

Board of Trustees Retreat
June 19, 2014
Lambertville Station Inn and Restaurant
Lambertville, NJ

Attending: S. Posten, S. Boyle, J. Davies, K. Goldstein, D. Collins, M. Fisher, J. Oberer, R. Ferguson, S. Senior, A. Robins. B. Call, N. DeRose, C. Barnes, S. Drew

Invited Guests: D. Sweeney and I. Kropp

President's Remarks

S. Posten began the meeting with a discussion on the June 18th IPSC meeting. A disconnect exists between the ecology and historic fill. The premise is that the contaminants would leach to the groundwater and then to receptors. DEP's policy is that ground water does not need remediated. Discussed differentiation between sensitive receptors within a site vs. outside a site.

Property Line as Point of Compliance

Discussed using the property line as the point of compliance, as allowed in other states, acknowledging that decreasing trends in groundwater were observed with no concentration greater than ten times the groundwater quality standard, in accordance with the MNA (monitored natural attenuation) approach. There are lots of circumstances, but may never reach the property line. Redevelopment may be the impetus to clean up a site. The institutional controls to monitor may not be in place.

How lawsuits are filed when LSRPs and RPs can't get access

It was suggested that results may be better if residents are contacted by a DEP employee. J. Davies suggested that the LSRPA draft the letter.

Management of restrictions/deed notices, etc.

D. Sweeney suggested that monitoring be performed under a Discharge to Groundwater (DGW). When a plume exists at an active site, a DGW, rather than a Deed Notice, is proposed. A Discharge Prevention, Containment and Countermeasure (DPCC) and DGW are used for operating facilities. A different problem exists when a plume goes off site and regulatory and mandatory deadlines will not be met. Ground water (GW), Remedial Action Permit(RAP) and Classification Exception Area (CEA) are not enough protection for inactive facilities. In these cases, an RAO would not be issued, but would require a Permit. Permits are now in place where case managers can easily access case reviews.

SRRA 2.0

I. Kropp advised the Board of Trustees to review the list of things SRRA wanted to accomplish and develop a new list of what needs to be accomplished in SRRA 2.0. It is easy to identify the anchor person at DEP by reviewing the issues.

S. Senior commented that although our goals were met, administrative burden and administrative amendments to RAOs are still issues. Much progress on professional judgment, but bolstering still needed by LSRPs. Any issues where DEP encroaches on LSRPs needs to be kept in the forefront.

Discussion followed on where conversations on policy are held since these conversations are not included in the stakeholder process. I. Kropp commented that the policy decisions came from the Governor's Office. Since there is no stakeholder process in developing policy, Senator Sweeney should be contacted.

The Legislature seems to be ready to tackle risk management issues, but it has to be tied to something, i.e., waste of taxpayer money, the economy, better use of funds. J. Davies reminded the Committee that our focus has always been on technical issues; therefore, it is time for change through the political process.

S. Drew advised that his Committee is developing a list of topics regarding soil standards to bring to the DEP. The reauthorization of this regulation is the right time to bring this issue to the forefront with DEP and then develop into a white paper. If statutorily constrained by 10^{-6} carcinogenic risk, then discussion will be impeded. Air standards from DEP used 10^{-4} to 10^{-6} . L. Voyce commented that 10^{-6} is not concrete for EPA, there is a range of values. If DEP has this as a bright line regarding guidance, this is where negotiation will stop. Discussion followed on what inputs are chosen, hesitation to change what is set and frustration with problems. Legislators will listen if there is an economic reason for change, but a constituency is needed.

Referring to Impact to Groundwater Remediation Standards, N. DeRose stated that nothing legislative dictates taking the conservative approach. The approach is on two lines, legislative and technical.

A. Robins reported there are three approaches to standards. (1) He suggested that nothing should be "off the table" and it is incumbent upon us to raise an issue. (2) Noted that 10^{-6} is different from the EPA standard, and assumptions can be overly conservative (when these standards are taken into a 10^{-4} scenario), therefore using EPA assumptions aren't necessarily valid as the construct is different. Keep pressing the issue. (3) In the risk-based aspect, it is not necessary to use the assumption that the site is residential, since it may vary. People are not exposed to a residential property 24 hrs. per day for 70 years and an LSRP cannot adjust for that. Scientific guidance, not 10^{-6} is used.

