
Committee Meeting

of

SENATE ENVIRONMENT COMMITTEE

Senate Bill No. 1897

*(Establishes licensed site professional program for
site remediation and makes various changes to site remediation laws)*

LOCATION: Committee Room 10
State House Annex
Trenton, New Jersey

DATE: June 16, 2008
1:00 p.m.

MEMBERS OF COMMITTEE PRESENT:

Senator Bob Smith, Chair
Senator Jeff Van Drew, Vice Chair
Senator John H. Adler
Senator Robert M. Gordon
Senator Christopher "Kip" Bateman



ALSO PRESENT:

Judith L. Horowitz
Algis P. Matioska
*Office of Legislative Services
Committee Aides*

Kevil Duhon
*Senate Majority
Committee Aide*

John Hutchison
*Senate Republican
Committee Aide*

***Meeting Recorded and Transcribed by
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SENATOR BOB SMITH (Chair): Good afternoon.

Today is going to be a very interesting day. We're going to hear, I think, the first version of the site remediation bill. There's no intention to release the bill today. We've already had probably four hearings on this, just on the concepts of what we should be doing and what we shouldn't be doing.

And we wanted to get out, into the public domain, a version so people could start talking about it and figuring out what's right and what's wrong. So today we're going to have an extensive discussion of this first draft. And I'm sure there are plenty of problems, issues, whatever. But be of good spirits. We listen, and we'll try to do the right thing. But the right thing won't be until September or October of next year, after we've had a Summer to chew on it, and on your comments, and to get more comments.

After doing the hearing on site remediation, and no release, we're then going to take a look at the OPRA modification bill. And that may or may not be released, depending on what we hear.

So that's the plan for today.

And for the record, Senator Adler was here, asked to be marked present. He had to leave for a few minutes, but he will be back in a bit.

So we have a quorum.

Let me just officially ask you to call the roll, Judy.

MS. HOROWITZ (Committee Aide): Senator Smith.

SENATOR SMITH: Present.

MS. HOROWITZ: Senator Adler was here, present.

Senator Gordon.

SENATOR GORDON: Here.

MS. HOROWITZ: Senator Bateman.

SENATOR BATEMAN: Here.

SENATOR SMITH: And by the way, one other comment on the site remediation bill.

In order to get a bill into the system, I put my name on it, and we couldn't get anybody else at that particular moment. But the plan is, if we have a bill we all like at the end -- to allow all members of the Committee to become prime sponsors on the bill, assuming everybody likes it. (laughter)

All right, now that being said, the bill we're talking about is S-1897, establishing licensed site professional programs for site remediation and making various changes to site remediation laws.

We're going to call this the Irene Kropp Show.

Irene, if you'd come forward -- from the DEP -- and tell us about the bill.

A S S T. C O M M I S S I O N E R I R E N E S. K R O P P:
Thank you, Senator Smith.

Good afternoon, Mr. Chairman and members of the Committee. I want to thank you again for the opportunity to address site remediation reforms for, as you stated, about the fourth time on behalf of Commissioner Jackson.

The Department is pleased to have been able to work with you and the Office of Legislative Services on Senate Bill 1897, which we believe to be the cornerstone bill necessary to strengthen the Site Remediation Program. As Commissioner Jackson has testified previously, the Department believes that serious reforms to the Site Remediation Program

are needed. And we recognize that additional legislation will also be necessary, but they are not included in S-1897.

However, this first bill primarily focuses on the establishment of a licensed site professional program, which is the one reform that will have the greatest impact on the environment and economic recovery in New Jersey, as cases will move through the remedial process more quickly.

We look forward to working with the Committee on additional legislation dealing with the permitting process for institutional and engineering controls, monitoring of changes in property use, underground storage tank reforms, and modifications to the HDSRF grant program to provide grants to community groups, as well as other issues that we have identified in previous legislation testimony.

I recognize that this is the beginning of the public dialogue on S-1897. I am optimistic that we can develop legislation that addresses the concerns raised by all the stakeholders.

Let me just briefly talk about S-1897. It addresses four of the major issues that we identified during the stakeholder sessions that DEP convened.

It provides incentives for permanent remedies and disincentives for remedies that rely on engineering controls. It streamlines the remedial process by establishing the parameters for the licensing and use of environmental consultants. It allows the Department to focus its limited resources on the highest priority cases. And it establishes predictable requirements associated with the remedial process, including timeframes for completion of a remedial phase and presumptive remedies for sensitive uses such as schools, childcare, and residential development.

Each of these components are a critical piece of the integrated system that will allow for the cases with the lowest risks to move through the Department quickly, while at the same time allowing the Department to focus more fully on higher-priority cases, ensuring proper and timely remediation.

Let me briefly lay out the components of the proposed legislation.

