The phase-in period for implementing the Site Remediation Reform Act (SRRA) and related amendments to other environmental laws ended on May 7, 2012. With some remaining exceptions—remediation of discharges from an unregulated heating oil tank, certain environmental due diligence investigations and sites where the EPA is the lead agency—contaminated site investigations in New Jersey are proceeding, and will continue to proceed under the direction of a Licensed Site Remediation Professional (LSRP).

The SRRA privatizes cleanups in New Jersey with the objective of accelerating the pace of remediation statewide. Despite the important role of the LSRP and the exercise of LSRP professional judgment, the New Jersey Department of Environmental Protection (NJDEP) retains important policy, review and audit responsibilities, and continues to promulgate “guidance” to assist the LSRP in completing his/her work.

The SRRA gets high marks one full year into the program, but it is worthwhile seeing what we have learned and to identify the challenges that remain.

Growing Pains

“It’s not that we don’t know how to drive, but for the first time we are driving on the left-hand side of the road” explains one LSRP.

Comprehensive licensing rules confirm that, as a group, New Jersey’s LSRPs are highly qualified to perform their assignments in ways that will be protective of human health, safety and the environment—controlling principles embedded in the SRRA code of conduct. LSRPs presumptively know how to evaluate sites, delineate the presence of hazardous substances, and prepare and implement a remedial action work plan consistent with regulation.

But the old iterative process that could take years—the cycle whereby consultants would propose and submit a plan or report and the NJDEP case manager would respond and direct—are over. It is a new order in which LSRPs are empowered to use professional judgment to clean up impacted sites. At the same time, they are becoming familiar with a plethora of NJDEP guidance and many new reporting forms. It is a new experience, and “left-hand drive.”

The NJDEP Web site contains no fewer than 63 new forms, models, spreadsheets and instructions, 51 guidance or related materials, and at least nine pages of tables summarizing new timeframes for remediation. The complexity is tempered to a degree by at least six different points of contact within the NJDEP for technical consultation on a broad range of subjects. And yet a significant number of submissions are being rejected by the NJDEP as deficient or non-compliant.

Certainly, one lesson learned is that more training and dialogue will be needed between LSRPs and the NJDEP so that each has a clear understanding as to what is needed to efficiently move a site to regulatory closure in a timely manner, consistent with program expectations.

Similar to earlier experiences in Massachusetts and Connecticut, two states with licensed site professionals, it will not be surprising for LSRPs to proceed conservatively until some balance and trust is achieved in the process as between the NJDEP reviewers and the LSRPs. With the potential for professional discipline or license revocation, no LSRP wants to have their submissions criticized or invalidated, perhaps leading to added and/or expensive—or arguably unnecessary—levels of site investigation or remediation. Meanwhile, clients are absorbing higher site costs, hoping these will be offset by obtaining closure at an earlier date.

This raises fundamental questions for clients. Who is left to advocate for them? Will in-house or outside counsel be asked to challenge and question the LSRP’s recommendations? Will the remediating party retain yet continued on page 34
another consultant, versed in New Jersey site remediation, to review the recommendations of the LSRP and to act as a check on the LSRP’s proposals? If submissions are being rejected because they are noncompliant or deficient, who will bear the cost of the corrected filings as between the LSRP and the client if not otherwise addressed in their contract? Are clients being asked to finance their LSRPs’ “learning curve?” And will this impact upon the trust and confidence between LSRP and client?

It will likely take at least a few years until the stakeholders—the NJDEP, LSRPs and the regulated community—can become fully comfortable with each other and the process, pace, costs and results.

**Looking Ahead**

Looming ahead is a deadline of May 7, 2014, for the completion of the remedial investigation of “older” sites that have been in the system for years (i.e., where remediation was required to be initiated before May 7, 1999). The deadline is statutory, but is it realistic? Will there be legislative relief for sites that are incapable of meeting the deadline? If not, is the NJDEP truly prepared to pull the trigger and undertake direct oversight of those sites (and reassign an already short-handed staff) or will a decision of that sort undermine the program?

Meanwhile, the NJDEP’s guidance continues to evolve. Will an LSRP be criticized when he/she departs from guidance in the exercise of professional judgment? What will be the consequences when an LSRP exercises his/her judgment in the absence of guidance, but where guidance is developed later and is at odds with that judgment? Will the NJDEP rescind the final remediation document? Will these issues lead to uncertainty in the regulated community and undermine business transactions or property transfers?

These questions remain to be answered, and no doubt will be, in order to keep an excellent idea moving ahead.

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