger companies of using out-of-state consultants and labs it investigate or audit facilities likely does not avoid the requirements of SRRA and, in fact, may run afoul of it. Of course, a bona fide third party engaging in pre-purchase due diligence can do what others cannot, at least pre-SRRA 2.0.

● **Q7.4- to Q7.6**: Omitted

● **Q7.7**: Can a PRCR protect itself against later NJDEP 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 any and every NJDEP or Board review unscathed in every instance. Further, the effort to seek such protection may be counterproductive. 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 cases, although not necessarily all.

◊ Obviously picking well experienced, thoughtful and careful professionals may prove useful in reducing risks to a PRCR both of and from NJDEP or Board review.

◊ Avoiding overly aggressive strategies also can reduce risks.

◊ And monitoring NJDEP 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.

◊ In some instances peer review, or second opinions from other consulting firms (perhaps out-of-state) or LSRPs, may be valuable in assessing an LSRP's actual or proposed work.

◊ In some cases advance technical consultation with NJDEP staff may prove useful to assure the viability of a technical approach and reduce the risk of later NJDEP review and revision.

◊ In some cases, the process of seeking and RAPs may provide useful NJDEP insight against later NJDEP review and revision.

◊ *{2018}* In some cases carefully written PLL environmental insurance products may be available, particularly to buyers of property, to address agency reopeners or changes of standards or law undoing LSRP RAOs. We are not aware at any such product yet tested as to LSRP issues.

● **Q7.8**: Can a PRCR indemnify its LSRP against NJDEP or Board review of its LSRP's work or conduct?

A7.8.1:

◊ We think that a PRCR or client may voluntarily at the time, or by advance contract, agree to pay for the LSRP's fees and expenses to handle a NJDEP audit or review of its work, and, perhaps to a lesser extent, some of 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 consequences occur because of material deficiencies in the LSRP's work under, and in violation of, prior Board rules or guidance then the PRCR likely will not be obligated to so proceed, although at least if not against public policy it may elect to, but it may have recourse against the LSRP and his or her firm if the LSRP breach constitutes malpractice (and it would be rare that contract terms bar such claims).

◊ The precise terms of the contract between the LSRP and his or her client providing for such may be critical. And every contract is subject to a Court's review, interpretation and application of equitable principles (such as the implied covenant of good faith and fair dealing in every contract) to avoid public policy violations (such as to enable an LSRP or PRCR to avoid obligations and consequences required by SRRA) and ensure a fair result.

◊ We note that NJ corporate law allows each corporation 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." Similar provisions may apply to other forms of entities and in other states and countries. .

A7.8.2:

◊ On initial reflection, we think it may be 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. We confess that we have not considered the issue in the face of a

real matter, real LSRP services, real PRCR demands and requirements, real contracts and real NJDEP or Board attacks. Facts may change our mind.

◊ But, in our view, 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 materially breached his or her duties as LSRP subject to Board review and discipline. Such a contract clause is likely subject to attack as void against public policy.

◊ However, we acknowledge that if a complaint to the Board 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. Even if not, a joint defense cooperative arrangement should be possible, and used to preserve privilege to the maximum extent practicable.

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 as an LSRP. Some will fail the exam. Some will not meet licensing criteria. Some want to not be LSRPs.

◊ 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 avoid violating SRRA and protect the LSRP licenses of every LSRP at its firm.

◊ *{2018}*We note that consulting firms should, in our view, be encouraging younger employees, associates and partners to pursue LSRP licensure. The failure to do so will hurt the LSRP program and the firm.

● **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 his or her client's representatives, and be flexible in his or her thinking, subject of course always to the requirements of his or her profession. Also while the goal should not change, different paths may be available to reach the goal. Discussions with the client and representatives are to be expected and encouraged, especially if the LSRP program is to be effective.

◊ The LSRP owes duties to the client that likely cannot be met absent consultation and thought. 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 NJDEP, 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.

◊ NJDEP has been criticized for failing to reach appropriate decisions in its past reviews, work and demands; while LSRPs will undoubtedly prove more conservative than mere consultants, especially those aggressively advocating client positions, it is to be expected that LSRPs will be more willing to make decisions faster than NJDEP 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 NJDEP guidance and/or NJDEP or Board audits alter the expectations of how remediation occurs, or the LSRP program works?

A9.1: ◊ For the moment it is unclear how NJDEP future rules and guidance, and interpretations of existing guidance, or changing standards, will change the future conduct of remediation. Even thereafter, no one can be sure how detailed, demanding and/or skeptical NJDEP and Board inspections, reviews and audits of LSRP deliverables will be. Only after a number of such events have occurred and been assessed will there be increased confidence in the ability of LSRPs to act decisively (assuming there are none too few reversals). But further changes can be expected.

