

## NEW JERSEY'S SITE REMEDIATION REFORM ACT

### Langan Engineering and Environmental Services, Inc.

The New Jersey Site Remediation Reform Act (SRRA), which was signed into law by Governor Corzine on May 7, 2009, has the potential to revolutionize the New Jersey Site Remediation program. Modeled after a similar Massachusetts law, it is an attempt to streamline the investigation and remediation of discharges to the environment of hazardous substances, a process which the former Commissioner of the New Jersey Department of Environmental Protection (NJDEP) described as “broken.” Presently, the New Jersey Site Remediation program has a backlog of over 18,000 cases awaiting remedial activity.

### *The LSRP Framework—A New Paradigm to Ensure Environmental Protection While Promoting an Expedited Remediation Process*

#### Establishing Independent Reporting Lines for the LSRP and Remediation Parties

The LSRP program will rely upon environmental consultants who have been approved as Licensed Site Remediation Professionals (LSRPs). LSRPs will be overseen by a 13-member Licensing Board, which is “in but not of” the NJDEP, to perform all investigations and remediation without pre-approval from the Department. Such actions must conform to a code of conduct contained in the Act, and non-compliance with applicable laws and regulation carries the threat of civil and criminal sanctions. NJDEP will continue to review submissions by LSRPs; however regulatory enforcement actions will be between NJDEP and Remediating Parties.

The law requires “additional review” annually by the NJDEP of at least 10% of the required submissions it receives from the LSRP. NJDEP reviews all documents and information submitted by an LSRP and may conduct an audit if “...any deficiencies, errors or omissions will result in an inability to determine if the remediation is protective of the public health, safety or the environment; or the remediation will not be protective, of the public health, safety, or the environment.” NJDEP may recommend to the Licensing Board that an investigation of an LSRP be conducted based on the results of an audit. The Licensing Board is required to perform audits of at least 10% of LSRPs annually.

This bifurcation of auditing duties reflects the division of authority established by the legislation. Responsibility for regulatory compliance remains with Responsible Parties. A separate line of responsibility for upholding a Code of Conduct is established for LSRPs by the Licensing Board. This duality is one of the critical components to ensure that a fair and impartial framework is established for the LSRP Program. With this framework in place, LSRPs can complete their work and move cases along knowing that their work will ultimately be judged against a reasonable threshold by an independent licensing board.

#### Legislative Mandate for Remediation and Environmental Protection

Under Section 30 of the legislation, any person responsible for the remediation of a discharge has an affirmative requirement to remediate a discharge and to meet mandatory time frames which will be promulgated by regulation. Remediation cases that do not meet established mandatory time frames or those cases subject to more than one enforcement action will be subject to direct oversight by NJDEP under a new punitive process which will require completion of a feasibility study and require NJDEP to identify the selected remedy for the site.

In addition, existing cases that are older than 10 years (pre-date May 7, 1999) must complete the Remedial Investigation for the entire site by May 7, 2014 or be put under direct oversight. Furthermore, all existing cases will be required to meet

stipulated mandatory time frames that will be adopted by NJDEP by November 3, 2009. These mandatory time frames will include requirements for addressing “Immediate Environmental Concerns,” completion of “Receptor Evaluations,” Preliminary Assessments and Site Investigations. Additional mandatory time frames will be published with adoption of the LSRP Final Regulations which is slated for 2011. Failure to meet a stipulated mandatory time frame will lead to Direct Oversight.

## **Recognizing the Role of Professional Judgment to Accomplish Effective Site Remediation**

One of the important concepts that have been incorporated into the SRRRA is the recognition that LSRPs must have access to available technical guidance in order to exercise professional judgment that is necessary for remedial decision making. Section 14 (c) of the SRRRA establishes a hierarchy to support professional judgment for the LSRPs by allowing for use of identified guidance as an alternative to New Jersey’s Technical Requirements for Site Remediation (aka “Tech. Regs.”). Section 14 (c) also requires the NJDEP to develop new guidance with input from other stakeholders. In response to this requirement, NJDEP has already begun outreach to various stakeholders including the newly formed New Jersey LSRP Association (LSRPA), industry trade groups and environmental organizations.

### ***Transition to the LSRP Program***

The time frame for complete implementation of the transition to the LSRP model will take place over three years. This will be accomplished by initially establishing an Interim LSRP program for new remediation cases. The Interim LSRP Program will take effect six months after the date SRRRA became law, November 3, 2009. Regulations for the Final LSRP Program should be adopted by May 7, 2011 and all remediation cases are required to be transitioned to an LSRP by May 2012.

