

LSRP

Power Broker and Punching Bag

by Albert I. Telsey

To find schmutz or not to find schmutz—that is the question. For those rusty on their Yiddish, schmutz means dirt. In the context of this article, it means dirty dirt, dirty groundwater, dirty building interiors and dirty vapors—all the things that require the investigation and remediation skills of a licensed site remediation professional (LSRP). Now that the LSRP program has been around for a few years, this article looks at some of the issues a lawyer may have with an LSRP and the issues an LSRP may have with lawyers, clients, regulators, lenders and other stakeholders.

New Jersey has deputized experienced environmental professionals to act as LSRPs or surrogate Department of Environmental Protection (DEP) case managers because the DEP was overwhelmed with a huge volume of unattended cleanup cases due to a reduction in staff and budget. An LSRP is a product of the Site Remediation Reform Act (SRRA)¹ and recently adopted LSRP regulations N.J.A.C. 7:26I (2016). There is a Site Remediation Professional Licensing Board to license and oversee LSRPs and a New Jersey Licensed Site Remediation Professionals Asso-

ciation to help LSRPs do their job as well as possible. At the present time, there are about 450 LSRPs in New Jersey.

According to the SRRA, an LSRP's first priority is to protect the environment. Next is to protect his or her business and reputation. Third is to protect the client. The good news is that the LSRP program has noticeably reduced the DEP backlog and shortened the time it takes to get cleanups completed and deals done. In most cases an LSRP can investigate, delineate and remediate contamination and issue a response action outcome (RAO) quickly and without the preapproval of the DEP. The bad news is that schmutz remains code language for 'hot potato of unwanted environmental expense.' Few people are willing to accept uncertainty, and this repugnance is now often directed at the LSRP.

Addressing environmental contamination comes up in the sale and purchase of real estate, leasing of property, stock sale, corporate restructuring, condemnation, foreclosure and distribution of property in a divorce or will, among other things. Yes, there is a social benefit to the remediation of environmental contamination, but "why do I have to pay for it?" is

what most clients ask their lawyer.

So what are some of the issues lawyers and clients are dealing with when interacting with LSRPs these days?

LSRP Contract

Lawyers and clients should consider the following terms and conditions in the LSRP contract, among other things:

1. Consider clarity regarding the nature of the RAO to be issued. For example, an RAO can be for the entire site or for specific environmental areas of concern (AOCs). According to the SRRA, when an LSRP issues a site-wide RAO the responsible party will not be liable for pre-existing unknown contamination should it be discovered in the future. That is a good thing. An AOC-specific RAO does not provide that protection.

The RAO can also be conditional or unconditional. A conditional RAO has a remedial action permit (RAP) associated with it, which allows the responsible party to leave contaminants onsite in soil and groundwater in a controlled and monitored fashion. For instance, low levels of contaminants in soil can be left onsite if a deed notice is recorded and a soil RAP is attached to the RAO. A soil RAP is a legacy obligation that will require yearly fees, submission of biennial reports to the DEP and the posting of a financial assurance if no exemptions apply. Low levels of contamination in groundwater can also be left onsite if a classification exception area (CEA) is established and a groundwater RAP is attached to the RAO. Yearly fees, biennial certifications and monitoring are required for a groundwater RAP. These legacy costs should not be left as a surprise to clients and stakeholders. An attorney should address them early on and make sure all stakeholders know who will be responsible for them;

otherwise, problems may develop later.

2. The LSRP insurance should cover the LSRP individually, since the LSRP's obligation is personal and does not attach to the consulting firm.
3. The LSRP's assumption of liability and indemnification to the client should cover the costs associated with the DEP reopening the RAO, should that occur. This may be contentious.
4. A meaningful dispute resolution clause should be added. While the client can fire the LSRP, that can be a hassle for many reasons. Consider adding the LSRP board mediation services in an LSRP contract as a dispute resolution clause.

Filing a Complaint

Sometimes a client, successor LSRP or other stakeholder may take umbrage with the strategy of an LSRP. For example, a client may think the LSRP is taking too many samples and just looking for problems the client will have to pay for. A successor LSRP may think the predecessor LSRP did a lousy job. A lender may complain that the LSRP did not do enough to protect it from making a loan on contaminated property.

