First Impressions: the Site Remediation Reform Act *(v. 4/25/09)*

Richard J. Conway, Jr.
Schenck, Price, Smith & King, LLP
Morristown, NJ
973-540-7328 rjc@spsk.com

{Note: an earlier version of this was published for the Business Law Symposium, Woodbridge NJ, April 2009}

I. Introduction:

There is a major change in remediation occurring in New Jersey. Passage of Senate bill S.1897 (a/k/a Assembly bill A.2962), enacting the "Site Remediation Reform Act" ("SRRA"), has been pursued by the New Jersey Department of Environmental Protection ("DEP") for a couple of years. A.2962/S.1897 passed the Assembly and Senate on March 16, 2009. It was expected to be signed shortly by the Governor; the delay in his doing so suggests opposition and reservations, likely from state employee unions and environmental groups. DEP's Commissioner recently stated he still expects the Governor to sign. When signed, implementation by DEP should follow quickly. The current version (the Senate Committee substitute) is available on the DEP website (http://www.state.nj.us/dep/srp/stakeholders/s1897scs.pdf).

The full effect of the bill will not be known for some time- perhaps as long as four to five years from now. But the SRRA is intended to quickly provide relief to DEP and the regulated community from the growing backlog of cases and delays in remediation so dominant at New Jersey contaminated sites in the last two years or more. It does so by licensing licensed site remediation professionals ("LSRPs"), generally to supervise remediations on their own with reduced DEP oversight, and somewhat in DEP's place, subject to some degree of after-the-fact DEP inspection, review, and audit (and possibly substantial second-guessing). Oversight of LSRPs will be provided by a new professional Board. At the same time SRRA changes some of the key existing rules for remediation and environmental liability. SRRA affects existing and future remediations, industrial establishments and other businesses and existing and future contract terms and obligations. It also empowers DEP to take more oversight, and to a degree control, of remediations at a number of sites than before (arguably only of the worst sites in DEP eyes). How DEP in fact will act, indeed how LSRPs and remediating parties will act under and by reason of SRRA, and how these changes will affect existing and future remediations and sites, is a bit of a guess at these early stages (a bit like predicting in September 1983 what changes the then novel Environmental Cleanup Responsibility Act would cause). While modeled on a similar Massachusetts licensing system, there are differences. Future New Jersey guidance and experience is almost certain to differ, perhaps dramatically. The process is not optional for non-residential parties: LSRP involvement eventually (in three years) will be required in all but a few sites. And in some cases, DEP powers have been expanded to allow DEP itself to pick the remedy for the site based on a feasibility study conducted by a LSRP.

Many existing sites have open remedial cases before DEP and will be affected by SRRA. Other sites will institute new cases, whether from spills or leaking tanks, hereafter that will be governed by SRRA. The following review provides a simple general review. For the sake of brevity, some provisions are paraphrased. At the end we attempt to answer some questions we have been asked. Approach use of this outline with caution; it is not legal advice to anyone. Every client's final approach should be based on review of its own facts and the specifics of the new law and after careful reflection. Some error is likely; perfection impossible. It should be fun; try to enjoy the new future (again).

II. Most Notable Changes:

● **2.1 LSRPs.** A new person, the "LSRP" (licensed site remediation professional), is given a pivotal role in NJ remediation, beginning about six months from now. A new licensing process is created, applications will be made, tests taken and some (not all) consultants will become LSRPs. Once that happens, DEP's role changes. A professional board also is formed to oversee LSRPs. LSRPs are people not firms. Persons responsible for remediation ("PRCRs") will need to use care in selecting and using LSRPs. Contracts will have to be revised. Consultants who are not LSRPs will have to ally themselves with an LSRP. Eventually some LSRPs will get in trouble with DEP and the Board.

● **2.2 LSRP Role.** In some senses LSRPs take the place of DEP. Work proposed and approved by a LSRP will be reported to DEP but should proceed without prior DEP approval in most cases. The LSRP's highest priority is to protect public health and safety and the environment; it is not to bill efficiently or do as clients ask. LSRPs must do a professional job and follow DEP rules and guidance. LSRPs have disclosure obligations: to clients; regarding work defects and deviations; re immediate environmental concern sites; re discharges; re other LSRPs; and even regarding retention and dismissal. While confidentiality is to be preserved these duties mean attorney-client privilege may suffer. Indeed, a conflict between a PRCR and an LSRP could have serious consequences for both.

● **2.3 DEP/Board Role for LSRPs.** The immediate focus is to gear up for the LSRP program. There need to be new rules and guidance for licensing, quick processing of applications for temporary licenses, and changes to existing rules to allow LSRPs to do their job. The board has to be appointed and take over the permanent licensing process. DEP inspects all LSRP submissions; presumably not all inspections are equal. Additional review is required in certain instances (for example if the site is ranked among the highest in priority). At least 10% of LSRP submissions are audited annually as will be 10% of all LSRPs. DEP has three years to audit a final LSRP result action outcome ("RAO") for a site. DEP shall invalidate a RAO if it is not protective.

● **2.4 DEP/Board Role for PRCRs.** PRCRs are affected by how their LSRPs fare in audits and reviews. If an LSRP is investigated all RAOs of that LSRP can be examined, even past the 3 year limit. But other program changes may be more important than the license program. DEP has the right to set presumptive remedies and time periods for remediation. If remediation moves too slowly, or a site or PRCR meets (or fails) certain criteria (if a site is bad or important to DEP), DEP can exercise direct oversight of a site, obtaining simultaneous review of LSRP deliverables, requiring the PRCR and LSRP to act as DEP specifies and requiring the PRCR to post cash for remediation. DEP also will be setting up a permit program for engineering and institutional controls. And it will be publishing a revised remedial priority ranking system.

● **2.5 DEP Roles for All.** DEP has the right to investigate, enter sites, and inspect and copy documents pertinent to LSRPs. DEP has the right to punish violations. These rights are not limited to PRCRs or LSRPs or even remediated sites. DEP has many rules and guidance to issue; its initial effort is effective automatically without public comment or review. DEP may choose to act more by guidance than rules hereafter. Website and electronic guidance and submissions may become more important.

● **2.6 Accelerated At Risk Work.** After a three year transition period for existing cases, and immediately in all new cases, PRCRs must be prepared to act without DEP approvals or oversight, relying on an LSRP; they may be able to do so voluntarily now. This should accelerate remediation, or at least investigation, likely at some increased cost. In most cases, PRCRs hereafter have a clear obligation to initiate and pursue remediation; they cannot legally sit back and wait for DEP directives at least if there have been discharges. As DEP still has the right to review and audit LSRP submissions, there will be increased risk to PRCRs that on review DEP may think differently and/or require more than the LSRP

does. How DEP will actually act, and how courts and PRCRs and LSRPs will react to DEP review and demands, will have to be observed and assessed. If a PRCR takes too long, DEP can and will assert a right of direct oversight; for now there may be a 5 year period for many existing sites to finish their remedial investigation (which may be easier said than done at complex sites).

● **2.7 ISRA changes.** The basic structure of ISRA remains the same. Industrial establishments still have to comply when triggering events occur. But LSRPs are now part of the process. Indeed, a remediation certification involving the LSRP replaces the need for a remediation agreement signed by DEP and the PRCR to close a sale. Letters of credit ("LCs") are again acceptable funding sources. But future no further action letters ("NFAs"), when available, may not contain covenants not to sue (while RAOs are deemed to have them). Existing cases likely continue as before, if DEP can apply its scarce resources to them, and transition into the land of LSRPs 3 years hereafter.

● **2.8 Site Usage.** A year after the SRRA DEP shall require the use of an unrestricted use remedial action, or a DEP established presumptive remedy or alternative remedy, where new construction or a change in use is proposed for residential purposes, for a child care center, or as a school, or another purpose that involves use by a sensitive population. DEP may disapprove a remedy which will render property unusable for redevelopment or recreational use. 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. DEP may require the treatment or removal of contamination that would pose an acute health or safety hazard in the event of failure of an engineering control. The role of LSRPs in such decisions is unclear.

● **2.9 Innocent Purchasers/Spill Act.** The basic structure and approach remain the same. Buyers can obtain protection from any FRD, not just NFAs, and can follow steps to be protected by post-purchase remediation. Contribution protection is changed to account for FRDs. The statute of limitation for natural resource damage claims has been extended to run from completion of remediation.

● **2.10 Key Terms Have Changed; Contracts must change.** Existing and future contracts will need revisions to address these new processes and terms. The role of LSRPs must be addressed. NFAs may be around for a while, but eventually RAOs will be the goal of remediations and new contracts will call for FRDs. Remediation agreements will not be sought to close sales under ISRA; instead remediation certifications will be filed. Buyers may insist on more oversight and participation of Seller LSRPs in the fear that DEP will provide less. LCs have returned as acceptable remediation funding sources. At some sites (where DEP takes oversight), there is a new requirement for a "FS" (feasibility study) from which DEP selects the remedy, likely over the objection of PRCR and possibly others (such as current owners). There may be problems translating older contract language into the new processes and terms.

III. Key Details:

● **3.1 The Definitions:**

■ 3.1.1 The Law: "Site Remediation Reform Act" (or "SRRA" herein) (S.1897 §1)

■ 3.1.2 Effective Dates: Sections 1 through 32 and Section 50 of the act shall take effect immediately, and the remainder of this act shall take effect 180 days after the date of enactment. (A.2962/S.1897 §50).

■ 3.1.3 Acronyms or terms (herein)

◊ child care center = a center licensed pursuant to N.J.S.A. 30:5B-1 et seq.

◊ CRYING = (1) what many will be doing hereafter; (2) what will occur if DEP audits an LSRP or an RAO and reopens the case.

◊ DEP = the New Jersey Department of Environmental Protection.

◊ DHSS = The New Jersey Department of Health and Senior Services.

◊ EC = engineering control.

◊ FRD = final remediation document; an RAO or NFA Letter.

◊ FS = feasibility study.

◊ HAZWOPER = Hazardous Waste Operations and Emergency Response; usually cited in connection with OSHA training requirements under 29 C.F.R. § 1910.120.

◊ HDSRF = Hazardous Discharge Site Remediation Fund.

◊ IC = institutional control.

◊ IEC = immediate environmental concern.

◊ ISRA = Industrial Site Recovery Act, N.J.S.A. 13:1k-6 et seq.

◊ Law(s) = all applicable statutes and regulations.

◊ LC = letter of credit

◊ NFA = no further action.

◊ PRCR = person responsible for conducting the remediation.

○ Note: this may or may not be the LSRP client (an undefined term; first used in A.2962/S.1897 §15.k.).

○ Note: that this may or may not be the actual discharger.

◊ RAO = response action outcome.

◊ RFS = remediation funding source.

◊ RPS = ranking system of and by DEP for prioritizing 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.

◊ SRRA = Site Remediation Reform Act (A.2962/S.1897 §1-29), N.J.S.A. _____

◊ UHOT = unregulated home heating oil tank.

◊ USEPA = United States Environmental Protection Agency.

◊ UST = underground storage tank.

■ 3.1.4 New SRRA Definitions:

◊ "Board" = Site Remediation Professional Licensing Board. (A.2962/S.1897 §2).

◊ "Feasibility Study" (or "FS" herein) = a study to develop and evaluate remedial options and create a list of those feasible. (A.2962/S.1897 §2).

◊ "Final remediation document" (or "FRD" herein) = a NFA letter issued by DEP under N.J.S.A. 58:10B-1 et seq., or a RAO issued by a LSRP. (A.2962/S.1897 §35; N.J.S.A. 58:10-23.11b.).

○ Note: New contracts will likely draft provisions addressing as adequate receipt of any FRD, even though as soon as licenses are given for LSRPs, DEP is inhibited from issuing covenants not to sue and thereafter RAOs may become the standard. See A.2962/S.1897 §49; N.J.S.A.58:10B-13.1f.

◊ "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. (A.2962/S.1897 §2).

○ Note: the existence of contamination in a potable well appears to be deemed an IEC without regard to the actual use or treatment of water from that well. This may not be rational, because absent exposure there can be no real immediate concern. But it is what DEP intends. However, as a basis for denying a PRCR control of remediation this may be subject to challenge.

◊ "Licensed Site Remediation Professional" (or "LSRP" herein; sometimes "LSP" by others) = an individual licensed by the Board under §7 of A.2962/S.1897 (a permanent license) or DEP under §12 of A.2962/S.1897 (a temporary or interim license). (A.2962/S.1897 §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. (A.2962/S.1897 §2).

○ Note: Is an innocent owner remediating a mere area of concern at a site, and not the whole site, a PRCR? Arguably not. But an innocent owner might be taking more risk than it is worth by doing so without compliance.

○ Note: Is a contractor removing dirt for construction purposes and then disposing of it or recycling it as contaminated and not clean materials a PRCR? Arguably not.

○ Note: This definition provides some support for the view that the legislature anticipates ongoing validity of memoranda of agreement ("MOAs). N.J.A.C. 7:26C.

◊ "Response action outcome" (or "RAO" herein) = a written determination by a LSRP that the contaminated site was remediated in accordance with all applicable Law(s), and based upon an evaluation of the historical use of the site, or of any area of concern at that site, and any other investigation or action the DEP deems necessary, 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.. (A.2962/S.1897 §2)

○ Note: Making a proper determination may require resolution of potentially complex legal issues. Is an LSRP licensed to resolve such issues? Likely not as the practice of law is not regulated by the legislature. However, the LSRP will have to do what it needs to do. If it does so on its own, without reliance on its own or the PRCR's counsel, in reaching opinions about such legal issues, the LSRP may obtain more liability than before for giving improper legal advice. Consider how many consultants still stubbornly propose mere ASTM Phase I's instead of true preliminary assessments to clients seeking innocent purchaser status under the Spill Act. Certainly a LSRP doing so will not be able to claim ignorance of the law, assuming he or she could before.

○ Note: This definition (and others noted elsewhere) focuses on investigations (or other requirements) deemed necessary by DEP: does this mean the LSRP cannot form his or her own judgment? Does it mean the LSRP has to consult with DEP in each such case? Does it mean DEP is the ultimate arbiter despite its published guidance, past practices, or LSRP experience and judgment? Or does it mean DEP can exercise this right only by providing comprehensive guidance so the LSRP can perform without waiting for DEP review? Likely the last. It seems counterproductive to achieving SRRA purposes to suggest that DEP either must become, or has the right to become, involved in the first instance in making decisions about such remediations. Elsewhere it is observed that DEP is to provide rules, criteria, guidance and standards for LSRPs and PRCRs, no longer merely specify minimum criteria. If DEP wants to require more investigation in certain cases, for specific reasons, it can clearly do so by providing additional guidance for the LSRP to use. And if it elects not to do so, I would argue DEP is breaching this requirement and can't perform case by case review and substitute its judgment in preference to the LSRPs (at least absent real threats). See similar discussions below.

◊ “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. (A.2962/S.1897 §2).

○ Note: This definition is used to provide relief from the need to provide a funding source for the operation, maintenance, and inspection of ECs. (A.2962/S.1897 §19.c.(2)).

◊ “Temporary License” = a LSRP license issued by DEP. (A.2962/S.1897 §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. (A.2962/S.1897 §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”).

● 3.2 Temporary License Program:

■ 3.2.1 DEP has 90 days after enactment to establish a temporary LSRP license program. DEP shall issue temporary licenses to those who meet certain minimum requirements. (A.2962/S.1897 §12). The guidelines must be published in the NJ Register but are effective upon publication. (A.2962/S.1897 §13).

◊ Standards for education, training and experience (A.2962/S.1897 §13.b)

○ The LSRP must show the same academic credentials as for a permanent license. See below.

○ The LSRP must have 10 years (more than the 8 required for a permanent license) of full time professional experience in site remediation (5 in NJ; 3 in NJ immediately prior to application) (A.2962/S.1897 §13.b.(2)). This means experience requiring application of scientific or engineering principles to site remediation where conclusions form the basis for reports or studies. DEP can consider work activities, field of practice, duration of employment and work products. DEP can allow credits for advanced degrees. (A.2962/S.1897 §13.c.).

- Note: This implies some subjectivity in licensing by DEP.

- Note: While we all need to await guidance and experience with application forms and processes to be sure, it seems somewhat unlikely now that DEP will deny a temporary license to any applicant who meets specified objective criteria, even if DEP has had some bad experiences with, or dislikes, a particular applicant and/or his or her work product or clients. To do so would likely result in litigation and challenge, consuming scarce DEP resources and perhaps early on threatening the success of the program. However, any potential applicant concerned with how to avoid issues with DEP in licensure, should consult with counsel in advance of application.

- Note: It also seems unlikely DEP will review and approve or reject applications one at a time. More likely it will process groups, perhaps all received by particular date(s) at one time.

