

# The Evolving Standard of Care for LSRPs

by Gregory D. Martin

**E**nvironmental professionals are held to a standard of care in practically all of their work, whether established by rule, contract, or standard industry practice. With the advent of the licensed site remediation professional (LSRP) program brought about by the Site Remediation Reform Act (SRRA),<sup>1</sup> a code of conduct was established for LSRPs that has changed the standard of care for environmental professionals practicing in New Jersey. Nearly all aspects of environmental services performed in New Jersey are now touched, in some way, by the LSRP program.<sup>2</sup>

As stated on the Site Remediation Professional Licensing Board website:

SRRA provides significant legal and administrative changes to the way in which sites are cleaned up by establishing a licensing program for...[LSRPs] who have responsibility for oversight of environmental investigation and cleanups. The LSRP's highest priority is protection of public health and safety and the environment.

This article explores how the SRRA and the code of conduct for LSRPs have changed the standard of care for environmental professionals practicing in New Jersey.

## Pre-SRRA Standard of Care

Pre-SRRA, the New Jersey Department of Environmental Protection (NJDEP) reviewed work plans and reports, typically providing written approval, conditional approval, or a notice of deficiency (NOD) based on its independent review of an environmental professional's work. Presumably, NJDEP reviewers measured environmental professionals' work against the Technical Requirements for Site Remediation,<sup>3</sup> the *Field Sampling Procedures Manual*, and/or a handful of then-available guidance documents.

The person responsible for conducting remediation (PRCR)

commonly expected the environmental professional to serve as a client advocate, with the expectation that the NJDEP would counter-balance that advocacy by expanding the work in the form of an NOD, as necessary. This often resulted in lengthy back-and-forth negotiation between the parties, delaying the completion of work. Pre-SRRA, the NJDEP's role was, in part, to enforce a standard of care on the PRCR and, by extension, to the environmental professional. For particularly recalcitrant PRCRs, the NJDEP would pursue enforcement actions.

The frequently issued NODs were directed to the PRCR. There were few ramifications for the environmental professional other than the potential of being dismissed from the matter if the PRCR perceived him or her as unknowledgeable, inefficient, or misaligned with the PRCR's goals.

## NFA/CNS Letter: The Gold Standard

Pre-SRRA, the NJDEP's scrutiny of documents varied significantly based on various factors, including: 1) timeframe (*e.g.*, 1980s vs. mid-2000s); 2) case type/complexity; and 3) the qualifications and experience of the individual reviewer. When the work was completed to the NJDEP's satisfaction, it issued a letter documenting that no further action was required and, depending upon the timeframe, included a covenant not to sue (collectively referred to as an NFA/CNS letter). In reaching his or her conclusions resulting in an NFA/CNS letter, the individual NJDEP reviewer frequently employed professional judgment.

These NFA/CNS letters typically included disclaimer language stating that the NJDEP's approval was based on information disclosed by the PRCR, and contained broad reopener provisions related to the identification of new issues or additional data. Despite the disclaimer language and the potential reopeners, such letters were considered the gold standard: desired by PRCRs, sought by lending institutions, relied upon

by buyers, deferred to by courts, and proudly posted on the office walls of environmental professionals.

Absent some new regulatory obligation or business reason to re-examine a matter, the NFA/CNS letter was often accepted at face value going forward. The pre-SRRA environmental professionals' work was commonly measured by the presence or absence of NJDEP approval. Thus, the *de facto* standard of care was the NJDEP's endorsement of the work. To the extent unaddressed environmental defects were discovered later, the PRCR and the environmental professional often pointed to the NJDEP's approval as proof they had met the then-applicable standard of care. A future dispute over previously undiscovered damages overlooked by the work covered by an NFA/CNS letter rarely resulted in the NJDEP reopening a matter. More commonly, such disputes were resolved through direct negotiation, mediation, or litigation between the parties, involving testimony by dueling experts, one armed with an NJDEP approval letter.

### **Post-SRRA Standard of Care: Highest Priority**

Based on the language found in the SRRA, an LSRP's overarching code of conduct obligation is broadly defined by the often-repeated provision, "[A]n [LSRP's] highest priority in the performance of professional services shall be the protection of public health and safety and the environment."<sup>4</sup> This seemingly straightforward provision is prone to vastly differing interpretations, but it clearly excludes an LSRP's advocating less than what is necessary to achieve a remediation that is protective of public health and safety and the environment.