The complainant can file a complaint with the LSRP board alleging a violation of any environmental law, regulation or LSRP ethics requirement—all of which the LSRP is obligated to uphold. Whether the complaint is legitimate or retaliatory, the LSRP board will review all complaints from all complainants. Presently, the LSRP board is investigating a fairly steady stream of complaints in accordance with the newly adopted LSRP regulations.

Independent Professional Judgment

As the surrogate DEP case manager, the LSRP is entitled to use his or her independent professional judgment to make decisions within the confines of a


large body of statutes, regulations and DEP guidance documents. Guidance documents are not regulations, but DEP recommendations for addressing thorny issues such as co-mingled groundwater plumes, historic fill, vapor intrusion, technical impracticability and other topics. How good a job the LSRP is doing interpreting and applying these environmental rules filtered through his or her own independent professional judgment is something all stakeholders are now looking at as the LSRP program matures and costs start piling up.

The buck stops with the LSRP, and some folks may soon be looking for the LSRP to disgorge some of those bucks. There has not yet been much litigation against LSRPs, other than LSRP board complaints, but these cases will come soon. They will allege malpractice. A plaintiff's LSRP expert will square off against a defendant's LSRP expert to fight over whether the defendant LSRP's professional judgment was so off base that it was contrary to accepted LSRP standards. So far, those accepted LSRP standards are still in development.

Funding and OPM

Most clients involved in an environmental cleanup ask their lawyer: "Can somebody else pay for this?" That is when other people's money (OPM) comes into play. The short answer is, "maybe." Maybe the seller or its current tenant is responsible; maybe the prior owners and prior tenants are responsible; maybe their insurance policies provide coverage; or maybe a federal or state grant is available. All of these avenues should be investigated.

New Jersey has a unique program with the Department of Treasury, generally known as the 75 percent reimbursement program. If a developer is going to construct new facilities that generate new state taxes, such as sales tax, use tax, insurance tax, etc., a developer can provide the department with a projec-



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tion of tax revenues to be generated over the next few years (ideally lots of sales taxes from a new retail store (as opposed to a relocated store) and enter into an agreement with the department whereby up to 75 percent of the environmental costs spent by the developer will be reimbursed to the developer upon receipt of the projected taxes. This is an OPM option with a self-help component, but it is quite useful.

DEP regulations also permit a property owner to petition the DEP for access to a financial assurance or remediation funding source posted by a responsible party if that party fails to do what is required to investigate and remediate the property. If a client is in a position to dictate terms regarding the amount and form in which these funds must be posted (it can be cash, letter of credit, line of credit, insurance policy or self guarantee), a lawyer should make sure it is cash, since those funds are the easiest to access by petition.

Affirmative Obligation to Cleanup

One of the big changes to existing environmental law provided in the SRRRA is that a responsible party must now affirmatively do the work. There are also timeframes within which work must get done. The fuss is no longer just about allocating liability among responsible parties and getting judgments for allocated shares. The SRRRA provides that if a responsible party is not doing the required work, a stakeholder can seek a court order compelling the responsible party to do the work and, most importantly, can request that the slow poke post a remediation funding source to do all the future work required, even if such a fund was not previously required.

Revisiting Previous DEP Decisions

When an LSRP submits an RAO package to the DEP, the DEP has a few years to audit the package, but generally the DEP reviews the package quickly and

provides feedback on required forms, fees and technical sufficiency. Recently, one of the issues being seen by LSRPs regarding older cases is the DEP requesting that the LSRP confirm whether the work approved by the DEP years ago is still good enough. This is a cost enhancer that is being resisted. Also, most LSRPs take the position that previously approved decisions by the DEP are the law of the case. This is still a rugby scrum in progress.

Open Public Records Act (OPRA)

An LSRP does not have to give his or her records to the public under the OPRA, but may do so if the person is pleasant and his or her client does not object. Otherwise, the public has to wait to get records from the DEP through an OPRA request once the LSRP files them with the DEP.

Conclusion

As Spiderman's uncle said, with great power comes great responsibility. The LSRP program provides tremendous power to an LSRP, checked by sobering responsibility. The program creates new dynamics for clients, lawyers and other stakeholders. So far, it seems to be creating more good things for stakeholders and the community than bad. ☺

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ENDNOTE

1. N.J.S.A. 58:10C-1 *et seq.* (2009).