The current No Further Action determination issued by the NJDEP will be replaced with a Response Action Outcome (RAO) issued by the LSRP, and it will also carry with it, as an operation of law, a Covenant Not to Sue, protecting subsequent property owners from actions by the state environmental problems which they did not cause.

### ***What Does the SRRRA and LSRP Program Mean to You Today? (August 2009)***

## **Anticipating the Interim SRRRA Regulations**

By November 3, 2009, NJDEP expects to publish and adopt an entire set of remediation regulations which will be known as the “Administrative Requirements for Remediation of Contaminated Sites” (ARRCS). This new rule will serve as the new “Oversight Regulations” and will also be accompanied by substantial revisions to the “Technical Requirements for Site Remediation” and all related remediation regulations (e.g., UST, ISRA). The new rules will go into effect upon publication and will not only establish regulations for the Interim LSRP Program but will also incorporate SRRRA requirements for the new “mandatory time frames.”

All new cases entering the NJDEP’s remediation program after November 3 will be required to use an LSRP. If you are anticipating that you will have a new remediation case, there are some options to consider if you can enter the program sooner than November 3. This includes volunteering as an “LSRP pilot site” to determine if there is a benefit to working more closely with the Department during this transition period. In any case, for these new sites, one will need to become familiar with the LSRP program and be prepared to begin working with an LSRP.

## **Moving Forward on Sites to Meet Mandatory Time Frames (With or Without NJDEP Approval)**

In order to compel Remediating Parties to move forward on all sites, NJDEP is currently developing revisions to regulations that will establish new requirements including mandatory time frames. These mandatory time frames will need to be met irrespective of a site’s status with NJDEP and even if NJDEP has not responded to your most recent submittal. One “miss” of a Mandatory Time frame will result in being transferred into the new NJDEP Direct Oversight Program (see below). By November 3, 2009, NJDEP is expected to add requirements for completion of receptor evaluations and identifying and

addressing Immediate Environmental Concerns (IECs).

In anticipation of these new regulations and related guidance, now is the time to review the potential for IEC-type conditions to exist at your site. By November 3, all remediating parties will be compelled to complete Receptor Evaluations and address IECs in accordance with mandated stipulated time frames. An IEC is defined as one of the following conditions:

- confirmed contamination in a potable well,
- confirmed contamination in an occupied or confined space,
- confirmed contamination that could result in acute human health exposure, or
- any other condition that poses an immediate threat to the environment or the public health and safety.

## **SRRA Brings With it New “Triggers” That Can Lead to Punitive NJDEP Direct Oversight**

On July 7, 2009, the NJDEP issued a new guidance that applies to all existing and new cases.

As per Section 27 (b) of the Site Remediation Reform Act (SRRA):

“The department may undertake direct oversight of a remediation of a contaminated site under the following conditions:

1. the contamination at the site includes chromate chemical production waste;
2. the department determines that more than one environmentally sensitive natural resource has been injured by contamination from the site;
3. a site has contributed to sediments contaminated by polychlorinated biphenyl, mercury, arsenic, or dioxin in a surface water body; or
4. the site is ranked by the NJDEP in the category requiring the highest priority pursuant to the ranking system developed pursuant to section 2 of P.L.1982, c.202 (C.58:10-23.16).”

The new guidance document outlines a two-step process by which sites will be identified for (punitive) direct oversight by the NJDEP. Soon, existing cases will be reviewed by the NJDEP—so Responsible Parties must be proactive in addressing any potential issues. *NJDEP has made it clear that they will use a heavy hand on those sites they view as recalcitrant.* For new cases, it will be up to the LSRP to perform the initial screening. If the project fails this screening, the LSRP will likely have to consult with the NJDEP to evaluate mitigating or aggravating conditions as outlined in the guidance document.

Direct oversight means that the NJDEP will review and approve each document. The LSRP must submit the documents to the NJDEP and the Responsible Party simultaneously. A feasibility study will be preformed and then the NJDEP will select the remedy. The Responsible Party will establish a remediation trust fund and the NJDEP will approve distributions from this fund for the remediation. In addition, a public participation plan must be written for these sites. Additional criteria and guidelines are still being developed in relation to the direct oversight program. The NJDEP has also indicated that they may use the threat of the direct oversight program to persuade Responsible Parties to proactively settle Natural Resource Damages issues.

## **Due Diligence and the “LSRP”**

As detailed within the SRRA, LSRPs will be subject to a strict code of conduct, thereby ensuring that the LSRP profession is established with the rigor and validity that goes hand in hand with other service professions where the public relies on specialized expertise.

