



March 6, 2015

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**RE: Licensed Site Remediation Professionals Association (LSRPA)  
Comments on Proposed Rule N.J.A.C. 7:26I**

Dear Dana:

There are the comments of the LSRPA on the proposed rules.

## SUBCHAPTER 1. GENERAL PROVISIONS

### 7:26I-1.3 Definitions

- “Continuing education credit” or “CEC” means a Board-approved unit of continuing education. Generally, one CEC is approved for each hour of instruction.

Comment:

Why must all CECs be Board approved? A technical or scientific training program that is approved or certified by another professional Board or Society (e.g., ACEC, ASCE) should also be allowed as LSRP CECs. There are dozens of relevant technical continuing educational opportunities for LSRPs that should be recognized by the Board (e.g., Battelle’s “Bioremediation Symposium” or “Conference on Remediation of Chlorinated and Recalcitrant Compounds”) so that the individual LSRP does not have to apply to the Board for CECs. The Board should identify those Boards, Societies, or professional organizations (e.g., Battelle, USEPA, and Universities) who regularly conduct technical training outside New Jersey, but whose training programs are relevant to LSRPs for technical and other CECs.

*(Comment provided by the LSRPA)*

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Comment – definitions:

- There are a number of terms used elsewhere in the rules, which could benefit from definition here:
  - “Board Website” as used in various places in the Rule
  - “Client” is used numerous times – perhaps substituting PRCR in lieu of client might be more appropriate
  - “Continuing education programs” as used in Subchapter 4
  - “Continuing education activities” as used in Subchapter 4
  - “All Appropriate Inquiry” as used in 7:26I-6.10(c)2 appears to mean something other than intended by the ASTM 1527-13 AAI standard.
  - “Executive Session” as used in Subchapter 7
  - “Retaliatory Action: as used in Subchapter 9 is narrowly defined therein as actions that might be taken against a LSRP or other professional. Retaliatory action against some other person (e.g. a client, member of the public.

*(Comment provided by the LSRPA)*

- “Person” - Authority of the Board to regulate persons other than LSRPs – in several places in the proposed rules, the Board asserts jurisdiction over persons other than LSRPs and makes those persons subject to compliance with certain requirements and to penalties for failure to comply. The definition of “person” in the rules is overly broad. Examples of the broad scope of this authority are as follows:
  - a. Section 5.6(a) requires that in addition to LSRPs and the PRCR “... **any other person** having information regarding and LSRP’s submissions and conduct shall cooperate with the Board in the conduct of an audit and shall provide any information the Board requests.” (Emphasis added).
  - b. Section 7.2(a)5 states that the “Disciplinary Proceedings” section governs the “Board’s actions in response to **any person’s** violation of the SRRA or any rule, regulation, or order adopted or issued pursuant thereto ...” (Emphasis added).
  - c. Section 7.5(f)2 and 3 allows the Board when conducting an investigation of a complaint against an LSRP to enter a site to investigate and to seize records, equipment, property and other evidence. As written, the Board appears to have the authority to enter any person’s property that is subject to the SRRA and seize any property that it deems relevant to its investigation. This is overly broad and put a burden on RPs, LSRPs and Property Owners with regard to access and other proprietary rights. This should be scaled back and more narrowly tailored. Further, this section provides the Case Review Team with subpoena power, which is not appropriate, when the Board itself does not even have this power.

d. Section 9.3 states that “[a]ny person who violates any provision of this chapter shall be subject to disciplinary action by the Board...” (Emphasis added).

The SRRA identifies the purpose of the Board: “The board shall establish licensing requirements for site remediation professionals and shall oversee the licensing and performance of site remediation professionals.” N.J.S.A 58:10C-3; see also N.J.S.A 58:10C-5. Thus, the Legislature intended to limit the reach of the Board to its regulation of LSRPs. To the extent that the rules apply to other “persons” they are outside the scope of the Board’s authority, particularly where this is not connected to the Board’s specific investigation or audit of an LSRP.

*(Comment provided by the LSRPA)*

- “Promptly” means by the date by which the Board or the Department requests a response or, if no such date is given, as soon as possible, not to exceed seven days. The word promptly occurs seven times in the draft rules, usually in reference to the timeframe with which a dismissed LSRP, inactive LSRP, suspended LSRP, etc. is required to make certain notifications. Our recommendation would be to specify these timeframes in the body of the rule, rather than requiring perusal of Section 1.3 for definition of this important requirement. Moreover, in the site remediation context, most tasks typically take longer than 7 days. A more appropriate length timeframe can be established for different items depending on the true urgency of the response.

*(Comment provided by the LSRPA)*

Comment – recommended added definitions (see section 6.10 for more details):

- “LSRP of Record” means an LSRP retained in accordance with Section 6.5 by the Person Responsible for Conducting the Remediation to perform professional services.
- “Professional Services” as used herein means the application of scientific or engineering principles to contaminated site remediation where the resulting conclusions by an LSRP of Record form the basis for Response Action Outcomes, reports, studies, or other documents for the purpose of remediating a contaminated site.

*(Comment provided by the LSRPA)*

## SUBCHAPTER 2. LICENSURE

### 7:26I-2.4(a)2 – Eligibility requirements

This proposed rule section does not apparently include the full definition of “full-time professional experience,” as specified in SRRA:

Proposed Rule - 2.4(a)2:

*2. Has experience amounting to at least eight years of full-time professional experience in the field of site remediation, of which at least five years shall have occurred in New Jersey and at least three years shall have occurred in New Jersey immediately prior to submission of the application;*

SRRA - C.58:10C-7(e) Establishment of licensing program, requirements

*“For the purposes of this section, “full-time professional experience” includes experience in which the applicant is required to apply scientific or engineering principles to contaminated site remediation where the resulting conclusions form the basis for reports, studies or other documents connected with the remediation of a contaminated site. The board may consider the applicant's work activities, field of practice, duration of employment, and work products prepared in determining the credit to be allowed for professional experience.*

#### Comment

The concern is that applicants sitting for the LSRP exam, who may meet the “...*eight years of full-time professional experience in the field of site remediation*”, do not meet the originally intended (and appropriate) requirement to demonstrate the ability to “...*apply scientific or engineering principles to contaminated site remediation where the resulting conclusions form the basis for reports, studies or other documents connected with the remediation of a contaminated site.*”

This could (and likely will) result in applicants sitting for the exam who may have 8 years of field work, sampling, reporting, etc. only, but have no decision making or project management experience to be able to apply the principles clearly stipulated in SRRA as a requirement to become a LSRP. The Board’s logic that the applicant will have passed the exam is faulty because the exam at present does not necessarily measure decision-making and professional judgment.

The LSRPA recommends that the definition of “full time professional experience” be amended as follows to better reflect the responsibility of an LSRP to both manage projects and prepare reports. Without referencing “project management,” the definition could be interpreted to mean eight years of fieldwork would qualify an individual to sit for the exam, which we do not believe is consistent with the intent of the legislature wanting experts in NJ site remediation.

“Full-time professional experience” means experience in which an applicant is required to apply scientific or engineering principles to contaminated site remediation where the resulting conclusions form the basis for reports, studies, or other documents *and the project management* connected with the remediation of a contaminated site. The Board

may consider the applicant's work activities, field of practice, duration of employment, and work products prepared in determining the credit to be allowed for professional experience. The Board may allow applicants with relevant advanced degrees up to two years of credit for professional experience, of which one year of credit may be awarded for applicants who have earned a master's degree in a relevant field of study and up to two years of credit may be awarded for applicants who have earned a doctorate degree in a relevant field of study.

*(Comment provided by the LSRPA)*

### **7:26I-2.7(b) – Application denial**

#### Proposed Rule 2.7(b)

*When the Board denies an application, the Board shall notify the applicant of the Board's findings and reasons for denial of the application and the period of time during which an applicant cannot reapply, up to three years.*

#### Comment

Why would the Board prohibit reapplication? What factors or criteria will be used to determine this period? Unless their license is revoked, why can't an applicant reapply during any open application period? The Board can simply reject the application, and has already done so.

*(Comment provided by the LSRPA)*

### **7:26I-2.9 – Results of the LSRP examination**

#### Proposed Rule -2.9(b)

*A candidate who does not pass the examination who wishes to retake the examination shall submit an application pursuant to N.J.A.C. 7:26I-2.4 through 2.8.*

#### Comment

Why should a full application be necessary? Can't the Board create an abbreviated format for re-application if submitted within one year?