S-1897 provides the Department with the authority to license professionals who conduct remedial investigations and recommend cleanup alternatives for a contaminated site. It provides the Department with the ability to revoke and suspend licenses, as well as take enforcement action against any licensed site professional -- or LSP -- or subsurface evaluator. Subsurface evaluators currently work on underground storage tank cases. This is authority that we do not currently have, an authority we believe will greatly strengthen the Site Remediation Program.

The bill allows us to temporarily set up a licensing program while we take the time to develop a certification program and a testing process for the full licensing of professionals. This will jump-start the program and begin the process of moving the over 20,000 cases currently in the Department toward more timely cleanup.

The bill establishes a strict code of ethics to which an LSP must comply, and it lays out the responsibilities of an LSP, explaining what certified documents they must submit to DEP and when.

S-1897 also establishes a tiered approach to how the Department will process cases in the future. Tier 1 cases will receive the greatest amount of oversight from the Department. Cases will be assigned

to Tier 1 when the person conducting the cleanup has an egregious compliance history. In these instances, the Department will require a remediation funding source in the form of a remediation trust fund, which means real money will be available for the investigation and cleanup, and the Department will control the release of those funds. The LSP would be required to submit documents directly to the DEP and the client simultaneously. And the Department will select the final remedy at Tier 1 sites. We anticipate approximately a hundred or so cases being in Tier 1.

Tier 2 cases will include environmental and economic priorities that warrant the same degree of oversight that the Department now provides, as well as the same degree of oversight that we provide for all immediate environmental concern conditions at any site, regardless of what tier they fall into. We estimate that there would be approximately 1,000 to 2,000 cases in this tier.

Tier 3 cases will be the majority of the cases that are currently in the system, including regulated underground storage tanks, most of the ISRA cases, and voluntary cleanup cases. We anticipate there would be about 12,000 to 14,000 cases in this tier. And we will review these cases using a screening process similar to that utilized by Massachusetts, when Assistant Commissioner Commerford came and spoke last.

Tier 4 cases will receive the least amount of DEP oversight. And they are the unregulated heating oil tank cases or the homeowner cases. We are currently processing these cases through the use of a streamlined review process that employs a checklist and an audit function. Currently, we receive about 4,000 to 5,000 unregulated heating tank cases each year. And we have found the streamlined review process to be quite

successful in moving these cases through the system quickly. Last month alone, we issued 108 NFAs for unregulated heating oil tanks, with one employee being in charge of that program.

S-1897 also provides authority with regard to remediation funding source requirements. It's a new authority. There are remediation funding source requirements that exist currently. The new authority will allow the Department to expand who has to apply -- who has to set up a remediation funding source. Right now, under current legislation, current statute, primarily it's people who are in an enforcement agreement, an ACO; people who have an ISRA remediation agreement; or folks in the ISRA program, once they get a remedial-action work plan approval.

Changes in S-1897 will allow the Department to require an establishment of a remediation funding source for every site entering the cleanup program, with the exception of homeowners, childcare facilities, and schools.

We are also expanding the types of mechanisms that can be used for an RFS, to include letters of credit and surety bonds. Again, under current legislation, an annual 1 percent surcharge is applied to all RFS, with the exception of self-guarantees. And the funds from the 1 percent surcharge are deposited into the HDSRF fund to be used for brownfields grants.

S-1897 would apply the 1 percent surcharge to all RFSs, including self-guarantees, and place the money in the Remediation Guarantee Fund, which I will discuss shortly. It would also limit the amount of money that could be self-guaranteed to \$1 million. Right now, any large company can self-guarantee for the total amount of their RFS

requirement. And these large companies do not have to pay the annual 1 percent surcharge that is imposed on smaller companies and smaller RPs.

We do not believe that this is fair. RFS funds are established so that the Department can access the money when a cleanup is not progressing and the Department or a third party is willing to complete the work. For instance, right now in New Jersey, we have many cleanups that are moving slowly for a lot of our mayors. They have designated redevelopers who are eager and willing to take over and redevelop the site for productive uses. And the DEP has not been able to access self-guaranteed RFS funds and provide the money to a municipality so that the site can be cleaned up and put back into productive use. Having this ability would help redevelopment efforts in this state.

We also believe the expansion of who has to establish an RFS and the limits on self-guarantees will provide critical incentives to responsible parties to ensure that the remediation of their sites proceed quickly and that cases do not languish in the Department for years.

For example, we currently have \$1.4 billion that is currently posted with the Department in remediation funding source accounts. Of that, approximately \$980 million are in self-guarantees. Of the \$980 million in self-guarantees, \$743 million are for cases that have been in the system for 15 years or longer; \$450 million cover cases that are older than 20 years in the Site Remediation Program.

