

LSRPA COMPLIANCE ALERT

LSRP DISCHARGE REPORTING OBLIGATIONS

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SITE REMEDIATION REFORM ACT AND LSRP REPORTING OBLIGATIONS

Prior to the passage of the Site Remediation Reform Act (SRRA), the obligation to report discharges to the environment to the New Jersey Department of Environmental Protection (NJDEP) was limited to the discharger and any person liable for a discharge (Spill Compensation and Control Act – NJSA 58:23.11). There were no reporting obligations for environmental professionals.¹

The responsibility for discharge reporting expanded greatly with the arrival of SRRA in 2009, specifically within Section 16, which outlined the code of conduct for Licensed Site Remediation Professionals (LSRPs). As described in Section 16.k, provided herein for reference below, LSRPs now had the obligation to report discharges under certain circumstances:

“k. If a licensed site remediation professional obtains specific knowledge that a discharge has occurred on a contaminated site for which he is responsible, the licensed site remediation professional shall: (1) notify the person responsible for conducting the remediation of the existence of the discharge; and (2) notify the department of the discharge by calling the department’s telephone hotline. The persons responsible for conducting the remediation shall also be responsible for notifying the department of the existence of the discharge. The provisions of this subsection shall not apply to a discharge that may be a result of the existence of historic fill.”

It is important to note that the initial provision in draft legislation did not contain the language “for which he is responsible.” The revision to the language of Section 16.k. resulted from consultation with the legislation sponsor and legislative committee by external stakeholders (represented partly by current members of the LSRPA) regarding the need for LSRPs to practice under certain circumstances (e.g. due diligence, forensic testimony, etc.) without violation of contractual confidentiality or conflict of interest requirements, as well as the view that such reporting should be performed by the responsible party.

In the early days of the LSRP Program, after passage of SRRA, but before the adoption of any implementing regulations by the NJDEP or the establishment of the Site Remediation Professional Licensing Board (SRPLB), the NJDEP interpreted Section 16.k to mean that LSRPs were obligated to report *all* discharges encountered during the course of their duties, not just

¹ A narrow exception to the limited focus of responsibility had been expressed in the Underground Storage Tank (UST) regulations (N.J.A.C. 7:14B-7.3) for many years for discharges from regulated USTs, which must be reported by ‘any person.’

discharges on sites where the LSRP was retained to perform remediation activities as the LSRP “of record” with the NJDEP (the common usage “of record” had not been developed at the time of passage of the SRRA). As noted above, the added language clearly differentiates between *any* site that an LSRP has involvement versus a site which the LSRP has responsibility under SRRA. Over the next few years, the LSRPA advocated to and educated other stakeholders, including the SRPLB, about this distinction.

The distinction is more starkly noticeable when Section 16.k is compared to Section 16.j, which addresses the reporting obligations for Immediate Environmental Concerns (IECs):

“j. if a licensed site remediation professional identifies a condition at a contaminated site that in his independent professional judgment is an immediate environmental concern, then the licensed site remediation professional shall: (1) immediately verbally advise the person responsible for conducting the remediation of that person’s duty to notify the department of the condition; and (2) immediately notify the department of the condition by calling the department’s telephone hotline.”

There is no ambiguity concerning the LSRP obligations for reporting IEC conditions to the NJDEP. There is no distinction between sites for which the LSRP is responsible as the LSRP of record and other sites, as described in Section 16.k.

The LSRP should note that the last sentence of section 16.k states that the reporting provisions do not apply to a discharge resulting from the existence of historic fill. The NJDEP has extended the same privilege to discharges resulting from diffuse anthropogenic pollution (DAP – see Diffuse Anthropogenic Pollution Administrative Guidance – April 30, 2013).

SITE REMEDIATION PROFESSIONAL LICENSING BOARD (SRPLB) ACTIONS AND RULES

The SRPLB signaled its understanding of the statutory language for discharge reporting in its written description of the rationale for the dismissal of Complaint No. 003-2011. A resident filed a complaint with the Board in which the conduct of an LSRP was questioned with respect to discharge reporting and other responsibilities. The complaint was related to a proposed residential development site where lead from a former skeet shooting range was detected in soil at concentrations greater than DEP remediation standards. The LSRP was hired by a proposed developer to conduct an environmental site assessment of the property. The LSRP was not hired and “acting as the LSRP of record for the site”. The Board dismissed the complaint and determined that, “...the complainant’s suggestion that the LSRP failed to timely notify DEP of the discharge in not valid because, at the time the discharge was discovered, the LSRP was not performing services on a contaminated site for which he was responsible.”

Among its other functions, the SRPLB is also responsible for the adoption of regulations implementing the provisions of SRRA. The regulations have been proposed in the New Jersey Register dated January 5, 2015. While the regulations must go through a public comment period

and a public hearing prior to being adopted as final rules, the proposed regulations provide a revealing glimpse of the intention of the SRPLB to implement the LSRP reporting obligations.