For example, a buyer may think this provision means the seller's LSRP must remediate a property to pristine conditions. Clearly this is not the case, as institutional and engineering controls

designed to address contamination to remain on a property are regularly approved as remedial measures in New Jersey. Another stakeholder may think this provision means all identified contamination must be cleaned up immediately to eliminate potential exposure pathways. Again, this is not the case, as there are well-defined timeframes for proceeding methodically through the sequential steps of a remediation in New Jersey.<sup>5</sup> Perhaps a more reasonable interpretation of this provision is that the remediation must achieve, and the LSRP's response action outcome (RAO)—the functional equivalent of a NFA/CNS letter—must memorialize the protection of receptors, both human health and the environment. However, if all LSRPs were asked to define what this code of conduct provision meant to them, consensus on a single, uniform definition would not be expected.

In some contested matters, the body of work completed by an LSRP will be measured against this broad code of conduct obligation. Given the site-specific nature of any remediation, and given the potentially divergent views and objectives of various stakeholders, the assessment of an LSRP's compliance with this code of conduct obligation may be the subject of dispute. The NJDEP is expected to strongly express its views regarding this new standard of care (highest priority), especially upon its review of receptor evaluations and RAOs. To date, to the extent the NJDEP has been concerned with a document submitted by an LSRP, it has requested further information from the LSRP and the PRCR, directed the withdrawal of the document by the LSRP, and/or submitted a complaint against the LSRP to the board. The actual actions taken by the NJDEP are presumably based on its interpretation of the severity of the perceived infraction, and the LSRP's ability to explain and defend his or her actions.

### **NFA/CNS Letter Replaced by RAO**

With the enactment of the SRRA, LSRPs now issue the equivalent of NFA/CNS letters in the form of RAOs. The NJDEP inspects and reviews documents under the SRRA, but in most instances it no longer formally approves the work.<sup>6</sup> This change has required education of various stakeholders, including lending institutions, which prefer the independent validation reflected by an NFA/CNS letter. It also has resulted in disputes, for example, where a pre-SRRA contract commits a seller to deliver an NFA/CNS letter issued by the NJDEP at the completion of remediation. In most instances, such a letter is no longer available.

The SRRA states, in short, that the NJDEP shall not audit an RAO more than three years after the LSRP filed the RAO.<sup>7</sup> Some contend that if the NJDEP does not challenge an RAO within this three-year audit period, the filing is deemed approved by the NJDEP. However, the NJDEP has repeatedly communicated to LSRPs and the regulated community that it does not 'approve' RAOs, though it may question an LSRP's filings through its inspection, review, and auditing obligations. Among others, a key exception to the SRRA's three-year auditing provision is the identification of previously undiscovered contamination. Additionally, the SRRA contains a separate provision where the NJDEP shall invalidate an RAO if it determines the remedial action is not protective of public health and safety or the environment.<sup>8</sup> To the extent an LSRP is subject to challenge by the NJDEP, and he or she is unable to adequately respond to the NJDEP's concerns, the NJDEP has various options, including invalidating an RAO and referring an LSRP to the board for complaint review and potential disciplinary actions.

Within the context of the applicable rules and guidance documents, the LSRP essentially approves his or her own work

(or the work of others where the LSRP is reviewing the work as a third party), but the NJDEP has broad authority to challenge the work or invalidate an RAO.

Since all but the simplest matters may vary or deviate in some way from the enormous body of applicable rules and guidance documents, how can it be determined if an LSRP has met the standard of care or, more specifically, complied with the code of conduct?

### Knowledge and Skill Ordinarily Exercised

Absent a determination that an LSRP failed to meet his or her 'highest priority' code of conduct obligation, the assessment of the standard of care would more likely be measured against the following SRRA provision: "A[n] [LSRP] shall exercise reasonable care and diligence, and shall apply the knowledge and skill ordinarily exercised by [LSRPs] in good standing practicing in the State at the time the services are per-

formed." <sup>9</sup> This language tends to parallel the language found in many environmental professionals' contracts and professional liability insurance policies. This SRRA provision establishes the LSRP's code of conduct obligations in the context of *reasonable care, ordinarily exercised* at the time the services are performed.