*(Comment provided by the LSRPA)*

### **7:26I-2.8 – LSRP Examination**

#### Proposed Rule -2.8(b)

*The Board shall provide each candidate who registers for the LSRP examination an LSRP Licensing Examination Candidate Agreement. The LSRP Licensing Examination Candidate Agreement shall contain the standards of conduct for candidates before, during, and after the examination including, but not limited to, prohibitions against...*

Comment

It is suggested that this language be revised as follows due to the potential for changing exam format to an "open book" exam or other format which could allow for the examinee to bring the materials identified. The specifics should be provided in the LSRP Licensing Examination Candidate Agreement as opposed to in the rule itself to provide the Board more flexibility.

*(b) The Board shall provide each candidate who registers for the LSRP examination an LSRP Licensing Examination Candidate Agreement. The LSRP Licensing Examination Candidate Agreement shall contain the standards of conduct for candidates before, during, and after the examination.*

*(Comment provided by the LSRPA)*

**7:26I-2.10 – Issuance of a license**

Proposed Rule -2.10(d) (change in contact information)

*An LSRP shall notify the Board of any change in contact information within 15 days of the change, so that the Board may maintain current and accurate contact information for each LSRP on the Board website at [www.nj.gov/lrspboard](http://www.nj.gov/lrspboard).*

Comment #1

This seems to be a short time, especially if the LSRP is between jobs. As long as enough information is accurate that the LSRP can be contacted, a longer period (30-60 days) would seem more reasonable.

Comment #2

Suggest modifying the language here so that the LSRP is also required to notify the NJDEP and clients by whom he or she has been retained when their contact information changes. Perhaps add the following:

*(e) An LSRP shall also notify the Department and each of the PRCRs for whom he or she has been retained of any change in contact information within 30 days of the change.*

*(Comment provided by the LSRPA)*

**7:26I-2.11 Renewal of a license**

Proposed Rule - 2.11(b) & (b)3

*(b) In order to be eligible to renew his or her license, an LSRP shall submit an application pursuant to (c) below that **demonstrates that he or she** meets the following qualifications: ...*

*3. **Has not** been convicted of, or pled guilty to, an environmental crime, any similar or related criminal offense under Federal or state law, or any crime*

*involving fraud, theft by deception, forgery, or any similar or related offense under Federal or state law;*

Comment

How does one demonstrate a negative? Suggest modification of language to “certify” instead of “demonstrate”.

*(Comment provided by the LSRPA)*

Proposed Rule - 2.11(b)4

*4. Has not had a professional license or certification revoked by any state licensing board or any other professional licensing agency within the previous 10 years; and*

Comment

Why define the revocation period as 10 years? Why not make it the older of the initial LSRP application, or 8 years; 8 years being consistent with the professional experience requirement identified in 7:26I-2.4(a)(2).

*(Comment provided by the LSRPA)*

Proposed Rule 2.11(i)(1)

*1. The Board’s findings and reasons for denial of the application and the period of time during which an applicant cannot reapply, up to three years;*

SRRA - C.58:10C-8 Suspension, revocation of license; reinstatement.

*8. a. The board may suspend or revoke a license pursuant to the provisions of section 17 of P.L.2009, c.60 (C.58:10C-17). The board shall establish standards and requirements for the reinstatement of a site remediation professional license that has been suspended or revoked.*

*b. The board may prohibit any person whose application for an initial license or for a license renewal is denied, or whose license is revoked, from applying for a license for a period of not more than three years. The term during which reapplication is prohibited shall be established as part of the determination of the board in the proceedings concerning the denial or revocation.*

Comment

- 1) What are the criteria that will be used to justify a shorter or longer period for reapplication?
- 2) What is the basis for prohibiting re-application? What factors or criteria will be used to determine this period? Unless their license is revoked, why can’t an applicant re-apply during any open application period? The Board can simply reject the application.

*(Comment provided by the LSRPA)*

### **7:26I-2.14- Revocation of a license**

#### Comment:

The rule allows the Board to suspend an LSRP's license prior to the outcome of a hearing where the Board determines that the conduct of the LSRP is so egregious as to pose an imminent threat to public health, and safety and the environment. First, this provision does not provide any due process for the LSRP to challenge the actions of the Board in the event of a suspension or revocation. Further, there should be set time in which the hearing must commence (upon request of the LSRP) so that the LSRP's license is not held in limbo for an inordinate amount of time.

*(Comment provided by the LSRPA)*

### **7:26I-2.15 Inactivation of a license**

#### Proposed Rule 2.15(a)2 & 3

*(a)2. His or her employment in New Jersey, if any, is not in any way related to the work typically performed by site remediation professionals, licensed or not, including, but not limited to:*

- i. The investigation or remediation of contaminated sites;*
- ii. The investigation or remediation of discharges from, or the removal of, underground storage tanks, regulated or not;*
- iii. The assessment of sites for environmental conditions; or*
- iv. The preliminary assessment or site investigation of contaminated sites for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property as provided in N.J.S.A. 58:10-23.11g;*

*3. He or she does not render assistance or advice to persons engaged in site remediation, including, but not limited to, site remediation professionals, licensed or not, or persons responsible for conducting the remediation;*

#### Comment

As written here, a LSRP who chooses to inactivate his or her license will not be able to provide environmental remediation consulting services in New Jersey. An inactive LSRP should not be prevented from providing environmental remediation consulting services as long as he or she does not represent him or herself as a LSRP. This language should be deleted from the rule.

These restrictions are not necessary, are overly burdensome and take away a professional's ability to earn a living, by preventing a former LSRP from practicing "in any way related to" site remediation. This prohibition would appear to provide fertile ground for a legal action against the Board. Why would a former LSRP, who voluntarily inactivates their license, be prohibited from employment related to non-licensed site remediation professional work (e.g., due diligence)?



There are various reasons for inactivating a license, including family or medical leave or other circumstances that necessitate a change to part-time employment. In these cases, the individual should still be able to practice environmental science - especially since they were qualified enough to be LSRPs to begin with. Does the Board intend to exclude working parents with family hardships from gainful employment in a field that they are clearly qualified?

A reasonable limitation on the duration of inactive status, e.g., 5 years, is appropriate, including requirements to ensure competency upon reactivation.

*(Comment provided by the LSRPA)*

Proposed Rule 2.15(g) (Deferral of Audits for Inactive Licensee)

*(g) If the Board selects an individual with an inactive license for an audit, the Board may determine whether to defer the audit until the license becomes active again. The Board shall not defer an audit or complaint investigation that is pending at the time the LSRP becomes inactive, and the inactive LSRP shall meet all obligations as set forth in N.J.A.C. 7:26I-5 and 7.*

Comment

Except in cases of complaint investigations, the Board should not require an inactive licensee to complete an audit. If the individual is not permitted to practice, the Board should not require any action from them except for cause.

*(Comment provided by the LSRPA)*

## SUBCHAPTER 3. FEES

### Subchapter 3 – General Comments

#### Comment:

The annual license fee of \$900 is out of line with other professions. According to the budgets posted on the SRPLB website, the Board spends about \$100,000 or more (as much as \$180,000) annually for examinations; however this cost appears to be covered by the annual fees of already-licensed LSRPs. To be fair to practicing LSRPs, has the Board considered covering the examination cost with an examination fee or increasing the cost of the application fee in order to reduce the annual fees for licensed LSRPs?

*(Comment provided by the LSRPA)*

#### **7:26I-3.5 Annual License Fee (a)4**

#### Comment:

States that the Board each year will adjust the renewal fee to account for any shortfall or surplus, however, despite showing a surplus every year, the fee remains at \$900. . Now that enough exam questions have been created, these questions can be used for future exams. Thus the budget for the creation of future exam should decrease and a decrease in fees should follow.

*(Comment provided by the LSRPA)*

#### **7:26I-3.3(a) – Application Fees**

#### Proposed rule 3.3(a)

*The Board shall annually recalculate the application fee, if the Board determines that the current fee does not cover the Board's costs to process and review license applications. The Board shall calculate the application fee by multiplying the average number of hours to process and review a license application by the projected hourly salary and overhead costs of Board staff processing and reviewing the license application. Beginning calendar year 2015, the application fee shall be \$400.00. The Board shall provide notice in the New Jersey Register of any change to the application fee in subsequent years.*

#### Comment:

The Fee increase language should include a ceiling (i.e., The application fee will not be increased by more than 100% for any calendar year). Additionally, the notice for an increase in the application fee (in the NJ Register) should include an explanation of why additional resources are required to process application fees.

*(Comment provided by the LSRPA)*

#### **7:26I-3.4(a) – Renewal Fees**

##### Proposed rule 3.4(a)

*The Board shall annually recalculate the renewal fee, if the Board determines that the current fee does not cover the Board's costs to process and review license applications.*

- 1. The Board shall calculate the application fee by multiplying the average number of hours to process and review a renewal application by the projected hourly salary and overhead costs of Board staff processing and reviewing the license application.*
- 2. Beginning calendar year 2015, the renewal fee shall be \$100.00.*
- 3. The Board shall provide notice in the New Jersey Register of any change to the renewal fee in subsequent years.*

##### Comment:

The Fee increase language should include a ceiling (i.e., The renewal fee will not be increased by more than 100% for any calendar year). Additionally, the notice for an increase in the renewal fee (in the NJ Register) should include an explanation of why additional resources are required to process renewal fees.

