

Offsite Access Under the Site Remediation Reform Act

The growing power of Licensed Site Remediation Professionals has changed the playing field in New Jersey.

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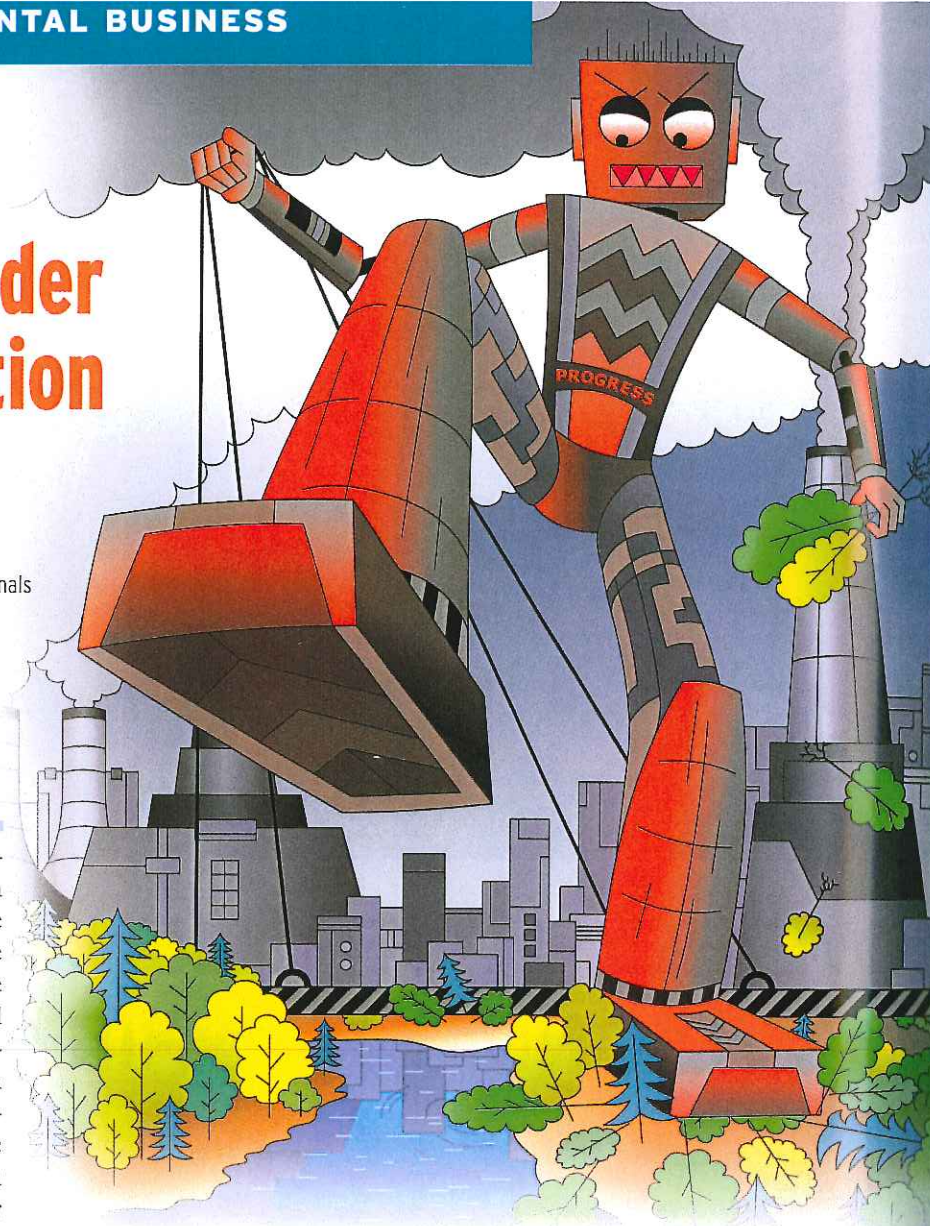
NEW JERSEY'S SITE REMEDIATION Laws (Spill Compensation and Control Act, Industrial Site Recovery Act, and Underground Storage of Hazardous Substances Act) all require "responsible parties" to investigate and remediate discharges of hazardous substances, not only on property they own or operate, but also onto adjacent properties to which contamination may have migrated. Such responsible parties often face resistance when approaching their neighbors for access. Absent the benefit of remediation of obvious contamination, the neighbors' disincentives to cooperate include disruption and damage caused by the access itself, and if contamination is discovered, potential disclosure obligations to tenants, lenders and prospective buyers.