- Note: It is unknown how many applications there will be. Certainly hundreds; possibly thousands.

○ The LSRP must have OSHA HAZWOPER training not more than one year before application. (A.2962/S.1897 §13.b.(3). The LSRP must have taken the DEP course on technical requirements for remediation not more than 3 years before application. (A.2962/S.1897 §13.b.(4).

○ The LSRP must have no conviction for environmental or other relevant crime (fraud). (A.2962/S.1897 §13.b.(5)). The LSRP must have no revocation of any professional license in prior 10 years (A.2962/S.1897 §13.b.(6)).

◊ DEP sets application forms and fees (including annual). (A.2962/S.1897 §12.b.).

◊ DEP can issue temporary licenses for UST remediation only and substitute professional experience for academic degrees if there are at least 14 years of experience with 5 in NJ immediately prior to application. (A.2962/S.1897 §12.d.).

■ 3.1.2 Temporary licenses may issue for up to 3 years. They are issued to and for individuals, not entities. They are not transferable. (A.2962/S.1897 §12.c.) They may be issued by publication on website. (A.2962/S.1897 §12.e.).

■ 3.1.3 DEP shall adopt, after notice, interim rules and regulations establishing a program that provides for the responsibilities of LSRPs in the remediation of contaminated sites pursuant to A.2962/S.1897. The interim rules and regulations shall be effective immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed 18 months. The regulated community cannot comment on these interim rules and regulations. (A.2962/S.1897 § 29).

◊ Note: Undoubtedly there will be issues with these interim rules. It is to be hoped, however, that there are no serious flaws, or many flaws, as may occur if no input is sought from the regulated community, because extensive or major flaws could well result in a speedy challenge, which could well threaten the implementation of the program. Of course, this is not the first program to regulate professionals in NJ and the experiences with other such programs, whether regulating PEs or MDs or Lawyers or others, should provide guidance to enable DEP to avoid major mistakes.

● **3.3 The Board:**

■ 3.3.1 The Site Remediation Professional Licensing Board ("Board") will consist of 13 members: the DEP Commissioner, the State Geologist, 6 LSRPs, 3 environmental group representatives (1 of whom must be a 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. (A.2962/S.1897 §3.b.)

◊ Note: As a result, the Board cannot be instituted immediately (no one has a license). It also is possible political issues may delay appointment and function of the Board. But such problems will not delay the temporary program.

■ 3.3.2 The Board is in DEP but not of it. It will be supported by DEP staff. (A.2962/S.1897 §3.a. & e.). A majority of the Board is a quorum; an absolute majority of the Board is required to act. (A.2962/S.1897 §4).

■ 3.3.3 The Board has various powers and responsibilities with respect to LSRPs. These include: reviewing, granting and denying 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 complaints, suspicions and revocations. (A.2962/S.1897 §5). It also investigates complaints, imposes discipline, and can suspend or revoke licenses (A.2962/S.1897 §8). The Board has 18 months after enactment to propose and adopt rules and regulations. These must ensure that LSRP RAOs are consistent with Law(s) concerning remediation and protect public health and safety and the environment. (A.2962/S.1897 §6).

◊ Note: The Board should be able to meet the expected timeline if it is quickly formed (say within 6-8 months). Further delay in its formation could delay the permanent program. The Board should have a running start because DEP is already working on Board related tasks.

◊ Note: It seems somewhat more likely that the Board may deny a permanent license to an applicant, potentially for subjective reasons, than that DEP would deny a temporary license. Any denial for subjective reasons, particularly of existing practitioners with a lot to lose, can easily result

in litigation and challenge. Any applicant concerned with how to avoid issues with DEP or the Board on licensure, particularly for a known or suspected problem, should consult with counsel in advance of application.

◊ Note: Presumably the Board can get involved in problems with temporarily licensed LSRPs. For example, likely it can investigate alleged misconduct.

■ 3.3.4 The LSRP licensing program must have certain features:

◊ 3.3.4(A) Standards for education, training and experience. (A.2962/S.1897 §7.b).

○ The LSRP must have a bachelors degree or higher in "natural, chemical or physical science, or engineering degree in a discipline related to site remediation", or a temporary license to remediate USTs. (A.2962/S.1897 §7.d.(1)). A holder of a temporary license for UST work can take the LSRP exam even without these academic credentials. (A.2962/S.1897 §7.f.).

○ The LSRP must have 8 years of full time professional experience in site remediation (5 in NJ; 3 in NJ immediately prior to application). (A.2962/S.1897 §7.d.(2)). This means experience requiring application of scientific or engineering principles to site remediation where conclusions form the basis for reports or studies. The Board can consider work activities, field of practice, duration of employment and work products. The Board can allow credits for advanced degrees. (A.2962/S.1897 §7.e. and 13.c.).

○ The LSRP must have a minimum of 5,000 hours of relevant NJ professional experience in 5 years before application sufficient that applicant is competent to issue a RAO. (A.2962/S.1897 §7.d.(3))

○ The LSRP must have OSHA HAZWOPER training not more than one year before application. (A.2962/S.1897 §7.d.(4). The LSRP must have taken the DEP course on technical requirements for remediation not more than 3 years before application. (A.2962/S.1897 §7.d.(5).

○ The LSRP must have no conviction for environmental or other relevant crime (such as fraud). (A.2962/S.1897 §7.d.(6)). The LSRP must have no revocation of any professional license in prior 10 years (A.2962/S.1897 §7.d.(7)).

◊ 3.3.4(B) Exams are required (A.2962/S.1897 §7.b.).

○ Note: It remains to be seen how difficult these exams will be. Exams for lawyer candidates to be admitted have sometimes had fail rates over 50%. (Disturbing, yes?)

◊ 3.3.4(C) Standards for professional conduct will be developed. (A.2962/S.1897 §7.b.).

◊ 3.3.4(D) References are required. (A.2962/S.1897 §7.b.).

◊ 3.3.4(E) The Board sets application forms and fees (including annual). (A.2962/S.1897 §7.b.).

■ 3.3.5 Permanent licenses are for 3 years. They are for individuals, not entities. They are not transferable. (A.2962/S.1897 §10). An LSRP must seek to renew at least 90 days and no more than 120 days before expiration of his or her license. (A.2962/S.1897 §9). No one can say they are a LSRP without a license. (A.2962/S.1897 §11).

■ 3.3.6 Enforcement.

◊ 3.3.6(A) When the Board, on the basis of available information, finds a person violated the SRRA, or knowingly has made any false statement, representation, or certification in any documents or information required to be submitted to the Board or DEP, the Board can act on any or all of the following (A.2962/S.1897 §17.a.(1)):

○ It can suspend or revoke a LSRP license or otherwise penalize the LSRP under SRRA §17.b. The Board may not suspend or revoke a license or impose another penalty until a violator has been notified by certified mail or personal service. The notice shall: (a) identify the basis at Law(s); (b) identify the specific act or omission; (c) identify the threatened license effect,

or the penalty to be imposed; and (d) affirm the right to a hearing and the procedures for requesting a hearing. A violator shall have 35 days from receipt of the notice within which to request a hearing. Upon the Board determination that a LSRP's misconduct is so egregious as to pose an imminent threat to public health, safety, or the environment if the LSRP is allowed to conduct remediation pending a hearing, the Board may suspend the license prior to the outcome of the hearing. Any Board order shall provide for the licensee's obligations regarding the maintenance and preservation of records. (Note: Similar rules apply to other enforcement options).

- A LSRP may not apply for a new license for three years following revocation or for the term established by the board (A.2962/S.1897 §8.b.). (A.2962/S.1897 §17.g.). Upon the second revocation of a license, a LSRP shall be permanently prohibited from applying for a site remediation professional license in this State. (A.2962/S.1897 §17.h.).

○ It can sue under SRRA §17.c for appropriate relief, including an injunction and/or costs of investigation and/or litigation.

○ It can issue an order under SRRA §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 SRRA §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 (C.2A:58-10 et seq.).

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

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

○ It can ask the attorney general to bring a criminal action under SRRA §17.a.(2) (which provides that a 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 do not appear to be limited to merely LSRPs. The Board can act against persons who violate SRRA (which includes entities and DEP personnel). This should deter the actions of unlicensed consultants, PRCRs, clients and others to act in violation of the SRRA.

○ Note: Any person faced with a Board, DEP or Attorney General investigation or enforcement should consult with counsel at the earliest possible moment.

◊ 3.3.6(B) The Board and DEP can enter, at reasonable times and manner, any known or suspected site or location for the purpose of investigating, sampling, inspecting, or copying any records, condition, equipment, practice, or property relating SRRA activities. They shall seek a warrant upon denial of permission to enter. If they do not wish to provide prior notice to the inspection or entry, a court may issue a warrant upon a showing that the entry is necessary to verify compliance with SRRA. (A.2962/S.1897 §18.a.). Where necessary to ascertain facts relevant to, or not available at, a location, any person shall, upon request of any officer, employee, or duly authorized

representative of the Board or DEP, furnish information relating to A.2962/S.1897 activities, and permit access to, and to copy, all records relating to same. (A.2962/S.1897 §18.b.).

○ Note: It is not clear what kind of site or location the Board can enter. In general the government can not enter any place it wants without just cause or a regulatory basis that itself is justifiable. Could the Board enter an LSRP's home? The LSRP's accountant's office? The LSRP's doctor's office? The LSRP's lawyer's office? The PRCR's corporate headquarters? The PRCR's lawyer's office? The restaurant where the lawyers all met to discuss the site? Realistically, what will the most likely targets be? (sites or locations of PRCRs, LSRPs, contamination, or relevant records or operations subject to regulation).

○ Note: Do these powers permit the Board to enter a law firm and inspect records of actual or suspected LSRP or non-LSRP or PRCR or attorney: actions; drafts; reports on site conditions, projects or plans; research; memos; bills; meeting or call notes; e-mails; contracts; or other matters, even if privileged? One would hope that the Board would seek to do so only rarely, if ever. But if ever the Board does so, one would expect a law firm to resist such efforts vigorously and at least force a court to consider claims of privilege before turning over privileged information. Are lawyer's clients entitled to less? Don't lawyers have separate ethical and professional duties? Is not the practice of law constitutionally regulated by the Supreme Court and not the legislature (or DEP)? Still, one day it will happen.

◊ 3.3.6(C) If the Board or DEP believes that any person has made fraudulent representations to them, or has destroyed or concealed evidence relating to SRRA, they may seize any records, equipment, property, or other evidence associated with these. (A.2962/S.1897 §18.c.).

○ Note: Similar issues arise.

◊ 3.3.6(D) If the Board finds a violation it may issue to a person causing or contributing (or likely to contribute) to the violation an order requiring the production or analysis of samples, records, or imposing such restraints on or requiring such action. The Board shall cause notice of each order, and of the results of proceedings, to be given to the DEP in order to enable DEP to implement any Law(s). (A.2962/S.1897 §18.d.).

■ 3.3.7 The Board shall audit annually the submissions and conduct of at least 10 percent of the total number of LSRPs. A LSRP and PRCR shall cooperate with the Board in any audit and shall provide any information requested for an audit. (A.2962/S.1897 § 24.).

◊ Note: If there eventually are 1,500 LSRPs this would mean that 150 of them would be audited each year. The extent of each audit is yet to be established. It seems likely there will be different levels of audit. Perhaps guidance will allow for future predictions; experience certainly will. This audit provision does not require audits of 10% of all submissions of all LSRPs.

◊ Note: It is to be expected that there will be a new LSRP association, one of whose roles will be to share information of this kind.

◊ Note: It is unlikely that Board members themselves will conduct these audits. It will almost certainly be DEP personnel staffing the Board who will perform these audits. However, the staff will then likely report their findings and make recommendations to the Board, who will be free to review the findings and recommendations and make their own findings.

◊ Note: The consequence of a poor audit result could be quite serious for the LSRP and its clients, particularly clients affected by deficient work identified in an audit. Clearly LSRPs should be careful in their record keeping to ensure that any such audit, including the most extensive imaginable, can be managed effectively and efficiently. This means more than merely following express Board guidance, rules and regulations. It means being careful and protective of the LSRP's and PRCR's interests. LSRPs may want to consult with counsel about some of these issues in advance of, and during, any audit. Existing record retention and other policies need to be reconsidered.

■ 3.3.8 DEP may recommend to the Board that an investigation of a LSRP be conducted based upon the result of an audit or a document review. (A.2962/S.1897 § 23.)

● 3.4 LSRP Role & Responsibilities:

■ 3.4.1 LSRPs must be used for remediation, at least in some cases in some periods (notably if remediation is initiated at least 180 days after enactment), and eventually for essentially all nonresidential sites (three years after enactment). (A.2962/S.1897, §30). The LSRP shall certify as part of its preparation and submission of reports to DEP that "the work was performed, … [the LSRP] managed, supervised, or performed the work that is the basis of the submission, and the work and submitted documents are consistent with all applicable remediation requirements adopted by… [DEP]." (A.2962/S.1897 §14.a.). The LSRP also shall certify electronic submissions and attest that "no other person is authorized or able to use any password, encryption method or electronic signature provided to…" the LSRP by the Board or DEP. (A.2962/S.1897 §14.b.).

◊ When required to use an LSRP, the PRCR also shall certify all documents submitted to DEP (A.2962/S.1897 §14.a.)

○ Note: This section does not specify what the PRCR must certify. Presumably DEP rules will require a similar certification as now required under N.J.A.C. § 7:26C-1.2 (essentially that the submission is true, accurate and complete).

◊ Note: Is it clear, as used here, when a PRCR initiates remediation at a site and therefore is obligated to use a LSRP? The definition of remediation 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…." It seems unlikely that the legislature meant that initiation of any step of remediation after enactment requires use of an LSRP, and more likely that if any step of remediation was initiated before enactment, the use of an LSRP is optional until three years passes or other conditions exist. And 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? Construction in areas of historic fill? Work in areas affected by migration of offsite contaminants onto a site? Work by banks? Work by easement holders? Work by government bodies? Pre-purchase investigations?

■ 3.4.2 In providing remediation services:

◊ 3.4.2(A) A LSRP shall make decisions to meet: health risk and environmental standards under N.J.S.A. 58:10B-12, DEP remediation standards, and DHSS indoor air standards under N.J.S.A. 52:27D-130.4 as applicable, and other standards under law. (A.2962/S.1897 §14.c.(1)). Indeed, a LSRP's "highest priority shall be the protection of public health and safety and the environment." (A.2962/S.1897 § 16.a.).

○ Note that this statement of the LSRP's highest priority may become the critical guideline for future behavior of LSRPs, PRCRs and their advisors, and changing past behaviors of consultants and PRCRs. In particular it negates the use of many previously significant factors to consultants and others as the highest priorities for remediation, at least for LSRPs. Consider how important the LSRP should rate the following, in the event of a conflict with the new stated priority: attorney-client or other privileges; trade secret, contractual or other confidentiality; prices, rates, estimates, projections, budgets, or profit; vacations, holidays, weekends, timing or schedules; quality or uncertainty of or in data, processes or results; contract terms or conditions; client review, instructions or approvals; potential bankruptcy?

Note that this duty may be matched by similar duties imposed on other licensed professionals, such as professional engineers ("PE"). A PE, for example, likely cannot rely on compliance with applicable building codes 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.

However, there is no similar statutory or regulatory statement of a PE's highest priority in N.J.S.A. 45:1-1 et seq. or N.J.S.A. 45:8-1 et seq. The closest analog is that it is misconduct for a PE to "Disregard… 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) A LSRP shall meet DEP requirements:

○ These include technical standards for remediation; mandatory timeframes and expedited site specific timeframes under S1897 § 28; and presumptive remedies. (A.2962/S.1897 §14.c.(2)).

- Note: It is unclear how the LSRP is responsible 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 behaviors and resources may be determinative of the approach and the results. A LSRP cannot force the PRCR to act; a LSRP should not be seen as an insurer or guarantor of process or result, or even compliance, except for hid or her own actions (and those supervised). Presumably a LSRP is responsible to act so as to recommend approaches that achieve the required results, and undertake his or her own efforts so as to improve the probabilities of success in doing so. But presumably a 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?) And if the client is, by its decisions, preventing a LSRP from satisfying one or more of these obligations, does the LSRP have to resign, as lawyers sometimes must? Conversely are their circumstances when he or she can not resign, as lawyers sometimes cannot? And if a LSRP has ceased work for a PRCR because of such concerns, thereafter can a new LSRP safely accept the position of working on that site when DEP requirements may not, or can not, be able to be met? Presumably future rules or regulations, statutory amendment, interpretations or guidance, or actual practice, will clarify these and other issues. But in the interim, should DEP and the Board recognize that it would be undesirable to induce LSRPs to refuse to work, for example, for PRCRs with problems, such as those in such financial difficulty that achievement of required timeframes is in doubt (as might occur if a LSRP elect to protect their license and pocketbook rather than undertake risk and help achieve some goals of remediation, even if not all). Of course, one possibility is to deal with such issues directly with DEP, if possible, seeking such assurances as may be available against actual or perceived risks to the LSRP.