*(Comment provided by the LSRPA)*

#### **7:26-3.5(c) – Annual License Fee**

*The Board shall provide notice in the New Jersey Register of any change to the annual license fee in subsequent years.*

##### Comment:

The notice for an increase in the renewal fee (in the NJ Register) should include an explanation of why additional resources are required to process renewal fees.

*(Comment provided by the LSRPA)*

#### **7:26I-3.5(f) – Annual License Fee**

*An LSRP's license shall immediately expire 90 days after the LSRP's receipt of the Board's annual license fee invoice if the LSRP fails to pay the annual license fee within that 90-day period.*

##### Comment:

The receipt of the annual fee invoice is outside of the control of the Board, because the invoices are automatically generated by the Department of Treasury. In practice, the invoice is received by the LSRP long after the invoice date. This could significantly reduce the period of time the LSRP has to submit the payment through no fault of their own. This policy does not allow for any leniency that may be warranted as a result of administrative error on the part of the Board or

Department (for example, an invoice not getting mailed, or being sent to a wrong address). Perhaps the Board can remedy this by attempting to reach (by phone or email) any License Holders that have not yet renewed after 60 days.

Comment:

This proposed rule appears to be overly harsh and restrictive. There should be a means of unpaid invoice warnings, multiple invoices or other notices to the LSRP beyond a single invoice and 90 day period before complete automatic license expiration. It is noted that email communications and other Department or Board correspondence and billings are not perfect, and an LSRP should not be subject to expiration of their license without a reasonable notice process and cure.

*(Comment provided by the LSRPA)*

#### SUBCHAPTER 4. CONTINUING EDUCATION

##### **7:26I-4.3 LSRP continuing education requirements**

###### Proposed rule 4.3(b)

Each LSRP shall earn the required 36 continuing education credits by

1. Attending Board-approved continuing education programs; or
2. Participating in Board-approved continuing education activities as described in N.J.A.C. 7:26I-4.5

###### Comment:

Why must all CECs be Board approved? Perhaps add...

3. For non-regulatory CECs, attending or participating in a technical or scientific training program that is approved or certified by another professional Board, Society or provider (e.g., ACEC, ASCE, Battelle) that the LSRP Board deems acceptable.

*(Comment provided by the LSRPA)*

###### Proposed rule 4.3(f)

No LSRP may apply continuing education credits earned during one license term toward another license term.

###### Comment:

Suggest allowing a rollover of a surplus portion of the credits from one cycle to the next. Possibly requiring a time limitation (within the prior 12 months/18 months)?

*(Comment provided by the LSRPA)*

## SUBCHAPTER 5. AUDIT PROCEDURES

### **7:26I-5.3 Selection of LSRPs to be audited**

#### Proposed rule 5.3(b)

The Board shall audit at least 10 percent of the total number of LSRPs in each calendar year.

#### Comment:

Rules should specify how Board is selecting the 10 percent of LSRPs to be audited – is it random as stated on the Audit Questionnaire?

*(Comment provided by the LSRPA)*

#### Proposed rule 5.3(e)

#### Comment:

The 10 percent rule means that in order to be equitable each LSRP should be audited once every 10 years (an extreme analytical position). Why then would the limit for re-audit be set at 24 months?

We suggest that the period be extended to a timeframe of 3 years, which is consistent with the licensure period.

*(Comment provided by the LSRPA)*

### **7:26I-5.5(e)3**

#### Comment:

LSRP needs a chance to defend their audit before an investigation is instituted and complaint committee is activated. Provides unilateral opportunity for the board to create a complaint.

*(Comment provided by the LSRPA)*

### **7:26I-5.6**

#### Proposed rule 5.6:

“the person responsible for conducting the remediation, and any other person having information regarding an LSRP’s submissions”

#### Comment:

This section implies that the LSRP is responsible to cause others to cooperate with an audit. The LSRP cannot be responsible for the cooperation or false swearing of any other party. This also opens the door for a disgruntled PRCR to retaliate against the LSRP by simply not cooperating with the audit.

*(Comment provided by the LSRPA)*

SUBCHAPTER 6. RULES OF PROFESSIONAL CONDUCT

**7:26I-6.3 Professional competency**

Proposed rule 6.3(a)

- (a) An LSRP shall know and apply the applicable statutes, rules, regulations, and appropriate technical guidance concerning the remediation of contaminated sites including, but not limited to, the remediation requirements set forth at N.J.S.A. 58:10C-14.c:

Comment: The language in Section (a) 8 is too broad and should be clarified to apply to applicable remediation-related regulations – suggested edit: “Any other applicable NJDEP remediation standards, or NJDEP environmental rules, or regulations, adopted pursuant to law.”

*(Comment provided by the LSRPA)*

Proposed rule 6.3(b)

- (b) An LSRP shall apply any available and appropriate technical guidance concerning site remediation as issued by the Department.

Comment:

Add the following at the end of the section:

“...in accordance with 7:26I-6.3(c)”

*(Comment provided by the LSRPA)*

Proposed rule 6.3(c)

- (c) When there is no specific technical guidance issued by the Department, or in the judgment of the LSRP the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements listed in (a) above, the LSRP may use the following additional guidance provided that the LSRP includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements listed in (a) above: and justifies the use of the guidance and methods that were utilized.

Comment:

In accordance with the Site Remediation Reform Act, and as clarified by NJDEP in its published guidance “Varying From a Rule and Applying Technical Guidance” Version 1.0 dated, November 28, 2011, while an LSRP is required to support his or her professional judgment in the selection and application of technical guidance to ensure the protection of human health and the environment, there is no requirement to justify why the technical guidance issued by the Department is ‘inappropriate or unnecessary.’ The suggested revised language (below), seeks to



ensure that LSRPs apply all available technical guidance to ensure protection of human health and the environment, even in those situations where NJDEP guidance may be relevant, but where in the professional judgment of the LSRP, alternative technical guidance is more germane to site-specific conditions. These situations should not require an LSRP to evaluate and assess NJDEP's guidance in comparison to the selected technical guidance, as long as remedial outcomes remain protective.

Recommended edit:

- (d) When there is no specific technical guidance issued by the Department, or in the judgment of the LSRP the guidance issued by the Department is inappropriate or unnecessary to meet the remediation requirements listed in (a) above, the LSRP may use the following additional guidance, provided that the LSRP [includes in the appropriate report a written rationale concerning why the technical guidance issued by the Department is inappropriate or unnecessary to] explains the rationale for use, and provides adequate justification to document that decisions made remain protective of public health, safety and the environment pursuant to SRRA and meets the remediation requirements listed in (a) above [and justifies the use of the guidance and methods that were utilized].

*(Comment provided by the LSRPA)*

#### **7:26I-6.5 Notification of retention and release**

##### Comment:

This section states that an LSRP shall submit notification of retention when retained. The LSRPA suggests adding the phrase "to perform services as the LSRP of Record for a site or AOC," since LSRPs may be retained in other capacities. The definition of LSRP of Record has been included in Subchapter 1.3, above. The reference to the online retention form should also reflect that it is now located on the DEPOne portal. The revision would read as follows:

*"An LSRP retained by a person responsible for conducting the remediation to perform services as the LSRP of Record for a site or AOC shall submit an LSRP Notification of Retention or Dismissal as found on the Department website at ~~www.nj.gov/dep/srp/srra/forms~~ <http://www.nj.gov/dep/online/> no later than 15 days after."*

The LSRPA recommends that the following paragraph be added to clarify the completion of the project and the LSRP's status after issuing an RAO: The recommended amendments clarify that an LSRP is by default "dismissed" after the issuance of an unrestricted RAO, and thus no proactive step is necessary.

*"(c) Upon issuance of a response action outcome for any activity, the LSRP shall be considered released as LSRP of Record for that activity. A Notification of Dismissal is not*

*required to be filed by the LSRP after the issuance of an unrestricted entire site RAO. Other than the record keeping requirements required by SRRA and these Rules, the LSRP's remediation oversight responsibility for the activity is concluded."*

*(Comment provided by the LSRPA)*

### **7:26I-6.6 Correcting deficiencies**

#### Proposed Rule

LSRP shall correct any deficiencies the Department identifies and resubmit the document to the Department.

#### Comment:

The LSRP does not have the responsibility to correct deficiencies within a particular regulatory timeframe, the PRCR does. The language does not seem appropriate for the LSRP to be responsible for meeting timeframes established by the Department for the PRCR. However, if the rule must contain this provision, we recommend revising the phrase as follows:

"An LSRP shall, [in accordance with timeframes the Department establishes,] correct any deficiency the Department identifies and resubmit the document to the Department."

