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## **ENVIRONMENTAL PROTECTION**

### **NEW JERSEY SITE REMEDIATION PROFESSIONAL LICENSING BOARD**

#### **Regulations of the New Jersey Site Remediation Professional Licensing Board**

**Adopted Amendments: N.J.A.C. 7:26I-1.3, 2.3, 2.4, 2.5, 2.11, 2.12, 2.13, 2.14, 2.15, 3.3, 3.4, 3.5, 3.7, 4.3, 4.4, 4.5, 5.1, 5.2, 5.4, 5.5, 6.3, 6.5, 6.7, 6.8, 6.9, 6.10, 6.15, 6.16, 6.18, 6.21, 6.24, 6.27, 7.1, 7.3, 7.5, 7.7, 7.8, 8.3, 9.1, and 9.2**

Proposed: November 7, 2022, at 54 N.J.R. 1998(a).

Adopted: October 2, 2023, by A. Paul Stofa, Chairperson, Site Remediation Professional Licensing Board.

Filed: October 23, 2023, as R.2023 d.131, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 58:10C-1 et seq.

DEP Docket Number: 06-22-09.

Effective Date: November 20, 2023.

Expiration Date: September 21, 2029.

The Site Remediation Reform Act (SRRA), N.J.S.A. 58:10C-1 et seq., established the New Jersey Site Remediation Professional Licensing Board (“SRPL Board” or “Board”) to oversee the licensing and performance of site remediation professionals. The Board promulgated the rules of the New Jersey Site Remediation Professional Licensing Board (Board Rules) to govern the licensing and conduct of Licensed Site Remediation Professionals (LSRPs).

Amendments to the SRRA were adopted on August 23, 2019. In light of the amendments to the SRRA, the Board reviewed the existing Board Rules at N.J.A.C. 7:26I for consistency with

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the amendments. As a result of its review, the Board is amending the existing rules to be consistent with the amendments to the SRRA. In addition, as the rules were promulgated in January 2016, the Board identified certain errors and inconsistencies in the rules, as well as certain provisions that were not completely clear in intention or meaning, and certain references to Department of Environmental Protection procedures that needed to be modified. The Board is amending the rules to correct the identified errors and inconsistencies, clarify the identified provisions, and modify the identified procedures.

**Summary of Hearing Officer's Recommendations and Board's Response:**

The Board published its notice of proposal in the New Jersey Register at 54 N.J.R. 1998(a) on November 7, 2022. The comment period for the proposed amendments closed on January 6, 2023. The Board held a public hearing concerning the notice of proposal on December 20, 2022, at 4:00 P.M. that was held virtually through Teams. Joann Held, Chairperson of the Rules Committee of the Site Remediation Professional Licensing Board, served as the hearing officer. Thirty people attended the public hearing and six people offered comments. A record of the public hearing is available for inspection, in accordance with applicable law by contacting:

Department of Environmental Protection

Office of Legal Affairs

Attn: DEP Docket Number 06-22-09

Department of Environmental Protection

401 East State Street

Mail Code 401-04L

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PO Box 402

Trenton, NJ 08625-0402

Including the commenters at the hearing, a total of nine people offered comments on the Board's notice of proposal. The hearing officer recommended that the Board adopt the rules as proposed, with the changes described below in the Summary of Public Comments and Agency Responses and in the Summary of Agency-Initiated Changes. The Board has accepted the hearing officer's recommendation.

This adoption document may be viewed on the Board's website at <https://www.nj.gov/lsrcpboard/board/rules/> and the Department of Environmental Protection's website at <http://www.nj.gov/dep/rules>.

**Summary of Public Comments and Agency Responses:**

The following persons timely submitted written and/or oral comments:

Number	Last Name	First Name	Affiliation
1	Call	William	PennJersey Environmental Consulting
2	Cantor	Raymond	New Jersey Business and Industry Assoc.
3	Ferguson	Rodger	Penn Jersey Environmental Consulting
4	Hart	Dennis	Chemistry Council of New Jersey and Site Remediation Industry Network
5	Lindhardt	Marlene	Licensed Site Remediation Professionals Assoc.
6	Lucking	Grant	New Jersey Builders Association
7	Morris	David	Licensed Site Remediation Professionals Assoc. and

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Tectonic Engineering

8	Oberer	John	Licensed Site Remediation Professionals Assoc.
9	Scagnelli	John	Licensed Site Remediation Professionals Assoc.

### **N.J.A.C. 7:26I-1.3 Definitions**

1. COMMENT: The commenter approves of the updated definition of “alternative verifiable learning format.” (7)

RESPONSE: The Board acknowledges the commenter’s support for this amendment.

2. COMMENT: The commenters state that two definitions in the proposed SRPL Board rules are different from definitions in the Site Remediation Reform Act (N.J.S.A. 58:10C-1 et seq.), as amended at P.L. 2019, c. 263, adopted August 23, 2019 (SRRA 2.0). These terms, “immediate environmental concern” and “remediation or remediate,” are defined by reference to the Technical Requirements for Site Remediation (N.J.A.C. 7:26E). The 2019 amendments to the Site Remediation Reform Act, N.J.S.A. 58:10C-1 et seq., amended the definitions of “immediate environmental concern” and “remediation or remediate.” The Department of Environmental Protection has not amended the Technical Requirements for Site Remediation to update the definitions of these two terms to conform with the 2019 Site Remediation Reform Act. Consequently, the SRPL Board rules conflict with the 2019 Site Remediation Reform Act definitions. (1, 3, 4, 6, and 7)

RESPONSE: The definitions discussed by the commenters are not among those that the Board has addressed in the proposed amendments. The Board proposed amendment to “alternative verifiable

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learning format” and added a new definition for “retained.” The proposed definition of “alternative verifiable learning format” is unique to the SRPL Board rules, as SRRA 2.0 does not define “alternative verifiable learning format.” The proposed definition of “retained” mirrored the language of the SRRA 2.0 definition of “retained.” The proposed amendments to the SRPL Board rules did not revise other definitions. Therefore, the comments regarding changes that should be made to other definitions are beyond the scope of this rulemaking.

