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LSRPA WHITE PAPER

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LICENSED SITE REMEDIATION PROFESSIONAL (LSRP) CONTRACTS AND THIRD PARTY RELIANCE

An important question for practicing New Jersey Licensed Site Remediation Professionals ("LSRPs") is whether an LSRP who is contracted by a site owner or operator for remediation of an entire site or particular Areas Of Concern ("AOCs") on a site is liable to third parties for his/her negligent acts and omissions relating to the remediation. The problem is that under the New Jersey Site Remediation Reform Act ("SRRA"), N.J.S.A. 58:10C-1 et. seq., the LSRP was given the authority to make remediation decisions, but no protection against private party lawsuits seeking damages for the LSRP's negligent acts and omissions relating to those decisions. The LSRP's legal exposure includes lawsuits brought by LSRP's direct client, the site owner and/or operator, and by third parties, all contending that they have suffered damage from the LSRP's remediation decisions. This paper discusses the second class of potential private party lawsuits against the LSRP, those brought by third parties with whom the LSRP does not have a contractual relationship.

Existing case law in New Jersey and in Massachusetts, which has Licensed Site Professional ("LSP") program, suggests that LSRPs can be held legally liable to third parties for their remediation decisions, which are ultimately reflected in the LSRP's issuance of Response Action Outcomes ("RAOs").

In a 2012 Massachusetts case, Meridian at Windchime, Inc. vs. Earth Tech, Inc., 960 N.E. 2d. 344 (Mass. Appeals Ct. 2012), the Appeals Court of Massachusetts held that Earth Tech, Inc., an engineering firm hired by the Town of North Attleborough to inspect the work of a contractor hired by Meridian, a developer, was not negligent in failing to identify deficiencies in the contractor's work, based upon the specific facts of that case. The contract between Earth Tech, Inc. and the Town of North Attleborough had specifically provided that Earth Tech had no authority or responsibility for the work of Meridian's contractor, and Earth Tech had supplied Meridian with a written memorandum stating that any deviation from the approved subdivision plans was at Meridian's contractor's risk.

In reaching its decision, however, the Court stated that the rule in Massachusetts is that an engineering firm can be held liable to third parties with whom it is not in contract if it is foreseeable and reasonable for the third party to rely upon the work of the engineering firm. 960 N.E. 2d at 348.

In New Jersey, the leading case is Grand Street Artists v. General Electric Co., 19 F.Supp. 2d. 242 (D. NJ. 1998). This case involved the discovery of mercury contamination in a building in Hoboken purchased by an artists' group, Grand Street Artists. Jenny Engineering had been hired by the seller of the building, Quality Tool & Dye Co., to handle New Jersey Environmental Clean-up Responsibility Act ("ECRA") filings related to Quality's cessation of operations in the building. The submitted ECRA filings were determined to be materially false, since they failed to reveal the mercury contamination in the building. The Federal District Court concluded that it was foreseeable that purchasers of the building would rely upon Jenny's ECRA submissions in deciding whether to purchase the building. The same rationale could apply to an LSRP's issuance of an RAO and an LSRP's remediation decisions, since under the New Jersey SRRA statute an LSRP's decisions are made not just for the party that hired the LSRP, but also for the benefit of third parties and the public.