There is an enormous body of requirements that did not exist when the NJDEP was serving in the capacity the LSRP now serves, including the SRRA, the Administrative Requirements for Remediation of Contaminated Sites (ARRCS),<sup>10</sup> revised TRSR, as well as numerous new guidance documents. In the face of such extensive requirements and guidance, what defines the standard of care within the context of "knowledge and skill *ordinarily* exercised by an LSRP?" Without reasonable access to the entire body of work completed by all LSRPs for a particular issue at a particular time, how can it be determined

whether the work in dispute meets this code of conduct provision?

### Tools for Assessing the Standard of Care

The types of tools available to assess whether an LSRP has met the standard of care under the SRRA are numerous. Evaluating the LSRP's work against the language in the SRRA, ARRCS, and the TRSR is a starting point, but further evaluation of the LSRP's work against the language in applicable guidance documents is also warranted. The regulations of the New Jersey Site Remediation Professional Licensing Board<sup>11</sup> (effective Jan. 4, 2016) and the related adoption document (which includes the board's response to comments received on its Jan. 5, 2015, rule proposal) provide further clarification regarding the board's interpretation of certain code of conduct obligations for the LSRP.

In most situations, an LSRP's alleged violations will be directly related to one

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or more of the 26 SRRA code of conduct provisions. Beyond the two provisions discussed above, the remaining 24 provisions cover numerous additional LSRP code of conduct obligations, including, but not limited to, the following: 1) practicing within his or her areas of professional competency; 2) correcting deficiencies in documents as identified by the NJDEP; 3) relying upon and using work completed by others; 4) reporting related to release and/or exposure conditions; and 5) reporting obligations related to material facts that were not disclosed in or contradict previously filed documents.<sup>12</sup> Careful consideration of the language in each code of conduct provision is appropriate.

Other considerations, to the extent available and applicable to a given matter, may include assessment of the following: 1) the NJDEP communications with the LSRP as a result of its review, inspection, or auditing of documents; 2) findings of an LSRP audit by the board; 3) the education and experience of the LSRP; 4) information contained in the NJDEP training materials; 5) course content of board-approved continuing education programs; and 6) publications, information, and training courses offered by industry trade groups. Collectively, these materials help to define and refine the LSRP's standard of care.

Another key factor in determining whether an LSRP has met his or her standard of care is an assessment of the LSRP's use of professional judgment and, more specifically, considering the written documentation produced to support and defend his or her position. The written findings from an LSRP's participation in the NJDEP's technical consultation process are also significant. These forms of documentation are both important mechanisms an LSRP may employ to describe and justify variations and deviations from regulations and guidance, respectively.

Finally, discussed in more detail

below, board disciplinary decisions help to define the interpretation of certain code of conduct provisions.

### **Board Disciplinary Decisions Regarding LSRPs**

Any party can lodge a complaint against an LSRP, including the NJDEP, for alleged violations of the code of conduct. The board has the responsibility and the authority to assess these complaints and take disciplinary actions when deemed necessary. The board's findings are posted on its website as case summaries of board disciplinary decisions.<sup>13</sup> These disciplinary decisions are valuable sources of information, especially as the number of subjects addressed is expanded moving forward.

In these disciplinary decisions, the board: 1) describes the relationship between the complainant and the subject of the complaint; 2) summarizes the nature of the complaint; 3) identifies the code of conduct provision(s) at issue; 4) provides a synopsis of the board's investigation; 5) summarizes the facts; and 6) presents its findings and disciplinary decision. It is clear from the phrasing of these disciplinary decisions that they are based on the specific facts of a given complaint, but they do help to illustrate the board's interpretation of certain code of conduct provisions.<sup>14</sup> In addition, the disciplinary decisions help to illustrate the types of issues the board will choose to consider.

A total of 25 case summaries of board disciplinary decisions have been posted since 2011, with a majority dismissed without formal disciplinary action against the subject of the complaint, usually an LSRP. Some examples of the types of complaints that have been dismissed without disciplinary action are described below.<sup>15</sup>

- Dispute over reasonableness of fees (No. 001-2011)—The board does not regulate fees charged by LSRPs. Com-

plaint dismissed.