The Board notes the terms the commenters are concerned about - specifically, “immediate environmental concern,” and “remediation or remediate” - were revised in the SRRA 2.0. The Board does not have the authority to revise these definitions, as they are defined in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E. The Board anticipates that the Department of Environmental Protection will conform the definitions in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, to the statute in a future rulemaking. The Board notes that if there is a conflict between a regulatory definition and a statutory definition, the statutory definition will prevail.

3. COMMENT: The term “site” should be defined in the SRPL Board rules. The term “site” is not the same as “contaminated site” in the Technical Requirements for Site Remediation (N.J.A.C. 7:26E) or the Administrative Requirements for the Remediation of Contaminated Sites (N.J.A.C. 7:26C); nor the same as “site” or “facility” in the Underground Storage of Hazardous Substances Rules (N.J.A.C. 7:14B); nor the same as “industrial establishment” in the Industrial Site Recovery Act (N.J.A.C. 7:26B). The term “site” is not defined in the Spill Act (N.J.S.A. 58:10-23.11), the Brownfield Act (N.J.S.A. 58:10B-1.3a), or the Site Remediation Reform Act (N.J.S.A. 58:10C).

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The colloquial use of the term “site” is used in the SRPL Board rules, but it is not sufficient for the Board to resort to this. The term “site” carries great significance for LSRP compliance with SRPL Board rules, especially since “entire site” is required for the selection of specific LSRP retention categories. (7)

4. COMMENT: The proposed amendments to the SRPL Board rules should include definitions of the following terms: “contaminated area of concern,” “contaminant of concern,” “unrelated compound,” and “non-contaminated area of concern.” LSRPs would benefit from these terms being formally defined. (7)

RESPONSE TO COMMENTS 3 AND 4: The Board proposed amendments to two definitions: “alternative verifiable learning format” and “retained.” The proposed amendments to the SRPL Board rules did not revise other definitions. Therefore, the comments respecting changes that should be made to other definitions or the addition of new definitions are beyond the scope of this rulemaking. The Board notes that it does not have the authority to define the terms “site” or “unrelated compound,” as they are not terms defined in the Site Remediation Reform Act, N.J.S.A. 5:10C-1 et seq., or this chapter. The Board notes that it does not have the authority to define the terms “area of concern” or “contaminant,” as they are defined in the Technical Requirements for Site Remediation, N.J.A.C. 7:26I-1.8. The Board anticipates that the Department of Environmental Protection will conform the definitions in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E, to the statute in a future rulemaking. The Board notes that if there is a conflict between a regulatory definition and a statutory definition, the statutory definition will prevail.

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**N.J.A.C. 7:26I-2 Licensure**

5. COMMENT: The commenter states that the proposed term “Department Portal” should be revised to “Online Business Portal at <https://www.nj.gov/dep/online/>.” (7)

RESPONSE: The Board agrees with this comment and is modifying the rules on adoption to substitute “Online Business Portal at <https://www.nj.gov/dep/online/> for “Department Portal.”

6. COMMENT: The commenters state that “client” and “clients” should not be used in the SRPL Board rules. (5 and 7)

RESPONSE: The Board utilized “clients” in one proposed amendment at N.J.A.C. 7:26I-4.4(b)4 to describe a new type of continuing education credit termed “professional development credit” that is “designed to advance the ability of an LSRP to provide service to clients.” The Board agrees and is modifying the rule to remove “to clients,” thus changing the phrase to “designed to advance the ability of an LSRP to provide professional services.”

7. COMMENT: The commenters state that the proposed amendments at N.J.A.C. 7:26I-2.3(c)1 and 2 preclude an LSRP from working on a remediation project where that LSRP or another LSRP has not been retained, which limits the work an LSRP can do and leads to lower quality investigations and reports, which could be detrimental to public health and safety and the environment. One commenter suggests adding language that describes the exceptions included at N.J.S.A. 58:10B-1.3.d; specifically, “remediation of unregulated underground storage tanks, 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 and investigations to

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confirm or evaluate a remediation performed or supervised by a retained LSRP.” Another commenter suggests adding language: “LSRPs can cooperate with a party that identifies that the work being conducted falls within the exceptions provided at N.J.S.A. 58:10B-1.3.” (6 and 7)

RESPONSE: This proposed amendment follows the Site Remediation Reform Act at N.J.S.A. 58:10C-16.aa and bb. The Board references N.J.S.A. 58:10B-1.3.d and relies on the language of the statute to describe the exceptions to the requirement to retain an LSRP. An LSRP should determine whether, in their independent professional judgment, the work falls within the exceptions at N.J.S.A. 58:10B-1.3.d, or whether they or another LSRP should be retained. Therefore, the Board declines to add additional language as suggested by the commenters.

8. COMMENT: The commenter approves of the proposed amendments at N.J.A.C. 7:26I-2.5 to provide “references” rather than “letters of reference” and to remove the requirement that references be provided from each of three persons; specifically, an LSRP, a current or past employer of the applicant, and any other person. (7)

RESPONSE: The Board acknowledges the commenter’s support for this proposed amendment.

9. COMMENT: The commenter suggests changes at N.J.A.C. 7:26I-2.12(d)1 concerning notification requirements upon expiration of a license to limit the responsibility of the LSRP. (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-2.12(d)1; therefore, the comments are beyond the scope of this rulemaking.

10. COMMENT: The commenter suggests changes at N.J.A.C. 7:26I-2.13(f)1 concerning



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notification requirements upon suspension of a license to limit the responsibility of the LSRP. (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-2.13(f)1; therefore, the comments are beyond the scope of this rulemaking.

11. COMMENT: The commenter suggests changes at N.J.A.C. 7:26I-2.14(f)1, concerning notification requirements upon suspension of a license to limit the responsibility of the LSRP. (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-2.14(f)1; therefore, the comments are beyond the scope of this rulemaking.