○ These also include DEP issued available and appropriate technical guidance. Some guidance exists now and more is likely. SRRA provides that DEP is to allow interested parties the opportunity to participate in development and review of such guidance. (A.2962/S.1897 §14.c.(3)).

- Note: How will this occur? What kind of participation is required? How much time will it take? Will it be possible to challenge such guidance in court? It seems unlikely that DEP will be statutorily compelled to proceed as if such guidance was a proposal to adopt rules and regulations. Therefore, the degree of participation, input and the right to challenge may be less meaningful than would be the case if the guidance was adopted by rule. Contrary arguments can be made.

◊ 3.4.2(C) A LSRP shall apply professional judgment:

○ Absent DEP guidance and requirements, if professional judgment allows, a LSRP shall apply (i) guidance from USEPA or other states, (ii) other relevant, applicable, and appropriate methods and (iii) practices that ensure protection of public health and safety and the environment. (A.2962/S.1897 §14.c.(4)).

- Note: Where DEP guidance or requirements exist, these other factors appear irrelevant and professional judgment apparently is constrained by the guidance or requirements.

- Note: Where DEP guidance exists, but is ambiguous, inconsistent or inconclusive, as experience suggests sometimes is the case, must, can or should the LSRP

exercise professional judgment to deal with the uncertainty? Or can it simply do what DEP allows or requires?

○ A LSRP shall "exercise reasonable care and diligence", applying "the knowledge and skill ordinarily exercised" by LSRPs (a highly qualified and experienced group) (A.2962/S.1897 § 16.b.).

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

○ A 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." (A.2962/S.1897 § 16.i.).

○ A 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) (A.2962/S.1897 § 16.c.).

◊ 3.4.2(D) A LSRP shall disclose:

○ A LSRP shall explain in documents submitted to DEP, any facts, data, information, qualifications or limitations known by the LSRP that are not supportive of conclusions in the document. (A.2962/S.1897 § 16.i.).

- Note: Does this obligation require the LSRP to provide information: given to it or its staff in confidence? Does it matter if the information is rumor, unsupported, contradicted or speculative? Believed or determined wrong or untrue? The answer likely depends on all the facts and circumstances, but undoubtedly it will be more risky for an LSRP to safely withhold any arguably relevant information than perhaps has been the case to date in such and other circumstances.

- Note: SRRA does not specify a precise manner or style for disclosure. Likely such disclosures need not appear in separate reports, or sections, or in bold print or large fonts. Likely a LSRP's skills in effective and efficient report writing will remain valuable to their clients in addressing such issues.

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

○ The LSRP shall promptly notify the client and DEP in writing of client actions or decisions which are deviations from a remedial action workplan or other report developed by the LSRP. (A.2962/S.1897 §16.l.)

- Note that the term "client" is undefined and 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.

- Note: It seems odd that deviations by the client require such prompt notification, but other deviations evidently do not.

○ The LSRP shall notify the client and DEP promptly in writing of the discovery of new material facts, data or information, after a report has been submitted to DEP, which would result in a materially different report than that submitted. (S. 1897 § 16.n.)

- Note: While "promptly" is undefined, at present, and may not require immediate or 15 minute notice, some circumstances may dictate immediate, direct and focused disclosures, for example to prevent or mitigate harm from any prior error or uncertainty.

◊ 3.4.2(E) A LSRP shall use good business practices:

○ A LSRP shall not reveal information obtained in a professional capacity, except as provided by law, without prior consent of the client, if the client advises the information is confidential (excluding information in the public domain). (A.2962/S.1897 § 16.m.)

- Note: The exception "except as provided by law" may essentially limit protection of confidential information affecting environmental matters required for decision making under SRRA and DEP guidance and rules. It may be useful otherwise (for example in

requiring the LSRP to protect confidentiality of trade secrets, employee lists and information, patient information, attorney-client privileged information [such as trial strategies] and the like.

○ A 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 a LSRP. (A.2962/S.1897. § 16.p.)

- Note: This may restrict the ability of a firm and non-LSRP's to engage in practices forbidden to LSRPs when they work together.

○ A 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. (A.2962/S.1897 §16.t.)

- Note: This obligation does not appear limited, or even directed towards, the LSRP's environmental products submitted to DEP. It appears to be aimed at such things as contracts, budgets, projections, schedules and plans. The reference to written documentation, if and as a reference to a contract for retention of the LSRP is perhaps sensible. But to what other communications does this apply so that written evidence of such informing of the client is required? Does this require an LSRP, for example, to keep a written record of phone calls? The provision seems incomplete and unclear.

○ A 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. (A.2962/S.1897 § 16.u.).

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

○ A 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) (A.2962/S.1897 § 16.v.).

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

◊ 3.4.2(F) A LSRP shall avoid conflicts of interest:

○ A 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. (A.2962/S.1897 § 16.x.)

- Note: It is not unusual for a consultant to work for multiple parties in remediating a site (Buyer and Seller; Bank and Borrower; a group of PRPs [potentially responsible parties]), splitting its charges among them, sometimes formally as a group representation, sometimes informally. LSRPs will need to take more care in documenting these arrangements and disclosures hereafter. Contracts may need to be more customized.

○ A LSRP shall not be a salaried employee of the PRCR, or any related entities, for which the LSRP is providing remediation services. (A.2962/S.1897 § 16.y.)

- Note: The limitation to "salaried" employees suggests other business and/or employment relationships may not violate this provision. However, LSRPs need to be quite cautious to avoid problems with DEP and the Board and even non-salaried relationships with PRCRs may need to be carefully evaluated, and I suspect often rejected, to avoid license exposure. See A.2962/S.1897 §16.z.

- Note: Why does this section use the term "remediation services" as opposed to "professional services" as elsewhere? See e.g., A.2962/S.1897 §14.c. Are remediation services a subset of professional services, or is it the other way around?

○ A 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. (A.2962/S.1897 § 16.z.)

- Note: The clear restrictions here for other business and/or employment relationships not limited to salaried employment supports the view that the narrow restriction in §16.y for salaried employment was intended (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 the professional services the LSRP renders.

■ 3.4.3 A LSRP must notify DEP of its retention by a PRCR within 15 days. (A.2962/S.1897 § 16.d.).

◊ Note that the details of the substance of the notice to DEP are not specified. Presumably rules will clarify that the notice must at least specify the PRCR and the site. But may DEP require more information, such as a description of the scope and limits of the retention, the pricing and schedule of work, the terms and conditions, the client (if different from the PRCR), or other matters?

○ Note: Does the use of the term "person responsible for conducting remediation" necessarily involve a then active effort for remediation of or at a site such that a different retention of an LSRP by a client not then a PRCR for a different purpose, even if thinking about becoming a PRCR, mean that a retention by such non-PRCR clients need not result in a notice to DEP? I believe so.

○ Note: Does the retention of a non-LSRP at a firm having a LSRP, even by a PRCR, require a notice to DEP? I believe not.

○ Note: Does the retention of a LSRP by a PRCR involved in a remediation of or at a site always require a notice to DEP? On its face this section says it does. But are there circumstances where this may not make sense and therefore not be required? What if the PRCR seeks a second opinion, and does not want a second LSRP to take over remediation duties from the first (at least yet)? Why does DEP need to know this? And does the Section require that the notice be given? The language in the Section is unclear: is the question "retention for what?" relevant? I would argue that such notice is required only if the retention involves the LSRP assuming responsibility as the LSRP responsible for remediation for the site under the SRRA, especially in view of the phraseology of the SRRA Section imposing an obligation to give notice on a LSRP's termination of such responsibility. (A.2962/S.1897 § 16.d.).

○ Note: Can an attorney hire a LSRP for the purpose of obtaining a second opinion, or other purposes, such that the LSRP need not then give notice to DEP? Probably.

○ Note: Can a PRCR hire a firm with or without a LSRP, or a non-LSRP at a firm with an LSRP, to help the PRCR without the LSRP obligated to give notice to DEP. I believe it can.

■ 3.4.4 A LSRP must notify DEP of its release from responsibility for a remediation before issuance of a RAO within 15 days (A.2962/S.1897 § 16.d.). This likely includes both a dismissal and a resignation.

◊ Note: Presumably a release from any other role would not require a notice to DEP (such as a release of a LSRP from its second opinion review).

■ 3.4.5 A LSRP must notify the Board or DEP when required by SRRA §16, even if discharged by the client prior to doing so. (A.2962/S.1897 § 16.w.).

■ 3.4.6 Both the LSRP and the PRCR shall correct any deficiency in a submitted document identified by DEP in the period allowed by DEP to do so. (A.2962/S.1897 §16.e.). (See also A.2962/S.1897 §16.g). As discussed elsewhere DEP will review documents filed by the LSRP, sometimes minimally, sometimes in detail.

◊ Note that SRRA does not address how either the PRCR or the LSRP are to correct deficiencies for which the other is uniquely positioned. For example, the PRCR cannot correct

certain submissions prepared by the LSRP except by either requiring the LSRP to do so or replacing the LSRP with another. Similarly the LSRP cannot force the PRCR to cure other things, such as contracting or paying for additional work, or obtaining or providing information or access. Presumably the duty in that instance is not shared, but individual, and similarly any violation of SRRA will be individual and not joint. But what if one of the two fails to act as required? In such circumstances what is the duty of the PRCR to replace the failing LSRP or the LSRP to resign from working for the failing PRCR? I think the answer will vary with the facts and circumstances. I think if a default is material enough, or of a long enough duration, or perhaps even if is a repeated offense, the non-breaching of the two may need to act to avoid blame. But otherwise, even if there is a breach after a DEP demand, I think arguments can be made that the non-breaching party is not required to resign or terminate and move on and may try to achieve a cure of the default. Indeed, I think in many cases it is in the interest of the State to encourage such curative efforts, and act reasonably by focusing on the differences in rights and responsibilities, in order to maintain and continue progress, preserve knowledge and expertise, avoid added costs and delays, and minimize the loss of scarce resources. Often under existing law and practices DEP has acted practically in similar circumstances (for example focusing initially on the 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?

◊ Note that SRRA does not address how DEP is to set periods fro correction of deficiencies. Presumably it cannot due so arbitrarily or unreasonably. Presumably it needs to be fair in considering all the facts and circumstances, including how it has acted itself in the past. However, it seems quite possible that DEP will continue its occasional practice of allowing limited periods (30 days) to pursue the often obviously impossible result.

◊ Note that SRRA does not address how the regulated community is to address disputes and disagreements with DEP, particularly over matters of judgment. Presumably there will continue to be some dispute mechanism, particularly when DEP asserts a deficiency. But it is possible DEP will, mistakenly, treat the powers granted to it in the SRRA as absolute and inarguable. In such event the program as a whole will be more likely to fail its goals.

◊ Note it is not clear how the grace period rules and penalties will affect and be affected by this and other SRRA changes. For example, will DEP return to comment letters or retain "Notices of Deficiencies."

■ 3.4.7 A LSRP may complete a 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. (A.2962/S.1897 §16.f.). That LSRP also must correct deficiencies in previously submitted LSRP documents as identified by DEP in the timeframes specified by DEP. (A.2962/S.1897 §16.g). A LSRP who learns of material facts, data or other information subsequent to the completion of a report concerning a phase of remediation, which would result in a report with material differences from the report submitted, shall promptly notify the client and DEP in writing of those. (S. 1897 § 16.n.) A successor LSRP before the issuance of a RAO who learns of material facts, data or other information concerning a phase of the remediation for which a report was submitted, without disclosure in the report of those, shall promptly notify the client and DEP in writing of those. (S. 1897 § 16.o.)

◊ Note that the role of an LSRP taking over a site in troubled condition may find it necessary or wise to explore in advance its options, alternatives, available extensions and risks, perhaps under a limited engagement, before accepting responsibility for supervising remediation of the site. Otherwise the well intentioned effort may expose the LSRP to investigation and censure, if not worse.

◊ Note that there is no similar transition rule for relying on pre-SRRA work (such as work that happened in 2008, 5 years ago or 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 intends that the LSRP cannot rely on such work and DEP communications and approvals of same. However, this may pose interesting issues for an LSRP, as it often does for PRCRs and DEP, as to how to treat work conducted under earlier rules, guidance, practices, especially if there were DEP approvals of uncertain meaning, scope and effect, and later changes in law, rules, guidance, criteria, standards and/or practices (which unfortunately has occurred frequently). For example, can an LSRP rely on a 1986 letter of DEP closing out an area of concern for further investigation based on 1985 composite sample results, when no such sampling would be permitted today? Does the answer depend on the precise words 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). I would argue the LSRP can and should rely on all such DEP decisions without second-guessing them and may rely on existing data and prior efforts to the extent sensible to do so (and not otherwise).

■ 3.4.8 If a LSRP identifies an IEC ((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 judgment, then the LSRP shall immediately (1) verbally advise the PRCR of the PRCR's duty to notify the DEP and (2) notify DEP by calling the hotline (now (877) 927-6337). (A.2962/S.1897 § 16.j).

◊ Note: This creates a new statutory requirement for reporting of IECs, although there is an existing technical requirement rule addressing reporting of IECs. See N.J.A.C. § 7:26E-1.4(b). It also creates is a new consultant obligation to report IECs.

◊ Note: Will this obligation require LSRP and PRCR reporting in 15 minutes, as is required for discharge reporting? Compare N.J.A.C. § 7:1E-5.3. As the understanding of the existence of an IEC may involve more thought and analysis, perhaps not. But in certain circumstances an LSRP or PRCR who hesitates calling the Hotline may find himself or herself facing enforcement. But which call should the LSRP make first?

◊ Note: Will the knowledge or view of non-LSRPs working with LSRPs, shared or unshared, be imputed to the LSRP? Perhaps. Shared information, certainly. But likely the test will be whether the LSRP should have known what the non-LSRP knows and, if so, ignorance may not be a defense. That test may itself depend on the degree of control exercisable by the LSRP over the non-LSRP.

■ 3.4.9 If a LSRP obtains specific knowledge that "a discharge has occurred on a contaminated site for which he is responsible" then the LSRP shall (1) immediately verbally advise the PRCR of the discharge, and (2) notify DEP by calling the hotline (now (877) 927-6337). The PRCR is also separately responsible for notifying DEP. (A.2962/S.1897 § 16.k).

◊ 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.

◊ Note: The referenced LSRP responsibility most likely relates to his or her responsibility for the site and not to responsibility for the discharge, and likely assesses his or her responsibility as the retained LSRP and not as an owner, operator or PRCR.

◊ Note: The knowledge to be reported is that a discharge has occurred, and appears not to be limited to new current discharges. Thus, historic discharges need to be reported. This may be a new statutory requirement for reporting, not just for LSRPs but also for PRCRs.

◊ Note: This provision requires a call to the Hotline, not a mere notice to the case manager.

◊ Note: There is no exception for previously reported discharges or discharges known to DEP. However, few repeatedly report such discharges to DEP or the hotline.

■ 3.4.10 A LSRP can't certify a document submitted to DEP unless he or she managed, supervised or performed the work which is the basis of the submission, or periodically reviewed and evaluated the work performed by others for the submission, or is completing work of another LSRP he or she concludes is reliable. (A.2962/S.1897 § 16.h).

◊ Note: This may create transition issues as to work conducted before A.2962/S.1897 took effect. See above discussion.

◊ Note: 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, expensive and risky.

■ 3.4.11 A LSRP shall provide any data, documents or other information as requested by DEP to conduct its review of documents under §21. (A.2962/S.1897 § 21.d.)

■ 3.4.12 A LSRP must cooperate with any investigation by the Board. In such an investigation a 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. (S. 1897, §16.q.). A LSRP shall comply with Board conditions resulting from a suspension or other disciplinary proceeding. (S. 1897 § 16.s.) A LSRP shall cooperate with the Board audits and shall provide any information requested for the audit. (A.2962/S.1897 § 24.)

◊ Note: While the foregoing strictures seem limited to LSRP duties in the case of a Board investigation, it is prudent to assume that equivalent rules apply as a general matter to the actions of the LSRP in the performance of its duties.

■ 3.4.13 Upon completion of the remediation the LSRP issues a 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." The LSRP files the RAO with the DEP when issued to the PRCR. (A.2962/S.1897 §14.d.). An RAO is deemed by operation of law to include a covenant not to sue (as presently included in certain no further action letters, usually the final). (A.2962/S.1897 §31.).