◊ There is inadequate experience as yet with Board reviews and complaints to ascertain many 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 NJDEP, PRCRs and LSRPs. Again further changes can be expected.

◊ *{2018}* However, in recent years occasional changes, sometimes major and sometimes not, have often caused disproportionate concerns, delays, revisitations and dislocations as PRCRs and LSRPs have found themselves forced to address the past in view of the new, more than completing then known open issues. Arguably this is an unavoidable consequence of new science, new laws, new management and new policies.

● **Q9.2:** Are there provisions in other existing law that do not mesh with the role to be allowed to LSRPs and NJDEP that may generate uncertainty as to NJDEP 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 NJDEP to overrule an LSRP decision, even if compliant with all rules and regulations, to exercise its own initiative, based on NJDEP 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 NJDEP wants to exercise this power it must better explain in advance the factors to be considered by the LSRP so the LSRP can follow NJDEP guidance and, absent such guidance, NJDEP 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.

◊ See also discussion re legacy landfills at this Article §3.7.3(H).

◊ 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 NJDEP that may generate uncertainty as to NJDEP 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 NJDEP to overrule an LSRP decision, even if compliant with all rules and regulations (such as presumptive remedy guidance), based on NJDEP hindsight views of the particular site use issues.

◊ But in order to do so, does NJDEP have to establish advance guidance for the LSRP 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 NJDEP but avoid being posted by NJDEP on the internet?

A9.4: ◊ It remains to be seen what, if anything, NJDEP 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 NJDEP does not address this issue.

◊ It appears appropriate to assume that anything filed with NJDEP 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 NJDEP.

● **Q9.5**: What can an LSRP to do to protect him or herself in cases with complex legal issues, and disagreements between NJDEP 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 NJDEP? NJDEP 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? Can they be safely ignored? Or is some due diligence and documented rationale always appropriate?

○ Does the LSRP 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. Does the client know what is involved?

○ 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 (please recall: not all lawyers are expert or competent in the fields relevant to all issues; a real estate lawyer may or may not have sufficient environmental expertise to guide an LSRP). 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. (Don't have any? Get one.)

○ Discussions with the client and its counsel may be critical and time sensitive. Don't delay. Client counsel may not be your counsel, but usually the client and client counsel will be on the same side as the LSRP and his or her counsel.

○ 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 NJDEP is making legal determinations, the LSRP likely cannot readily 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 NJDEP likely wants, has the LSRP clearly advised the client of NJDEP's likely positions and the consequences of not satisfying NJDEP. Has the LSRP done so in writing? Clients should be advised to comply with the law, rules and guidance. If NJDEP's views are clear, even if arguably right or wrong, the LSRP should make sure the client understands those views and what, if anything, should be done to satisfy NJDEP. 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 directly in all issues? 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? What is the effect of an appeal or challenge?

○ Contracts need to be clear on the LSRP's 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.

● **Q9.6**: Is SRRA to be amended in 2018 by so-called SRRA 2.0? If so how? (See this Article at Q10,1 as to our thoughts).

A9.6: ◊ It is dangerous to speculate as to the fate of any bill to change law. It is particularly difficult to do so here when we have a new Governor and have seen a draft bill. Still, some are working with legislators and NJDEP on SRRA changes. Many feel changes are likely to be proposed in the near future.

○ There reportedly have been a number of closed-door discussions. It is generally thought that full repeal is not in the cards, despite the feelings of some in NJDEP and in the environmentalist community that LSRPs may not be as diligent as NJDEP was. As noted in this article, we disagree. We think that a key aspect of SRRA has been accomplished: better decision making by more experienced professionals with NJDEP;s role and delays reduced, but not avoided. Indeed we would reduce it further.

○ More modest and limited changes seem more likely, even under Governor Murphy.

◊ Topics potentially to be addressed include the following.

○ Reducing mandatory requirements. Giving NJDEP greater express authority to act on a case-by-case basis. Providing more realistic deadlines.

- The approaching deadlines for completion of remediation may pose serious challenges for many PRCRs, sites and their LSRPs, absent relief in SRRA 2.0 or by new NJDEP policies.

○ ,Reconsider requirements for financial assurances and the like, both for RAPs and Direct Oversight.;

○ ,Addressing Historic Fill, and perhaps history pesticides, differently, perhaps by not requiring investigation, remediation by engineering controls, deed notice and RAPs, at least in some instances.

○ ,Considering potential changes to Spill Act defenses. And procedures for prospective purchasers.