12. COMMENT: The commenter suggests changes at N.J.A.C. 7:26I-2.15(a)1, 2, and 3 concerning inactivation of a license to reduce the restrictions placed on an inactive LSRP. (5 and 7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-2.15(a) beyond minor grammatical and punctuation changes and updating of references at N.J.A.C. 7:26I-2.15(a)2, 4, 5, and 6; therefore, the comments are beyond the scope of this rulemaking.

13. COMMENT: The commenter suggests changes at N.J.A.C. 7:26I-2.15(a)4 concerning inactivation of a license to limit the responsibility of the LSRP. (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-2.15(a)4 beyond one minor grammatical change; therefore, the comments are beyond the scope of this rulemaking.

### **N.J.A.C. 7:26I-3 Fees**

14. COMMENT: The commenter states that the Board has removed “Beginning in 2015, the

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application fee shall be \$400.00” at N.J.A.C. 7:26I-3.3(a)2, “Beginning in 2015, the renewal fee shall be \$100.00” at N.J.A.C. 7:26I-3.4(a)2, and “Beginning in 2015, the annual license fee shall be \$900.00” at N.J.A.C. 7:26I-3.5(b), and questions whether this “is a pretext for more licensure fee increases with little, if any, public involvement or oversight and accountability for how LSRP’s licensing fees are being spent.” The commenter states that the current fee structure for the LSRP program is unfair and that licensing fees for LSRPs are too high, particularly when compared to the fees for other professional licenses in the State. (7)

RESPONSE: The SRPL Board has removed the base fees designated as beginning in 2015 because in 2015, base fees were necessary as there was not yet data to use in the calculation of fees. Since 2015, the Board has collected sufficient data to calculate the application fee pursuant to N.J.A.C. 7:26I-3.3(a)1, the renewal fee pursuant to N.J.A.C. 7:26I-3.4(a)1, and the annual license fee pursuant to N.J.A.C. 7:26I-3.5(a), so base fees are no longer necessary. The Board has not proposed amendments to the rules concerning the calculation of fees; specifically, N.J.A.C. 7:26I-3.3(a)1, 3.4(a)1, and 3.5(a), which are calculated based on the cost of processing and reviewing applications for new licenses and license renewals and the cost of Board operations.

With respect to the concern about “public involvement or oversight and accountability for how LSRP’s licensing fees are being spent” the Board provides notice in the New Jersey Register of the annual calculation of fees and any resulting changes and posts the annual SRPL Board Fee Calculation Reports and annual SRPL Board Budgets on the Board website.

#### **N.J.A.C. 7:26I-4.3 LSRP Continuing Education Requirements**

15. COMMENT: The commenter approves the expansion of the types of continuing education

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credit to include individual professional development of LSRPs. (7)

RESPONSE: The Board acknowledges the commenter's support for this amendment.

#### **N.J.A.C. 7:26I-4.4 Board Approval of Continuing Education Programs**

16. COMMENT: The commenters object to the addition of the term "guidance" at N.J.A.C. 7:26I-4.4(b)2. (6 and 7)

RESPONSE: The Board believes that educational content that is designed to advance the ability of an LSRP to competently perform, supervise, and coordinate site remediation in New Jersey in compliance with applicable statutes, rules, and guidance is appropriate for the continuing education of LSRPs. Therefore, the Board declines to remove the term "guidance."

17. COMMENT: The commenter approves the proposal to include at N.J.A.C. 7:26I-4.4(c)12, LSRPs' affidavits at large format conferences that do not utilize sign-in and sign-out sheets as documentation of their attendance at continuing education programs. (7)

RESPONSE: The Board acknowledges the commenter's support of this amendment.

#### **N.J.A.C. 7:26I-4.5 Board Approval of Continuing Education Activities**

18. COMMENT: The commenter notes that the proposal recodifies N.J.A.C. 7:26I-4.5(a), (b), (c), and (d) as (b), (c), (d), and (e). The correct recodification is N.J.A.C. 7:26I-4.5(a), (b), and (c) as (b), (c), and (d). (7)

RESPONSE: The Board agrees with this comment and is modifying the rules on adoption to recodify existing N.J.A.C. 7:26I-4.5(a), (b), and (c) as (b), (c), and (d).

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#### **N.J.A.C. 7:26I-5.4 Audit Review Process**

19. COMMENT: The commenters object to the addition of “and the LSRP’s application of appropriate guidance” to “Evaluate the LSRP’s compliance with the SRRA and any rule, regulation, or order adopted or issued pursuant thereto” at N.J.A.C. 7:26I-5.5(i)1 because “appropriate guidance” is not defined and, therefore, it is a violation of an LSRP’s right of due process to hold him or her to an undefined standard of conduct, and because “guidance” is not legally enforceable as administrative rules because they were not adopted in compliance with the notice and hearing requirements of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In addition, subjecting LSRPs to investigation and discipline for failing to apply undefined “appropriate guidance” is contrary to allowing an LSRP to exercise independent professional judgment as permitted pursuant to the SRRA, N.J.S.A. 58:10C-14. (6, 7, and 9)

RESPONSE: The Board believes that it is appropriate for the Audit Committee to review the work of LSRPs to evaluate whether they apply appropriate guidance when conducting remediation. The application of available and appropriate guidance is required pursuant to N.J.S.A. 58:10C-14.c(3) and N.J.A.C. 7:26E-1.5(b) and 7:26C-1.2(a)3. The failure of an LSRP to apply appropriate guidance may indicate issues with the submissions and conduct of an LSRP, which require additional investigation and review.