◊ Note: It can be argued that it is an essential purpose of SRRA that LSRPs do this (issue RAOs) more often and faster than DEP has preciously issued NFA Letters.

◊ Note that with the limitation on DEP issuance of covenants not to sue hereafter, RAOs may be more valuable.

◊ 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 sites with a long history of prior work. It is also a new requirement: existing submissions to DEP for NFA Letters do not require proof or a determination of full compliance with all applicable laws. One can imagine past sites and remediations that received no further action letters from DEP without such evaluation or compliance (for example, perhaps a land use law was violated, a permit was not obtained or violated, a waste was mismanaged). Yet if the LSRP cannot reach this conclusion hereafter he or she seemingly cannot issue a RAO.

◊ Note: If violations did occur, can the case never be closed because the LSRP cannot make the certification? Arguably, if the violation has been cured or eliminated the LSRP should be able to do so. But what if it has not been or cannot be?

◊ Note: Such a determination is without doubt a legal question and arguably requires a judgment of a lawyer. In practice, this may prove a small burden for most LSRPs at most sites, as DEP likely will not care about the issue. Perhaps 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). We need to see how practice develops, but some degree of care or caution by the LSRP is appropriate.

■ 3.4.14 A 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 (whoever developed them, including attorneys), that relate in any way to the contamination at the site. Three electronic copies of the records shall be submitted to DEP at the time the RAO is filed with DEP. (A.2962/S.1897 §20.).

◊ Note the absence of express reference to drafts. Does this support the view that drafts need not be preserved?

◊ Note the absence of an exception for privileged and confidential materials. Does this support the view that such materials are records subject to this provision?

◊ Note the requirement of submission of three copies of "the records" to DEP. Does this mean that all records need to be submitted? Does this include: contracts? Invoices? Drafts? Privileged and Confidential Materials?

◊ Note: Will all records so submitted to DEP be subject to release under the NJ Open Public Records Act? N.J.S.A. 47:1A-1 et seq. Or must confidentiality be asserted to prevent this?

◊ Note: It is to be hoped that DEP will clarify and narrow these requirements to avoid the many issues that can arise if it is broadly interpreted.

■ 3.4.15 A LSRP shall be jointly responsible for a violation of A.2962/S.1897 §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 §16 and (3) the LSRP fails to take reasonable steps to avoid or mitigate the violation. (S. 1897, § 16.r.).

◊ Note: This is actually a relatively narrow liability. It does not, for example, impose liability for similar breaches by PRCRs or non-LSRPs.

■ 3.4.16 Note: It is to be remembered, however, that LSRP liabilities are not limited to express provisions not set forth in the bill. LSRPs can and will have liabilities outside SRRA.

◊ A LSRP cannot commit a crime; for example it cannot provide false testimony, affidavits or certifications.

◊ A LSRP cannot forge documents or signatures.

◊ A LSRP cannot breach a contract.

◊ A LSRP cannot negligently or intentionally injure persons or property as to whom it has a duty of care.

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

● 3.5 Other Contractors

■ 3.5.1 Note: The bill does not expressly regulate non-LSRP consultants, except in relatively narrow ways. For example, any person violating the law may have liability. A.2962/S.1897 §17.

■ 3.5.2 Note: The bill does not expressly regulate lawyers. Obviously if a lawyer can become an LSRP he or she will be subject to those requirements. However, there may be many issues, and few advantages, if any, posed for practicing lawyers who become LSRPs. And there are a number of provisions that have effects on attorneys and clients.

■ 3.5.3 Note: The bill effects certified subsurface evaluators by confirming that they cannot act for remediation of regulated USTs but can act as to remediation of UHOTs. (A.2962/S.1897 § 15).

● **3.6 DEP Roles**

■ 3.6.1 DEP supports the Board. (A.2962/S.1897 §3.a. & e.)

■ 3.6.2 DEP has an 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. (A.2962/S.1897 §18.b.). It 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". (A.2962/S.1897 §18.c.).

■ 3.6.3 DEP has the power and responsibility to establish the temporary LSRP license program. (A.2962/S.1897 §12 & 13).

■ 3.6.4 DEP shall inspect all submissions of LSRP concerning a remediation upon receipt. (A.2962/S.1897 § 21.a.).

◊ 3.6.4(A) Note: All submissions will be inspected on receipt. In general, future sites will not have identified case managers because, in essence, the LSRP replaces the case manager. How this will work is unknown, particularly as it is likely in many instances the LSRP will need or elect to seek DEP guidance. The degree of inspection, and the identity and experience of the inspector, are not certain but at present it is thought the inspectors may be supervisor level personnel, not case manager level. It remains to be seen how well this will work. It also has been thought that if the inspector identifies concerns, perhaps beyond those specified expressly in SRRA, the submission will be sent elsewhere for a more detailed review, perhaps to case manager level personnel. Guidance to LSRPs and PRCRs will be provided by some means not yet established.

◊ 3.6.4(B) DEP may provide additional review of any document upon a determination that: (1) the LSRP did not comply with A.2962/S.1897; (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. (A.2962/S.1897 § 21.a.).

○ Note the seeming narrowness of this authorization for additional review.

◊ 3.6.4(C) DEP shall perform additional review of any document, or the performance of a remediation, if: (1) the contamination poses a significant detrimental impact as determined by a receptor evaluation or the site is ranked by DEP in the highest priority in the RPS; (2) the contamination may affect a licensed child care center, school or other sensitive population; (3) the contaminated site is located in a low-income community of color that has a higher density of contaminated sites and permitted discharges with the potential for increased health and environmental impacts, as compared to other communities; or (4) State grants or loans are being used to remediate. (A.2962/S.1897 § 21.b.)

○ Note again the seeming narrowness of this authorization for additional review.

○ 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).

◊ 3.6.4(D) DEP may perform additional review of any document, or the performance of a remediation, if: (1) the site is in a brownfield development area 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 SRRA, N.J.S.A. 58:10B-1 et seq., N.J.S.A. 58:10A-21 et seq., ISRA or the Spill Act; (4) the site has had an impact on a natural resource; (5) an oversight document, administrative order or remediation agreement is in effect that requires DEP review and approval; (6) there is substantial public interest in the contaminated site; (7) the PRCR has proposed the use of alternative or site specific remediation standards; (8) the remediation requires the issuance of a DEP permit; (9) the use of the site is changing from any use to residential or mixed use; (10) the submission may not be in compliance with any rules and regulations applicable to contaminated site remediation; or (11) the remediation may not be protective of the public health, safety, or the environment. (A.2962/S.1897 § 21.c.) The LSRP and PRCR shall provide any data, documents or other information as requested by DEP to conduct its review. (A.2962/S.1897 § 21.d.). Unless directed otherwise by DEP, the PRCR and the LSRP may continue to conduct the remediation while DEP inspects or reviews. (A.2962/S.1897 § 21.e.) DEP shall, at a minimum, provide additional review pursuant of at least 10 percent of all documents submitted annually by LSRPs. (A.2962/S.1897 § 21.f.)

○ Note the seeming breadth of this authorization for additional review. Thus, despite the earlier narrowness, DEP has tremendous flexibility to review whatever it wants except at the most pristine sites. Sites with groundwater issues (i.e., an impact to a natural resource) or EC or IC (i.e., will require a permit), or a concern of noncompliance, for example, can always be reviewed.

○ Note: Test (3) is not limited to current noncompliance; apparently any past noncompliance justifies DEP to focus on the PRCR or LSRP as much as it elects, as often as it elects.

○ Note: There is a mandatory 10% audit requirement. If 5,000 documents are submitted annually, 500 must be audited.

■ 3.6.5 DEP shall invalidate a RAO if DEP determines that the subject remedial action is not protective of public health, safety, or the environment, or if a presumptive remedy was not implemented as required pursuant to N.J.S.A. 58:10B-12.g. (as amended by the SRRA). However, if a presumptive remedy is not implemented as required, but DEP determines the remedial action is as protective of the public health, safety, and the environment as the presumptive remedy, DEP shall not invalidate the RAO. (A.2962/S.1897 § 22.).

◊ Note that N.J.S.A. 58:10B-12.g. 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."

■ 3.6.6 DEP may recommend to the Board that an investigation of a LSRP be 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. (A.2962/S.1897 § 23.)

■ 3.6.7 DEP shall not audit a RAO more than three years after the date the LSRP filed the RAO with DEP, unless: (a) undiscovered contamination is found on the site with the RAO; (b) the Board investigates the LSRP; or (c) the LSRP has his or her license suspended or revoked by the Board. (A.2962/S.1897 § 25.)

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

◊ Note: As some of these events can occur after the three year safe period has expired, there is really no period after which an RAO is unable to be audited. 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.

◊ Note: Is the right to audit an RAO affected by the pendency or result of an investigation of the LSRP? Likely it is not.

■ 3.6.8 DEP shall establish a permit program for IC and EC. (A.2962/S.1897 § 19.) See below.

■ 3.6.9 DEP is required to provide mandatory direct oversight of certain sites, most notably if mandatory periods, yet to be established, are not met or extended, or for older sites where the remedial investigation was not completed within 10 years after the discharge before SRRA and the remedial investigation is still not finished within 5 years after SRRA is adopted. DEP may elect to provide direct oversight of others. (A.2962/S.1897 §27.)

◊ Note: A key effect of direct DEP oversight is a new requirement for a feasibility study (to assess alternative remedial approaches), the right of DEP to select the remedy and the creation of a trust fund by the PRCR to fund the remedy. The exercise of these rights could have significant consequences on all concerned. See below.

◊ Note: While the words are clear, this may not be an effective approach if the permitted maximum 5 year period hereafter is inadequate for older cases, as is quite possibly the case, especially as it appears DEP may lack the express right to extend this time period (although I would argue it has the implied and equitable right to do so for good cause) absent judicial relief (as seemingly contemplated by SRRA §27). Consider that DEP was tasked for over 20 years with the job of proposing and adopting remedial standards, and did not succeed until recently. Consider that the 1993 S.1070 mandated efforts on ecological standards and risk standards that never were completed. Consider that DEP delays, constantly changing rules, and associated reopeners of issues, areas of concern and sites, have significantly contributed to delays to date, and likely will do so hereafter. Consider that the legislature has altered and extended the natural resource damage statute of limitation repeatedly, including in SRRA, because DEP and others lack the resources to proceed with NRD claims. Consider that the very reason the LSRP bill was pursued by DEP, after years of DEP opposition to the Massachusetts model, was the growing lack of progress in remediations, the steadily increasing workload on DEP (from new cases, unfinished old cases, and programmatic changes [such as due to vapor intrusion or child care centers]), and the steadily decreasing DEP resources, all contributed to unassigned cases, unreviewed filings and universal frustration. Consider that access issues, contract issues, money issues, resource issues and permit issues often exacerbate remedial schedules even for those who want to proceed with remediation diligently and in good faith. In view of these considerations, is not the imposition of an absolute 5 year time period hereafter, in fact, unjustifiable, arbitrary and unreasonable? Further, in the face of these issues and these experiences, is it really the desired result, at least at sites where bona fide issues exist but progress is being made, for DEP to build hereafter a steadily increasing sizable new list of sites at which it must re-involve itself, presumably with increased risk of challenge and confrontation, solely because sites taking more than 5 years hereafter are added to the list? Or are similar failures and/or results likely in the future as have been seen in the past? I would argue the passage of time does not prove recalcitrance or error: it may show complexity. And complexity does not mandate DEP control and direct oversight: some change is appropriate in my mind. On the other hand, recall that the requirement is "only" for completion of the remedial investigation, not completion of the remediation itself. The challenge, then, is relatively clear. Finish the investigation soon. Still, while the words and intent seem clear, the probable consequences of this provision are less clear at this time. Time will tell.

■ 3.6.10 DEP shall adopt, after notice, interim rules and regulations establishing a program that provides for the responsibilities of PRCRs and LSRPs in the remediation of contaminated sites pursuant to A.2962/S.1897. The interim rules and regulations may include amendments to rules and regulations adopted pursuant to other laws, in order to make them

consistent with A.2962/S.1897. The interim rules and regulations shall be effective immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed 18 months. (A.2962/S.1897 § 29).

● **3.7 PRCRs & the Regulated Community.**

■ 3.7.1 No one can use a certified subsurface evaluator for remediation of a discharge from a regulated UST. Anyone can use either a certified subsurface evaluator or a LSRP for remediation of a UHOT. (A.2962/S.1897 § 15).

■ 3.7.2 A PRCR shall provide any data, documents or other information as requested by DEP to conduct its review of documents under SRRA §21. (A.2962/S.1897 § 21.d.)

■ 3.7.3 A PRCR shall cooperate with the Board in annual audits and shall provide any information requested for the audit. (A.2962/S.1897 § 24.)

■ 3.7.4 No person shall take retaliatory action if a LSRP: **a.** discloses to the Board or DEP an activity, policy or practice the LSRP reasonably believes: (1) is a violation of Law(s), including any violation involving deception of, or misrepresentation to, any client, customer, DEP, or any other governmental entity; or (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation that the LSRP reasonably believes may defraud; **b.** provides information to, or testifies before, any public body conducting an investigation into any violation of Law(s) by a client or customer with whom there is a business relationship, including any violation involving such deception of, or misrepresentation, or, in the case of a 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. (A.2962/S.1897 § 26.)

◊ Note: This restriction could extend to the PRCR for whom the LSRP is working, a firm employing a LSRP or others. Could it extend to an attorney retaining an LSRP? To a person seeking bids from LSRPs who elects to hire others? Possibly. (Obvious proof issues exist).

■ 3.7.5 DEP shall adopt, after notice, interim rules and regulations establishing a program that provides for the responsibilities of PRCRs and LSRPs in the remediation of contaminated sites pursuant to A.2962/S.1897. The interim rules and regulations shall be effective immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed 18 months. (A.2962/S.1897 § 29).

◊ DEP's focus in adopting these interim rules and regulations should be limited to making the LSRP program effective and functional. It should not be to alter the existing framework for remediation by PRCRs.

■ 3.7.6 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, shall remediate the discharge. (A.2962/S.1897 § 30.a.)

◊ 3.7.6(A) Note: This section is intended to cure a perceived defect that existing law does not clearly obligate a PRCR to remediate. Rather DEP could issue a directive to the PRCR ordering remediation and the PRCR could comply, or not, with consequences provided by law for

breaching the directive and/or DEP could undertake remediation itself. Now a directive is unnecessary. Similarly, while over the decades DEP has periodically discouraged "at risk" work, this and other sections now require work without DEP review and approval in many cases.

◊ 3.7.6(B) Note: Does this obligation of an owner or operator of an industrial establishment apply before the occurrence of a triggering event? The language is unclear. I would argue it does not apply until after the triggering event occurs.

◊ 3.7.6(C) New Cases: A person who initiates a remediation of a contaminated site at least 180 days after the date of SRRA shall: (1) hire a LSRP to perform the remediation; (2) notify the DEP of the name and license information of the hired LSRP; (3) conduct the remediation without the prior approval of DEP, unless directed otherwise by DEP; (4) establish a RFS if required pursuant by N.J.S.A.58:10B-3; (5) pay all DEP fees and oversight costs; (6) provide access to the contaminated site to DEP; (7) provide access to all applicable documents concerning the remediation to DEP; (8) meet the mandatory remediation timeframes and expedited site specific timeframes established by DEP under A.2962/S.1897 §28.c.; and (9) obtain all necessary permits. (A.2962/S.1897 § 30.b.).

○ Note: These outline the key requirements for those initiating remediation beginning six months after SRRA. But exactly when is such remediation initiated? Even at many "new" cases, remediation began before SRRA was enacted. However, many cases hereafter will clearly meet this test (new discharges, for example).

◊ 3.7.6(D) Cases before Licensure: Any person who initiates a remediation prior to the date of SRRA, or prior to the issuance of temporary licenses to LSRPs pursuant to A.2962/S.1897 §12, shall comply with the provisions of A.2962/S.1897 § 30.b.paragraphs (4) through (9). (A.2962/S.1897 § 30.c.(1)).

○ Note: This seems to mean that such cases need not use LSRPs or proceed without DEP involvement. DEP must therefore continue its existing system to process such cases. But in reality, will many such cases progress?

◊ 3.7.6(E) New Violations: If DEP (a) issues a final order or a penalty becomes due and payable, concerning the performance of remediation, or (b) issues a demand for stipulated penalties pursuant to the provisions of an oversight document in which the person waived a right to a hearing on the penalties, then DEP may require compliance with the provisions A.2962/S.1897 §30.b. (A.2962/S.1897 § 30.c.(2)).