- Note: There are rumors that NJDEP is offended by the practice of Seller's allowing Buyer due diligence, without use of an LSRP, and subject to the obligation to maintain results as confidential, particularly if SI sampling is conducted and finds something (not reported by the Buyer's consultant because it is not an LSRP, and not reported by the Buyer because it is not then an owner, operator or discharger, and not reported by the Seller because it does not know. Supposedly NJDEP believes it worth debate as to whether everyone should have a duty to report.

○ Evaluating whether the review and delays of NJDEP's RAP program, authorized but not specifically outlined in SRRA, are appropriate. NJDEP practices and delays involving RAPs can be problematic, were not contemplated by SRRA, involve substantive NJDEP reviews of, and may involve threats of substitution by NJDEP of its own judgments over, LSRP judgments. We feel the RAP process should be expressly limited in SRRA 2.0. Nonetheless we acknowledge that the degree of review and skepticism actually applied by NJDEP to LSRP decisions and use of Deed Notices and CEAs means that LSRPs, PRCRs and others may find themselves at less risk from later audit and review of the resulting RAO after issuance of RAPs from such rigorous review.

○ Considering increased permit authority to LSRPs and perhaps others (professional engineers ("PE")? A new class of licensed land use professional?)

10. Policy Questions:

Q10.1: If further change is to be pursued for and under SRRA, what do the authors feel should be considered? (See this Article at Q9.6 as to the rumored SRRA 2.0).

A10.1: ◊ We believe a number of changes (legislative and regulatory) should be considered.

○ Remedial deadlines should be revisited and extended, particularly for complex sites.

○ The issue of new discoveries of older cases should be addressed to avoid the risk of automatic direct oversight.

○ Direct oversight should be revisited so it is more rare and effective.

○ :LSRPs should be empowered to issue RAPs. Alternatively, NJDEP review of LSRP decisions as part of the RAP process should be limited and, in our view, re-balanced so proper deference is given to LSRP decisions.

○ LSRPs should be empowered to issue other permits that are essential to remediation. These should include wetlands, stream encroachment, air and waste/recycling related permits.

○ Deadlines should be extended.

○ Self Guaranties should be permitted as FAs; alternatively the requirement for FAs should be eliminated, perhaps in reliance on a remedial superlien (as under the Spill Act) if NJDEP spends money to maintain compliance with a CEA or Deed Notice after breach and opportunity to cure.

○ NJDEP should be directed to 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 NJDEP consultation process.

○ There should be a voluntary remediation process pursuant to MOAs.

○ There should be better dispute resolution processes including between parties, LSRPs and NJDEP, perhaps including special environmental appeals, adjudicatory or arbitration processes, especially to address NJDEP audits and reviews, threatened rescissions, requests for RIPW and de minimis quantity exemptions, applicability issues, defenses, and directives.

○ The Board should directed to provide guidance on a number of issues to LSRPs and non-LSRPs.

NJDEP staffing should be reduced. The budget and support for the Board should be increased.

<END>

Index of Attachments:

Attachment A: List of Acronyms and Definitions.

Attachment B. SRRA Changes 2014-2016.

Attachment C: NJDEP Metrics.

Attachment A:
List of Acronyms and Definitions

■ A.1.1 Acronyms or terms (herein)

◊ APCA = New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq.

◊ ARRCS Rule = the rules NJDEP 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.

◊ CEHA = County Environmental Health Act, N.J.S.A. 26:3A2-21 et seq.

◊ CERCLA = Superfund= the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq.

◊ child care center = a center licensed pursuant to N.J.S.A. 30:5B-1 et seq.

◊ DAP = diffuse anthropogenic pollution.

◊ 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).

◊ HAP = historically applied pesticides.

◊ 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.

◊ including = including without limitation.

◊ 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).

◊ KCSL = known contaminated site list.

◊ 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)

◊ LSRPA = New Jersey Licensed Site Remediation Professionals Association

◊ NFA = no further action (of NJDEP under N.J.S.A. 58:10B-1 et al.).

◊ NJDEP (or NJDEP) = the New Jersey Department of Environmental Protection.

◊ 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.

◊ pollutants = as defined in the New Jersey Pollutant Discharge Elimination System (NJPDES) Rules, *N.J.A.C. 7:14A*,

◊ Person = a human person or legally separate entity (e.g., partnerships, corporations, and limited liability companies), including government entities and officials.

◊ PFAS = Per- and Polyfluoroalkyl Substances.

◊ PFOA = perfluorooctanoic acid.

◊ PFOS = perflourooctane sulfonate.

◊ 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 NJDEP 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.

◊ SRP = Site Remediation Program (now SRWMP)

◊ 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).

◊ SRWMP = Site Remediation Waste Management Program's (formerly SRP)

◊ 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.