#### **N.J.A.C. 7:26I-6.3 Professional Competency**

20. COMMENT: The commenter states that “guidance is not a rule and has not been promulgated per the Administrative Procedures Act (APA). It has no binding effect until so promulgated,” so

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should not be added at N.J.A.C. 7:26I-6.3(c). (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.3(c) beyond the removal of “technical” before “guidance” wherever it appears in the existing rules; therefore, the comments are beyond the scope of this rulemaking. The Board notes the concern expressed by some commenters that the Board is adding an additional factor into the review of the submissions and conduct of LSRPs; specifically, whether LSRPs are following appropriate guidance. The Board acknowledges the concern that LSRPs should not be limited in their analysis and application of the procedures and techniques that they judge are appropriate to be used in the investigation and remediation of individual contaminated sites. The Board notes that the application of available and appropriate guidance is required by the Technical Requirements for Site Remediation (N.J.A.C. 7:26E-1.5(b)) and the Administrative Requirements for the Remediation of Contaminated Sites (N.J.A.C. 7:26C-1.2(a)3) and the Site Remediation Reform Act (N.J.S.A. 58:10C-14.c(3)). The proposed amendments to the Board’s rules were not intended to add any requirements with respect to following guidance beyond those that are already established in the Technical Requirements for Site Remediation and the Administrative Requirements for the Remediation of Contaminated Sites. The Board has amended the rules to remove “technical” before “guidance” where that term already appears, and to add “guidance” in some sections, to acknowledge that application of available and appropriate guidance of all types is an important aspect of remediation and is something that LSRPs should incorporate into their decisions when conducting remediation. Consequently, the Board believes it is appropriate to evaluate an LSRP’s application of appropriate guidance when auditing an LSRP’s submissions and conduct or evaluating a complaint. An LSRP may use their independent professional judgment to determine that guidance issued by the

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Department is inappropriate or unnecessary to meet the remediation requirements listed at N.J.A.C. 7:26I-6.3(a), in which case the LSRP may use additional guidance listed at N.J.A.C. 7:26I-6.3(c), provided the LSRP includes in the appropriate report a written rationale as to why the guidance issued by the Department is inappropriate or unnecessary and a justification for the use of the guidance that was followed.

21. COMMENT: The commenter suggests the substitution of “certified” in place of “authorized” at N.J.A.C. 7:26I-6.3(f). (7)

RESPONSE: The Board agrees with this comment and is modifying the rule upon adoption to substitute “certified” for “authorized” at N.J.A.C. 7:26I-6.3(f).

#### **N.J.A.C. 7:26I-6.8 Exercise of Independent Professional Judgment**

22. COMMENT: The commenter suggests removing “to all actions” from “apply independent professional judgment to all actions during the entire course of the remediation” at N.J.A.C. 7:26I-6.8(a)1. (7)

RESPONSE: The Board agrees with this comment and is modifying the rule upon adoption to remove “to all actions” at N.J.A.C. 7:26I-6.8(a)1.

23. COMMENT: The commenter suggests the substitution of “the LSRP’s” in place of “all” in “describe and document all decision-making” at N.J.A.C. 7:26I-6.8(a)2. It is not necessary for LSRPs to document all decision-making, because many decisions are standard practice or irrelevant, and the requirement to document them all could create unnecessary delays and

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additional recordkeeping burdens. (6 and 7)

RESPONSE: The Board agrees with this comment and is modifying the rule upon adoption to substitute “the LSRP’s” for “all” at N.J.A.C. 7:26I-6.8(a)2.

24. COMMENT: The commenter suggests removing “or deviate from guidance” from “provide documentation of the scientific, technical, or other factors supporting his or her decision to vary from regulations or deviate from guidance when performing remediation” at N.J.A.C. 7:26I-6.8(a)3 because a written justification for deviating from guidance is only required in complying with the standards and rules. (7)

RESPONSE: The Board does not agree with removing “or deviate from guidance” at N.J.A.C. 7:26I-6.8(a)3. According to N.J.A.C. 7:26E-1.5(b), “any person conducting remediation pursuant to this chapter shall apply, pursuant to N.J.A.C. 7:26I-1.2(a)3, any available and appropriate technical guidance concerning site remediation as issued by the Department or shall provide a written rationale and justification for any deviation from guidance.” The use of “or deviate from guidance” does not impose on LSRPs obligations additional to those already required pursuant to N.J.A.C. 7:26E.

25. COMMENT: The commenters state that “outside influence” at N.J.A.C. 7:26I-6.8(a)4 is vague and overly broad in “make decisions and conduct remediation free from outside influence that is not protective of public health and safety and the environment.” “Outside influence” is not defined and could be interpreted beyond the intended scope. The meaning of “outside influence that is not protective of public health and safety and the environment” in “make decisions and conduct

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remediation free from outside influence that is not protective of public health and safety and the environment” is not clear. Does “outside influence” mean the opinion of other professionals, regulators, or clients? The addition of this clause creates a subjective, vague standard of professional conduct, generates uncertainty in whom an LSRP can listen, to and how an LSRP can make determinations and exercise their duties and may result in non-meritorious complaints being filed against LSRPs. (2, 4, 6, and 7)

RESPONSE: The term “outside influence” refers to influence that may pressure an LSRP to veer away from prioritizing public health and safety and the environment. This provision is not meant to inhibit an LSRP from conferring with clients, consulting with regulators, or seeking the advice and opinion of other site remediation professionals. Such opinions and advice are necessary and valid factors in LSRPs’ decision-making. Such opinions and advice, however, are distinguishable from outside influence, which is intended or has the effect of pressuring an LSRP to make decisions that may not be in the best interest of public health and safety and the environment. LSRPs must use their judgment in determining the motives of any opinions and advice they receive and be mindful of such during their decision-making process.

26. COMMENT: The commenter states that the meaning of “be responsible” in “be responsible for the decisions he or she makes even when the LSRP considers information, advice and opinions of others” at N.J.A.C. 7:26I-6.8(a)5 is not clear. (7)

RESPONSE: An LSRP is responsible for his or her decisions. That means that the LSRP can account for each decision by providing the facts that are the basis of the decision, confirm that the decision complies with all applicable statutes, rules, and guidance, and stands behind the decision



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as correct, appropriate, and protective of public health and safety and the environment. An LSRP's responsibility includes making sure each decision is explained and supported in submissions that are true, accurate, and complete. The Board does not expect LSRPs to have complete knowledge of every facet of site remediation. Therefore, it is appropriate and expected that LSRPs seek the advice and opinions of other professionals. However, even when relying on such advice and opinions, an LSRP is ultimately responsible for the decisions made; therefore, LSRPs should ensure that the professionals they consult are trained and experienced in the subject areas that they are advising on and that the LSRP understands and agrees with the basis and substance of their advice. An LSRP cannot relinquish his or her responsibility for a decision by claiming it was made by following the advice of another. Even if that is so, the LSRP is in charge and answerable for the outcome.