◊ 3.7.6(F) Everyone in 3 years: No later than 3 years after the date of SRRA, a PRCR, no matter when the remediation is initiated, shall comply with the provisions of A.2962/S.1897 § 30.b. (A.2962/S.1897 § 30.c.(3).

○ Note: Thus existing cases have 3 years to finish remediation before they have to use LSRPs and proceed with remediation thereafter, in most cases, without DEP oversight. (And then, for older sites where the discharge happened 10 or more years ago and the remedial investigation is not yet done, only two years to finish before the 5 year period allowed to complete the remedial investigation. [A.2962/S.1897 §27.]) Considering the likely problems with DEP responsiveness in the next three years, or lack thereof, and the transition issues of moving to an LSRP at such a late date, PRCRs would be well advised to consider an early shift to use of a LSRP if their circumstances, rights and obligations allow. This will, of course, require analysis and discussion with the client.

○ Note: SRRA fails to consider how various other issues affect the advantages and disadvantages of using LSRPs, sooner or later. For example, the terms and conditions of the following may affect, or be affected by, the change from DEP oversight to LSRP oversight, with uncertain consequences: existing sale agreements, leases or loan agreements; settlement agreements; court orders; pending suits; insurance coverage; escrow arrangements; Spill Fund, Sanitary Landfill Fund or other claims; HSDRF grant or loan recipients. More analysis is required.

◊ 3.7.6(G) Exceptions: A.2962/S.1897 §30 shall not apply to any person who remediates a discharge from an UHOT (but A.2962/S.1897 §15 shall apply). (A.2962/S.1897

§30.d.(1)) A.2962/S.1897 §30 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. (A.2962/S.1897 § 30.d.(2))

◊ 3.7.6(H) Any person who fails to comply with the provisions of A.2962/S.1897 § 30 shall be liable to the enforcement provisions established pursuant to N.J.S.A. 58:10-23.11u (which provides DEP can bring a civil action for [(1) a temporary or permanent injunction; (2) the costs of any investigation, cleanup or removal, and for the reasonable costs of preparing and successfully litigating; (3) the cost of restoring, repairing, or replacing real or personal property damaged or destroyed by a discharge, any lost income, and any reduction in value of the property caused by the discharge; (4) the cost of restoration and replacement, where practicable, of any natural resource; and (5) any other costs incurred by the department pursuant to P.L.1976, c.141.], for a civil administrative penalty of not more than $50,000 for each violation, and each day of violation shall constitute an additional, separate and distinct violation, a civil administrative order for the costs of any investigation, cleanup or removal, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty, for a civil penalty not to exceed $50,000.00 per day for each violation, and each day's continuance of the violation shall constitute a separate violation, and forfeiture of conveyances used or intended for use in the willful discharge of any hazardous substance).

○ Note: The liability extends to "any person" and is not limited to PRCRs. However, the nature of the obligations under this Section suggest a relatively narrow universe of potential targets.

◊ 3.7.6(I) Receipt of an RAO from the LSRP is deemed to include a covenant not to sue by operation of law. (A.2962/S.1897 § 31.a).

● 3.8 Changes to the Existing Remediation Program

■ 3.8.1 Engineering and Institutional Controls

◊ DEP shall establish a permit program to regulate the operation, maintenance and inspection of EC and IC and related systems installed as part of a remedial action of a contaminated site. DEP may require periodic monitoring, inspections, and maintenance by the person responsible for the controls and the submission of certifications regarding those activities. Such permits may be individual, by rule, or be general permits. (A.2962/S.1897 § 19.a.) DEP may require any person responsible for the monitoring, operation, and maintenance of EC and IC before SRRA, and any person required to submit a certification on a biennial basis pursuant to N.J.S.A. 58:10B-13.1 to obtain such a permit. (A.2962/S.1897 § 19.b.) DEP may charge reasonable application fees and annual fees to cover the costs of permit issuance, administration and enforcement. (A.2962/S.1897 § 19.d.)

◊ Except per A.2962/S.1897 §19.c.(2), DEP may require that a person issued such a permit maintain insurance, financial assurance or another financial instrument to guarantee that funding is available to operate, maintain, and inspect the EC. That person may petition DEP on an annual basis to decrease the amount of funding required to be maintained. (A.2962/S.1897 § 19.c.(1))

◊ A government entity, a person who is not otherwise liable for cleanup and removal costs pursuant to N.J.S.A. 58:10-23.11 et seq. who purchases contaminated property before A.2962/S.1897 and undertakes a remediation of the property, a person who undertakes a remediation at their primary or secondary residence, the owner or operator of a licensed child care center who performs a remediation, the person responsible for conducting a remediation at a school or the owner or operator of a small business responsible for performing a remediation at their business property, shall not be required to establish or maintain a funding source. (A.2962/S.1897 § 19.c.(2))

■ 3.8.2 Mandatory DEP Oversight of Remediation

◊ DEP shall undertake direct oversight of a remediation of a contaminated site: (1) the PRCR has a history of noncompliance with the Law(s) concerning remediation that includes the issuance of at least two enforcement actions (administrative order, notice of civil administrative penalty, or a court order) after the date of A.2962/S.1897 during any five year period concerning a remediation; (2) the PRCR has failed to meet a mandatory remediation timeframe or an expedited site specific timeframe adopted by DEP under A.2962/S.1897 §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 A.2962/S.1897, 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 A.2962/S.1897. (A.2962/S.1897 § 27.a.)

○ Note: Thus many sites have only 5 years hereafter to complete the remedial investigation hereafter, seemingly without right to an extension absent court order, or else DEP shall undertake direct oversight. Obviously those concerned with this result should focus now on expediting completion of the remedial investigation phase.

○ Note: The nature, extent and effect of DEP direct oversight is somewhat uncertain and unexplained. But see A.2962/S.1897 § 27.c. Consider, for example, how DEP oversight is implemented if no LSRP is willing to become responsible for the remediation of such a site under DEP oversight. Is the PRCR in breach? Can DEP pick its own LSRP?

○ Note: DEP is not obligated to issue guidelines establishing specific criteria for the conditions under which a site may be subject to direct oversight pursuant to this subsection. (Compare A.2962/S.1897 § 27.d.)

■ 3.8.3 Permissive DEP Oversight of Remediation

◊ DEP may elect to undertake direct oversight of a remediation of a contaminated site under the following conditions: (1) the contamination includes chromate chemical production waste; (2) DEP determines that more than one environmentally sensitive natural resource has been injured; (3) the site has contributed to sediments contaminated by PCBs, mercury, arsenic, or dioxin in a surface water body; or (4) the site is ranked by DEP in the highest priority pursuant to the RPS. (A.2962/S.1897 § 27.b.)

○ Note: This provision is clearly aimed at the Hudson County chromate waste site remediations. It is also clearly aimed at the Passaic River and other river remediations to come. In those areas DEP has authority to take charge. But will PRCRs and LSRPs cooperate if DEP acts? It seems likely they will fight back, and as the stakes increase, so will the litigation costs and risks.

◊ DEP shall issue guidelines establishing specific criteria for the conditions under which a site may be subject to direct oversight pursuant to this subsection. (A.2962/S.1897 § 27.d.)

■ 3.8.4 Effect of DEP Oversight

◊ For any site subject to DEP direct oversight: (1) DEP shall review each document submitted by a LSRP and shall approve or deny the submission; (2) a feasibility study shall be performed and submitted to DEP for approval; (3) DEP shall select the remedial action; (4) the PRCR shall establish a remediation trust fund pursuant to N.J.S.A. 58:10B-3 in the amount of the estimated cost of the remediation; (5) all disbursements from the remediation trust fund shall require prior approval by DEP; (6) all submissions prepared by the LSRP concerning the remediation required by DEP shall be provided simultaneously to DEP and the PRCR; and (7) the PRCR shall

implement a public participation plan approved by DEP to solicit public comment from the surrounding community concerning the remediation. (A.2962/S.1897 § 27.c.)

○ Note: DEP has to review and approve or deny every submission. Déjà vu all over again.

○ Note: The power to choose the remedy is powerful. However, litigation is sure to follow if DEP chooses a remedy that the PRCR would not have chosen. And if pre-enforcement review is denied, then constitutional requirements may affect the efficacy of this statutory approach.

○ Note: The power to require payment into a remediation trust fund is powerful and expensive to the PRCR. Litigation may challenge this right of DEP. And if pre-enforcement review is denied, then constitutional requirements may affect the efficacy of this statutory approach.

○ Note: It appears that drafts and other materials must be provided by the LSRP to DEP and the PRCR at the same time. Apparently this is to allow DEP greater and earlier insight, input and control. But can this be argued to mean otherwise, or worked around? Are there any lawyers around?

■ 3.8.5 Exceptions

◊ Any oversight procedure, remedy, or other obligation in A.2962/S.1897 §27.c. shall not affect a remediation conducted pursuant to and in compliance with a settlement of litigation to which DEP is a party if the settlement (a) occurred prior to the date of A.2962/S.1897, or (b) is a settlement of litigation pending on the date of enactment of A.2962/S.1897. For any litigation pending or settled on the date of enactment of A.2962/S.1897, concerning a remediation performed pursuant to the "Resource Conservation and Recovery Act," 42 U.S.C. s.6921 et seq., nothing in A.2962/S.1897 shall affect an oversight procedure, remedy, or other obligation imposed by a federal administrative order or federal court order. (A.2962/S.1897 § 27.d.).

■ 3.8.6 Timeframes

◊ DEP shall establish mandatory remediation timeframes, and expedited site specific timeframes when necessary, to protect the public health and safety and the environment, for each of the following: (1) a receptor evaluation; (2) control of ongoing sources of contamination; (3) establishment of interim remedial measures; (4) addressing IEC conditions; (5) the performance of each phase of the remediation including preliminary assessment, site investigation, remedial investigation and remedial action; (6) completion of remediation; and (7) any other activities deemed necessary by DEP to effectuate timely remediation. (A.2962/S.1897 §28.a.) In establishing these timeframes DEP shall take the following into account: (1) the potential risk to the public health, safety, and the environment; (2) the results of the receptor evaluation; (3) the ongoing industrial or commercial operations at the site; (4) whether, for operating industrial or commercial facilities, there are no releases of contamination to the groundwater or surface water from the site; and (5) the complexity of the contaminated site. (A.2962/S.1897 § 28.b.)

◊ DEP shall grant an extension to a mandatory remediation timeframe as a result of: (1) a DEP delay in reviewing or granting a permit, provided that there was a timely filing of a complete application; (2) a delay in the provision of State funding for remediation, provided that there was a timely filing of a complete application; or (3) a delay by the department for an approval or permit required for long-term operation, maintenance and monitoring of an EC at the site provided the request for approval or permit application is complete. (A.2962/S.1897 § 28.c.)

○ Note that, arguably without rational basis, these same factors do not seem to apply to the 5 year test for mandatory DEP direct oversight so as to permit an extension of that period. This arguably is a significant defect and undoubtedly will serve as a basis for challenge.

◊ DEP may grant an extension to a mandatory remediation timeframe on a case-by case basis as a result of: (1) a delay in obtaining access to property, provided the PRCR demonstrates that good faith efforts have been undertaken to gain access, access has not been granted

by the property owner, and, after good faith efforts have been exhausted, a complaint was filed with the Superior Court to gain access, in accordance with Law(s); (2) other circumstances beyond the control of the PRCR, such as fire, flood, riot, or strike; or (3) other site-specific circumstances that may warrant an extension as determined by DEP. (A.2962/S.1897 § 28.c.)

○ Note that, arguably without rational basis, these same factors do not seem to apply to the 5 year test for mandatory DEP direct oversight.

■ 3.8.7 Active Remediation

◊ There is a new affirmative obligation of PRCRs and others to remediate discharges. (A.2962/S.1897 § 30.a.)

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

◊ LSRPs issue RAOs and do not issue no further action letters with covenants not to sue. (A.2962/S.1897 §14.d.). This does not mean that no further action letters, with and without covenants not to sue, will no longer be issued at all. However, covenants not to sue will not be issued with no further action letters after interim licensing begins. See amended N.J.S.A. 58:10B-13.1.f.(1)

○ Note: Does this mean, however, that RAOs will hereafter be more valuable because they result in a covenant not to sue and a no further action letter does not?

○ Note: Does this mean that there are now issues of whether DEP can meet its contractual obligations to provide no further action letters with covenants not to sue, if and when so required (under a remediation agreement, ACO, or MOA?). It seems so.

◊ After a LSRP issues a RAO to the PRCR, the person shall be deemed, by operation of law, to have received a covenant not to sue with respect to the real property upon which the remediation has been conducted.

○ The covenant not to sue shall be subject to any conditions and limitations contained in the RAO. The covenant remains effective only for as long as the real property continues to meet the conditions of the RAO. Upon a finding by the DEP that real property no longer meets with the conditions of the RAO, DEP shall provide notice of that fact to the person responsible for maintaining compliance with the RAO; DEP may allow a reasonable time to come into compliance. If the property does not meet the RAO conditions and if DEP does not allow for a period of time to come into compliance, or if the person fails to come into compliance within the time period, the covenant not to sue shall be deemed to be revoked by operation of law. (A.2962/S.1897 §31.a.). 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. (A.2962/S.1897 §31.c.).

- Note: While the effect of a revocation of the covenant is not elucidated, presumably it means DEP can sue for remediation of the problem no longer addressed in compliance.

- Note: Revocation of the covenant may permit reopener of a wide range of issues beyond the problem causing the revocation. For example, can DEP require additional sampling and/or remediation, or pursue natural resource damages, under then current rules and practices? Presumably it can.

- Note: The effect of a revocation of the covenant is not limited to the breaching person. It likely can extend to the original PRCR.

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

○ Except as provided in A.2962/S.1897 § 31.e, a covenant not to sue shall by operation of law provide for the following, as applicable: (1) a provision releasing the PRCR from all civil liability to the State to perform any additional remediation, to pay compensation for damage to, or loss of, natural resources, for the restoration of natural resources or for any cleanup

and removal costs; (2) for a remediation that involves the use of EC or IC: (a) a provision requiring the person (presumably the one who undertook the remediation), or any subsequent owner, lessee, or operator, to maintain those controls, conduct periodic monitoring, and submit to DEP, on a biennial basis, a certification that the controls are being properly maintained and continue to be protective (stating the underlying facts and results of any tests or procedures performed); and (b) a provision that the covenant is revoked by operation of law if the controls are not being maintained or are no longer in place; and (3) for a remediation that involves the use of EC but not for IC only, a provision barring the persons whom the covenant not to sue benefits, from making a claim against the New Jersey Spill Compensation Fund and the Sanitary Landfill Facility Contingency Fund (and not bar such claims if, after a valid RAO DEP orders additional remediation, except that the covenant shall bar such a claim if DEP ordered additional remediation in order to remove the IC). (A.2962/S.1897 §31.a.2.).

○ 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. (A.2962/S.1897 §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). (A.2962/S.1897 §31.d.).

○ The covenant not to sue shall be deemed to apply to any person who obtains a response action outcome as provided in subsection a. of this section. 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. (A.2962/S.1897 §31.e.).

■ 3.8.9 NJEDA Grants & Loans

◊ The NJEDA shall require that payment of a grant or financial assistance from the HDSRF shall be conditioned upon the subrogation to DEP of all rights of the recipient to recover remediation costs from an insurance carrier, discharger, or person in any way responsible for a hazardous substance pursuant to N.J.S.A. 58:10-23.11g.8.c. and 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. (A.2962/S.1897 §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. (A.2962/S.1897 §32.b.).

◊ In any action by DEP to enforce a right of subrogation, DEP shall be entitled to invoke any right or defense available to the recipient. (A.2962/S.1897 §32.c.). All moneys collected in a cost recovery subrogation action shall be deposited into the HDSRF. (A.2962/S.1897 §32.d.).

◊ The HSDRF no longer receives the 1% annual surcharge on RFS. (A.2962/S.1897 §44; N.J.S.A. 58:10B-4). Instead such surcharges go to the Remediation Guarantee Fund established pursuant to N.J.S.A. 58:10B-20. (A.2962/S.1897 §46 & 51; N.J.S.A. 58:10B-11 & 20). That fund also now may be disbursed by DEP as technical assistance grants to nonprofit organizations to evaluate remediation methods and monitor site conditions at specific sites of public concern in the local community.

■ 3.8.10 ISRA

◊ The definitions at N.J.S.A. 13:1K-8 are expanded to include a definition of "licensed site remediation professional" and "response action outcome". (A.2962/S.1897 §33.)

◊ The requirement at N.J.S.A. 13:1K-10 to attach certain approvals from DEP to the contract or agreement of sale or agreement to transfer or any option to purchase with respect to

the transfer of ownership or operations of an industrial establishment (or to later send them) now extends to a RAO or remediation certification. (A.2962/S.1897 §34.)

