NEW JERSEY'S LSRP PROGRAM: AN ENVIRONMENTAL CONSULTANT'S PERSPECTIVE

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The December 2009 article by Richard Ericsson in this newsletter effectively summarized and thoughtfully elucidated a number of critical business and legal concerns associated with implementation of New Jersey's recently enacted Licensed Site Remediation Professional (LSRP) program. But to ensure a productive working relationship with an LSRP, several of Ericsson's points need to be considered by attorneys and their clients from the viewpoint of the program's licensed practitioners.

Responsiveness

In his article, Ericsson raises a valid concern regarding the ability of an LSRP to be an effective advocate for her or his client. The LSRP's code of conduct and license essentially mandates that he or she hold paramount the public (environmental) welfare. Client relationships and project commercial (financial) interests have become secondary to that requirement. A new business model is developing in response to this changed paradigm. For example, the company I work for, EWMA in Parsippany and West Windsor, and other firms in this arena are administratively separating their practices into LSRP and non-LSRP tiers. As with law firms and investment banks, environmental consulting organizations can establish mechanisms that protect a client's due diligence and compliance information. At EWMA, this includes restricting LSRP access to certain computer servers and drives containing due diligence site data, specially designated file folders for those strategic materials that should not be made available for LSRP review, and staff training to sensitize personnel to the need to segregate LSRP and non-LSRP assignments. In some cases, clients have elected to "outsource" the LSRP function and obtain regulatory oversight-related services from a different company. In fact, senior staff within EWMA that have extensive due diligence practices have elected not to obtain LSRP certification so as to continue to provide unencumbered transactional advice and support to their existing clients. It is an unfounded misconception that only the "best" consultants are becoming LSRPs.

With less emphasis on advocacy comes an advantage: responsiveness. The LSRP can devote his or her full attention to reviewing and approving work plans, reports, and the other documents needed to construct a basis for the issuance of a defensible and credible Remedial Action Outcome (RAO, formerly, the much coveted "no further action" letter). Recently at EWMA, a client who had opted into the program was able to obtain LSRP approval for a significant reduction in a remediation funding source. An EWMA LSRP also authorized for another client a substantial decrease in ongoing groundwater monitoring program requirements (number of wells, frequency of sampling). Both requests had been languishing at the New Jersey Department of Environmental Protection (NJDEP) for more than six months. Similarly, EWMA's LSRPs are able to prepare and file Industrial Site Recovery Act (ISRA) Remediation Certificates and associated Remediation Funding Source documentation that allows transactions to proceed to closing without department approval. This type of regulatory compliance flexibility is not only precisely what the Site Remediation Reform Act intended but also is an enormous benefit to those seeking to buy and sell commercial real estate in New Jersey.

Flexibility

Ericsson suggests that, with the threat of stiff penalties and license revocation, LSRPs will choose to be more conservative than NJDEP case managers in requiring new or additional work at a site. While such a prediction is reasonable given the nascent status of the LSRP program, over the long term, market and technical forces will exert counterbalancing pressures. Tension in client-consultant interactions usually is focused around developing consensus on how best to achieve compliance with regulatory requirements. In

pre-LSRP days, the consultant, acting as an advocate, would negotiate, plead, whine, and/or otherwise attempt to cajole the case manager into accepting an investigative or remedial approach that may not have been strictly compliant with department guidance or protocols, but still was consistent with NJDEP's human health and environment mandates. This technique remains valid; simply substitute the LSRP for the case manager. During its very extensive and productive stakeholder outreach program, the department repeatedly assured LSRP candidates that technically sound and well-reasoned variations from its guidance (particularly the tech regs—N.J.A.C. 7:26E) will not be grounds for negative audit findings or disciplinary action. In fact, the department now allows guidance from other states, EPA, and recognized authoritative sources (e.g., American Society for Testing and Materials) to be used in developing and implementing a remedial program so long as they are adequately documented and deemed to be technically competent and reliable.

This is clearly more leeway than traditionally has been given to case managers. Some LSRPs may feel that strict tech reg compliance is the only methodology that will be acceptable (i.e., safe). But those with a more holistic approach to achieving site objectives, and the confidence and technical skills to build a defensible and innovative remedial program that takes into account site- and client-specific factors, will be quickly favored in the marketplace. While there may be some overconservatism in the beginning as LSRPs and NJDEP define acceptable practice guidelines, in the mid-to-long term (as has occurred in Massachusetts and Connecticut) a reasonable performance envelope eventually will be established.