In 1993, the New Jersey Legislature sought to remedy this impediment to the orderly investigation and remediation of contaminated sites by enacting an access provision in Section 40 of the then-first major reform of New Jersey's site remediation programs, S-1070. Section 40 is now codified as N.J.S.A. 58:10B-16. It provides that if there is "a reasonable possibility...that contamination...has migrated onto" offsite property (emphasis added) or that offsite property access is "reasonable and necessary" to remediate contamination, the responsible party, after good faith voluntary negotiations, may seek an order from the Superior Court granting such access. These matters are heard in a summary fashion. Moreover, unless there is some good cause shown, no other action may be joined (e.g., counter-claims for contamination or for the remediation itself). This remedy

was extraordinary: it authorized suing the down-gradient "victim" of contamination—but it was perceived to be necessary.

Thankfully, the vast majority of the thousands of off-site access requests have been voluntarily resolved between the parties without seeking court intervention. This is due in large part to the recognition by responsible parties of several factors: the awkwardness of approaching the court to order access to the property of a victim for investigation and remediation of conditions that they themselves created; their obligation to utilize "all reasonable measures to minimize the disruption... and return the property to its condition prior to the commencement of remediation"; and the authority of the court to impose "reasonable conditions as part of the access order." On the other hand, those from whom access is sought have recognized that once a plan of investigation or remediation proposed by the responsible party is approved by the New Jersey Department of Environmental Protection (NJDEP), the likelihood of a successful challenge is limited by the general principle

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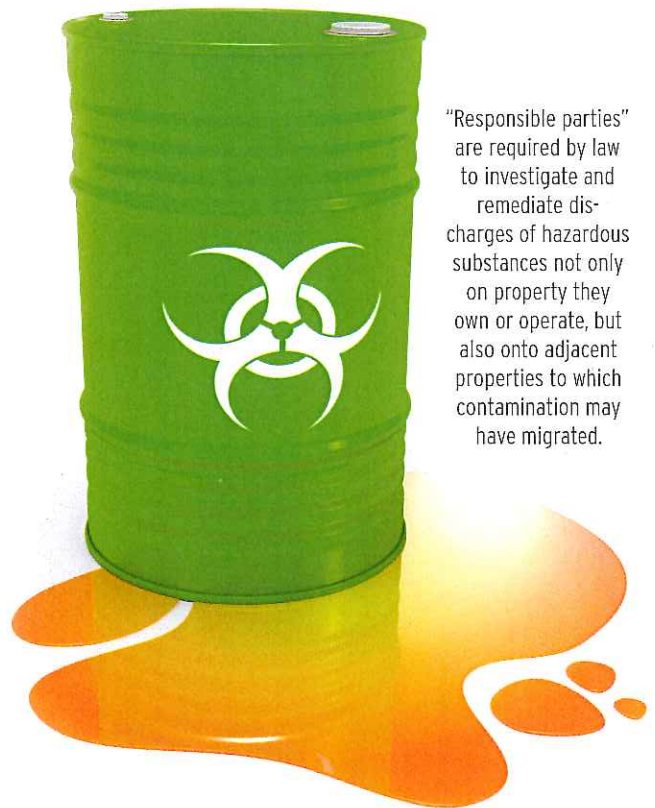
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of law that administrative agencies are granted great deference in decisions made in their area of expertise.