27. COMMENT: The commenters suggest the removal of "independent" before "professional judgment" at N.J.A.C. 7:26I-6.8(c). In the commenters' opinion, the entire subsection should be removed because the requirement to notify the person responsible for conducting remediation and the Department of timeframes should not be based on the LSRP's independent professional judgment but should be automated. In addition, it is the responsibility of the person responsible for conducting the remediation, not the LSRP, to meet timeframes. Also, even when the Department is notified of timeframes, it takes no action, so the existing requirement at N.J.A.C. 7:26I-6.8(c) serves no purpose. (1, 3, and 7)

RESPONSE: The Board declines to remove "independent" or otherwise modify the amendment. The LSRP has the responsibility of informing the person responsible for conducting remediation

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and the Department, in writing, when in his or her independent professional judgment based on site history any one or more applicable mandatory or expedited site-specific timeframes referenced at N.J.A.C. 7:26C-3 is unlikely to be met. This obligation to notify cannot be automated, as only the LSRP can judge whether a timeframe is unlikely to be met. N.J.A.C. 7:26I-6.8(c) does not confer upon the LSRP the responsibility to meet timeframes that remain with the person responsible for conducting remediation. However, the responsibility to notify must be the LSRP's, as the LSRP is in the best position to judge whether the remediation is progressing in such a way that a timeframe is unlikely to be met. The Board has no authority over the Department or its response to notifications.

28. COMMENT: The commenters suggest removing N.J.A.C. 7:26I-6.8(c) or adding “on the appropriate form provided by the Department” after “in writing” in “an LSRP shall notify the person responsible for conducting the remediation and the Department, in writing, when in his or her independent 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.” (7)

RESPONSE: The Board declines to delete N.J.A.C. 7:26I-6.8(c) for the reason noted in the Response to Comment 27 above. The Board is modifying the rule upon adoption to add “on the appropriate form provided by the Department” as specified in the comment.

#### **N.J.A.C. 7:26I-6.10 Responsibility to Report a Discharge**

29. COMMENT: The commenter suggests adding “except when the retention of an LSRP is not required pursuant to N.J.S.A. 58:10B-1.3(d)” to the beginning of N.J.A.C. 7:26I-6.10, and

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changing "at any location on the site" to "within or associated with an area of concern that the LSRP has been retained to address," because an LSRP should not be required to report a previously unreported discharge if the LSRP obtains knowledge of the discharge but is not retained on the site. (7)

RESPONSE: This amendment follows the Site Remediation Reform Act at N.J.S.A. 58:10C-16k; therefore, the Board declines to modify N.J.A.C. 7:26I-6.10 as suggested. If an LSRP is retained there is no limitation on that LSRP's obligation to report any unreported discharges. N.J.A.C. 7:26I-6.10 applies to all LSRPs that are retained to perform remediation, regardless of whether they are retained to perform remediation pursuant to N.J.S.A. 58:10B-1.3.d. With respect to "at any location on the site," this amendment follows the Site Remediation Reform Act at N.J.S.A. 58:10C-16k and is intended to apply the requirements at N.J.A.C. 7:26I-6.10 to any location, even if the location was not previously identified as an area of concern.

30. COMMENT: The commenters suggest removing N.J.A.C. 7:26I-6.10(a)2, "immediately notify the Department of the discharge by calling the Department's telephone hotline at 1-877-WARN DEP" because the obligation is too broad. This should be a requirement of the person responsible for conducting the remediation, not the LSRP. This is especially problematic if the newly discovered contamination is not in an area that the LSRP has been retained to address. LSRPs should not be required to report discharges other than in the area the LSRP has been retained to perform remediation. (2, 4, 6, and 7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.10(a)2; therefore, the comment is beyond the scope of this rulemaking. The Board also notes that this provision mirrors

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the language at N.J.S.A. 58:10C-16.k.

31. COMMENT: The commenters suggest removing N.J.A.C. 7:26I-6.10(a)3, “immediately notify any other LSRP that is working on the contaminated site of the discharge” because the obligation to notify should be that of the person responsible for conducting the remediation, not the LSRP. (4, 6, and 7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.10(a)3; therefore, the comment is beyond the scope of this rulemaking. In addition, the Board does consider it to be an obligation of an LSRP to notify other LSRPs also working on the contaminated site of a discharge that an LSRP finds.

#### **N.J.A.C. 7:26I-6.11 Deviation from Workplan by Client**

32. COMMENT: The commenter suggests that if the deviation will not otherwise require a response from the Department, the changes be submitted in the next phase report rather than adding an additional reporting requirement. (2, 4, and 7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.11; therefore, the comment is beyond the scope of this rulemaking.