◊ The requirement at N.J.S.A. 13:1K-10 allowing a transfer closing to proceed on and after DEP's approval of a remedial action workplan now extends to "a remedial action workplan certified by a licensed site remediation professional" or a remediation certification (replacing remediation agreements; see below). (A.2962/S.1897 §34.)

◊ N.J.S.A. 13:1K-10 allows the LSRP to file the RAO with DEP upon the remediation of the industrial establishment in accordance with SRRA §30. (A.2962/S.1897 §34.)

◊ N.J.S.A. 13:1K-10 now provides for the owner or operator to submit to DEP a remediation certification (in lieu of an application for, and receipt of a remediation agreement): (1) an estimate of the cost of the remediation prepared and certified by a 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 A.2962/S.1897, 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." (A.2962/S.1897 §34.)

○ Note: It is possible the use of a remediation certification, which is self executing without need for a DEP signed agreement, will accelerate the ability to proceed with closings of transactions subject to ISRA quicker than before. However, the need to have the LSRP involved, and the need of the LSRP to protect itself against the possibility of error in its submissions (and in particular in the cost estimate), and the lack of a second view by the DEP on the projected costs determining the amount of the RFS, may actually result in delays as LSRPs try to form these judgments more cautiously and accurately than has been the case before.

○ Note: Arbitrary and undocumented practices, such as a requirement for remediation agreement for a minimum RFS of $100,000 for sites not involving ground water issues or a minimum of $1,000,000 where groundwater issues are feared, may disappear unless DEP proposes rules or issues guidance requiring same as part of the LSRP process.

◊ N.J.S.A. 13:1K-10 allows the remediating party to pick the approach for remediation so as to obtain LSRP approval, but subject to the provisions of SRRA §27 that allow or require DEP to take direct oversight. (A.2962/S.1897 §34.)

◊ N.J.S.A. 13:1K-10 allows the remediating party to proceed with remediation without prior DEP approval for soils or groundwater remedies if and permitted by SRRA. (A.2962/S.1897 §34.)

■ 3.8.11 Spill Act

◊ The Spill Act includes a new term "final remediation document" which means either a NFA letter issued by DEP under N.J.S.A. 58:10B-1 et seq., or a RAO issued by a LSRP, as well as definitions of "licensed site remediation professional" and "response action outcome" and "Person responsible for conducting the remediation" conforming to SRRA. (A.2962/S.1897 §35; N.J.S.A. 58:10-23.11b.)

◊ The requirement for published notice of NFA letters under N.J.S.A. 58:10-23.11e2 is eliminated. (A.2962/S.1897 §36.; N.J.S.A. 58:10-23.11e2)

◊ The contribution provisions of N.J.S.A. 58:10-23.11f are altered to account for RAOs, and to allow notice of a remediation in lieu of an agreement with DEP as a condition of a possible treble damage claim against recalcitrant directive recipients. (A.2962/S.1897 §37.; N.J.S.A. 58:10-23.11fa.(2)(b) & (3)(d)).

◊ The Spill Act debt and lien provisions are changed to apply to cleanup and removal costs and related costs of the State. (A.2962/S.1897 §37. 58:10-23.11ff.)

◊ The Spill Act innocent purchaser defense available for those who rely on a NFA letter now allow such protection for reliance on a FRD (including a RAO). (A.2962/S.1897 §38.; N.J.S.A. 58:10-23.11gd.(2)(e)) It similarly limits claims against the Spill Act Fund and the Sanitary Land Fill Fund for RAOs involving EC. (A.2962/S.1897 §38.; N.J.S.A. 58:10-23.11ge.)

◊ The Spill Act defense against liability available to those who know of a problem before they buy but follow the right steps for post-purchase remediation that results in a NFA letter now allows the same protection if an RAO similarly issues. (A.2962/S.1897 §38; N.J.S.A. 58:10-23.11gf.(4))

◊ The Spill Act required RPS System List is altered to be a database and ranking system of known cases, sites and areas of concern. No later than 1 year after SRRA DEP shall establish a ranking system that establishes categories in which to rank sites based upon the level of risk to the public health, safety, or the environment, the length of time the site has been undergoing remediation, the economic impact of the contaminated site on the municipality and on surrounding property, and any other factors deemed relevant by DEP. There shall be public access to reports from the database on DEP's internet website. (A.2962/S.1897 §39; N.J.S.A. 58:10-23.16)

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

■ 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". (A.2962/S.1897 §40; N.J.S.A. 58:10B-1).

◊ A new term of "presumptive remedy" is added as used at N.J.S.A. 58:10B-12g.(10). (A.2962/S.1897 §40; N.J.S.A. 58:10B-1).

◊ DEP shall no longer adopt merely minimum standards and guidance; it shall adopt "rules and regulations establishing criteria and standards". It need no longer publish a list of alternate remedies (A.2962/S.1897 §41; N.J.S.A. 58:10B-2)

○ Note: Does this mean the end of the occasional demand by DEP that its rules and guidance set only minimum requirements and it can always ask for more than they provide (see e.g., N.J.A.C. §7:26E-1.1(a))? Possibly. Does this mean PRCRs and LSRPs can better rely on DEP published criteria and standards (if they can figure them out), and interpret the absence of same as allowing more leeway, with less concern for DEP initiated abrupt changes and unforeseen interpretations? Perhaps; time will tell. But certainly the legislature meant to require more from DEP by this change than it demanded of DEP before. DEP needs to change its ways as well. A failure to do so will expose it to attack.

◊ A person who performs a remedial action in the manner prescribed in DEP rules, and who certifies this fact to DEP, shall obtain a FRD for that particular remedial action. (A.2962/S.1897 §41; N.J.S.A. 58:10B-2).

○ Historically some have felt aggrieved by DEP's refusal to issue NFA letters after similar compliance, but were left with no practical remedy other than to await DEP action or surrender to DEP demands. Many waited and lengthy delays ensued. Many surrendered and still found themselves unable to obtain the coveted NFA letter, ending up facing new demands instead. Judicial relief seemed rarely available. While the legal standard used in this section remains essentially the same as before, the possibility now exists that a LSRP will be more willing to issue a FRD (a RAO) than DEP has been. This is arguably a key goal of SRRA- to accelerate remediations. But if this is the case, another consequence will be a shift in the relative legal positions of PRCRs and DEP. Absent clear error, efforts by DEP to reopen cases having obtained RAOs are certain to meet opposition in court by both the PRCR and LSRP. In such suits, one can speculate that courts will be less fearful of ruling against DEP and less compelled to blindly defer to DEP. They likely will be more willing to

accept good faith determinations by LSRPs based on published rules and guidance, and less willing to defer to DEP fears, speculations and concerns unsupported by objective evidence of a failure to comply or an actual unremediated condition. This seems to be a result the legislature wants. For the same reason, while DEP can be expected to review LSRP decisions carefully, and sometimes even skeptically, DEP may find it far easier to sit silent and accept an LSRP decision when uncertain than it ever found it in itself to issue a final NFA letter with covenant not to sue in similar circumstances (as if there is an error the legislature, PRCR and LSRP will take more of the blame than DEP will).

◊ The oversight charges that can now be recovered include costs related to the work charged to DEP by other State departments or agencies. (A.2962/S.1897 §42; N.J.S.A. 58:10B-2.1)

◊ The obligation to post a RFS is altered so that it is both consistent with A.2962/S.1897 §27 and exempt government entities, persons remediating their primary or secondary residence, the owner or operator of a child care center, or the PRCR remediating a school. LSRP's can set the amount of the funding source, including in a remediation certification. Decreases in the amount of an RFS may occur based on LSRP certifications. The time periods for establishing the RFS remain essentially the same except that when DEP takes over direct oversight under A.2962/S.1897 §27 the RFS is to be established when that occurs. Otherwise the RFS is due when DEP approves a RAW or remediation agreement or a remediation certification is submitted under ISRA (A.2962/S.1897 §43; N.J.S.A. 58:10B-3)

◊ A letter of credit (LC) can be used again as an RFS, except of course when DEP acts under A.2962/S.1897 § 27. (A.2962/S.1897 §43; N.J.S.A. 58:10B-3).

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

◊ Self Guarantees require an unqualified audited opinion in the supporting financial reports. (A.2962/S.1897 §43; N.J.S.A. 58:10B-3)

◊ DEP can draw against a RFS to finance the cost of the remediation for a failure to perform a required remediation or after a failure to meet mandatory timeframes. (A.2962/S.1897 §43; N.J.S.A. 58:10B-3)

◊ The 1% annual surcharge does not have to be paid after an RAO. It still need not be paid by those acting under a "memorandum of understanding" so long as DEP mandatory timeframes for remediation are still being met. (A.2962/S.1897 §46; N.J.S.A. 58:10B-11).

○ Note: This confirms that MOAs may still pose advantages to applicants.

◊ Conforming changes were made to the statutes addressing redevelopment agreements. (A.2962/S.1897 §52, 53, 54 & 55; N.J.S.A. 58:10B-26, 28, 29 & 31)

■ 3.8.13 Standards

◊ 3.8.13(A) For any remediation initiated one year after the date of A.2962/S.1897 DEP shall 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 area of concern 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. For any remediation initiated on or after the date of A.2962/S.1897, DEP may require the use of an unrestricted use remedial action or a presumptive remedy as provided in N.J.S.A.58:10B-12g(10) for a site or area of concern that is to be used for residential, child care, or school purposes or another purpose that involves use by a sensitive population. Except as provided in this subsection, and A.2962/S.1897 §27 DEP may not disapprove the use of a restricted use remedial action or a limited restricted use remedial action so long as the remedial action meets the required health risk standard, and is protective of the environment. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(1))

○ Note: This is a major change in extending relatively recent restrictions similar to those now applied to child care centers and schools to residential uses. Those now under contract for such developments may find themselves with substantial difficulty in proceeding with those developments unless DEP guidance, not yet existing, freely allows use of ECs and ICs to minimize exposure to residual contamination. Those hereafter considering such developments need to more carefully assess the risks of new impediments by these requirements.

○ Note: It is to be hoped that DEP guidance will clarify techniques that will permit such developments rather than outright prohibit them (which would seem inconsistent with these provisions so long as actual exposure pathways can be eliminated or controlled). For example: Is a six inch clean zone beneath a slab sufficient or a one or two foot zone required? are vapor mitigation measures always to be installed as a precautionary measure or only in certain instances? Are deed restricted lots to be avoided for single family lots, but accepted for condominium developments?

○ Note: There is no guidance clarifying which other uses may involve sensitive populations requiring more protection. 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? Athletic or recreational facilities?)

◊ 3.8.13(B) Except as provided in this subsection (N.J.S.A. 58:10B-12g) and A.2962/S.1897 §27, the choice of the remedial action to be implemented shall be made by the PRCR in accordance with Law(s) and that choice shall be approved by DEP if all the criteria for remedial action, as applicable, are met. (A.2962/S.1897 §47; N.J.S.A. 58:10B-12g.(1)).

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

◊ 3.8.13(C) DEP may disapprove the selection of a remedial action for a site which will render the property unusable for future redevelopment or for recreational use (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(1)).

○ Note: Does DEP have to come up with guidance or rules before it can exercise this power? Arguably yes. . See e.g., A.2962/S.1897 §41; N.J.S.A. 58:10B-2.

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

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

○ Note: If a municipality complains after an RAO that it believes the remedy selected makes a property unusable, can DEP reopen the RAO? One would hope not. And even if it can for some period, the 3 year limit arguably should still apply.

◊ 3.8.13(D) DEP may also require the treatment or removal of contaminated material that would pose an acute health or safety hazard in the event of failure of an EC. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(2)).

○ Note: Presumably the LSRP should consider these issues, particularly if DEP provides guidance. In general there may be a consensus on many of the more obvious issues to which this may apply (creation of an explosive condition, for example). But absent that consensus, or new DEP guidance, can an LSRP safely rely in his or her own judgment? Compare, however, N.J.S.A.58:10B-12g.(7): is the difference support for the view that this is a DEP power, right and responsibility, but not that of an LSRP?

◊ 3.8.13(E) Property that does not meet unrestricted use criteria can still be used for residential use, essentially on the same logic as before, but now only if there is a DEP presumptive remedy or DEP approved alternative remedy for same under N.J.S.A.58:10B-12g.(1) & (10). (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(3)).

○ Note: Until DEP promulgates such remedies there will be increased danger in pursuing a residential use on a site not remediated to unrestricted standards.

◊ 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. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(7)).

○ Note: Presumably this means that an LSRP should prefer a remedy that is implementable in a reasonable time frame over one that is not.

◊ 3.8.13(G) DEP may authorize a PRCR to divide a contaminated site into one or more areas of concern. For each area of concern, a different remedial action may be selected provided the requirements of this subsection are met and the remedial action selected is consistent with the future use of the property. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(11)).

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

○ Note: Presumably the LSRP may consider these issues, particularly if DEP provides guidance. But absent that consensus, or new DEP guidance, can an LSRP safely rely in his or her own judgment? Compare, however, N.J.S.A.58:10B-12g.(7) (which expressly provides that the LSRP and DEP each shall consider time periods in considering alternatives): is the difference support for the view that this is a DEP power, right and responsibility, but not that of an LSRP?

◊ 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. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(12))

○ Note: Some such uses exist today, both with and without such controls. It is not clear that this new legislative policy judgment is truly appropriate: EC should suffice to be protective absent an acute risk aggravated by, for example, a failure of controls and 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 and, presumably, the legislature determined more protection was needed for use of landfills. But can this policy decision withstand scrutiny?

◊ 3.8.13(I) The protection afforded against changes in standards by less than an order of magnitude granted to DEP approved remedial action workplans now also extends to approved remedial action workplans of LSRPs. (A.2962/S.1897 §47; N.J.S.A.58:10B-12j)

◊ 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 A.2962/S.1897 § 19 and the final remediation document. (A.2962/S.1897 §47; N.J.S.A.58:10B-12o)

◊ 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). (A.2962/S.1897 §48; N.J.S.A.58:10B-13).

◊ 3.8.13(L) DEP cannot require more remediation if a LSRP approves an EC if the EC is in fact protective. (A.2962/S.1897 §48; N.J.S.A.58:10B-13g.).

◊ 3.8.13(M) Except with respect to UHOTs, after LSRP's are licensed DEP is not to issue covenants not to sue. (A.2962/S.1897 §49; N.J.S.A.58:10B-13.1f.)

■ 3.9 Presumptive Remedies & Alternatives

◊ DEP shall, by rule or regulation, establish presumptive remedies required on any site or area of concern to be used for residential purposes, as a child care center, or as a school. DEP may also issue guidelines that provide for presumptive remedies that may be required as provided in N.J.S.A. 58:10B-12g.(1) on a site to be so used. The presumptive remedies shall be based on the historic use of the property, the nature and extent of contamination, the future use and any other factors deemed relevant. DEP may allow for the use of EC and IC in the presumptive remedies. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(10)).

○ Presumably the LSRP may consider these issues, particularly if DEP provides guidance. But absent that new DEP guidance, can an LSRP safely rely in his or her own judgment? Compare, however, N.J.S.A.58:10B-12g.(7): is the difference support for the view that this is a DEP power, right and responsibility, but not that of an LSRP? Does the LSRP have no role when such uses are planned? And if DEP's role is determinative in such cases, how is DEP's view to be sought and obtained, especially in a timely manner?

◊ If a PRCR demonstrates to DEP 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 DEP. (A.2962/S.1897 §47; N.J.S.A.58:10B-12g.(10)).

○ Presumably the LSRP may consider these issues, particularly if DEP provides guidance. But absent that new DEP guidance, can an LSRP allow an alternative remedy? See 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 (A.2962/S.1897 §48; N.J.S.A.58:10B-17.1b.) except if the statute of limitation has previously expired. (A.2962/S.1897 §48; N.J.S.A.58:10B-17.1d.)

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

○ Yet if an RAO issues by the LSRP in favor of the PRCR, which by operation of law includes a covenant not to sue, can the state still thereafter seek NRD? Arguably not.

IV. Some Questions and Answers:.

1. Program Effects:

● **Q1.1 (old Q28):** What happens in the next six months?

A: In theory the old system keeps chugging as it has been. Feel better? In reality it may be hard for most existing sites to make any real progress before DEP as DEP will be gearing up for LSRPs and there may be few or no licensed LSRPs for that long. Existing backlogs are not likely to improve. DEP has staffing, budget and morale issues: these will not get better while we wait. Even when LSRPs are licensed, it may take them a bit to get up to speed, particularly under new guidance, and as rumors of more change to come spread, generating more uncertainty about how to proceed.