◊ TSCA = The Toxic Substances Control Act, 15 U.S.C.A. § 2601 et seq.

◊ 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.

◊ WPCA = New Jersey Water Pollution Control Act, as amended, N.J.S.A. 58:10A-1 et seq.

■ 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 NJDEP 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 NJDEP 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 NJDEP. (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”).

Attachment B:
SRRA Changes 2014-2016

■ **B.1.1 SRRA program Changes in 2014:** Changes in the SRRA program in 2014 included:

● Increasing delays in, or absence of, NJDEP reviews, including of such filings requiring NJDEP review such as applications for remediation in progress waivers. For some clients and LSRPs this increases a general feeling of unease as fear grows that when NJDEP 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, NJDEP 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 NJDEP. See this Article § 3.8.2 below. Also, NJDEP has not "officially" clarified the position that the extension of the RI Deadline also extended deadlines for remediation.

● In March 2014 NJDEP 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 NJDEP 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). NJDEP 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 NJDEP'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 NJDEP, then such violates the covenant-not-to-sue and various constitutional protections to beneficiaries).

● In May 2014 NJDEP 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 NJDEP issued another variant on the RAO template, Appendix D of ARRCS, N.J.A.C. 7:26C (despite NJDEP'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, NJDEP 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, NJDEP 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.

● NJDEP announced, by its September 10, 2014 listserv blast e-mail, that its resources no longer permit substantial review by NJDEP 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, NJDEP reviews, including of such filings requiring NJDEP review as applications for remediation in progress waivers, have increased a feeling of unease for some clients and LSRPs as fears grow that when NJDEP review finally does occur, the odds of a full acceptance are low, and at complex sites the risk of serious disagreement is high.

● NJDEP 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 NJDEP's view.

● In 2014 NJDEP announced that applications for RAPs must always be accompanied by a signed consent of the site owner. Later NJDEP 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 NJDEP has always taken the view that the State owns the water).

● In October 2014 NJDEP 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: NJDEP itself suggests that before filing a form, you check its website to see if the form has changed.

■ **B.1.2 SRRA program Changes in 2015:** Changes in the SRRA program in 2015 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.

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

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

● In February 2015 NJDEP 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 NJDEP 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 NJDEP 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, NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP 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 NJDEP provided similar advice as before as to preparedness and reactions to an impending hurricane.

● In October 2015 the New Jersey Superior Court Appellate Division determined that Spill Act abrogates the State of New Jersey's sovereign immunity for contribution claims for contamination related to the historic construction of a sea wall and jetty with contaminated materials. See *NL Industries, Inc. v. State*, Dkt. No. L-1296-14 (Law Div. 2014), *affd.* Dkt. No. A-0869-1413, (App. Div. 2015).

● In October 2015 NJDEP announced the availability of an updated Preliminary Assessment Technical Guidance, reflecting NJDEP'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 NJDEP announced the availability of the Landfills Investigation Technical Guidance to reflect NJDEP'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 the New Jersey Supreme Court affirmed that private party contribution claims under the Spill Act are not subject to any statute of limitations. See Morristown Assoc. v. Grant Oil Co., 220 N.J. 360 (2015)

● In November 2015 NJDEP 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 NJDEP 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, NJDEP 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.

■ **B.1.3 SRRA program Changes in 2016:** Changes in the SRRA program in 2016 included:

◊ The Board adopted its regulations for LSRPs and others (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 NJDEP announced the availability of administrative guidance entitled "Administrative Guidance for Addressing Unknown Off-Site Sources of Contamination" for use by LSRPs and Subsurface Evaluators when encountering contamination that is suspected to be unrelated to a known discharge undergoing remediation, including steps to follow when contamination is encountered on or off the site undergoing remediation as well as situations involving residential unregulated heating oil underground storage tanks. See http://www.nj.gov/dep/srp/guidance/srra/offsite_source_guidance.pdf.

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

◊ In January 2016 the NJ Superior Court Appellate Division reversed a lower court's decision to pierce the corporate veil in a Spill Act action, requiring a jury trial on the relevant factors, affirming however the denial of innocent purchaser status to another. See NJDEP v. Navillus Group (Docket No. A-0, 2016).

◊ In February 2016 NJDEP announced the availability of administrative guidance entitled "SPILL ACT LIENS AND THE PROCEDURES FOR A PROPERTY OWNER TO CONTEST A SPILL ACT LIEN" which outlines the process by which the owner of property may challenge the filing of a Spill Act lien by NJDEP against that property. See http://www.nj.gov/dep/srp/guidance/srra/spill_act_lien_guidance.pdf.