One unique aspect of the SRRA is that it addresses certain reporting situations that may arise when an LSRP is performing work on behalf of his or her client. This includes requiring that an LSRP must report any IEC known by the LSRP to the NJDEP. This notification requirement applies to sites whether or not an LSRP is performing remediation work subject to NJDEP regulation and would therefore apply to an LSRP performing due diligence work on behalf of a “buyer” or “seller”

of a contaminated property. In addition, for those sites where an LSRP identifies a “reportable discharge of hazardous substances,” an LSRP must notify NJDEP if the discharge is not reported by the owner or operator of the site.

These and other “code of conduct” obligations of an LSRP are important considerations to understand when engaging an LSRP, including engagements to perform “Due Diligence.” However, for all new cases after November 3, 2009, ultimately all work to be submitted to NJDEP will need to be overseen by an LSRP.

## ***Beyond the LSRP Program***

The law is complex, involving numerous changes to existing cleanup laws in New Jersey. In addition to establishing the LSRP Program, the bill includes a number of significant additional new regulatory requirements.

As outlined, the bill establishes mandatory time frames for the performance of the various phases of investigation and remediation. The bill also, for the first time, establishes an affirmative obligation for a Responsible Party to remediate discharges of hazardous substances to the environment. Some have described this as the end of New Jersey’s Voluntary Cleanup Program.

The legislation also requires the NJDEP to establish presumptive remedies for remediation sites that will be developed for residential, certain educational uses and child care facilities. And there are prohibitions on similar types of developments on landfills. The legislation also requires the NJDEP to establish “hot spot” soil concentrations that must be remediated. In order to ensure that operation, maintenance and monitoring of non-permanent remedies is accomplished for the long term, a new permitting program is mandated.

In addition, the legislation includes requirements for the NJDEP to establish a database of all remediation cases and to rank these sites in order to identify those that pose the greatest environmental risk. Finally, the legislation extends the trigger date for NJDEP Statute of Limitation for pursuing Natural Resource Damage Claims to begin with the completion of Remedial Activities for the entire site.

## ***Summary***

The LSRP Program holds promise for moving cases along and to allow LSRPs to exercise professional judgment in performing their work. The current dialog with NJDEP indicates that the focus on the remediation program in New Jersey will shift away from an over-reliance on “prescriptive cook book” details to ensuring that remediation eliminates unacceptable threats and impacts to human health and the environment. However, hand in hand with this transition, new regulatory mandates will soon be put into effect. These include mandates for addressing IECs and completing Receptor Evaluations and, after November 3, 2009, all new and existing cases will also be subject to mandatory time frames for completion of Preliminary Assessments and Site Investigations. In addition, existing and new sites that may impact more than one environmentally sensitive receptor including ground water are also vulnerable to NJDEP Direct Oversight.

With all of the above in mind, it is time to prepare for the SRRA and to understand that the greatest benefits of the program will be derived from those seeking to move remediation projects along. In order to reap the benefits of the new LSRP Program, review of existing cases should be considered part of the necessary preparation.

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ENGINEERING & ENVIRONMENTAL SERVICES

Your source for news and information about the NJ  
Licensed Site Remediation Professional Program

# New Jersey's Site Remediation Reform Act (SRRA) Summit: Implementing the Interim LSRP Program

Trenton, New Jersey  
Trenton Marriott at Lafayette Yard  
December 4, 2009

## Agenda

8:00 AM - 8:30 AM	Registration, Breakfast
8:30 AM - 8:50 AM	Welcome, Introductory Remarks - Dr. Jorge Berkowitz, Langan
8:50 AM - 9:30 AM	NJDEP's Implementation of the Interim LSRP Program - Irene Kropp, NJDEP
9:30 AM - 10:00 AM	What Remediating Parties Need to Know Now regarding the Interim LSRP Program - Nick De Rose, Langan
10:00 AM - 10:15 AM	Break
10:15 AM - 11:00 AM	Legal Perspectives on New Jersey's New LSRP Program - George Schlosser, New Jersey Deputy Attorney General Dennis Toft, Wolff & Samson Andrew Robins, Giordano, Halleran & Ciesla Steven Senior, Riker, Danzig, Scherer, Hyland & Perretti
11:00 AM - 11:45 AM	Business Perspectives on New Jersey's New LSRP Program - David Brogan, New Jersey Business and Industry Association Carrie McGowan, ISP Michael Egenton, New Jersey State Chamber of Commerce John Donohue, Fuel Merchants Association of New Jersey
11:45 AM - 12:00 PM	Closing Remarks - Jorge Berkowitz, Langan