- Dispute between current and former owners regarding the allocation of responsibility for remediating a discharge (No. 005-2013)—The board determined the complainant failed to establish the LSRP had violated the SRRA. Of interest, the board stated, "While the potentially responsible parties may continue to dispute the source of contamination and the responsibility for remediating it, a complaint to the Board is not the appropriate forum in which to resolve this dispute."
- Complaint alleges numerous violations of the SRRA related to mischaracterization of data, manipulation of calculations, and withholding of data, among other allegations (No. 003-2014)—The board conducted document review; interviewed the complainant, the LSRP, and NJDEP personnel; and concluded the LSRP did not violate the provisions of the SRRA. In addition, the board determined some of the alleged violations occurred prior to the date the LSRP obtained a license and, thus, the board declined to even consider those allegations.

In certain instances, warning letters or referrals of the matter to another party have been made. For example:

- The LSRP's proposal incorrectly stated an LSRP was required to issue an RAO for a homeowner heating oil underground storage tank (UST) (No. 001-2011)—The board issued a warning letter directing the LSRP to correct erroneous statements in all remediation proposals and advertising materials.
- As part of an audit of an LSRP's work, the audit review team noted potential infractions of rules regarding reporting of a new discharge and completion of a vapor intrusion (VI)

investigation within the regulatory timeframe (No. 001-2013)—With respect to the VI issue, the board dismissed this part of the complaint against the LSRP since this was the responsibility of the PRCR. A warning letter was issued to the LSRP, emphasizing the need to communicate applicable timeframes and other information to the PRCR.

In other instances, the board has issued one or more settlement agreements, notices of reprimand, restraining orders, and penalty assessments, such as:

- Allegation that an LSRP failed to properly manage hazardous waste, which was transported to a facility not licensed to receive the waste (No. 002-2011)—The LSRP argued his con-

tract was only for waste sample collection and analysis, and that a different contractor was responsible for the waste characterization and disposal. The board issued a notice of reprimand and a \$500 penalty, finding, among other things, that “an LSRP of record cannot contract away his or her responsibility to protect public health and the environment.”

- The NJDEP complaint alleging numerous serious deficiencies with technical documents submitted by the LSRP (No. 001-2014)—The board cited eight separate violations subject to a total penalty assessment of \$12,000. In addition, the LSRP’s license was suspended for 12 months, with reinstatement contingent upon meeting a number of conditions, including supplemental continuing education requirements and further evaluation of the LSRP by the board by way of future oral and/or written examination.

### Looking Forward

The SRRA and its code of conduct provisions have dramatically changed the standard of care for environmental professionals practicing as LSRPs. While there are numerous tools available to assess whether an LSRP has met his or her standard of care, there will undoubtedly be disputes based on different stakeholders’ views on a particular matter. The board will address those complaints that are alleged violations of an LSRP’s code of conduct, but several of its published disciplinary decisions suggest the board is sensitive to expanding its role, for example, to resolve business disputes between parties. As the SRRA and the LSRP program continue to mature, and as the number of board disciplinary decisions increases, the LSRPs’ standard of care, as defined by the SRRA code of conduct, is expected to be refined. ☪

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### ENDNOTES

1. N.J.S.A. 58:10C.
2. For applicability and exemptions, see N.J.A.C. 7:26C-1.4.
3. N.J.A.C. 7:26E.
4. N.J.S.A. 58:10C-16a.
5. Accelerated remedial are required under certain circumstances. For example, control of ongoing sources and implementation of interim remedial measures, see N.J.A.C. 7:26E-1.10 or addressing immediate environmental concern requirements, see N.J.A.C. 7:26E-1.11.
6. In certain situations, unregulated heating oil tank cases, for example, the NJDEP does still approve the work and issues NFA/CNS letters. See N.J.A.C. 7:26C-6.3.
7. N.J.S.A. 58:10C-25.
8. N.J.S.A. 58:10C-22.
9. N.J.S.A. 58:10C-16b.
10. N.J.A.C. 7:26C.
11. N.J.A.C. 7:26I.
12. For a complete list of the LSRP’s code of conduct obligations, see N.J.S.A. 58:10C-16.
13. <http://www.nj.gov/lrspboard/index.html>.
14. The reader is reminded that disciplinary decisions are based on the facts of the specific complaint, and that all of the facts may not be included in the summary.
15. All of the examples provided are brief summaries of select disciplinary decisions, and are provided solely to illustrate the types of issues reviewed by the board to date. Refer to the board’s website for the complete case summaries of all disciplinary decisions.

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