Alternatively, if the intent of the paragraph is to focus strictly on the LSRP's deficiency (not the PRCR), then we suggest the following edit: "An LSRP shall, in accordance with timeframes the Department establishes, correct any deficiency the Department identifies associated with the work of the LSRP and resubmit the document to the Department."

Additionally, this is a modification of Paragraph 16e of the SRRA Code of Conduct, but extends to all deficiencies whether identified by the Department or not. The form of these corrections should be flexible to meet the specifics of the issue, and should not necessarily require resubmission of an entire report. Rather, submission of a report addendum, letter, or similar written correction should be appropriate. It should also be appropriate to address these corrections in the next remedial phase report.

*(Comment provided by the LSRPA)*

### **7:26I-6.7 Responsibility of successor LSRP**

#### Proposed Rule 6.7(b)

(b) An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, shall correct all deficiencies in a document submitted by the previous site remediation professional including, but not limited to, those the Department identifies, in accordance with timeframes the Department establishes.

Comment: The LSRP does not have the responsibility to correct deficiencies within a particular regulatory timeframe, the PRCR does. The language does not seem appropriate for the LSRP to be responsible for meeting timeframes established by the Department for the PRCR.

Recommend removing the last phrase as follows: An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, shall correct all deficiencies in a document submitted by the previous site remediation professional including, but not limited to, those the Department identifies [in accordance with timeframes the Department establishes].

Alternatively, if the intent of the paragraph is to focus strictly on the former LSRP's deficiency (not the PRCR), then we suggest the following edit: An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, shall correct all deficiencies of the work of the LSRP in a document submitted by the previous site remediation professional including, but not limited to, those the Department identifies, in accordance with timeframes the Department establishes.

Additionally, this is a modification of Paragraph 16g of the SRRA Code of Conduct, but extends to all deficiencies whether identified by the Department or not. The form of these corrections should be flexible to meet the specifics of the issue, and should not necessarily require resubmission of an entire report. Rather, submission of a report addendum, letter, or similar written correction should be appropriate. It should also be appropriate to address these corrections in the next remedial phase report.

*(Comment provided by the LSRPA)*

Proposed Rule 6.7(c)

An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, before the issuance of a final remediation document, and who learns of material facts, data, or other information concerning any phase of the remediation for which a report was submitted to the Department and the material facts, data, or other information were not disclosed in the report, shall promptly notify the LSRP's client and the Department in writing of those material facts, data, or other information and circumstances.

Comment:

Suggested edit to limit the extent of the notification to those facts, data or information that are material to protection of human health and the environment:

An LSRP who has taken over the responsibility for remediation of a contaminated site from another site remediation professional, licensed or not, before the issuance of a final remediation document, and who learns of material facts, data, or other information concerning any phase of the remediation that will impact the effectiveness of the remediation to protect human health and the environment for which a report was submitted to the Department and the material facts, data, or other information were not disclosed in the report, shall promptly notify the LSRP's client and the Department in writing of those material facts, data, or other information and circumstances.

*(Comment provided by the LSRPA)*

### **7:26I-6.8 Exercise of independent professional judgment**

Comment:

Recommended edit to 6.8(a):

- (a) An LSRP shall exercise independent professional judgment and comply with the requirements and procedures set forth in the SRRA and any applicable rule, regulation, and order adopted or issued pursuant thereto.

*(Comment provided by the LSRPA)*

Proposed rule 6.8(c):

- (b) An LSRP shall notify the person responsible for conducting the remediation and the Department in writing when in his or her professional judgment based on site history any one or more applicable mandatory or expedited site-specific timeframes referenced in N.J.A.C. 7:26C-3 is unlikely to be met.

Comment:

It is the LSRP's responsibility to notify the PRCR when the LSRP anticipates that a mandatory or expedited site-specific timeframe is unlikely to be met; however, there is no statutory/SRRA requirement for the LSRP to notify the Department in writing that mandatory or expedited site-specific timeframes are unlikely to be met. Further, the requirement to notify clients and the NJDEP that the LSRP believes timeframes are "unlikely to be met" is vague and lacking definition. How is an LSRP to judge? What if the client disagrees? If a timeframe is not met, the DEP has the information necessary to take enforcement action; it does not need notification from an LSRP that the timeframe is "unlikely to be met." What would NJDEP realistically do with this information?

The LSRPA recommends that "and the Department" should be deleted from this citation.

*(Comment provided by the LSRPA)*

### **7:26I-6.9 Responsibility to report an immediate environmental concern**

- (a) If an LSRP identifies a previously unreported condition at a contaminated site that in his or her independent professional judgment is an immediate environmental concern, the LSRP shall:

1. Immediately verbally advise the person responsible for conducting the remediation of the condition and of that person's duty to notify the Department of the condition; and
2. Immediately notify the Department of the condition by calling the Department's telephone hotline at 1-877-WARNDEP.

Comment:

It is our understanding that if the LSRP notifies the PRCR, and the PRCR notifies the NJDEP of the condition, then there is no need for the LSRP to again provide notification. We have been advised that the Department does not want two calls, which can lead to the assignment of two incident numbers, complicating the administrative process. This should be clarified in the rule.

*(Comment provided by the LSRPA)*

**7:26I-6.10 Responsibility to report a discharge**

Proposed Rule 6.10:

(a) If an LSRP obtains specific knowledge that a previously unreported discharge, other than of historic fill, has occurred on a contaminated site for which he or she is responsible, the LSRP shall:

1. Immediately notify the person responsible for conducting the remediation of the discharge and of that person's duty to notify the Department of the discharge;
2. Immediately notify the Department of the discharge by calling the Department's telephone hotline at 1-877-WARNDEP; and
3. Immediately notify any other LSRP that is working on the contaminated site of the discharge.

(b) An LSRP is considered to be responsible for a contaminated site if he or she has been hired by a person responsible for conducting the remediation at that site.

(c) The provisions of this section shall not apply to an LSRP who has been hired by any person who:

1. Does not own the contaminated site;
2. Conducts a preliminary assessment or site investigation of the contaminated site for the purpose of conducting all appropriate inquiry into the previous ownership and uses of the property as provided in N.J.S.A. 58:10-23.11g; and
3. Has not discharged a hazardous substance at the site or is not in any way responsible for a hazardous substance discharged at the site pursuant to N.J.S.A. 58:10-23.11g.

Comment – proposed rule 6.10(a):

To prevent multiple incident numbers from being generated, add to end of (a)2: ...at 1-877-WARNDEP, “unless the person responsible for conducting the remediation has provided such notice;”

Comment – proposed rule 6.10(b):

We believe the term “hired” within 6.10(b) is far too vague and broad, and may result in LSRPs relinquishing their licenses so that they can continue to provide services in specific technical disciplines unrelated to remediation (e.g. structural engineering, stormwater management, ecological sciences). It will be difficult for an LSRP to continue to work on a portfolio of client sites if this broad language remains in place. Clients will be less likely to use their LSRP as an advisor/strategist (on non-remediation tasks) which also may lead to LSRPs giving up their licenses. This has the potential to cause exactly what the Board does not want – an abundance of less experienced, 3<sup>rd</sup> party LSRPs signing off on work someone else has performed.

*(Comment provided by the LSRPA)*

Comment – proposed rule 6.10(b):

Section 6.10, including subsections 6.10(b) and 6.10(c), is proposed in part in order to clarify the reporting obligation of an LSRP pursuant to Section k of the statutory Code of Conduct and the meaning of the phrase “for which [the LSRP] is responsible” contained in the statute. The draft rule provides that an LSRP is “responsible” for a contaminated site when he or she has been hired by a person responsible for conducting the remediation of that site. LSRPA maintains that the statutory language of Section k is clear and means that an LSRP is responsible for a contaminated site when retained as the LSRP of Record with respect to the contaminated site. Defining “for which [the LSRP] is responsible” as the LSRP of Record is consistent with the statutory language, legislative intent, and the Board’s prior determination set forth in its decision with respect to SRPLB Complaint# 003-2011.

It is worth noting that at the time the SRRA was enacted the term “LSRP of Record” had not yet been coined. This term was developed later as the Department began to implement the new program through rules and forms. In the drafting of Section k of the Code of Conduct the language “for which [the LSRP] is responsible” was added by the Legislature to the section as initially proposed in response to comments made by the then LSP Consultant Coalition, a precursor to the LSRPA. At the same time this amendment was made to the S-1897 bill, the next sentence, “The persons responsible for conducting the remediation shall also be responsible for notifying the Department of the existence of the discharge,” also was added. These amendments were made to ensure that discharges would be reported by appropriate, responsible persons, i.e., the person responsible for conducting the remediation and the LSRP hired by such person for the purpose of remediating the contaminated site.