◊ In March 2016 NJDEP announced the availability of a policy statement entitled "Policy Statement: Licensed Site Remediation Professionals and Certified Subsurface Evaluators Do Not Need to Have an A-901 License When Overseeing Remediation" to clarify the situations when LSRPs and Certified Subsurface Evaluators do not need to have an A-901 license when overseeing remediation, as well as those situations when an A-901 license is required. See http://www.nj.gov/dep/srp/guidance/srra/lsrp_sse_a901_policy_statement.pdf.

◊ In March 2016 NJDEP announced the availability of an updated policy, entitled "SITE REMEDIATION & WASTE MANAGEMENT PROGRAM IMPLEMENTATION OF NOVEMBER 25, 2015 INTERIM GROUND WATER QUALITY STANDARDS", for implementing the November 25, 2015 interim ground water quality standards. Specifically, the update addresses how the Department will interpret whether the remedial investigation for a contaminated site is completed, including sites subject to the May 7, 2016 statutory deadline. See http://www.state.nj.us/dep/srp/guidance/srra/srwmp_implementing_11-25-15_interim_gwqs.pdf .

◊ In March 2016 NJDEP announced the availability of administrative guidance entitled "GUIDANCE FOR SUBMISSION OF ELECTRONIC DOCUMENTS ON COMPACT DISC OR OTHER PORTABLE MEDIA" regarding the submission of electronic documents on compact disc or other portable media. See http://www.state.nj.us/dep/srp/guidance/srra/electronic_submission_guidance.pdf.

◊ In April 2016 in accordance with N.J.A.C. 7:26C-1.6(c), the use of the Remedial Investigation NJDEP Online Service became mandatory, unless otherwise instructed by the Department. The Department will not accept Remedial Investigation Reports and supporting documentation submitted on paper. A FAQ sheet on RIs was made available later at http://www.nj.gov/dep/srp/srra/forms/remedial_investigation_report_faqs_online.pdf.

◊ In April 2016 NJDEP announced the availability of updated administrative guidance entitled "Issuance of Response Action Outcomes (RAOs)." See http://www.nj.gov/dep/srp/guidance/srra/rao_guidance.pdf.

◊ May 7, 2016 was the extended deadline, for those exercising the option, pursuant to the amendment to SRRA (P.L.2013, c.283) for certain PRCRs to complete the remedial investigation. On May 11, by a ListServ e-mail, NJDEP advised that for those sites that did not meet this statutory extension deadline, certain actions were required to be completed over the next 90 days. In NJDEP's view, pursuant to SRRA and ARRCS (N.J.A.C. 7:26C-14.2(a)), "…a site that does not meet the statutory extension deadline is immediately subject to direct oversight, and the person responsible for conducting the remediation shall comply with the direct oversight requirements at N.J.A.C. 7:26C-14.2(b). Failure to comply with direct oversight carries a penalty exposure of $25,000 per day (see N.J.A.C. 7:26C-9.5(b))." In particular NJDEP noted "… it is essential that the person comply timely with N.J.A.C. 7:26C-14.2(b)9 (submitting a public participation plan with a schedule within 30 days of missing the statutory extension deadline), N.J.A.C. 7:26C-14.2(b)4 (submitting a cost review to the Department within 60 days of missing the statutory extension deadline), and N.J.A.C. 7:26C-14.2(b)5 (establishing a remediation trust fund within 90 days of missing the statutory extension deadline). NJDEP noted that "[p]ursuant to N.J.A.C. 7:26C-14.4, the Department will consider adjustments to the requirements of N.J.A.C. 7:26C-14.2(b)." NJDEP recommended that the PRCR "contact the Bureau of Enforcement and Investigations to discuss resolving any penalty exposure or earning adjustments in direct oversight. The Department also encourages any person responsible for conducting a remediation that has outstanding violations related to direct oversight to resolve their penalty exposure by signing an Administrative Consent Order before a formal enforcement action is taken." NJDEP advised that "The Duty Officer of the Bureau of Enforcement and Investigations can be reached at (609) 633-1480."

◊ In May 2016, to assist LSRPs meet their obligations under N.J.A.C. 7:26I-6.8(b) and (c) and N.J.A.C. 7:26I-6.18(b) (to communicate with clients regarding applicable remediation timeframes, notify clients if those timeframes are unlikely to be met, and warn of the consequences of missing those timeframes, and notify NJDEP when he or she believes that applicable mandatory or expedited site-specific timeframes will likely be missed) NJDEP posted the "Licensed Site Remediation Professional (LSRP) Timeframe Communication Requirements" as an administrate guidance document. In addition NJDEP created a form to be emailed to NJDEP (srpnotifications@dep.nj.gov) entitled "Notice of Failure to Comply with a Mandatory or Expedited Site-Specific Remediation Timeframe." See http://www.nj.gov/dep/srp/guidance/srra/lsrp_timeframe_req.pdf and http://www.nj.gov/dep/srp/srra/forms/notice_to_comply_form.pdf?version_1_0.