The proposed rules, N.J.A.C. 7:26I-6.10(b), state, “An LSRP is considered to be responsible for a contaminated site if he or she has been hired by a person responsible for conducting the remediation of that site.” Thus, once hired by the PRCR to comply with the SRRA, the LSRP must report discharges which occur at the site. Note that the proposed rule does not mention whether the LSRP has filed the retention form, only that he or she has been hired by the PRCR. While this distinction may not be critical, if the rules are adopted in their current form, an LSRP hired by the PRCR to prepare an SPCC Plan, or a NJPDES or Air Permit Application, arguably might be considered responsible for reporting a discharge, even if the retention form is not yet filed.

Consistent with the LSRPs obligations for a site for which he or she is hired by a PRCR, it is good practice that the LSRP ensures that any known discharges are reported to them (and thence to the NJDEP) by all personnel working under their direction at the site including any other LSRP.

The proposed rules also presents the requirement for reporting an IEC condition in N.J.A.C. 7:26I-6.9, which matches the provisions of Section 16.j, with no change in the statutory provisions. The Vapor Intrusion Technical Guidance (VITG) states that the ‘investigator’ (which may or may not be the LSRP) must notify the Department immediately upon knowledge (receipt of data) of the IEC. Note that the Tech Regs citation (N.J.A.C. 7:26E-1.11(a)1) for this provision obligates only the PRCR, not any other entity, such as the LSRP. However, given the clear language in the statute and the proposed Licensing Board regulations, it is incumbent upon the LSRP to report the IEC condition to the Department. The VITG also states that the investigator must notify the Department within 14 days upon knowledge (receipt of data) of a Vapor Concern (VC) condition. Arguably, there is no enabling statutory or regulatory language which requires the LSRP to report VC conditions to the NJDEP; however, the requirement for the PRCR to do so is clear at N.J.A.C. 7:26E-1.15(e)1i, as is the broader requirement for reporting all VI data under N.J.A.C. 7:26E-1.15(d). Thus, while most, if not all, LSRPs would strive to comply with this condition on behalf of his or her client, there should be no basis for a complaint against the LSRP if the timeframe for VC notification is not met (unless the LSRP failed to notify the PRCR of the requirement).

The proposed rules also clarify at N.J.A.C. 7:26I-6.10(c) that an LSRP who has been hired to perform environmental due diligence by a person who is not responsible for conducting the remediation of a site does NOT have to report a discharge at that site, unless the previously unreported discharge is an IEC condition.

A more complex issue is that in some due diligence, the property owner/operator contractually states they NEVER want to see the data. In that case, the property owner/operator may not even know they had a discharge to report. This may cause a dilemma for the LSRP whose highest priority is protection of public health and the environment. LSRPs should be careful to understand what will be done with the data collected from their work. If the data are provided to the property owner/operator, then the LSRP may feel comfortable that their duties are

discharged. But if the LSRP knows that a non-IEC condition was found which may not be protective of human health, safety and the environment, AND knows that no one will ever be told, code of conduct questions may arise.

PRACTICAL CONSIDERATIONS

There is significant concern by some members of the regulated community (PRCRs and attorneys) regarding the role of an LSRP involved with a site who is not hired by the PRCR. The LSRP may be performing due diligence on behalf of a client or working for another interested party at a site (i.e. current property owner, landlord, neighbor), who is not the PRCR. The basis of the concern is that the LSRP may need to report all discharges, irrespective of the role of his or her client. In addition, this concern is resulting in some responsible parties limiting the role of the LSRP by creating a 'firewall' between the LSRP and the day to day project team. These concerns may not be in the best interest of the LSRP program as they may interfere with the LSRP and client relationships and thereby create impediments to a successful program. Remediating parties who do not feel comfortable communicating with its LSRP (the most highly qualified individual working at the site) will not receive the best advice an LSRP can offer or trust that advice once it is given.

In September 2014, the NJDEP published Administrative Guidance for Licensed Site Remediation Professionals and Subsurface Evaluators when encountering contamination that is suspected to be unrelated to a known discharge undergoing remediation. Based on this guidance, the Department considers the identification of a suspected or verified off-site source of groundwater contamination to be a separate discharge. Therefore, the Department requires notification to the Hotline for the suspected or verified off-site source irrespective of whether the impacts were discovered on the site for which the LSRP is responsible or discovered off the site for which the LSRP is responsible. While the former circumstance fits under the aforementioned LSRP responsibilities as previously presented, it is not clear if the latter circumstance (off-site discovery) is reportable by either the PRCR or the LSRP pursuant to the either the Spill Act and SRRA or the any adopted or proposed regulations. Certainly if the discovery assists the PRCR in its investigation, it makes sense to notify the NJDEP, but the obligation to report the discovery of off-site contamination unrelated to the on-site investigation is debatable and should not extend as an obligation to the LSRP. NJDEP's position relative to this situation is that the LSRPs highest priority to protect public health and the environment supersedes any potential uncertainty associated with the language of Section 16.k, and that the clear direction provided in the Department's September 2014 guidance protects the LSRP from potential litigation initiated by off-site parties.