The amendments were not made to address concerns over whether an LSRP would be able to perform due diligence, as has frequently been stated. Indeed this statutory section makes no reference to due diligence or all appropriate inquiry as it would have if that was the intended distinction between the reporting obligations of Section k and Section j applicable to reporting of Immediate Environmental Concerns that does not include the qualification “for which [the LSRP] is responsible”. An LSRP who has not been retained for the purpose of performing the remediation required by the NJDEP’s rules and regulations is not “responsible for” a contaminated site pursuant to Section 16.k. of the statute.

Interpreting Section k broadly and speculation over the meaning of the phrase “for which [the LSRP] is responsible” has had unintended effects. For example, it is now routine in real estate contracts to exclude LSRPs from performing due diligence as a result of concerns over when reporting may be required. This also has resulted in parties performing remediation holding LSRPs at arms-length in various ways to avoid an LSRP gaining “specific knowledge of a discharge”, e.g. when they may serve as an expert in litigation or assist a client to make appropriate confidential reviews and inquiries with respect to transactions, or with respect to environmental compliance evaluations or permitting and other matters. The exclusion of LSRPs from due diligence and other environmental matters is contrary to a policy that should encourage LSRPs to be involved in all aspects of site remediation. Interpreting Section k sensibly, in accordance with the statutory language and intent, would require LSRPs to report any Immediate Environmental Concern, protecting public health and the environment, but lesser discharges only when the LSRP is “of Record.”

These issues can be addressed with two changes. First, define the “LSRP responsible for the site” as the “LSRP of Record” in Section 1.3 under Definitions. Where an LSRP who is not “of record” learns of a previously unreported discharge, they should be required to report the discharge 1) to the owner of the property, 2) to the person responsible for conducting the remediation, if other than the owner, and 3) to the LSRP of record for the site, if one exists. In addition, the LSRP should be required to inform each of these parties of their responsibility to report the discharge.

To address this, we have recommended language to define the terms “LSRP of Record” and “professional service,” to the definitions in Subchapter 1.3. The term “LSRP of Record” has become the term of art that was not envisioned by the legislature, but was encompassed by the phrase “...on a contaminated site for which he or she is responsible.” The term “professional service” is referenced a number of times in both SRRA and the draft rule, but is not defined. We recommend that the Board adopt the following language into the regulation:

“(a) If an LSRP *of Record* obtains specific knowledge that a previously unreported discharge, other than of historic fill, *diffuse anthropogenic compounds, or lawfully applied herbicides/pesticides*, has occurred on a contaminated site for which he or she is ~~responsible~~ *has been retained as the LSRP of Record, the LSRP shall:*

1. Immediately notify the person responsible for conducting the remediation of the discharge and of that person’s duty to notify the Department of the discharge;
  2. Immediately notify the Department of the discharge by calling the Department’s telephone hotline at 1-877-WARNDEP; and
  3. Immediately notify any other LSRP that is working on the site of the discharge.
- (b) An LSRP is considered to be ~~responsible~~ *the LSRP of Record* for a contaminated site if he or she has been hired by a person responsible for conducting the remediation of that site *to perform professional services relating to the investigation or remediation of contamination.*

(c) The provisions of this section shall not apply to an LSRP who is not an LSRP of Record with respect to the contaminated site or employed by the LSRP of Record to perform remediation related services at the contaminated site. ~~who has been hired to perform environmental due diligence by a person who is not responsible for conducting the remediation of a site, unless the previously unreported discharge is an immediate environmental concern, in which case the requirements of Section 6.9 above apply.~~

*(d) If the LSRP of Record obtains specific knowledge that a previously unreported discharge, other than of historic fill, diffuse anthropogenic compounds, or lawfully applied herbicides/pesticides, has occurred on a contaminated site for which he or she is not the LSRP of record, the LSRP shall immediately notify the owner/operator, as said owner/operator is identified in publicly available records, of the discharge and of that person's duty to notify the Department of the discharge."*

*(Comment provided by the LSRPA)*

Comment – proposed rule 6.10(b)

Alternatively, if the inclusion of the definitions for LSRP or Record and Professional Services is not acceptable, the LSRPA recommends an alternative modification to the incorrect clause. As the reporting obligation is intended to focus on the LSRP responsible for the remediation of the site, we recommend that the language in SRRA be used, or a recommended edit as follows:

(b) An LSRP is considered to be responsible for a contaminated site or an AOC if he or she has been hired to perform remediation services by a person responsible for conducting the remediation at that site (or AOC).

*(Comment provided by the LSRPA)*

Comment – proposed rule 6.10(c):

During drafting of the SRRA legislation, the bill's sponsor reached out to scientists and engineers who would form the basis of the future LSRP community for comment on specific aspects of the statute. On one occasion, the issue of the LSRPs discharge reporting responsibility was discussed at length relative to the drafting of SRRA Section 16.k. Specifically, it was agreed that requiring LSRPs to report discharges under all circumstances (as defined for IEC conditions) would limit use of the most qualified professionals to perform specific services in the marketplace. Examples of services discussed during this meeting included performance of due diligence and expert testimony, although it was acknowledged that other services could also fall into this category (see comment to 6.10(b) above). As a result, SRRA Section 16.k. was written to limit the reporting responsibility of a LSRP to "a contaminated site for which he is responsible", allowing for a range of other support services, without specifically defining them. (As part of the discussions at this meeting, Section 16.k was also revised to include the requirement for the PRCR to also report a discharge to the Department where a retained LSRP



has that responsibility.) Consequently, we believe that this section of the rule “Due Diligence Exception” is too limiting, and does not reflect the spirit or intent of the discussions with the bill’s sponsor regarding this issue. We believe that this section should be removed, or revised to acknowledge the intent of 16.k, which is that the LSRP is responsible to report a discharge only at “a contaminated site [or AOC] where he is responsible”; i.e., has been hired to perform remediation services and retained as the LSRP of Record.

*(Comment provided by the LSRPA)*

Comment – proposed rule 6.10(c):

If a prospective purchaser does not have to retain a LSRP to conduct a PA, a lender or property owner should not either. Clarify that lenders conducting due diligence for mortgages do not have to use a LSRP and that a property owner wanting to look at his/her own property with no indication of a discharge, e.g., PA of one’s own property, does not have to use a LSRP.

*(Comment provided by the LSRPA)*

**7:26I-6.11 Deviation from workplan by client**

Recommended edit: If an LSRP learns of a PRCR’s action or decision that results in a substantial deviation from the remedial action workplan or other report concerning the remediation that will impact the effectiveness of the remediation in protection of human health and the environment, the LSRP shall promptly notify the PRCR and the Department, in writing, of the deviation.

*(Comment provided by the LSRPA)*

**7:26I-6.13 New information after submitting report**

Recommend edit: An LSRP who learns of material facts, data, or other information subsequent to the completion of a report concerning any phase of remediation, which would result in a report with material differences from the report submitted that will impact the effectiveness of the remediation in protection of human health and the environment, shall promptly notify the client and the Department in writing of those facts, data, information, and circumstances.

*(Comment provided by the LSRPA)*

**7:26I-6.14 Responsibility to disassociate from unscrupulous persons**

Proposed rule 6.14:

An LSRP shall not allow the use of his or her name by a person, and shall not associate with a person in a business venture, if the LSRP knows or should know that the person engages in fraudulent or dishonest business or professional practices regarding the professional responsibilities of an LSRP.

Comment: The term ‘business venture’ in the section is vague. Is it meant to imply that the LSRPs should dismiss themselves as the LSRP for the site? Can the LSRP work for the client as a non-LSRP?

*(Comment provided by the LSRPA)*

#### **7:26I-6.16(a) LSRP responsibilities for subordinate LSRP**

LSRP shall be jointly responsible for a *violation of the SRRA or any rule, regulation, or order adopted or issued pursuant thereto* committed by another LSRP whose work he or she reviews if....

Comment: The italicized text is an expansion to Paragraph 16r of the SRRA Code of Conduct. The statutory language was specific to violations of the Code of Conduct. We recommend deletion of the phrase, “or any rule, regulation, or order adopted or issued pursuant thereto.”

*(Comment provided by the LSRPA)*

#### **7:26I-6.18 Duty regarding client communications**

##### Proposed rule 6.18(b)

(b) An LSRP shall inform a client of:

1. Each regulatory, mandatory, and expedited site-specific timeframe that the LSRP can reasonably ascertain for each contaminated site for which the client has hired the LSRP;
2. The dates by which each component of the remediation shall be completed in order to meet the timeframes in (b)1 above; and
3. The penalties and consequences set forth in applicable statutes and regulations, if the timeframes in (b)1 above are not met.