◊ In May 2016 USEPA issued its final Lifetime Health Advisories for the compounds perflourooctanoic acid ("PFOA") and perflourooctane sulfonate ("PFOS") lowering the health advisory concentrations for these chemicals to the part per trillion level. See https://www.epa.gov/ground-water-and-drinking-water/drinking-water-health-advisories-pfoa-and-pfos. While NJDEP has been addressing these compounds with greater scrutiny since, and the Drinking Water Quality Institute has solicited public comment (see http://www.state.nj.us/dep/srp/srra/listserv_archives/2016/20160923_srra.html), NJDEP's prior website discussion has not been updated. See http://www.nj.gov/dep/watersupply/dwc_quality_pfoa.html. For certain clients having these chemicals on site, or manufacturing them, poses added risks of remedial requirements hereafter.

◊ In June 2016 SRRA fees were adjusted. See at www.nj.gov/dep/srp/fees.

◊ In June 2016 NJDEP announced that the Landfills Investigation Technical Guidance has been revised from version 1.2 to version 1.3.

◊ In June 2016 NJDEP announced the availability of new Technical Guidance entitled "Planning for and Response to Catastrophic Events at Contaminated Sites". Topics covered in the Guidance related to catastrophic events, include: factors to consider in planning for and responding to catastrophic events; incorporating resiliency into the design and implementation of site remedies; retro-fitting vulnerable sites to decrease disruption to existing systems; establishing communication networks, chain-of-command structures, and procedures to be used during catastrophic events; and how to re-assess systems and review lessons learned to better prepare for future catastrophic events. See http://www.nj.gov/dep/srp/guidance/srra/response_to_catastrophic_events.pdf.

◊ In June 2016 NJDEP advised that it is no longer issuing Child Care Facility Approval letters. NJDEP asserted that an LSRP must be hired to conduct a Preliminary Assessment, at a minimum, and issue an RAO. See the "Environmental Guidance for All Child Care Centers & Educational Facilities" at http://www.nj.gov/dep/dccrequest/.

◊ In July 2016 NJDEP announced a 30-day public comment period as to the re-evaluation of the 2009 Maximum Contaminant Level Recommendation for 1,2,3-Trichloropropane. See: http://www.nj.gov/dep/watersupply/pdf/123tcp-srcp.pdf.

◊ In August 2016 NJDEP announced the availability of revised Technical Guidance entitled "Historically Applied Pesticide Site Technical Guidance" to allow the deferral of HAP remediation at active agricultural sites and active golf courses where sampling results indicate HAP are present at levels exceeding applicable standards until the property is no longer used for agricultural purposes or as an active golf course. See http://www.nj.gov/dep/srp/guidance/srra/hap_guidance.pdf. NJDEP also made available a new HAP Deferral Request Form. http://www.nj.gov/dep/srp/srra/forms/hap_deferral_request_form.pdf?version_1_0. NJDEP treats accumulations of pesticides exceeding standards as a discharge requiring remediation.

◊ In August 2016 NJDEP announced the availability of revised VI Technical Guidance entitled "VAPOR INTRUSION TECHNICAL GUIDANCE" revised to Version 4.0. The most significant change reportedly involves a new science-based approach to handling VI investigations at petroleum contaminated sites, using vertical screening distance. The guidance is at http://www.nj.gov/dep/srp/guidance/vaporintrusion/vig_main.pdf?version_4 and other materials are at http://www.nj.gov/dep/srp/guidance/vaporintrusion/index.html.

◊ August 2016 NJDEP published its Landfill Proposal to: amend the Solid Waste rules, N.J.A.C. 7:26, Recycling Rules, N.J.A.C.7:26A, Air Pollution Control rules, N.J.A.C.7:27, and the Air Administrative Procedures and Penalties, N.J.A.C.7:27A, as they pertain to sanitary landfills, largely to codify and implement the provisions of the Legacy Landfill Law, N.J.S.A. 13:1E-125.1 et seq. See 48 N.J.R. 1526(a). NJDEP proposed to integrate that law's requirements into NJDEP's existing rules addressing closure and post-closure care and disruption of all sanitary landfills. See this Article § 3.7.3(H). While the proposal does not seem to integrate well with SRRA, or even consider the role of LSRPs, if any, the proposed amended rule does seem to require investigations, and maybe remediations, in certain circumstances. As under the existing rules, the proposed rule requires the significant participation and certification of a professional engineer. The proposal also includes a new definition of "Contaminated soil," deletes the definition of "clean fill" and amends the definition of solid waste so that processed or unprocessed mixed construction and demolition debris are solid wastes but exempts non-water-soluble, non-decomposable, inert solids, such as rock, soil, gravel, concrete, glass, clay, or ceramic products from the definition of solid waste, provided these materials do not contain contaminant concentrations exceeding the more stringent of the residential or non-residential direct contact soil remediation standards. The impacts of these proposals on site remediation are not discussed by NJDEP or understood or obvious to the regulated community, including LSRPs.

