



**Testimony of Ileana Ivanciu, ACECNJ Environment Committee Chair**  
**regarding implementation of the Site Remediation Reform Act**  
**Thursday December 9, 2010**

Good Morning Mr. Chairman and Members of the Committee. My name is Ileana Ivanciu. I am a Professional Geologist and a Vice President with a prominent consulting engineering firm with a significant environmental remediation practice and over 200 employees in New Jersey alone. I also serve as Chair of the Environment Committee of the American Council of Engineering Companies of New Jersey (ACECNJ).

In this capacity I have worked closely on behalf of New Jersey's consulting engineering profession on the development and implementation of the LSRP program. I appreciate the opportunity to offer testimony on the progress of the LSRP program to date. ACECNJ supported the Site Remediation Reform Act and worked with NJDEP on key provisions of the bill. The organization is pleased to participate in the LSRP program which will stimulate our economy and clean our environment.

This has been a trial year, not just for the program but for all of the bright and positive minds in New Jersey collaborating to bring workable solutions to the table to make this program a success. I'd like to recognize the New Jersey Department of Environmental Protection (NJDEP) and specifically Irene Kropp, who has worked tirelessly building a consensus approach to shape the program. As of September 1st, there are 405 LSRPs certified in New Jersey, a significant percentage of them from ACECNJ member firms and representing a true cross-section of New Jersey's consulting engineering industry. Clearly, ACECNJ has a deep interest in collaborating with Irene, interested stakeholders, and the regulated community to build a successful program.

During the past year, members of our organization spearheaded and participated in stakeholder groups to help develop guidance documents, contributed our understanding of the regulated community and our technical expertise and know how to improve the program, and advised site owners and responsible parties on opting into the program. We see the many benefits that this program has the potential to bring to the state's economy, but would like to caution the Committee about some of the realities and potential impacts of the unknowns with the LSRP program because these are very much uncharted

waters for all of us. Unknowns like this carry significant potential risks that in this case are being put squarely on LSRPs and their firms, whereas previously individuals and the firms for which they work had no such risks because NJDEP was in the decision-maker seat and consultants made recommendations for them to agree with, or not – then responsible parties had either to comply or take the risk of doing nothing on themselves.

These unknowns are especially prevalent here because the LSRP program is brand new and is different enough from the previously-established programs in Massachusetts and Connecticut that the full story of risk to consultants (and LSRPs as individuals) is not yet known. However, we do have enough expertise in complex remediation projects to understand the importance of providing protection against the significant risk that is incurred by LSRP's who take on these complex clean-up projects. ACECNJ hopes to see the following as the LSRP program evolves:

- a. If and how NJDEP and/or the LSRP Board protects, and/or takes action against LSRP's depending on different scenarios or situations;
- b. how courts interpret individual LSRP's and consulting firm's duties to clients, public, and third parties – as well as how effective any protective contract language that firms use may ultimately be when tested in court; and,
- c. how the insurance industry reacts and plays into the equation (i.e., will they fully cover under errors and omissions under this new program? Even if initially they do , as we tend to expect based upon our analysis, will insurers later react by tightening up policies with exclusions or other protective measures like they did over the years for asbestos, toxic mold, etc. after they take a few hits and seek to mitigate these types of hits?).

We understand the legislature may not be inclined to consider amendments at this time, however ACECNJ believes that technical correction amendments may be necessary to maximize the effectiveness of the program.

Specifically, ACECNJ recommends that close attention be paid to liability protections for LSRPs and consider a “safe harbor” provision, or at least a presumption of acceptable conduct in actions absent clear proof of professional error or omission, reckless or intentional misconduct. This would provide some form of liability protection, thereby encouraging broader participation in the LSRP program and avoid potential chilling effects on the program as adverse cases of actions against LSRP's and their firms ultimately occur. Under current law, the LSRP acts as the regulator but does not have anywhere near the same

protection as NJDEP has as a regulatory agency. Speaking on behalf of consulting engineering firms that carry significant risk by participating in this program, I can tell you that we will be closely watching what unfolds and could potentially be put in the position to consider withdrawing from the LSRP program absent any viable means of mitigating the risks associated with the unknown future liabilities. Specifically, ACECNJ is concerned that without adequate liability protection for LSRP's, participation in the program as a whole could ultimately be muted, potentially diminishing the impact of the program on New Jersey's backlog of contaminated sites and reducing both the number and the quality of actively practicing LSRP's.

Therefore, ACECNJ believes that LSRPs must have the same protection that NJDEP employees have relative to liability protection under the law. If an LSRP comes across a potential environmental concern and reports it to NJDEP while operating in good faith and it is found at a later date that the LSRP was wrong, both the LSRP and the firm that they work for would be at risk, thereby incurring liability and costs for which they had no potential profit gain, nor would they have insurance.

In addition, while New Jersey's program is based on similar programs in Massachusetts and Connecticut, there are important differences that may require additional liability protections in place for New Jersey LSRP's. We believe that while changes to a firm's contractual language and insurance instruments may help control the risk to some extent, there is truly no risk management strategy to address the LSRP liability under the current law. We do not want to see liability alone become the determining factor when a professional considers becoming an LSRP.

Beyond the issue of liability protection for LSRP's, ACECNJ offers several other thoughts for the Committee's consideration. The ACECNJ's recommendations specifically include:

#### **Professional–Judgment Risk**

There are significant unknowns based on professional judgment risks. We recommend the legislation clarify topics such as re–openers, financial assurance requirements.

#### **Record–Keeping Risk**

Can the legislation reconsider the LSRP's personal record–keeping responsibilities?

Can the legislation clarify the LSRP's requirements under Open Public Records Act (OPRA)?

In addition, ACECNJ is concerned that this provision will create the need to duplicate all records with the LSRP and the firm maintaining asset of files, since the LSRP would have to protect themselves in the event they leave the firm that they are currently with.

When a LSRP leaves a firm, the firm is going to have to keep a set of records and yet the LSRP will have the same obligation.

### **Conflict-of-Interest Risk**

In the case of a recalcitrant client, can the legislation clarify whether an LSRP can dismiss himself from a case without client approval?

### **Time-Element Risk**

In the case of a client who cannot meet the mandatory timeframes (for example, third party permitting/approvals issues), can the legislation define procedures for the extension of mandatory and regulatory timeframes?

### **Affirmative Reporting Obligations**

Given that the LSRP has an affirmative obligation to report risk to protect public health and the environment, can the legislation consider offering protection to the LSRP acting outside of a contract in the context of exercising his or her affirmative reporting obligations?

### **Guaranteed Fixed Price Remediation**

Can the legislation clarify the LSRP's role in the context of guaranteed fixed price remediation contracts?

Finally Mr. Chairman, I'd like to take a moment on the record to recognize Thomas Lewis, Ajay Kathuria, Tom Waldron, Joseph Galley, Charles Martello, Gary Loesch, Charles Stebbins and William Pendexter. These ACECNJ members have spent countless hours not only working on the development and implementation of the LSRP program but also analyzing its impact and effectiveness to date. New Jersey is fortunate to have such a wealth of knowledge and expertise on which to draw.

Thank you again for the opportunity to testify. On behalf of ACECNJ, I look forward to continuing to act as a resource to this Committee as it monitors implementation of the LSRP program and takes steps it deems appropriate to maximize its impact and effectiveness in reducing New Jersey's backlog of clean-ups. I would be happy to answer any questions.