Comment:

The final clause (#3) appears to transgress into the realm of providing legal advice, and we recommend its deletion.

*(Comment provided by the LSRPA)*

#### **7:26I-6.19 Duty regarding public communications**

Comment: LSRPA believes that proposed rule 7:26I-6.19, as drafted, is inconsistent with Administrative Requirements for the Remediation of Contaminated Sites (ARRCS) Rule N.J.A.C. 7:26C-1.7(o), which requires the person responsible for conducting the remediation (RP) to respond to public inquiries either received by them directly or received by the Department and sent to them. It is also inconsistent with the Department’s position that

enforcement action for non-compliance with the public inquiry requirement will be directed against the RP and not the LSRP. See, Site Remediation Program Public Inquiry Policy Document, October 2012. This rule in its entirety should be deleted, and the Rule 7:26C-1.7(o) requirement that the RP, and not the LSRP, be responsible should control.

LSRPA also believes that the requirement in Rule 7:26I-6.19(b)3 that the LSRP must provide any additional information that is important for the public to know in order to protect their health and safety is: (1) much broader than the notification and public outreach requirements in N.J.A.C. 7:26-C-1.7, since it can include LSRP “work in progress” and (2) inappropriately shifts the burden to the LSRP to determine what information would be important for the public to know. This subsection should be deleted.

LSRPA has noted that 7:26I-6.19(a) has removed the language “regarding the site or area of concern for which he or she is the LSRP of record” which appeared in prior drafts of the Rules. Under SRRA and ARRCs, an LSRP is responsible only for a site or area of concern for which he or she has been designated LSRP of record. An LSRP should not be required to respond to public requests for information for any area or subject beyond the scope of his designation as LSRP of record. LSRPA strongly requests that the previous language “regarding the site or area of concern for which he or she is LSRP of record” be restored in 7:26I-6.19(a).

*(Comment provided by the LSRPA)*

Proposed rule 6.19(b)2:

(b) 2. Information that the LSRP shall provide... shall include:  
Information that has been submitted to the Department

Comment: Why should the LSRP be required to provide this information (at a potential cost to their client) when this information is available to the public through OPRA (at a potential cost to the requesting party).

*(Comment provided by the LSRPA)*

Comment:

Since requests for records to the Department must be in writing and fees apply, the LSRPA recommends the following new clause:

“Therefore, the LSRP should be allowed to require the information request to be in writing and may charge the requester reasonable fees for reproduction.”

*(Comment provided by the LSRPA)*

Comment:

Recommended new clause:

The LSRP is no longer obligated to comply with this section after the LSRP issues an unrestricted RAO or is otherwise no longer retained as the LSRP responsible for the site.

*(Comment provided by the LSRPA)*

**7:26I-6.22 Duty to notify even if no longer employed by client**

Proposed rule:

An LSRP shall provide any notification to the Board and the Department required pursuant to the SRRA or any rule, regulation, or order adopted or issued pursuant thereto even if the client discharges the LSRP, or the LSRP discharges himself or herself, prior to providing the notification.

Comment: There needs to be more clarity here. One could interpret this to indicate that a LSRP has an obligation to report a discharge on a site for which he or she has been dismissed, even if the discharge occurred after the LSRPs' dismissal. Recommend clarification that the notification requirement is limited to activities occurring during the LSRPs tenure as the LSRP responsible for the site. Also recommend a timeframe for the notification to occur after dismissal (i.e. 30 days). What is the timeframe by which the LSRP is obligated to provide such notifications? Forever? This should be subject to the same 10 year record keeping requirement noted in section 6.27, subsequent to dismissal or the issuance of the RAO.

*(Comment provided by the LSRPA)*

**7:26I-6.25 Response action outcome**

Proposed rule 6.25(a)

(a) Upon completion of the remediation, the LSRP shall not issue an RAO to the person responsible for conducting the remediation until:

1. In the LSRP's opinion, the contaminated site has been remediated so that it is in compliance with all applicable statutes, rules, and regulations protective of public health and safety and the environment; and

Comment: This statement should be revised to state "...the contaminated site or AOC has been remediated..." If a LSRP has been retained to remediate an AOC only, he has no responsibility to address the entire site.

*(Comment provided by the LSRPA)*

**7:26I-6.27 Maintenance of records.**

Comment:

LSRP's often don't own the documents – their clients or their employers do. No other licensees (PE, MD, etc.) are required to maintain casefiles as a condition of their license. What is the rationale for this requirement?

*(Comment provided by the LSRPA)*

**7:26I-6.28 Cooperation with Department Review of Remediation**

Proposed rule 6.28(b)

(b) Unless the Department directs otherwise, the LSRP may continue to remediate the contaminated site while the Department conducts any inspection or additional review of documents pursuant to N.J.S.A. 58:10C-21.

Comment:

A LSRP does not remediate the contaminated site – the person responsible for conducting remediation remediates the contaminated site. This should be revised to read as follows:

(b) Unless the Department directs otherwise, the LSRP may continue performing its duties on behalf of the person responsible for conducting remediation while the Department conducts any inspection or additional review of documents pursuant to N.J.S.A. 58:10C-21.

*(Comment provided by the LSRPA)*

## SUBCHAPTER 7. DISCIPLINARY PROCEEDINGS

### General Comment - Timing of Complaint Review Process

The Proposed Rule should require prompt investigation of any complaints and, with respect to complaints to be dismissed, dispose of these quickly in order to mitigate the impact of the disciplinary process on the affected LSRP, their employer, and the PRCR. The LSRPA understands that the Board members are all volunteers with their own professional responsibilities; however, the existence of a complaint, and the uncertainty as to the potential impact on an LSRP's ability to continue to make a living, would weigh heavily on any individual, even if the complaint were known to be totally unfounded.

Moreover, the Proposed Rule should also stipulate that that the Complaint Review Team has an obligation to respond to requests, inquiries, questions, papers, legal briefs, and position statements from the LSRP that is subject of a complaint within 35 days of receipt by the Complaint Review Team, the same length of time as specified in the adjudicatory process in 8.3(b)1 and 8.4(b).

*(Comment provided by the LSRPA)*

### 7:26-7.3 Filing complaints

#### Comment:

The Proposed Rule provides that any person may file a complaint against an LSRP, without limitation of the grounds for the complaint, (i.e. whether the LSRP's alleged actions were a violation of SRRA code of conduct . The LSRPA suggests that the proposed rule be revised as follows:

7.3(a) Any person may file a complaint with the Board ~~alleging~~ if they believe that a person has specifically:

1. Violated the SRRA or any rule, regulation, or order adopted or issued pursuant thereto; or
2. Knowingly made any false statement, representation, or certification in any document or information submitted to the Board or the Department.

The complainant should have to describe their relationship to the case, project, or LSRP. While the LSRPB form includes questions directing to the complainant to describe a business or contractual relationship with the LSRP, the Rules should include this requirement. This information is critical for the Board to pursue an effective investigation of the nature of the complaint and the facts alleged thereto. The LSRPA recommends that the statement in 7.3(b) be amended to include this critical description of the relationship as follows:

7.3(b) A person shall make a complaint to the Board on the form available on the Board website at [www.nj.gov/l srpboard](http://www.nj.gov/l srpboard), and include a description of their contractual,

business, or other relationship to the LSRP and/or the Person Responsible Conducting the Remediation.

To further emphasize the that the compliant process is not to be used for retaliation, as prohibited by 7:26I-9, the determination that the complaint is “is retaliatory” should be the first go/no-go bar/decision for action by Board’s initial review and/or the Complaint Review Team - and should be a high one. The LSRPA recommends that the following language be added to 7.3:

7.3(c) Any person cannot make a complaint for any other reason, including for retaliation. A contextual determination will be made of every complaint files, as to whether the complaint is perceived to be retaliatory and therefore, expressly excluded from Board action.

7.3(d) Any person can only make a complaint on the grounds of provided in (a)1, and (a)2. above.

*(Comment provided by the LSRPA)*

#### **7:26I-7.4(d) and 7.6(e) and (f) Publishing the Names of the LSRP and Complainant**

##### Comment:

This provision describes the Board’s procedure to determine whether or not a complaint should be investigated. In the case of 7.4(d), when the Board Professional Conduct Committee finds that there are no grounds to investigate the complaint or determines that the complaint should be dismissed, the Rule Proposal requires that a summary of the complaint should be published on the Board website. This should be done without publishing the names of the LSRP or complainant. The names of the LSRP or complainant are redacted by the Board during the review of the complaint. The LSRPA believes that, in the interest of fairness to all, that the names should remain withheld if the complaint was found to be without merit. If requested, the Board should provide the names consistent with the Open Public Records Act.