◊ In September 2016 NJDEP warned of the need to take precautions for Tropical Storm Hermine.

◊ In September 2016 NJDEP advised that the certification section of several SRRA forms have been corrected for incorrect statutory citations. Oddly, version numbers were left unchanged.

◊ In September 2016 NJDEP by ListServ e-mail clarified requirements when historic fill is encountered at a site undergoing remediation. NJDEP asserts that (i) historic fill meets the definition of a discharge within the Spill Act and requires remediation, (ii) the Brownfield and Contaminated Sites Act (N.J.S.A. 58:10B-1 et seq.) provides a rebuttable presumption that NJDEP shall not require any person to remove or treat historic fill in order to comply with applicable health risk or environmental standards in 58:10B-12h but does not alter the requirement to remediate, requiring engineering and institutional controls to prevent exposure to humans, and (iii) SRRA exempts reporting historic fill to the NJDEP Hotline (N.J.S.A. 58:10C-16k) but does not alter the requirement to remediate in compliance with N.J.A.C. 7:26C-2.3.

◊ In September 2016 NJDEP announced the availability of administrative guidance entitled "Direct Oversight Public Participation Plan Guidance" regarding the development of public participation plans required for sites that are subject to direct oversight. See http://www.nj.gov/dep/srp/guidance/srra/direct_oversight_pp_plan.pdf.

◊ In September 2016 NJDEP announced the availability of the updated Underground Storage Tank Notice of Intent to Close Online Service. The updated service will be available on October 4, 2016. Use of this online service is mandatory. See www.nj.gov/dep/srp/srra/training/sessions/online_service_cid_handout.pdf.

◊ In September 2016 NJDEP issued a compliance advisory that Perchloro-ethylene ("PERC") Dry Cleaning Equipment Located in Buildings with Residences Must Cease Operation After December 21, 2020. See http://www.nj.gov/dep/enforcement/advisories/2016-10.pdf

◊ In October 2016 the Board issued a "document" entitled "A New Jersey Property Owner's Guide to Hiring Licensed Site Remediation Professionals" intended to assist any responsible party, but especially home owners and small business owners who are responsible for conducting remediation, when hiring a LSRP, including important considerations for hiring an LSRP. See www.nj.gov/lsrpboard/board/licensure/lsrp_hiring_guide.pdf.

◊ In October 2016 the New Jersey Superior Court Appellate Division, in a condemnation case, set the amount of an escrow to be held for remedial costs of the condemning authority, from the price paid by that authority, at the cost to achieve the use for which the property was valued (in that case a residential development), even though the authority may only conduct a less expensive remediation to achieve its intended use (possibly an industrial development), likely allowing for a later release of any balance on completion. See New Jersey Transit Corp. v. Franco, Docket No. A-3802-12T4 (App. Div. 2016).

◊ In October 2016, a New Jersey trial court applied rarely applied "laches" defense to bar a private-party claim for contribution under the Spill Act. Laches is an equitable principle, imposed by courts applying such principles in furtherance of justice and equity, that a claim was improperly delayed in assertion, usually with prejudice to the defendant. The principle can prevent assertion of a claim still valid under the applicable statute of limitation. See 22 Temple Ave., Inc. v. Audino, Inc., et al., Dkt. No. BER-L-9337-14 (Law Div. 2016),

◊ In November 2016 NJDEP adopted its 2015 proposed Flood Rules. See 48 N.J.R. 1067(a). The adoption included new requirements for LSRP involvement in the investigation, clean-up, and removal of hazardous substances. See this Article § 3.4.1 below.

◊ In December 2016 the New Jersey Superior Court Appellate Division ruled that prior NFAs do not grandfather a PRCR or site against compliance with SRRA and retention of an LSRP, at least as to the obligation to comply with ISRA for a fourth new ISRA trigger. Drytech had been advised by a candidate LSRP that it might have to reinvestigate the entire site under new guidance, despite the existence of prior NFAs, and found that advice upsetting. See Drytech, Inc. v. NJDEP, Docket No. A-5619-14T4 (App Div. 2016). We note that there is no indication whether the PRCR sought to obtain relief from NJDEP under specific provisions of ISRA left in place by SRRA, but rejected by NJDEP in rule making, allowing for expedited review in such cases.