● **Q1.2**: Is there an opportunity to influence DEP's initial efforts?

A: There may be some effort by DEP to reach out on limited issues for limited periods to groups previously involved in the LSRP legislation. However, major change may be impossible and likely DEP efforts are already started.

● **Q1.3 (old Q1):** Will the new SRRA save remediating persons time and money?

A: It is possible there will be savings to some but not likely in most cases as LSRPs may actually demand more work than they would have been willing to propose to DEP. Also LSRPs likely will charge a premium rate for their involvement, although competition and market forces may affect this. However, it is to be hoped and expected that there are real opportunities for saving time, subject to the risk of post RAO audits and reopeners.

● **Q1.4 (old Q27):** Will the program work?

A: It can. It is to be hoped it will. Many of us can help it to succeed or, if too many act poorly, fail. It is to be hoped that DEP personnel will embrace it and help it to work, but there may need to be a significant shift in DEP attitudes. The regulated community will need to watch and see what happens. It may take several years to fairly evaluate it. If the program fails to achieve its goals, change by DEP and the legislature are quite likely. And if LSRPs find themselves the victims of a search for perfection, they themselves may decline to pursue the demanded role.

2. LSRP-Client Issues:

● **Q2.1**: Who hires the LSRP?

A: Likely the person responsible for conducting the remediation (the PRCR). That could be a seller or buyer, a landlord or tenant, a directive recipient, a brownfields developer or others. It is not likely to be DEP. It could conceivably be a lawyer, a parent or affiliated person or entity or an insurer contracting for services. There is no clear rule to determine who should or should not hire the LSRP. We expect that there will be cases when parties may bargain who will hire the LSRP. It is at least possible that more than one person or entity could hire the LSRP.

● **Q2.2 (old Q4):** Who is the LSRP's "client"?

A: There is no definition of this term. It is not DEP. However, presumably it is analogous to a lawyer's client and a vendor's customer. If this is correct it could be the person or entity contracting with the LSRP for services, or the person to whom the LSRP owes a special duty by contract or professional or ethical guidance. This may or may not be the PRCR at a site. When an attorney represents an owner of a contaminated site, but was retained by an insurance company, who is the client? Is it both the owner and the carrier? Similar issues and answers may apply here. 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.

● **Q2.3 (old Q5):** When might a LSRP's "client" not be a PRCR?

A: It is possible an LSRP could be retained by a buyer, a lender, a government entity, a tenant, an insurance company, a parent or affiliated entity, a consulting firm or a lawyer, any of whom could at the time of retention not be a PRCR. It appears some of the provisions of A.2962/S.1897 could still apply to the LSRP and/or client in such an instance.

● **Q2.4 (old Q6):** When will there first be licensed LSRPs?

A: This is uncertain. It seems quite unlikely it could be any sooner than 4 months after enactment (unless DEP has made great progress in preparation during the delay since passage before the Governor signs) or any longer than 10 months after enactment. Informal timeline information from DEP currently suggests 6-9 months after enactment.

● **Q2.5**: Can or should a PRCR for an existing case hire an LSRP right away?

A: It probably can. It may even have to do so if DEP acts under its oversight powers. But the actual and perceived advantages either way may depend on the procedural posture and the history of the matter, whether or not delineation is inarguably complete, and whether there is a significant chance of

finishing the matter within three years. It may also depend on existing contract rights, confidence in the available LSRPs and the PRCRs willingness to be one of the early experimenters. If an LSRP is likely to be required because of the anticipated duration of the matter, a cogent argument can be made that sooner may be better. In any event, it may make sense to talk to your consultants now and find out what they plan to do about this law and who in their organization is likely to pursue a license.

● **Q2.6 (old Q7):** Are there any reasons to not hire LSRPs?

A: At first reflection, there may be 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. Some consultants, perhaps the most senior, may perceive sufficient disadvantages as to await more experience with the demands and consequences of licensure. Some will not have the required years of experience and yet be able to provide valuable resources. Some will be needed and willing to work with LSRPs, just as many work under the supervision of more senior professionals today. Some may offer a less expensive rate or price to their clients. Some may fail the test, yet have invaluable expertise or knowledge. Some tasks may not require an LSRP because they are not part of the process of remediating as site. As one example, conduct of a preliminary assessment under state law and/or a Phase I/Environmental Site Assessment/All Appropriate Inquiry report under federal law, for loan underwriting, basic due diligence, compliance auditing, or innocent purchaser status, does not likely require use of an LSRP. 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, may prefer to reduce the risk of a conflict between LSRP duties and attorney-client privilege by use of non-LSRPs. On the other hand, will use of an LSRP for such tasks, especially pre-purchase due diligence and a preliminary assessment, create a better result, such as a more viable defense, and/or serve as a better foundation for a later compliance with remedial requirements, under ISRA for example, if needed? Also consider: are there any reasons to use an unlicensed out-of-state professional? To use an unlicensed out of state laboratory? To use in-house staff not licensed as LSRPs?

● **Q2.7:** Should PRCRs with multiple sites use multiple LSRPs or just one?

A: Either strategy could work well for a particular PRCR depending on the choices and philosophy of the PRCR. The question may be most relevant to a PRCR having multiple sites using multiple consultants. Even if each such existing consultant ends up with its own LSRP available, the philosophy of that particular LSRP may or may not match the strategies implemented by that PRCR and that consulting firm for that site or PRCR or other sites. Use of one LSRP might reduce the risks of problems from audits if that LSRP is particularly talented, as undoubtedly some will be. Conversely, use of only one LSRP may pose risks if that LSRP is audited, with resulting problems before DEP.

● **Q2.8 (old Q15):** When are new cases initiated such that the PRCR must use a LSRP?

A: Although mere investigation is included within the meaning of remediation, and a PRCR initiating remediation for the first time after there are licensed LSRPs is subject to the new system, it seems unlikely that in every case mere investigation or assessment should always count as a new case requiring a LSRP. Clearly new discharges occurring after there are LSRPs will be subject to the new system. But otherwise the facts and circumstances, and future DEP guidance, may determine the answer. Of course, after three years the question may be less important. However, we expect that there are tasks within the definition of remediation that will not be ruled to always require use of an LSRP even three years from now (such as conduct of a preliminary assessment).

● **Q2.9**: For an existing case, what should the PRCR do now about its existing contracts with third parties (for example those calling for pursuit of no further action letters)?

A: Review critical contracts to assess if there are issues in view of the changes. Consider seeking amendments to clarify the issues in advance of need or conflict. Don't wait until the last moment.

● **Q2.10 (old Q24):** Will there be problems under existing contracts given the new approach?

A: Likely yes there will be. Reasonable persons can probably find alternate approaches that will come close to satisfying old contract provisions made under prior law and terminology. Unreasonable persons and/or persons forced into confrontations (for example, by reason of a bankruptcy), may insist on performance as written. 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, given that NFA Letters may still be available, is the tenant obligated to pursue such a FRD if the landlord is inflexible? The answer likely depends on the precise wording of the lease, but in New Jersey the implied covenant of good faith and fair dealing, and equity itself, may also compel acceptance of a RAO in most circumstances. Other contract issues may similarly arise. Some issues, however, may be much more difficult to resolve.

● **Q2.11 (old Q25)**: What should new contracts, leases and loan documents say?

A: Effective immediately old forms should be changed. They can address the period until the Governor's signature is obtained, and the possibility it is not signed, and should address transition issues. However, New contracts should use the new terms and expressly address new issues under SRRA. Clauses should call for FRDs and address the issues rising from the differences between NFA Letters and RAOs. They should deal with the new permitting scheme for ECs and ICs. They should deal with the role of LSRPs and the possibility of DEP intervention and oversight. They should recognize the acceptability of remediation certifications. They should recognize the availability of LCs, if they detail acceptable RFS. Those pursuing innocent purchaser status should deal with the revised requirements. (But I confess I have not yet drafted changed forms myself: I have been busy writing this).

● **Q2.12**: Seller sold a property four years ago and has been proceeding with a remediation of the sold site under an MOA. Escrow agent has been holding $500,000 in escrow waiting for an NFA Letter. If everyone agrees that an LSRP can finish up, and the LSRP issues a RAO, filing it with DEP, can the escrowed funds be released?

A: Absent an express revision to preexisting agreement(s), the answer to this may depend on the terms of the escrow agreement. Certainly if one were drafting such an escrow today, the parties would draft specifically to provide for treatment of an RAO. They also would likely address DEP's three year audit period in some way, perhaps by releasing some of the money instead of all, or perhaps holding the funds until a successful audit or the passage of three years. But older escrow agreements must be read as they were written and it is doubtful that one answer will work for all.

3. Technical Issues:

● **Q3.1 (old Q2):** Will there be more or less sampling hereafter?

A: Likely more. LSRPs can be expected to be more cautious. Earlier and more extensive sampling may accelerate results, planning, decision making and completion. Delay can be problematic. Cost is arguably less relevant to the process than before.

● **Q3.2**: If there are technical issues as to DEP interpretations and requirements, can one still go to DEP?

A: Likely yes. It is expected that DEP will establish mechanisms for formal and informal consultation, perhaps limited to LSRPs, so that surprises from future DEP review can be limited. Despite DEP assertions otherwise investigation and remediation are rarely "cook-book" or formulaic. Judgment is critical. And sometimes reasonable professional minds can disagree. Other mechanisms may also exist, including consultation with other professionals or professional associations, particularly when DEP guidance is unavailable or unhelpful.

● **Q3.3**: If the PRCR has a complex technical question about its site, can or should the PRCR brainstorm the issue with the LSRP, or even the other consultants of the LSRP firm, particularly if it wants to maintain maximum choice?

A: A PRCR who wants a strong relationship and the highest quality result from its LSRP arguably should interact with its LSRP on all issues. However, there may be hypothetical issues the PRCR would like to discuss in confidence with a technical advisor, and it may be difficult to do so in a free-wheeling exchange of ideas with the LSRP, and perhaps even others of the LSRP's firm, without risk of tainting the LSRP's thoughts. In that case consultation with an independent advisor, perhaps only for a second opinion, may have more utility and preserve the ability to later discuss the facts and/or issues with the LSRP in a manner more acceptable to the PRCR. Remember, though, that facts, errors and deviations from rules, standards and guidance must be addressed; confidentiality as to those is likely irrelevant.

● **Q3.4 (old Q9):** Is it safe for a client to conceal material information from the LSRP? Is it safe for counsel to help a client conceal such information? Is it safe for a non-LSRP consultant to do so?

A: No. The LSRP has duties that will be hampered by such concealment. See e.g., A.2962/S.1897 § 16.a. (the LSRP's "highest priority shall be the protection of public health and safety and the environment."). In general, environmental issues have a small chance of disappearing or improving over time, and a larger chance of spreading and getting worse. People and property may be harmed by delay or confusion. Absent full disclosure, the LSRP process will have a greater risk of failure and the RAO issued by an LSRP may be worthless or worth less, when material information is concealed. Real problems may be missed by the LSRP with an inaccurate understanding. The PRCR also has separate duties, including to certify submissions as true, accurate and complete; if information is concealed can the PRCR validly give that certification? Not likely or easily. See A.2962/S.1897 §14.b. Further, concealment may be a violation of law in some cases. Any person violating the law may have liability. A.2962/S.1897 §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").

● **Q3.5**: For an existing case, if delineation is not complete what should the PRCR do now?

A: Act to complete the remedial investigation to a point where the LSRP is convinced of that completion and DEP either will also be convinced or likely unwilling to argue. Of course, that point is not known today. But failure to act within the specified periods increases the risk of DEP asserting oversight. That should be avoided if possible. If delineation will be delayed for reasons that are valid, extensions should be sought, even if of uncertain effect. If access issues are a source of delay, sue for access sooner.

● **Q3.6 (old Q10):** 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 DEP that there be no sampling. Will that be 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 made before as a mere consultant?

A: It seems quite likely that in many cases the LSRP will come to a different judgment than before. But as DEP personnel themselves often came to different judgments in similar circumstances, sometimes as a matter of experience, sometimes as a matter of attitude, it is to be expected that different LSRPs will come to different judgments. This does not mean that some are right and others are wrong: all may be right. Clearly a LSRP will be held to a different and higher standard than a mere consultant. A LSRP must act to protect public heath and safety, and the environment. His or her highest duty is no longer to the client. As DEP decision makers themselves sometimes elected to be overly cautious, at least in the view of PRCRs, so LSRPs may find themselves taking a more conservative path hereafter. Further, remember that neither a NFA Letter or RAO provide protection to a PRCR at a site where the decision not-to-sample, whether by the prior DEP case manager or a new LSRP, results in an actual demonstrable failure to detect and remediate a problem in fact then existing. Whether a mistake was made, or a justifiable decision in full compliance was made, it is doubtful that the PRCR is protected at all from such a problem by the faulty NFA Letter or RAO: real problems will not be ignored and must be addressed. 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, potentially 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 itself. At least PRCRs can hope that will be the case.

● **Q3.7:** Will the LSRP be authorized to make decisions about the most thorny decisions previously faced (such as: historic fill; offsite or background contributions and sources; innocent purchaser status; permit issues; free and residual product; groundwater flow [in fractures; in bedding planes]; controls and deed notice terms)?

A: We need to see DEP rules and guidance on such issues. If the system is to work as the legislature intends then LSRPs must be able to face, address and decide most of these. However, DEP is given sufficient power to clarify these and other issues, and constrain the ability of LSRPs to move forward on such issues. It remains to be seen if and how they will do so.

4. Finality:

● **Q4.1 (old Q11):** How reliable is an RAO as a substitute for a NFA Letter?

A: It is to be hoped RAOs will prove at least as reliable as NFA Letters. They in fact may be more so because the LSRP may prove more cautious than DEP has sometimes been. However, they are subject to review and reopener. That is potentially problematic and parties and contracts need to consider this risk somewhat more carefully than they have considered the rare reopener of NFA Letters. But only time and experience will permit a real understanding of the difference between RAOs and NFA Letters.

● **Q4.2 (old Q12):** Which is better: a NFA Letter or an RAO?

A: As DEP's ability to issue covenants not to sue (other than for UHOTs) is constrained by law after LSRPs are licensed (A.2962/S.1897 §49; N.J.S.A.58:10B-13.1f.) an RAO appears to have more value. However, in general DEP's own issuance of that scarce commodity – an NFA letter- is still arguably valuable in that it likely is less exposed to audit or reopener. An RAO is subject to review for three years after issuance (A.2962/S.1897 § 25.) and longer if certain, hopefully rare, circumstances occur.

5. DEP Oversight of LSRPs and Sites:

● **Q5.1**: How exactly will DEP direct oversight work?

A: I don't know. I don't expect it to work well or easily. It likely will work confrontationally if it works at all. As is often the case, those who are weak and in difficult positions may find themselves with the most headaches and least flexibility. Those who are strong and willing to fight DEP may find

themselves acting hereafter as they have before. There will certainly be challenges to DEP decisions, process, rules and perhaps even the very constitutionality of the system. Unfortunately, the small and the weak lack the resources to engage in such fights.

● **Q5.2 (old Q26)**: Will it be a fun experience to have DEP take over direct oversight.

A: Fun for whom? PRCRs? We suspect not, although it is possible that at some sites DEP may make the experience less traumatic and confrontational than at others. For example, if a PRCR has been proceeding in good faith but misses deadlines such that DEP undertakes direct oversight, DEP may be less aggressive in its approach and demands than may be the case when DEP takes over a site it perceives has languished for decades, in the face of known serious issues, where the PRCR is a known or suspected recalcitrant or violator.

● **Q5.3 (old Q16):** When, if ever, is a remedial investigation phase clearly completed so as to reduce the risk of DEP taking direct oversight?

A: This may be uncertain at sites where DEP, and perhaps LSRPs hereafter, have an insatiable desire for more samples and more wells, in more places, depths, and directions than previously conducted. Arguably at such sites the remedial investigation may never finish. However, I do not believe that the need or fact of additional sampling always eliminates a position that a remedial investigation has been previously completed. Of course, it would be helpful to have a declaration, either self serving or by the LSRP or DEP, that is accurate, reasonable and correct in all material respects, that the remedial investigation for the site is complete, at least in a submitted report, and hopefully in a DEP or LSRP approval. To make such a case, it would seem necessary that horizontal and vertical delineation be complete. Of course, at complex sites that issue is itself the centerpiece of debate, as parties and DEP argue directions of groundwater flow, the presence and significance of product, fracture sets and bedding planes, and pumping wells, the presence and effect of regional or background conditions, the presence and effect of historic fill, and the need for offsite evaluations of groundwater and/or vapor intrusion issues. Still, if delineation is complete a cogent argument can be made that additional sampling has other purposes (such as remedial design). But if additional sampling is conducted after a declaration of a completed remedial investigation and such sampling finds a further problem, is the prior determination wrong so that the remedial investigation now is seen as incomplete (with the possible effect that DEP can or must take direct oversight and the PRCR must establish a trust fund?) Perhaps in some cases.