#### **N.J.A.C. 7:26I-6.15 Responsibility in Board and Department Investigation**

33. COMMENT: The commenters suggest removing “and the LSRP’s application of appropriate guidance” to “the LSRP’s compliance with the SRRA and any rule, regulation, or order adopted or issue pursuant thereto” at N.J.A.C. 7:26I-6.15(b)1. (7 and 9)

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RESPONSE: The Board notes the concern expressed by some commenters that the Board is adding an additional factor into the review of the submissions and conduct of LSRPs; specifically, whether LSRPs are following appropriate guidance. The Board acknowledges the concern that LSRPs should not be limited in their analysis and application of the procedures and techniques that they judge are appropriate to be used in the investigation and remediation of individual contaminated sites. The Board notes that the application of available and appropriate guidance is required by the Technical Requirements for Site Remediation (N.J.A.C. 7:26E-1.5(b)) and the Administrative Requirements for the Remediation of Contaminated Sites (N.J.A.C. 7:26C-1.2(a)3). The amendments to the Board's rules are not intended to add any requirements with respect to following guidance beyond those that are already established in the Technical Requirements for Site Remediation and the Administrative Requirements for the Remediation of Contaminated Sites. The Board has amended the rules to remove "technical" before "guidance" where that term already appears, and to add "guidance" in some sections, to acknowledge that application of available and appropriate guidance of all types is an important aspect of remediation and is something that LSRPs should incorporate into their decisions when conducting remediation. Consequently, the Board believes it is appropriate to evaluate an LSRP's application of appropriate guidance when auditing an LSRP's submissions and conduct or evaluating a complaint.

**N.J.A.C. 7:26I-6.16 Circumstances Under Which an LSRP is Held Responsible for Subordinate LSRP**

34. COMMENT: The commenter suggests not amending N.J.A.C. 7:26I-6.16(a) to substitute "site remediation professional, licensed or not" for "LSRP" because there is no definition of "site

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remediation professional, licensed or not” and it is unclear how this term would be applied and to what extent it would be applicable. An LSRP cannot have expertise in every technical aspect of a project and needs to rely on the expertise of other professionals. (7)

RESPONSE: The Board is substituting the term “site remediation professional, licensed or not” instead of “LSRP” at N.J.A.C. 7:26I-6.16(a) because there are circumstances in which an LSRP may be supervising site remediation professionals who are not LSRPs, and the LSRP should be responsible for those professionals he or she reviews or supervises.

35. COMMENT: The commenter suggests removing “or should know” at N.J.A.C. 7:26I-6.16(a) because it is an ambiguous term. Determining when and what an individual “should know” is a matter of judgment and should not be a requirement in the rule. (7)

RESPONSE: The Board added the term “or should know” because it is not always feasible to ascertain what an LSRP actually knows, while it is possible to define what LSRPs should take the initiative to be aware of and, thus, “should know.”

#### **N.J.A.C. 7:26I-6.18 Duty Regarding Client Communications**

36. COMMENT: The commenter suggests removing the obligation of the LSRP to inform clients of regulatory, mandatory, and expedited site-specific timeframes at N.J.A.C. 7:26I-6.18(b)1, as the Department of Environmental Protection should inform the person responsible for conducting the remediation of the timeframes in the initial notification letter. (7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.18(b)1 beyond substituting “for which the LSRP has been retained” for “for which the client has hired the LSRP;”

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therefore, the comment is beyond the scope of this rulemaking. In addition, the Board does consider it to be an obligation of an LSRP to notify clients of regulatory, mandatory, and expedited site-specific timeframes.

37. COMMENT: The commenters suggest adding new N.J.A.C. 7:26I-6.18(c) to state that “In cases where the regulatory, mandatory or expedited site-specific timeframe exceedance is the result of a Department delay(s) in review/approval of a timely document, permit, or other submittal reviews, the LSRP remains responsible for notifying the client of the anticipated delay but the responsibility for extending the associated timeframe will rest with the Department, with no requirement for a Timeframe Extension Request.” (4 and 7)

RESPONSE: The Department is not under the jurisdiction of the Board. Therefore, the Board cannot dictate how the Department addresses timeframe exceedances.

#### **N.J.A.C. 7:26I-6.19 Duty Regarding Public Communications**

38. COMMENT: The commenters suggest limiting the requirements for LSRPs to respond to inquiries for information to documents that can be readily transmitted electronically at N.J.A.C. 7:26I-6.19(b). An LSRP should not be required to transmit information that is not in the public record (or will not be in the public record once remediation and reporting are complete). LSRPs should also be shielded from having to respond to long lists of questions when the information can be gleaned from materials in the public record. (2, 4, 6, and 7)

RESPONSE: The Board has not proposed amendments at N.J.A.C. 7:26I-6.19; therefore, the comment is beyond the scope of this rulemaking.

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**N.J.A.C. 7:26I-6.21 Prohibition Against Misrepresentation**

39. COMMENT: The commenter suggests removing “in the Board’s opinion” and “or guidance” from “make a statement that, in the Board's opinion, is likely to create an unjustified expectation about results the LSRP may achieve, or state or imply that the LSRP may achieve results by means that violate the provisions of applicable environmental statutes, rules, or regulations, including the SRRA and any rule, regulation, order, or guidance adopted or issued pursuant thereto” at N.J.A.C. 7:26I-6.21(a)3. (7)

RESPONSE: The Board disagrees with removal of “in the Board’s opinion” and “or guidance” from N.J.A.C. 7:26I-6.21(a)3. The Board did not remove “in the Board’s opinion,” and the Board added “or guidance” to clarify that the LSRP must consider guidance when making statements about results that may be achieved.

**N.J.A.C. 7:26I-7.1 - Purpose; 7.3(a) – Filing of Complaint; and 7.5(e) - Board’s Investigation of Complaint**

40. COMMENT: The commenters suggest removing “not applying appropriate guidance,” “did not apply appropriate guidance,” and “has not applied appropriate guidance” from N.J.A.C. 7:26I-7.1, 7.3(a), and 7.5(e). LSRPs should be exercising their independent professional judgment. If “guidance” is inserted into these sections, the Board will not have the ability to allow the LSRP to use their judgment when choosing other methods and/or practices that may be more applicable to specific site conditions. In addition, there is no definition of “appropriate guidance,” so subjecting LSRPs to investigation and/or discipline based upon undefined appropriate guidance is a violation



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of an LSRP's right of due process. Furthermore, guidance documents issued by the Department are not legally enforceable as administrative rules because they were not adopted in compliance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. Subjecting LSRPs to investigation and/or discipline for failing to apply undefined "appropriate guidance" is contrary to allowing an LSRP to exercise independent professional judgment. (7, 8, and 9)