So what has changed? With the enactment of the Site Remediation Reform Act (SRRA), virtually all decisions regarding the identification of areas of concern, the scope of investigation, and the conditions of remediation have been delegated to Licensed Site Remediation Professionals (LSRPs). Except for certain cases in which the NJDEP retains direct oversight, the NJDEP's role in the site remediation program is now limited to that of an auditor.

In drafting reports, the LSRP must carefully differentiate between making a "finding" as an LSRP that offsite access is necessary to effectuate investigation of migration from the responsible party's property or to implement remediation, and "recommendations" made in their role as a consultant/advocate for offsite sampling believed to be advantageous for their clients, but not supported by the Section 40 criteria.

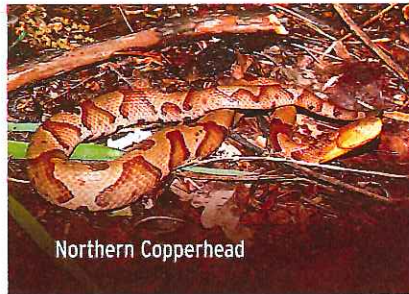
For example, the LSRP might suspect that contamination is coming onto the responsible party's property from a neighbor and demonstrating that would exculpate the responsible party from liability. However, Section 40 only requires neighbors to grant access if contamination is migrating onto their properties, not if the contamination is believed to originate at their properties.



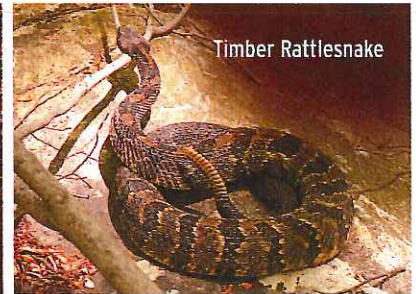
"Responsible parties" are required by law to investigate and remediate discharges of hazardous substances not only on property they own or operate, but also onto adjacent properties to which contamination may have migrated.

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NJDEP Removes and Relocates Venomous Snakes



Northern Copperhead



Timber Rattlesnake

OF THE 22 SPECIES OF SNAKES FOUND IN New Jersey, only the timber rattlesnake and the northern copperhead are venomous. The timber rattlesnake inhabits three distinct areas—the Kittatinny Ridge and the northernmost portion of the Highlands as well as the sprawling Pine Barrens of southern New Jersey. The copperhead is limited to hilly, forested regions in portions of northern New Jersey and a few isolated, hilly areas of Hunterdon and Somerset counties.

While the rattlesnake has its rattle to distinguish it from other snakes, many other snakes mimic the rattlesnake by shaking their tails on leaves, twigs and other objects. A rattlesnake has jagged and dark bands extending from side to side around the center and back end of the snake.

Distinguishing a copperhead from other look-alike species can be even trickier. The copperhead, one of New Jersey's least common snakes, is frequently confused with the northern water snake and the eastern

milk snake, among the most common species. Copperheads have a dark-colored pattern that forms hourglass-shaped bands from side to side, but coloration is highly variable among individuals and changes according to seasonal shedding periods.

While both the copperhead and rattlesnake are reclusive, each will defend itself if threatened. Under the state's Endangered and Nongame Species Conservation Act, it is illegal to kill, harm, harass or collect any native, non-game wildlife.