● **Q5.4 (old Q17):** How will the need for permits (such as wetlands or flood), and delays in obtaining them, factor into assessment of whether a PRCR is meeting required deadlines?

A: It is to be hoped that changes at NJDEP will reduce unnecessary delays. Further, to the extent that NJDEP rules establish time periods for remediation, those rules should account for such issues. However, the statutory periods for completion of remedial investigations at older sites may not be subject to extension for such or other matters, absent new DEP rules or court intervention.

● **Q5.5**: Do the rules for residential development stay the same?

A: No; but practices may ultimately prove similar to present practices. We need to see future DEP guidance on presumptive remedies for residential developments. If the SRRA's new rules, like those for schools and day cares, are used to discourage or prevent residential developments on contaminated sites, many new and pending projects may have problems. However, if DEP allows such developments where there is an adequate barrier against exposure, vapor intrusion protections are taken, water comes from public water supplies, and mechanisms are in place to ensure that controls are honored, then perhaps such developments will still be feasible.

6. Disputes:

● **Q6.1:** When there is a disagreement between the LSRP and another, who prevails?

A: When two or LSRP's disagree, at least in the first instance the one LSRP responsible to supervise the remediation is likely to prevail. When an LSRP and a client disagree, likely the LSRP prevails unless the client fires the LSRP, hires another LSRP who agrees with the client, and the disagreement does not cause problems before DEP. When an LSRP and DEP disagree, more likely than not the DEP prevails unless DEP is acting improperly. When an LSRP, DEP and/or the Board disagree, the disagreement likely ends up before a Judge and the Judge prevails (at least until some other Judge says otherwise). It remains to be seen how much deference the Courts will give to DEP and the Board, especially if the try to enforce policies and rules that are unwritten, vague, unclear, and/or contradictory.

● **Q6.2 (old Q13):** What happens if a RAO is wrong?

A: See the definition of CRYING above. Basically chaos. The case can be reopened. 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. Perhaps as important, the LSRP license may be threatened and other cases of the LSRP may be examined. 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. Generally, we recommend that all RAOs be right.

● **Q6.3:** If DEP rejects an RAO and requires more work, will the parties be returned to the *status quo ante*?

A: Probably not, unless the parties themselves found a way to do so, or everyone is ready, willing and able to do so. For example, escrows may have been released and funds dissipated, distributed or expended. Alternatively a person may have died or moved, or a company dissolved. A site may have been sold or abandoned. A bankruptcy may have occurred. A rejection of an RAO may not avoid the results of such changes. What then happens remains to be seen.

● **Q6.4 (old Q33):** Will there be more court cases than before?

A: Likely yes. First, some aspects of the SRRA create greater risk and need for adjudication because of the significance of the issues and DEP unilateral powers (such as the compulsion for a PRCR to deposit a lot of cash in a trust account in some cases). Second, LSRPs are certain to defend themselves on license issues, whether denials, audits or enforcement issues. Third, PRCRs have reason to ensure that decisions made by LSRPs are preserved and enforced. Finally, courts may be less likely to defer to DEP judgment as much as previously given the legislatively mandated roles specified for LSRPs and the Board and the obligations and limits on DEP.

● **Q6.5 (old Q34):** Are there limits to the Board and DEP's inspection, access, seizure and other rights?

A: Yes. These powers will not be absolute, especially if the Board or DEP do not act narrowly. It is unlikely that their powers can be used to ignore legitimate privileges and confidentiality. If they fail to respect those legitimate concerns, courts will intervene.

● **Q6.6 (old Q35):** Will any LSRPs and/or PRCRs suffer by reason of DEP reviews and/or audits?

A: Yes. Mistakes are certain. DEP and the Board are likely to want to establish a strong precedent that poor work will be detected, reversed and punished. Someone will be disciplined and/or lose a license early. Don't let it be you or a friend. And some PRCRs will also be the focus of enforcement to ensure LSRP independence and work quality. Other PRCRs will suffer because of LSRP errors. In such cases litigation seems likely.

● **Q6.7**: If DEP rejects an RAO requiring additional work, are there claims against the LSRP?

A: Perhaps. Did the LSRP violate a standard of care or DEP rules, policies or guidance? Or does DEP simply want more (assuming for the moment that DEP can so act)? Consider the possibility that a LSRP issues an RAO in the absence of sampling around a transformer pad and on audit DEP wants sampling: does the answer depend on what specifically DEP rules, policies or guidance say? (I think so). Does the answer depend on the results of added sampling? (It may). In general, one would expect a professional to avoid malpractice type liability if it exercises the judgment of an ordinary professional, even if in hindsight that judgment proves wrong. Of course, it remains to be seen what DEP, the board and the courts will say about LSRPs. But I do not believe that it is a condition of licensure that an LSRP always be right.

● **Q6.8**: Is there personal liability for an LSRP? Should a candidate for LSRP fear individual liability?

A: As with all professionals there is potential civil liability if something is done wrong. The glib answer to such a fear is that no one who does a good job need fear personal liability. The second glib answer is that an LSRP should get and rely on good insurance. But there are many who were once thought of as good lawyers and Doctors who found themselves on the wrong end of a malpractice suit who found little comfort in how good they thought they were and the existence of an insurance policy. A person needs to decide how fearful to be of individual liability; it cannot be avoided, even by not becoming an LSRP. However, being an LSRP will shine more of a light on a person's decisions than staying behind the scenes, particularly as against DEP. Obviously good insurance helps to manage exposure for civil damages, but not likely for fines, criminal sanctions or loss of license. Even so, each insurance policy needs to be assessed to see how much it helps. Personally, as a lawyer I face similar risks as well. While DEP has scant powers over my career, the courts have substantial power over me and my license. Yet I could not imagine any other career for myself; I like helping clients and making professional judgments even in areas within which there is little certainty. If a candidate believes in his or her own skills, qualifications, experience and abilities, if risks are evaluated and taken carefully and thoughtfully, after appropriate deliberation and research, with due regard for DEP guidance, practices and rules, and with care to disclose relevant limits, I think the exposure should be fully manageable and I urge such candidates to seek licensure. PRCRs and DEP need people to step forth and take the responsibility of serving as a 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, and DEP and the board will understand that no one can be perfect and professional judgment does not mean perfection. But certainly, there is a risk. And those who are unable or unwilling to take added risk probably need not apply.

● **Q6.9 (old Q29):** Does the SRRA affect Natural Resource Damage claims?

A: Yes. First for many sites it extends the statute of limitation so that claims can be brought by DEP after remediation is complete. At some sites that could be decades from now. Second, DEP's occasional past practice of delaying issuance of a NFA Letter until NRD was resolved for the site will now disappear with LSRP issuance of RAOs (unless future DEP guidance about RAOs tries to force LSRPs into NRD enforcement), but likely DEP review of NRD will be triggered automatically on submission of the RAO. Third, RAOs may impede NRD suits by their very terms. Fourth, DEP will have more time to prepare and prosecute NRD claims. It will be able to wait longer to establish favorable precedents before chasing more cases. It will be able to use its resources better.

7. DEP Processes:

● **Q7.1 (old Q3):** Will there be more or less reporting to the DEP Hotline?

A: Likely more. In a few cases both the PRCR and LSRP must make several calls. Historic conditions appear to be reportable more often. No exemption exists for previously reported conditions. With LSRP licenses at stake, conservative reporting is more likely.

● **Q7.2 (old Q14):** Are MOAs dead?

A: Some discussions with DEP suggest that MOAs may no longer be needed, or perhaps available, after there are LSRPs. At least one senior DEP official has been heard to urge delaying seeking MOAs, and even terminating them, because of the backlog in assigning MOA cases to DEP case managers. Further guidance and experience is needed to understand the proper approach. But there may be advantages to proceeding under MOAs even if DEP oversight is minimal, because, for example, they may avoid the need for an RFS. See A.2962/S.1897 §46. Certainly existing MOAs continue, unless someone terminates them under their terms. Whether a party to an MOA can or should terminate an MOA needs to be carefully considered. Nothing in the MOA process or terms should be interpreted to prevent use of an LSRP as part of that compliance.

● **Q7.3**: Some companies conduct audits before they proceed with remediation. Sometimes they try to do so confidentially. Is this still possible?

A: Conducting a confidential audit has been challenging because an audit cannot be used to evade the law. Many environmental issues trigger self-reporting. Many environmental issues pose issues of continuing violations of law. Some use attorney-client privilege to shield audits, at least preliminary assessment or compliance type audits. Such audits have proven to provide valuable tools to many. It would be a shame if they are now less likely to occur than before. However, use of an LSRP for such audits, and perhaps even a firm having LSRPs on staff, may pose added challenges because of the new duties of LSRPs. For example, an LSRP has an absolute independent obligation to report an IEC to DEP.

● **Q7.4**: I am selling an industrial establishment. Can I really close my deal simply by filing a GIN, a remediation certification and complying with ISRA remedial obligations thereafter?

A: We need to see DEP guidance to see if it is really that simple, but it appears it should be.

● **Q7.5:** Who is liable under the new permit scheme for EC and IC?

A: We need to see new rules and guidance. Undoubtedly, DEP will initially take the position that everyone must seek a permit; but likely if someone does everyone else need not. And it seems logical to assume that the holder of a permit will have more direct responsibility for breaches and transfers of the permit than non-holders. But I suspect the permit system will impose some level of contingent or secondary liability for all those now liable for controls at a site.

● **Q7.6 (old Q30):** Will DEP act more or less often by formal rule making than before?

A: SRRA seemingly ratifies DEP providing guidance for remediation and LSRPs, as distinguished from rules and regulations. DEP has never feared imposing substantial requirements by guidance: it used cleanup criteria for decades without rules; it imposes vapor intrusion investigation requirements without rules. It seems likely DEP will so proceed more often hereafter.

8. Licensure:

● **Q8.1 (old Q8):** Are licensed professionals from other states (such as Massachusetts) at an advantage relative to presently unlicensed consultants in NJ, legally, technically or in the marketplace?

A: I do not believe so, given DEP's focus on New Jersey specific requirements.

● **Q8.2 (old Q18):** In assessing whether a particular person qualifies for a LSRP license, how does one assess and calculate that person's work experience?

A: This has yet to be determined. Presumably the approach will be a common sense approach. It may be, for example, that a full time chief executive officer of a consulting firm, or a marketing or sales official, may have some difficulty meeting these requirements if in fact they spend little time actually

working on remediations. It is not obvious how work on permitting, planning, schedules, communications and access should count. It is not obvious how to count work in different states. It is not obvious how to handle supervisory experience with little recent field experience. It is not obvious how to count exclusive field work with little experience in planning or reporting.

● **Q8.3 (old Q19):** Should a consulting firm maintain some of its staff as LSRPs and others not?

A: Yes. Not every consultant now practicing can or will be licensed. Some will fail the exam. Some will not meet licensing criteria. Further, there may be a role in some client's minds for non-LSRPs, particularly if non-LSRPs cost less. However, there will be problems if a non-LSRP engages in any conduct prohibited to a LSRP in the same firm. See A.2962/S.1897. § 16.p. A firm planning to so proceed needs to think about this issue so as to protect the LSRP's license.

● **Q8.4 (old Q20):** Are all interim LSRPs certain to become permanent LSRPs?

A: No. But we will have to see the first test results before we know if that becomes a major stumbling block. Otherwise, we would expect most temporary licenses to convert.

● **Q8.5 (old Q21):** Should an existing consulting firm's form contracts be changed to deal with LSRP issues?

A: Yes. The contract should likely be clear about when an LSRP is or is not working on a matter, and/or is responsible for remediation of a site, if only to permit compliance with the notice of retention requirements. It may also be appropriate to have separate contracts, or at least riders, addressing general contract consulting services and LSRP services differently. Other provisions may be advisable to deal with the range of issues and obligations associated with the LSRP program, including without limitation disclosure and notification requirements, LSRP duties, conflicts, record retention, confidentiality etc. Future guidance and standards for LSRPs may include specific requirements that will need to be met.

● **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?

A: An LSRP must consider its client. Professional judgment is seldom simple or formulaic. And the LSRP owes duties to the client that likely cannot be met absent consultation. Also while the goal should not change, different paths may be available to reach the goal. Discussions with the client are to be expected and encouraged, especially if the LSRP program is to be effective. Contracts and professional duties will include protection of client interests. Also if a professional relationship is to be maintained, an LSRP's Client must have confidence that their concerns are considered and addressed by the LSRP. At the same time the LSRP must be attentive to its professional obligations. But professionalism does not depend on dictatorial power. And the LSRP does not work for DEP. While some tension may exist in some cases, and in the worst case the LSRP may resign or be terminated, the most effective LSRPs are likely to be those who find a balanced approach to achieving mutual goals to finish remediation in a reasonable manner, at reasonable cost, and in reasonable periods. DEP has been criticized for failing to reach appropriate decisions in the past; while LSRPs will undoubtedly prove more conservative than mere consultants, especially those advocating client positions, have been, it is to be expected that LSRPs will be more willing to make decisions faster than DEP itself has been. And clients and PRCRs will likely be more willing to expedite work relying on those LSRP judgments because they will have had a more complete discourse with a professional hereafter than they have experienced in the past.

9. Uncertainties:

● **Q9.1:** Will DEP guidance alter the expectations of how remediation occurs, or the LSRP program works?

A: It is unclear how DEP rules and guidance will change the future conduct of remediation. Some change is possible but major change seems unlikely. However, the LSRP program and rules and guidance

for LSRP behaviors may be significantly detailed in future rules and guidance. Much is uncertain until DEP issues its first pronouncements within three months after SRRA enactment. Even thereafter, no one can be sure how detailed, demanding and/or skeptical DEP inspections, reviews and audits of LSRP deliverables will be. Only after a number of such have occurred and assessed will there be increased confidence in the ability of LSRPs to act decisively. If LSRPs fail to act to protect health, safety and the environment the LSRP program is sure to fail. Conversely, if DEP challenges many LSRP decisions, the LSRP program may be unable to achieve the legislative goals unless the courts or the legislature thereafter temper DEP oversight.

● **Q9.2 (old Q22):** Are there provisions in other existing law that do not mesh with the role to be allowed to LSRPs and DEP that may generate uncertainty as to DEP rights and PRCR and LSRP obligations?

A: Yes. Consider, for example, unamended N.J.S.A. 58:10B-12f.(2) which provides "The department may, upon its own initiative, require an alternative remediation standard for a particular contaminant for a specific real property site, in lieu of using the established minimum residential use or nonresidential use soil remediation standard adopted by the department for a particular contaminant pursuant to this section. The department may require an alternative remediation standard pursuant to this paragraph upon a determination by the department, based on the weight of the scientific evidence, that due to specific physical site characteristics of the subject real property, including, but not limited to, its proximity to surface water, the use of the adopted residential use or nonresidential use soil remediation standards would not be protective , or would be unnecessarily overprotective, of public health or safety or of the environment, as appropriate." Unless superseded by other provisions of SRRA, this provision, read as paramount to others, would seem to allow DEP to overrule an LSRP decision, even if compliant with all rules and regulations, to exercise its own initiative, based on DEP views of site specific and contaminant specific factors. While these should be rare, and undoubtedly if exercised will be attacked, there is doubt as to how to reconcile this provision. An alternate resolution, for example, would be to conclude that if DEP wants to exercise this power it must better explain in advance the factors to be considered by the LSRP so the LSRP can follow DEP guidance and, absent such guidance, DEP cannot unilaterally use this section to overrule an LSRP decision. See e.g., A.2962/S.1897 §41; N.J.S.A. 58:10B-2. There may be many other provisions that will show themselves to be problematic in view of the new LSRP program.

● **Q9.3 (old Q23):** Are there similar provisions in SRRA itself that do not mesh with the role allowed to LSRPs and DEP that may generate uncertainty as to DEP rights to reopen LSRP decisions?

A: Yes. Consider, for example, amended N.J.S.A. 58:10B-12g.(1) which provides "The department may disapprove the selection of a remedial action for a site on which the proposed remedial action will render the property unusable for future redevelopment or for recreational use." This provision, read as paramount to others, would seem to allow DEP to overrule an LSRP decision, even if compliant with all rules and regulations, based on DEP views of site use issues. But in order to do so, does DEP have to establish advance guidance for the LDRP to consider, or can it act at whim, after the fact, when, for example, local municipal forces intervene? There may be other provisions that will show themselves to be internally inconsistent with one or more elements of the new LSRP program.