◊ In November 2016 NJDEP announced a change to its RAO template allowing LSRPs to issue an RAO for a site with contaminated sediment migrating from an off-site source. See http://www.nj.gov/dep/srp/srra/listserv_archives/2016/20161121_srra.html

◊ The Site Remediation Advisory Group met four times in 2016, discussing many items of concern to LSRPs and PRCRs. Agendas, information, handouts and presentations from these meetings, including on limited statistics on the NJDEP's Site Remediation Program, can be found at http://www.nj.gov/dep/srp/srra/stakeholder/cvp_srag/index.html. The most recently available NJDEP statistics for 2016 are included in Attachment C. Topics addressed included: Land Use Process; Remedial Action Deadlines; ◊ Data Miner; Guidance Documents; Public Participation Plans; Remedial Investigation Reports and Direct Oversight Stats; Sustainable Remediation Panel Presentation; NJ Environmental Infrastructure Trust Financing Program; NJ Economic Development Authority's Grow NJ and ERG ; NJ Department of Transportation's Funding Programs for Local Infrastructure Improvements; Somerville Green Seam Brownfield Development Area (BDA); Update on A-901 licensing; LSRP Roles and Responsibilities Panel Discussion: SRPL Board Rules; Implementing November 25, 2015 Interim Ground Water Quality Standards; and HSDRF.

Attachment C:
NJDEP Metrics (11/2017)

Total Number of Active Cases in SRP	**14,274**
Total Number of Active LSRP Cases in SRP	**11,344**
Total Number of Active Other Cases in SRP	**695**
Total Number of Active UHOT Cases in SRP	**824**
Total Number of Active Publicly Funded Cases in SRP	**818**
Total Number of Active Unknown Source Cases in SRP	**266**
Total Number of Active Traditional Oversight Cases in SRP	**327**
Total Number of Active LSRP Cases with LSRP Retained	**9,283**

	November 2017	**Total**
Total Number of Licensed Site Remediation Professionals	**0**	**688**
Number of LSRPs submitting Documents (includes Temp. LSRPs)	**221**	**681**

Total Number of Cases Initiated in SRP	**353**	**N/A**
Total Number of LSRP Cases Initiated	**75**	**19,023**
Total Number of Other Cases Initiated	**3**	**N/A**
Total Number of UHOT Cases Initiated	**275**	**52,770**

Total Number of Cases in SRP Closed	**359**	**N/A**
Total Number of LSRP Cases Closed	**43**	**6,769**
Total Number of Other Cases Closed	**1**	**N/A**
Total Number of UHOT Cases Closed	**315**	**51,744**

Total Number of RIR Documents	**87**	**7,702**

Total Number of RAO Documents	**118**	**10,917**
Average Number of Days to Submit RAO Documents	**1,245.19**	**709.21**

Number of RAOs Withdrawn by LSRP	**4**	**350**

Documents with DEP Administrative Check, Inspection and Review in Progress	**535**	**4,962**
Documents with DEP Administrative Check, Inspection and Review Completed	**900**	**40,266**
Number of RAOs where DEP Inspection and Review Completed	**136**	**8,821**
Number Of Documents awaiting LSRP response	**20**	**4,618**
Number Of RAOs Invalidated	**0**	**12**

Average Number of Days for LSRP Submission to be Administratively Complete	**6.96**	**20.30**
Average Number of Days for DEP to Inspect LSRP Submission	**160.14**	**104.89**
Average Number of Days for DEP to Review LSRP Submission	**149.52**	**42.03**
DEP Total Process Time	**182.71**	**126.58**

Total Number of Active RAP	**2,972**
Total Number of Active Ground Water RAP	**1,183**
Total Number of Active Soil RAP	**1,789**

Ground Water	**November 2017**	**Total**
Total Number RAP Applications Received	**23**	**2,219**
Total Number RAP Issued	**36**	**1,758**
Number of Permit Applications awaiting LSRP Response	**15**	**74**

Soil		
Total Number RAP Applications Received	**19**	**2,449**
Total Number RAP Issued	**15**	**2,158**
Number of Permit App. awaiting LSRP Response	**12**	**197**

General		
Average Days for App. to be Administratively Complete	**75.95**	**40.93**
Average Days for App. to be Technically Complete	**234.81**	**120.90**
Average Days for DEP Total Process Time	**173.65**	**108.76**
Average Days for Permits to be Issued	**200.54**	**154.26**

Total Number RAP Documents - Withdrawn	**3**	**262**
Total Number RAP Documents - Rejected/Incomplete	**0**	**5**