The Board recently voted to adopt a policy of redacting the identity of the complainant and the subject of a complaint when a complaint is dismissed. We appreciate the Board’s policy decision; however, while this section does not specifically state that these identities are to be published, to be consistent with the policy, this section of the rule should be revised to state that the identities of the complainant and the subject of the complaint will be redacted. This is consistent with SRRA, which provides that the Board publish the names of LSRPs whose license has been suspended or revoked and to provide the public with information on request as cited below:

To publish and maintain a list of all site remediation professionals whose license has been suspended or revoked by the board and make the list available on the board’s internet website; C.58:10C-5 k.

To maintain a record of complaints filed against licensed site remediation professionals and provide the public with information upon request. C.58:10C-5 m.

The concern in this section is that when a complaint is found to be without merit or is dismissed, the existence of the complaint should not reflect on the professional reputation of the LSRP. This is, in effect, retaliatory action, which is prohibited by SRRA, and the presumption of innocence until guilt is proven. Given the stigma associated with having a person's identity revealed on the Board's website in association with a complaint, the Board should redact any information that reveals the identity of the LSRP where the Board decides to dismiss the complaint or not enforce after an investigation.

The provisions in Subchapter 9 prohibiting retaliatory action against a complainant, may in fact encourage baseless complaints. Note that in 7.6(d), a similar decision by the Board to dismiss the complaint requires a summary of the complaint and disposition to be published on the Board's website. Again, if no Board action is required, the name of the LSRP and complainant should remain confidential.

As currently written, the proposed rule does not adequately address this important concept; as a result, the LSRPA recommends adding the following text as follows:

7.4(d)1.ii. Publish a summary of the complaint with the names of the complainant and the LSRP redacted, including the reason(s) for dismissal on the Board website.

7.6(e) "Upon a determination by the Board pursuant to (b)2 above, a summary of the complaint, with the names of the complainant and the LSRP redacted, and its disposition shall be made available on the Board website at [www.nj.gov/l srpboard](http://www.nj.gov/l srpboard).

7.6(f). Upon a determination by the Board pursuant to (b)3 above, a summary of the complaint with the names of the complainant and the LSRP included, and its disposition shall be made available on the Board website at [www.nj.gov/l srpboard](http://www.nj.gov/l srpboard).

*(Comment provided by the LSRPA)*

#### **7:26I-7.5(d) Notification of the LSRP that there is a complaint**

##### Comment:

The Proposed Rule provides that the LSRP be notified in the event that a complaint has been lodged against the LSRP. However, the Proposed Rule provides the CRT with the ability to bypass the normal notification process.

7.5(d) If the Complaint Review Team determines that the investigation of the complaint could be undermined by notifying the subject of the complaint, the Complaint Review Team may delay notification until a later date.



This paragraph potentially undermines the professional status of the LSRP by conducting an investigation without notifying the LSRP as provided in 7.5(c). By conducting an investigation, the Complaint Review Team could contact other parties potentially involved in the complaint before they notify the LSRP. Despite any precautions that the CRT may impose, the release of the confidential information regarding the existence of a complaint is inappropriate and could unfairly damage the reputation and professional status of the LSRP should the complaint subsequently be dismissed. The LSRPA recommends that the language be modified as follows:

7.5(d) If the Complaint Review Team determines that the investigation of the complaint could be undermined by notifying the subject of the complaint, the Complaint Review Team may delay notification until ~~a later date~~ the review of the readily available documents has been completed, but before any of the parties are contacted.

*(Comment provided by the LSRPA)*

#### **7:26I-7.5(e) and (g) Expansion of the Investigation by the CRT**

##### Comment:

The board has added language to the Proposed Rule that provides extraordinary additional scope to the Complaint Review Team to investigate complaints beyond the allegations of the complaint, as cited below. This additional language was not present in prior drafts of the Proposed Rule, but is provided in 7.3(a), i.e. the grounds for filing a complaint.

7.5(e) The Complaint Review Team shall take such actions it deems necessary to thoroughly investigate the allegations of the complaint. **The Complaint Review Team may expand its investigation beyond the allegations of the complaint to investigate whether the subject of the complaint has violated the SRRA or any rule, regulation, or order adopted or issued pursuant thereto, or has knowingly made any false statement, representation, or certification in any document or information submitted to the Board or the Department.** [emphasis added]

7.5(g) The Complaint Review Team may review information from other persons regarding an LSRP that is the subject of the complaint including, but not limited to:

1. Records from other cases that the LSRP is or was involved in;
2. Prior complaints; and
3. Prior disciplinary actions.

As expressed in SRRA, the SRPLB has the power:

To investigate complaints, impose discipline, and suspend and revoke licenses of site remediation professionals who violate the provisions of P.L.2009, c.60 (C.58:10C-1 et al.); C.58:10C-5i.

and shall:

establish procedures for the investigation of complaints concerning licensed site remediation professionals initiated by any person;” C.58:10C-6(3)

This additional scope of compliant investigation in 7.5(e) and (g) is not addressed in the formal policy approved by the SRPLB on November 14, 2011. The most recent Professional Conduct Committee Flow Chart, dated January 18, 2012, stated on page 2, which includes:

- Respondent and complainant are asked to provide all pertinent information to aid the investigation.(contracts, reports, correspondence, proposals, etc.)
- CRT may call third party witnesses if appropriate
- CRT may investigate other cases performed by the LSRP if relevant to investigation.

The emphasized language in 7.5(e) cited above is redundant with the grounds for which any person may submit a complaint as specified by 7.3(a); therefore, it is unnecessary to add to 7.5(e). If this is truly the licensing board’s intent, this unnecessary language would permit the expansion of the CRT investigation beyond the complaint would grant the CRT the unprecedented power to investigate complaints not granted to any other professional licensing board in New Jersey and far beyond the legislative intent authorized in SRRA. To our knowledge, there has not been an instance where the CRT has needed to exceed their statutory authority in the performance of their investigatory powers. We believe that this provision could essentially allow a “witch-hunt” wherein the CRT is permitted investigate LSRPs with impunity from the limitations placed by SRRA. The LSRPA questions why this last minute change in the CRT’s authority (not contained in earlier drafts available for review) was believed to be necessary in the promulgation of the Proposed Rule.

In addition, there would be an unintended consequence to the Proposed Rule. All of NJDEP SRP’s regulations, especially the Technical Requirements for Site Remediation (TRSR), were revised significantly after the adoption of SRRA, and as required by SRRA. This additional unfortunate language in 7.5(e) would prevent an LSRP from utilizing their professional judgment and varying from the TRSR, while being protective of human health and the environment, because the Proposed Rule would subject the LSRP to potential action by the CRT for a perceived violation of the TRSR. Clearly, this is completely counter to the legislature’s intent, the Department’s existing regulations, and guidance that encourages use of professional judgment (with technical justification) to provide a protective and compliant remedy. The LSRP’s professional judgment, must be based on the hierarchy of statute, regulation, and guidance established by SRRA at C.58:10C-14(c)4.

As a result, the LSRP strongly recommends that the additional language of 7.5(e) be eliminated and 7.5(g) be modified as shown below to be consistent with SRRA and current Board policy.

7.5 (e) The Complaint Review Team shall take such actions it deems necessary to thoroughly investigate the allegations of the complaint. ~~The Complaint Review Team may expand its investigation beyond the allegations of the complaint to investigate whether the subject of the complaint has violated the SRRA or any rule, regulation, or order adopted or issued pursuant thereto, or has knowingly made any false statement,~~

~~representation, or certification in any document or information submitted to the Board or the Department.~~

7.5(g) The Complaint Review Team may review information from other persons regarding an LSRP that is the subject of the complaint ~~including, but not limited to:~~ *including, regarding the nature of the complaint.*

- ~~1. Records from other cases that the LSRP is or was involved in;~~
- ~~2. Prior complaints; and~~
3. Prior disciplinary actions may be considered by the Complaint Review Team only after the Board has determined that a violation has occurred and that a disciplinary action is warranted.

*(Comment provided by the LSRPA)*

### **7:26I-7.5(f) Authority of the Complaint Review Team**

#### Comment:

The Proposed Rule includes language that provides for the CRT's powers during the investigation of a complaint.

7.5(f) The Complaint Review Team has the authority to take any one or more of the following actions:

1. Request, order, or subpoena the subject of the complaint, the complainant, and any other person that may have information regarding the facts of the complaint to:
  - i. Submit to questioning or interviews;
  - ii. Produce data, documents, records, and information;
  - iii. Respond to inquiries from the Complaint Review Team; and
  - iv. Make sites, remedial systems, monitoring devices, or other equipment available for inspection;
2. Enter, at reasonable times and in a reasonable manner, any known or suspected site, vessel, or other location, whether public or private, for the purpose of investigating, sampling, inspecting, or copying any records, condition, equipment, practice, or property relating to activities subject to the SRRA or any rule, regulation, or order adopted or issued pursuant thereto. In the event entry is denied or the Board does not wish to provide prior notice, the Board shall seek a warrant authorizing entry before entering the site; and
3. Seize any records, equipment, property, or other evidence relating to activities subject to the SRRA or any rule, regulation, or order adopted or issued pursuant thereto when the Complaint Review Team has reason to believe that any person has made fraudulent representations to the Board or the Department or has destroyed or concealed evidence.