RESPONSE: The Board notes the concern expressed by some commenters that the Board is adding an additional factor into the review of the submissions and conduct of LSRPs; specifically, whether LSRPs are following appropriate guidance. The Board acknowledges the concern that LSRPs should not be limited in their analysis and application of the procedures and techniques that they judge are appropriate to be used in the investigation and remediation of individual contaminated sites. The Board notes that the application of available and appropriate guidance is required by the Technical Requirements for Site Remediation (N.J.A.C. 7:26E-1.5(b)) and the Administrative Requirements for the Remediation of Contaminated Sites (N.J.A.C. 7:26C-1.2(a)3). The proposed amendments to the Board's rules are not intended to add any requirements with respect to following guidance beyond those that are already established in the Technical Requirements for Site Remediation and the Administrative Requirements for the Remediation of Contaminated Sites. The Board has amended the rules to remove "technical" before "guidance" where that term already appears, and to add "guidance" in some sections, to acknowledge that application of available and appropriate guidance of all types is an important aspect of remediation and is something that LSRPs should incorporate into their decisions when conducting remediation. Consequently, the Board believes it is appropriate to evaluate an LSRP's application of appropriate guidance when auditing an LSRP's submissions and conduct or evaluating a complaint.

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#### **N.J.A.C. 7:26I-7.5 Board's Investigation of Complaint**

41. COMMENT: The commenter agrees with removal of “a recommendation, if applicable, as to the type of disciplinary action along with a basis for this recommendation” at N.J.A.C. 7:26I-7.5(h)5, as the full Board should hear the Complaint Review Team’s findings with respect to the facts and potential violations and make the determination as a full Board as to whether a penalty is warranted and if it is, the severity of said penalty. (7)

42. COMMENT: The commenter agrees with removal of “and recommendations” from “the Professional Conduct Committee shall review the findings and recommendations of the Complaint Review Team and present the Complaint Review Team's report and its own recommendation to the Board in executive session” at N.J.A.C. 7:26I-7.5(i). (7)

RESPONSE TO COMMENTS 41 AND 42: The Board acknowledges the commenter’s support of this proposed amendment.

#### **N.J.A.C. 7:26I-7.7 Board's Actions in Response to Violation**

43. COMMENT: The commenter agrees with adding “issue a letter of warning or admonition” at N.J.A.C. 7:26I-7.7(a)7 because the Board should allow for the issuance of warnings or admonitions as a lower level of penalty other than fines, civil action, criminal proceedings, etc. (7)

RESPONSE: The Board acknowledges the commenter’s support of this proposed amendment.

#### **N.J.A.C. 7:26I-9.1 Purpose**

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44. COMMENT: The commenters suggest removing “or in the LSRP’s application of appropriate guidance” from “in the performance of his or her duties and obligations [under] pursuant to the SRRA and any rule, regulation, or order adopted or issued pursuant thereto, or in the LSRP’s application of appropriate guidance, an LSRP may be required to take action that is adverse to a client, an employer, or another person in order to protect public health and safety and the environment or otherwise carry out his or her professional services in compliance with the SRRA and any rule, regulation, or order adopted or issued pursuant thereto, or in the LSRP’s application of appropriate guidance” at N.J.A.C. 7:26I-9.1 because it is inappropriate to refer to guidance in this context. (7 and 9)

RESPONSE: The adopted rule includes “appropriate guidance,” as the application of available and appropriate guidance is required pursuant to N.J.A.C. 7:26E-1.5(b) and 7:26C-1.2(a)3.

45. COMMENT: The designation (2) at N.J.A.C. 7:26I-9.1 in the proposal should be changed to (a). (7 and 9)

RESPONSE: N.J.A.C. 7:26I-9.1(a) is correct as published in the New Jersey Register, which is the official version of the notice of proposal. The courtesy copy of the notice of proposal posted on the Board’s website incorrectly identified N.J.A.C. 7:26I-9.1(a) as 7:26I-9.1(2).

## **General**

46. COMMENT: The commenter is concerned that the rule proposal creates an overly broad and burdensome obligation of LSRPs to maintain documents and records that may have little or no value by requiring the preservation of all documents and records. This requirement appears at

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N.J.A.C. 7:26I-2.12(d)2, 2.13(f)3, 2.15(a)6, and 6.27(a). This requirement should be revised to a more manageable standard. (6)

RESPONSE: The Board proposed only minor wording changes at N.J.A.C. 7:26I-2.12(d)2, 2.13(f)3, 2.15(a)6, and 6.27(a) to clarify the obligations of an LSRP with respect to the maintenance of data, documents, records, and information. The amendments do not impose additional obligations. Therefore, the Board declines to modify the amendments. The Board notes that the obligation to maintain all data, documents, and information is at N.J.S.A. 58:10C-20.

47. COMMENT: The commenter suggests that the Board include provisions requiring an affidavit of merit for bringing suit against an LSRP. (7)

RESPONSE: The Board has no jurisdiction over lawsuits concerning LSRPs. The Board notes that N.J.S.A. 2A:53A-27 requires affidavits of an appropriate licensed person be provided by plaintiffs in an action against licensed persons for damages for personal injuries, wrongful death, or property damage, and that “licensed persons” includes “licensed site remediation professionals,” pursuant to N.J.S.A. 2A:53A-26.

### **Summary of Agency-Initiated Changes:**

It has come to the Board’s attention that the New Jersey Department of Environmental Protection Office of Dispute Resolution is not available to mediate settlements between LSRPs and the Board. Therefore, the Board is modifying the rules upon adoption to remove “through the Department’s Office of Dispute Resolution” from N.J.A.C. 7:26I-8.3(c)9. The Board is also modifying the rules upon adoption to revise the address of the SRPL Board set forth at N.J.A.C.

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7:26I-3.7(b) and 8.3(b) to remove “c/o New Jersey Department of Environmental Protection Site Remediation Program Office of the Assistant Commissioner.”