L. Voyce commented that it is the LSRPs discretion how to manage the risk. Simply focusing on a remediation standard alone is not the only consideration. NJ regulates every molecule of soil or water like a discharge, when there are some things....parking lots, foundations...that should not be regulated. Need to question whether we are protecting human health or focusing on the right things.

Duff Collins stated it is misleading to take all comments and qualify this as a stakeholder process. Professional Judgment should be included in the process since it is the foundation of the process. The fall back may be the level of future protection if there is an overly liberal judgment.

Discussion followed on writing RAOs that can't be overturned unless they are not protective. This can be done by backing out background (i.e. historic fill) in the evaluation. A. Robins advised that Brownfields Act requires that background be considered. Discussed CEA by rule; entire area CEA, regulatory change no longer IGW based on IIA, change standards. N. DeRose commented that focus should be on groundwater use, not degradation. Identify areas of non-groundwater use, different standards or CEA-type approach.

Standards should be developed to avoid overly redundancy and being overly conservative, etc. to acceptable levels. It was suggested to contact the Commissioner's Office, since it is difficult for a regulator to get out of a certain mindset. Will not win on science and using conservative approach always wins. There is acceptance that some contamination remains. S. Boyle suggested involving Steve Chranowski since his group has clout and connections. Should not operate in the realm where this isn't the framework. Draft a letter to the Commissioner and DAG for SRP. K. Goldstein commented that initially a letter should be sent to Sens. Sweeney and Smith and contact everyone who could help elevate the issue.

Regulatory Issues

S. Boyle advised receiving a member comment on whether the LSRPA can be used as a bulletin board for soil. It was agreed that the LSRPA website could be used, but no endorsement.

LSRPA arbitration

Responding to a question on whether we want to become involved...nothing is stopping the parties from hiring a third party.

Safety

Need to consider not only worker safety, but also building interiors.

Safe Harbor

The DEP has protection. If an LSRP assumes the same responsibilities that have liabilities, they should have a safe harbor if the Code of Conduct and regulations were followed. S. Boyle commented that "hat on/off" was bigger issue than reporting spills. Massachusetts defines professional services as LSRP services; all those things done for LSRP services. Statutory language

will not change and the Licensing Board could provide “professional services” framework. Discussion on whether the safe harbor or another avenue should be followed. There is a statute in litigation context that states, before bringing a lawsuit regarding malpractice, a similarly licensed professional has to have an affidavit before that lawsuit can move forward.

Affidavit of Merit

Should it be amended to include LSRPs.

LSRPs subjected to OPRA

The Attorney General’s Office concluded that LSRP’s are not subjected to OPRA rules. This decision should be documented.

IECs

Duff Collins suggested that the DEP get resources to be the repository. Access is one point with free access. DEP previously provided press releases. Question whether there is a format for updating site conceptual model and is it available to the public.

Action Item: Keep after Attorney General’s Office to release a memo.

Direct Oversight

This is a program issue. There are 800 small sites that can’t make it. What can be done? Sites that didn’t make deadlines will be looking for LSRPs to get them in compliance.

RAPs and DGW

Is it rule or statute? CEA concept is regulatory. DEP is exerting old school case management. This should be raised as an IPS concerns

There is a record of restriction with the permit. It needs to come from DEP in statute. DGW outside of the permit gives authorization to SRP and DEP may require routine monitoring.

RAO reopeners

Only the LSRP can edit their RAO. DEP will have to invalidate. Discussing successors, it was concluded that it would be an RP problem.

Records retention

For many reasons, New Jersey should be responsible for records. Burden cannot be on the LSRP. Definition of documents to be retained is too cumbersome.

Spill Act

Owner should have known about contamination. When a client should know may depend on what the professional tells them. LSRPs could be in the middle of the dispute. Not a big LSRP issue, but can be for cost recovery. Cleanup and removal in contribution suit are those that are approved by DEP. If LSRP makes determination that costs are appropriate the case can move forward

Fennimore legislative impacts

This is a solid waste issue and impacts have not been clear. Legislation that had LSRPs overseeing the capping of landfill for redevelopment changed to PEs. Creates different process, one site gave rise to new program. Trying to get a decision out of SRP case regarding landfill going to solid waste. FA is required for old (Fennimore) landfills.