SRRA is clear in that the CRT, as an agent of the board, needs a warrant where access is denied: The board or the department shall seek a warrant authorizing such entry upon denial of permission to enter. (C.58:10C-18 18a)

The LSRPA believes that there are serious doubts regarding the Board's authority to undertake all of what is contained in the proposed rule (e.g., subpoenas), let alone the ability to delegate that authority to the CRT (which could be as small as two Board members). Section 7.5(f)2 and 3 allows the Board, when conducting an investigation of a complaint against an LSRP, to enter a site to investigate and to seize records, equipment, property and other evidence. As written, the Board appears to have the authority to enter any person's property that is subject to the SRRA and seize any property that it deems relevant to its investigation. This is overly broad and places a burden on RPs, LSRPs and Property Owners with regard to access and other proprietary rights. This should be scaled back and more narrowly tailored. Further, this section provides the Case Review Team with subpoena power, which is not appropriate, when the Board itself does not even have this power.

SRRA identifies the purpose of the Board: "The board shall establish licensing requirements for site remediation professionals and shall oversee the licensing and performance of site remediation professionals." N.J.S.A 58:10C-3; see also N.J.S.A 58:10C-5. Thus, the Legislature intended to limit the reach of the Board to its regulation of LSRPs. To the extent that the rules apply to other "persons" they are outside the scope of the Board's authority, particularly where this is not connected to the Board's specific investigation or audit of an LSRP.

*(Comment provided by the LSRPA)*

#### **7:26I-7.9 (b)1 and (c)1 Administrative Order**

##### Comment:

7.9(b) In each administrative order, when determined to be required as part of the corrective action, the Board may:

1. Require the production or analysis of samples;

7.9(c) In each administrative order, when determined to be appropriate, the Board may assess and recover the costs of:

1. Any investigation incurred by the Board and any other State agency:

The Board should not be determining what is required as part of a corrective action, and should not have the power to require that the LSRP produce or analyze samples. These technical aspects of site remediation are not within the Board's purview, which is limited to the conduct of LSRPs and their requirement to follow all application rules and regulations. The LSRP is not responsible for producing technical work product or furthering the corrective action, except as authorized by the responsible party.

The Board should not be allowed to recover costs directly from the LSRP, including costs incurred by a separate agency not of the Board. The investigation of the Board is at the Board's discretion, and is therefore beyond the control of the LSRP under investigation. The conditions around which the Board can decide efforts, costs and the need for recovery would need definition. It is noted that, as written, these decisions around cost recovery from the LSRP may occur before any input or response from the LSRP regarding the investigation. This is overly broad and outside of the right to assess civil administrative penalties.

Moreover, certain of these items should remain discretionary (“may” rather than “shall”). In particular, it would be unfair and inappropriate for the board to assess its or another agency’s costs (e.g., investigation costs or the Attorney General’s) against every LSRP that it disciplines. The shifting of such costs is highly uncommon (e.g., NJDEP does not do so), it is contrary to the “American rule” of our civil litigation system in that each party bears its own costs and, thus, assessing costs and fees should be discretionary and reserved for unusually egregious matters.

*(Comment provided by the LSRPA)*

## SUBCHAPTER 8. ADJUDICATORY PROCEEDINGS

### 7:26I-8.5 Final Orders and Other Board Decisions

#### Comment:

These sections should state clearly whether the board has the ability to ignore the decision of the judge. An appellant should be aware before a ton of money is spent.

7:26I-8.3(c)9 "A statement of willingness to negotiate..."

This is to be provided by the LSRP. We recommend additional language that the LB also provides a "statement of their willingness to negotiate."

*(Comment provided by the LSRPA)*

7:26I-8.4(a) "The Board shall determine whether to grant and administrative hearing based upon:"

The way this section is worded, the LB MAY grant the hearing, but it does not state that the hearing is automatically granted. Then in Section 8.4(b), the proposed rule provides two causes for hearing denial by the LB. If the LSRP complies with all prerequisites for the hearing request, the request for hearing MUST be granted by the LB.

*(Comment provided by the LSRPA)*

7:26I-8.3(a) Procedures for requesting and conducting an adjudicatory hearing

(a) A person may request an adjudicatory hearing to appeal any of the following Board actions:

#### Comment:

Under the list of items under (a) it is noted that cost recovery is not listed as an item that can be appealed. As noted under the preceding comment, the Board may determine that recovery of costs is appropriate. If this is allowed, it should be allowed to be appealed, and included under the list of items under (a).

*(Comment provided by the LSRPA)*

### 7:26I-8.3(b) Procedures for requesting and conducting an adjudicatory hearing

(b) The person requesting a hearing pursuant to (a) above shall:

1. Have 35 days after receipt of notification of the Board's action within which to request a hearing;

#### Comment:

Under (b), 35 days is not enough time for an LSRP to prepare for and request a hearing, including preparation of the items under (c) and (d). It is noted that failure to respond in this short time frame is automatic grounds for denial of the appeal. The LSRP should have adequate

time to review the compliant, information provided by the Board, secure legal representation and prepare for the appeal as required. Recommend change to a minimum of 60 Days.

*(Comment provided by the LSRPA)*

**7:26I-8.3 (c) 1, 2, 4, 6, 7, 8, 9 Procedures for requesting and conducting an adjudicatory hearing**

Comment:

Under (c) 1, 6, 7, 8 and 9, the term “*disciplinary document*” should be defined, or replaced with “*administrative order*”.

Under (c) 2 the term “*petitioner*” should be defined, or replaced to clarify as meaning the LSRP or subject of the complaint.

Under (c) 4, the term “*barrier-free location*” should be defined or clarified.

Under (c) 9 “*...settlement with the **program**...*,” the term “program” should be changed to “Board.”

*(Comment provided by the LSRPA)*

## SUBCHAPTER 9. PROHIBITION AGAINST RETALIATORY ACTION

### 7:26I-9 – General Comments

The definition of retaliatory actions should be moved into the definitions section of 7:26I-1.3.

The retaliatory clauses in the rule are well-intentioned and welcome, but do not set forth any penalties, nor any actions when such actions are identified.

For instance - If a complaint is identified and construed to be retaliatory – the complaint should be summarily disqualified from formal action and the complainant be barred from making substantially similar complaints on the same grounds (i.e. the LSRP should not be subject to “double-jeopardy” via creative complaining).

We hope that the Board will review their register of complainants to assist in identifying strategic or chronic complainants each time a complaint is raised to assist in identifying retaliatory actions.

Retaliatory action is the subject of much agency rulemaking (e.g. Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990). Discharging responsibilities pursuant to SRRA and in accordance with the ARRCs are currently iterated as a group of items somewhat similar to the group of protected actions for the cited rulemaking. For instance, under Federal Equal Employment Opportunity Commission’s rules and policies, they note that an employer is automatically liable for harassment by a supervisor that results in a negative employment action; further, an employer (person) can be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors (i.e. LSRPs) or clients on their premises). However, there is belief that the Board’s jurisdiction is limited to LSRP licenses and does not extend to anyone who may be retaliating, unless the retaliating party is a LSRP.

*(Comment provided by the LSRPA)*

#### 7:26I-9.1(b)

##### Comment:

Retaliation should be explicitly prohibited by extension against the LSRP’s employer/firm also.

*(Comment provided by the LSRPA)*

#### 7:26I-9.1(d)

##### Comment:

Remove “*otherwise terminating a person’s ... or contract to provide professional services*” from the definition of retaliatory action. It is not in the statute and is perceived to be an undue



restriction on LSRP's freedom to contract for unilateral or negotiated termination provisions including agreeing that the client and/or LSRP can terminate for any reason or no reason. An LSRP terminating their own contract due to PRCR non-compliance cannot be retaliation.

*(Comment provided by the LSRPA)*

**7:26I-9.1(d)**

Comment:

The definition of retaliatory actions should be expanded to identify parties such as a PRCR, another LSRP, or the firm of the LSRP (the LSRP's employer) not just another "person".

**Question for the Board to opine upon:** Do retaliatory actions include filing civil or criminal complaints and legal proceedings? These and other outside and likely complaint provisions should be included and explained.

*(Comment provided by the LSRPA)*

Respectfully submitted,



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Licensed Site Remediation Professionals Association