The New Jersey Department of Environmental Protection (NJDEP) has a Response Team—made up of some 80 volunteers—for handling removals and relocations of venomous snakes. For assistance, call the NJDEP Endangered and Nongame Species Program's northern region office at (908) 638-4381 or (908) 638-4127, or the southern region office at (609) 628-2103. After hours and on weekends call (877) WARN-DEP. ■

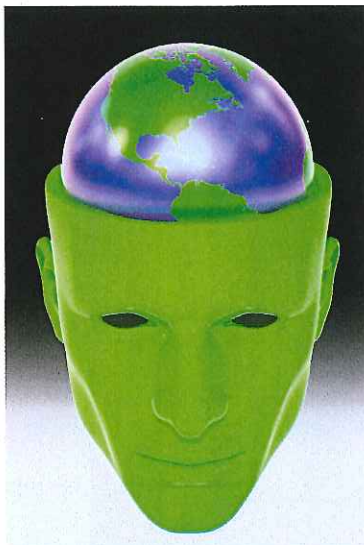
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Failure to distinguish between LSRP “findings” and consultant/advocate “recommendations” could result in a misrepresentation in support of a Section 40 letter request or lawsuit. Indeed if such up-gradient offsite access is necessary, the responsible party can in the context of a lawsuit seek access under New Jersey Court Rule 4:18-1(a)(2) to obtain same—but cannot use the expedited procedures of Section 40 to achieve the same result.

Neighbors are not without recourse. Those sued for access could always assert that the statutory criteria had not been satisfied, but endorsement by the NJDEP had made success unlikely. Now, the challenge is to the decision of an agent of the responsible party (i.e. the LSRP), not to an administrative agency whose decision is given deference. Moreover, neighbors may well cite the potential conflict of interest of the privately retained LSRP to cause the courts to closely examine whether the statutory criteria have been satisfied.

Judicial decisions rejecting access as unsupported could subject the LSRP to either private or public remedies. Unlike the NJDEP, the LSRP does not enjoy Sovereign Immunity in the performance of its functions and might be subject to damage claims. In addition, an adverse decision might carry with it the implication that the request was pursued in bad faith, thereby subjecting the LSRP to fines or loss of license by the LSRP Review Board.

The vast majority of access requests will still be resolved on an amicable basis without court involvement. However, the new role of LSRPs as both servant of the responsible party and quasi-objective arbiter of the scope and nature of investigation and remediation have changed the playing field in New Jersey. ■



Environmental compliance has a new face. With the enactment of the Site Remediation Reform Act, virtually all decisions regarding the identification of areas of concern, the scope of investigation, and the conditions of remediation have been delegated to LSRPs.

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COMMERCE NEWS

Sharing Knowledge is Good Business



BY DEBRA ROMANO
CIANJ VICE PRESIDENT

THE MOST RECENT INSTALLMENT in CIANJ's Financial Decision Makers Roundtable series focused on keeping up to speed with the variety of accounting software tools at a company's disposal. The meeting, held on Feb.

16, 2011, at the Hilton Hasbrouck Heights, featured insights from an exceptional panel of guest speakers: Michael Smith, senior vice president of finance at Berkeley College; Danny Miller, principal and practice leader at Grant Thornton, LLP; Mary Hildebrand, Esq., partner and shareholder at Lowenstein Sandler PC; and Ken Dickinson, senior director at SAP AG. Marcy LoCastro, senior advisor at Alvarez & Marsal handled the moderating duties. More than 50 executives from a range of industries, from legal practices to HR staffing companies, attended the roundtable.

Change is in the air, and CIANJ programs and events help keep members informed about the latest financial trends and issues.



Michael Smith shared his insights on paperless payroll advances from the initial offerings of direct deposit to employees decades ago all the way up to the present, taking time to discuss how Berkeley College has handled payroll software issues along the way. Cloud computing is a hot topic right now, but it also carries certain dangers. Danny Miller and Mary Hildebrand discussed these possible cloud computing hazards, including: legal and audit ramifications; dealing with aging data on an off-site server; security issues; and business continuity/disaster recovery concerns. Ken Dickinson walked the attendees through some of the available business software solutions that SAP has to offer for all businesses, small and large. A Q&A session at the conclusion of the program allowed some give and take between the speakers and audience members. The roundtable was sponsored by Gibbons PC and LGP Business Services, LLC. ■