### **Federal Standards Statement**

The adopted amendments are not mandated by Federal law and do not contain standards comparable to any Federal standards. Accordingly, no further analysis is required.

**Full text** of the adoption follows (additions to proposal indicated in boldface with asterisks

**\*thus\***; deletions from proposal indicated in brackets with asterisks **\*[thus]\***):

#### SUBCHAPTER 2. LICENSURE

##### 7:26I-2.13 Suspension of a license

(a)–(e) (No change from proposal.)

(f) No later than 15 days after the date of the final order of suspension, the individual whose license has been suspended shall:

1. (No change from proposal.)

2. Submit an LSRP Notification of Dismissal through the **\*[Department Portal]\*** **Online Business Portal** at <https://www.nj.gov/dep/online> for each contaminated site for which he or she had submitted a Notification of Retention; and

3. (No change from proposal.)

(g) (No change from proposal.)

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7:26I-2.14 Revocation of a license

(a)–(e) (No change from proposal.)

(f) No later than 15 days after the date of the final order of revocation, the individual whose license has been revoked shall

1. (No change from proposal.)

2. Submit an LSRP Notification of Dismissal through the \*[Department Portal]\* \* **Online Business Portal** at <https://www.nj.gov/dep/online>\* for each contaminated site for which he or she had submitted a Notification of Retention; and

3. (No change from proposal.)

(g) (No change from proposal.)

7:26I-2.15 Inactivation of a license

(a) An LSRP may inactivate his or her license by submitting to the Board a written certification of inactivation on the appropriate form the Board prescribes, available on the Board website at [www.nj.gov/lsrpboard](http://www.nj.gov/lsrpboard), which demonstrates or certifies that:

1.–4. (No change from proposal.)

5. He or she has submitted an LSRP Notification of Dismissal through the \*[Department portal]\* \***Online Business Portal** at <https://www.nj.gov/dep/online>\* for each contaminated site for which the LSRP had submitted a Notification of Retention; and

6. (No change from proposal.)

(b)–(g) (No change from proposal.)

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### SUBCHAPTER 3. FEES

#### 7.26I-3.7 Payment of fees

(a) (No change.)

(b) Payments shall be mailed to the following address, unless otherwise indicated on the billing invoice:

New Jersey Site Remediation Professional Licensing Board

\*[c/o New Jersey Department of Environmental Protection

Site Remediation Program

Office of the Assistant Commissioner]\*

PO Box 420

Mail Code 401-06

401 East State Street

Trenton, NJ 08625-0420

### SUBCHAPTER 4. CONTINUING EDUCATION

#### 7:26I-4.4 Board approval of continuing education programs

(a) (No change from proposal.)

(b) In addition to the requirements at (a) above:

1.-3. (No change from proposal.)

4. Continuing education approved for individual professional development credit shall have educational content that is designed to advance the ability of an LSRP to provide \*[service to clients]\* **\*professional services\***. Approvable individual professional development credit shall

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include education regarding professional practice of LSRPs, including, but not limited to, project management, communication, both written and verbal, preparation of written reports, use of databases, and preparation of the technical components of proposals and scopes of work.

(c)–(f) (No change from proposal.)

#### 7:26I-4.5 Board approval of continuing education activities

(a) (No change from proposal.)

Recodify existing (a)-(c) as (b)-(d) (No change in text.)

### SUBCHAPTER 6. RULES OF PROFESSIONAL CONDUCT

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

(a)–(e) (No change from proposal.)

(f) An LSRP shall not install, close, test the tank of, or analyze the corrosion protection system of an underground storage tank system regulated pursuant to N.J.S.A. 58:10A-21 et seq., or install, close, test the tank of, or analyze the corrosion protection system of an unregulated heating oil tank system, or otherwise provide underground storage tank services, unless he or she is \*[authorized]\* **\*certified\*** to do so in accordance with N.J.A.C. 7:14B-13 and 16.

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

(a) An LSRP retained by a person responsible for conducting the remediation shall submit an LSRP Notification of Retention or Dismissal through the \*[Department portal]\* **\*Online Business Portal** at <https://www.nj.gov/dep/online>\* no later than 15 days after:



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1.-2. (No change from proposal.)

(b) When an LSRP decides to terminate his or her position as the retained LSRP prior to issuing an RAO, the LSRP shall, within 15 days after terminating his or her position:

1. (No change from proposal.)

2. Submit a Notification of Dismissal through the \*[Department portal]\* \* **Online Business Portal** at <https://www.nj.gov/dep/online>.\*

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

(a) An LSRP shall exercise independent professional judgment, apply appropriate guidance, and comply with the requirements and procedures set forth in the SRRA and any rule, regulation, and order adopted or issued pursuant thereto. In the exercise of independent professional judgment an LSRP shall:

1. Apply independent professional judgment to all actions during the entire course of the remediation;

2. Describe and document \*[all]\* **\*the LSRP's\*** decision-making;

3.-5. (No change from proposal.)

(b) (No change from proposal.)

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

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(d)–(e) (No change from proposal.)

7:26I-6.16 Circumstances under which an LSRP is held responsible for subordinates \*[LSRP]\*

(a) (No change from proposal.)

## SUBCHAPTER 8. ADJUDICATORY PROCEEDINGS

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

(a) (No change from proposal.)

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

1.–2. (No change from proposal.)

3. Deliver all items specified at (c) below to the following:

New Jersey Site Remediation Professional Licensing Board

\*[c/o New Jersey Department of Environmental Protection

Site Remediation Program

Office of the Assistant Commissioner]\*

PO Box 420

Mail Code 401-06

401 East State Street

Trenton, NJ 08625-0420

(c) A person requesting a hearing shall do so in writing on the Administrative Hearing Request Checklist, which is found on the Board website at [www.nj.gov/lsrcpboard](http://www.nj.gov/lsrcpboard), and include at a minimum each item specified below:

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1.-8. (No change.)

9. A statement of willingness to negotiate settlement with the Board or with mediation

\*[through the Department's Office of Dispute Resolution]\*.

(d) (No change.)