Another New Jersey case, Ford Motor Co. v. Edgewood Properties, Inc., 2012 U.S. Dist. Lexis 125197 (D.NJ. 2012), involved liability arising out of the off-site disposal of contaminated concrete from the former Ford Motor Co., Edison, New Jersey plant. Ford and Edgewood Properties, Inc. ("Edgewood") entered into a contract whereby Ford agreed to provide 50,000 cubic yards of concrete to Edgewood in exchange for Edgewood's hauling it off-site. Edgewood brought the concrete to seven properties it was developing. Ford retained an environmental firm, Arcadis, as its New Jersey Industrial Site Remediation Act ("ISRA") consultant at the Ford plant site. Arcadis was named as a party by Edgewood in the lawsuit brought by Ford against Edgewood relating to the off-site distribution of the contaminated concrete. Arcadis attempted to escape liability by characterizing itself as an ISRA consultant only, without involvement in the off-site distribution of the concrete. The District Court found that Arcadis' services involved more than ISRA compliance and included work related to the stockpiling and sampling of the concrete related to its off-site disposal, and further found that an ISRA consultant like Arcadis could expect that third parties like Edgewood would foreseeably rely upon Arcadis' conclusions relating to the contaminated concrete. The District Court cited the Grand Street Artists v. General Electric Company case to support its conclusion.

The New Jersey Site Remediation Professional Licensing Board ("SRPLB"), has also issued a decision that touches on third party reliance on an LSRP's remediation decisions, on facts that are somewhat similar to those in the Ford Motor Co. v. Edgewood Properties, Inc. case. In SRPLB Complaint No. 002-2011, a private party filed a complaint with the SRPLB alleging that the LSRP had failed to properly manage hazardous wastes at a contaminated site. During the remediation of the site, hazardous wastes were removed and transported off site to a municipal landfill not licensed to receive the hazardous wastes. The hazardous wastes were ultimately removed from the municipal landfill and transported to a hazardous waste disposal facility. The LSRP claimed that under his contract with his client, he was not responsible for waste characterization and was only responsible for the collection of waste samples, receiving the results from the analytical laboratory and forwarding the results to the construction contractor. The SRPLB disagreed with the LSRP and concluded that regardless of any contract terms or contractual relationship, the LSRP of record for a site in every instance must hold protection of the public health and the environment as his or her highest priority and an LSRP of record cannot contract away his or her responsibility to protect public health and the environment. The SRPLB determined that the LSRP had failed to insure that those who were contractually responsible for disposing of the material were aware that the soil contained high concentrations of lead. The SRPLB's decision in Complaint No. 002-2011 is consistent with the decision of the Appeals Court of Massachusetts in Meridian at Windchime, Inc. vs. Earth Tech, Inc. and the New Jersey Federal District Court decisions in Grand Street Artists v. General Electric Co., and Ford Motor Co. v. Edgewood Properties, Inc. in finding that the LSRP has duties to parties other than its immediate direct client with respect to the LSRP's remediation decisions and issued RAO's in cases for which the LSRP is responsible.

Given these decisions as discussed above, a New Jersey LSRP needs to carefully consider his/her legal exposure when becoming an LSRP for a site. There are a few things for an LSRP to consider. First, an LSRP must consider whether to accept an engagement as an LSRP of record for an entire site as opposed to specific AOCs for a site. An LSRP's exposure to third party claims could be less if the LSRP's engagement is for a specific AOC on a site as opposed to the entire site. Second, an LSRP should carefully define his/her contractual services for the client in his/her LSRP contract and consider including language stating that the LSRP's services are only for the client's use, that the LSRP contract and the LSRP's services may not be used or relied upon by any third party and that there are no intended third

party beneficiaries of the LSRP's contract and services. While including this language in the LSRP contract will not eliminate the LSRP's liability and exposure to third party claims, it could help. Finally, to the extent the LSRP is relying upon the services of others, including other consultants and subcontractors, relating to the remediation work for which the LSRP is LSRP of record, the LSRP should seek to obtain contractual indemnification from the other consultants and subcontractors against claims brought by the LSRP's client and third parties related to services performed by the other consultants and subcontractors. The LSRP could require that those indemnifications be backed up by insurance taken out by the other consultants and subcontractors naming the LSRP as an additional insured.

These difficult issues all relate to the fact that the drafters of the New Jersey SRRA statute provided the LSRP with the authority to make remediation decisions, but failed to protect the LSRP with protection against private party lawsuits seeking damages for the LSRP's negligent acts and omissions relating to those remediation decisions.