Finality

Ericsson's concern over how to address the three-year audit period precisely expresses the anxiety of those counting on a reliable end point to the process. However, NJDEP's ability to reopen closed cases has long been preserved in its "no further action letters" and guidance documents. Reopeners have included transmittal of false or misleading information, changes in regulatory or cleanup standards, and, more vaguely, the discovery of new information or conditions. The audit provisions of the LSRP program establish a three-year window for departmental review and, possibly, requirements for additional work. But several factors are in play that mitigate the uncertainty surrounding the audit. NJDEP has assured LSRPs and stakeholders that the auditing process will be focused on important, substantive project issues, not procedural or technical nitpicks (e.g., collecting a soil sample from an eight-inch interval versus a six-inch interval). Oversight fees are now knowable in advance (levied annually based on the number of areas of concern and the media impacted) rather than being subject to the whim of the case manager and technical team assigned to the site.

The audit is intended to be a constructive review of project performance and environmental protectiveness, with findings shared among LSRPs, clients, attorneys, and other interested parties. These will not be the old "gotcha" technical deficiency letters but rather will be directed to things that would improve the overall performance of the remedial program that has been implemented at the site. NJDEP reportedly has chosen for the audit teams those senior individuals who have a wide-ranging and in-depth understanding of all the issues associated with moving a site toward final cleanup and closure.

In addition, the department is strongly encouraging LSRPs to ask for guidance at critical decision points in the work. The department is assuring LSRPs that documents required for submittal prior to issuance of an RAO will be peer reviewed on a timely basis with useful feedback provided to the responsible party and LSRP. NJDEP has retained direct oversight of immediate environmental concerns (IECs)—those high-risk conditions representing a potential immediate threat to public health, such as a contaminated water supply well or migration of vapors into a building.

It is encouraging to note that in the formal and informal LSRP guidance for stakeholders the department

appears to be signaling a major cultural change in its management of site cleanups; from a command-and-control attitude to one that is (hopefully) more collaborative and interactive. While the details of the LSRP program remain to be defined, and there will undoubtedly be some growing pains, it is clear that this new way of doing business with NJDEP will be quicker, less bureaucratic, and more cost-effective.

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INDIANA ADOPTS RISK-BASED APPROACH TO REMEDIATION

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This paper concerns the ongoing efforts of the Indiana Department of Environmental Management (IDEM) to abandon its historically stringent remediation requirements and create a more practicable and feasible scheme of risk-based remediation. These efforts began almost a decade ago with IDEM's publication of its Risk Integrated System of Closure (RISC) Guidance for remediation of contaminated property. The RISC Guidance is a Nonrule Policy Document published by IDEM in February 2001. Since then IDEM has been fine-tuning its RISC Guidance in an effort to introduce greater consistency, flexibility, and risk-based practicability into its various remediation programs. The programs to which the RISC Guidance applies include voluntary remediation, leaking underground storage tanks, state cleanup, and Resource Conservation and Recovery Act closure and corrective action.

Since 2007 IDEM has been engaged in the process of revising and updating its RISC Guidance. The centerpiece of this effort is the recognition that complete removal of contaminants from some sites may not be practicable. This is a dramatic departure from where we were several years ago, when nothing short of complete removal of contamination was required in nearly all cases and neither feasibility nor practicability was a consideration.

In 2008 IDEM began the development of a hierarchy of alternative remediation options reflective of its new philosophy of flexibility and feasibility. These options include source controls, receptor controls, and institutional controls. All of these are alternatives to the traditional "dig and haul" and "pump and treat" methods of remediation for contaminated soil and groundwater.

Last year, the Indiana General Assembly weighed in on the subject of risk-based remediation of contamination when it enacted House Enrolled Act (HEA) 1162 (Public Law 78-2009). HEA 1162 became effective on July 1, 2009. It is an omnibus bill that addresses a variety of environmental issues and amends a number of environmental statutes.

Perhaps some in the legislature were concerned that IDEM was not moving quickly enough away from traditional methods of active remediation toward risk-based passive remediation. Others believed that there was some reluctance on the part of IDEM to recognize that passive remediation may be appropriate in certain cases. However, for whatever reason, with the enactment of HEA 1162, risk-based and site-specific assessment and remediation of contamination are now mandated by statute.

Specifically, HEA 1162 amends I.C. 13-25-5-8.5 to expressly recognize that passive measures, such as restrictive covenants and environmental restrictive ordinances, may be viable alternatives to active remediation for the management of risk and control of exposure to contamination in some cases. I.C. 13-25-5-8.5(e) now expressly provides that IDEM "shall consider and give effect to restrictive covenants and environmental restrictive ordinances in evaluating risk