Lastly, S-1897 would require a one-time premium of 5 percent on the cost of a cleanup when the person conducting the remediation selects a restricted use remedy. That 5 percent premium would be deposited into the Remediation Guarantee Fund. Clearly, this is included

to provide an incentive to selected unrestricted or limited-restricted use remedial actions.

With regards to the use of the remedial action Guarantee Fund, there are three intended grant purposes included. First off, when a person conducting a remediation cleans up to an unrestricted or limited-restricted use standard, they will be provided finality. They will be released from any future liability associated with the change in the soil standard of an order of magnitude. The current property owner would be allowed to receive a grant from the fund to cover the investigation and cleanup, if necessary, associated with the standard change.

Second, if there is no viable responsible party when new standards are developed, and there is a need to investigate or conduct additional remediation due to an order of magnitude change, an existing property owner can receive a grant to do that work.

Third, if there is no viable responsible party, and due to the reason other than failure to properly maintain the engineering control and there is a remedy failure, the current property owner can access the fund to fix the engineering control.

We believe that this fund will provide critical protection to homeowners, homeowners associations, and other qualifying subsequent purchasers who purchase properties that are employing engineering controls, as we move forward with the program.

The bill also provides the DEP with the authority to establish and mandate the use of presumptive or enhanced remedies when the end use of a property is slated for a school, childcare, or residential housing. It allows the Department to establish mandatory timeframes for the

completion of phases of cleanup so that cases do not languish within the Department for 20-plus years as they do now. And it provides the Department with the ability to disapprove a remedial action when the Department believes that a remedy will not be protective of a sensitive use, again those being schools, childcare facilities, and residential development.

There are some additional aspects of the bill that we would like to continue to work with the Committee on. And we understand that there are additional discussions that need to take place regarding what is in the current proposed legislation. For instance, we need to consider whether a licensing board is something that would be beneficial down the road. We should consider mandating electronic submittals of all documents. We would like to ensure that all individuals meet certain qualifications before they get the ability to sit for an exam. And we believe all documents should have to be certified by an LSP, including preliminary assessments and site investigations submitted for a no further action letter. This is currently exempted under the existing proposed legislation.

In closing, Commissioner Jackson and I look forward to continued discussion with regard to S-1897 and other legislative reforms.

Thank you very much.

SENATOR SMITH: Okay. I'm sure we have questions. I have a couple.

Number one, when you talked about the four tiers that the current caseload would be put into-- When you described Tier 1, which sounded like the toughy group -- how many-- You didn't mention the number of cases that were in there.

ASSISTANT COMMISSIONER KROPP: We're hoping that that is limited to around 100 to 200 cases, primarily putting people in that category for punitive reasons. They're very egregious in terms of compliance history.

SENATOR SMITH: Right.

As I was reading this over the weekend, I have to tell you, just because it's -- we're amending so many different laws, it was a little difficult to follow. But in the -- I think it was in Tier 2, you were talking about the licensed site professional doing the work, but then it being double-checked by DEP. What would be the extent of the double check, and are we getting the savings and advantages that we wanted to get, and are we still having enough oversight to make sure that the cleanup is done properly?

ASSISTANT COMMISSIONER KROPP: Let me first say that we haven't worked out all the implementation aspects of the legislation yet. But our concept is very similar to that that Massachusetts employs, which is requiring the submittal of some documents, but not every single document that gets submitted right now under the current program; having a screening process for the documents that come in under Tier 2; based on that screening, having a more limited universe of cases that might require additional review; and the ability to go out and do inspections or take additional action if something doesn't seem right and staff feels that additional work is necessary. So screening, a little bit more of a review, then down to field inspections and audits.

SENATOR SMITH: Right. And you see that process being one where utilizing the existing staff that you have, there will be sufficient resources to do that function?

ASSISTANT COMMISSIONER KROPP: Let me just-- Can I just do two things?

SENATOR SMITH: You can do as many as you want.

ASSISTANT COMMISSIONER KROPP: One, introduce Janice Brogle, my Executive Assistant, who has worked on the legislation with me.

SENATOR SMITH: Absolutely.

ASSISTANT COMMISSIONER KROPP: She just corrected me and said, "No, you just talked about Tier 3, not Tier 2." (laughter) So Tier 2 is the existing cases that are economic redevelopment and brownfields cases that we would handle during the exact same process that we handle now. And we're hoping that's like 1,000 to 2,000 cases.

SENATOR SMITH: So they're staying within the Department. They're not being done by licensed site professionals.

ASSISTANT COMMISSIONER KROPP: At this particular point in time, correct.

SENATOR SMITH: All right. That's actually one of the major purposes of this legislation -- to see to it that the economic engine, that brownfields redevelopment can be, actually occurs. We have a gazillion complaints from the brownfields' redevelopers.

Is it your opinion that if you take away these -- not take away these functions -- if you use the licensed site professionals for the other functions, you're going to be able to process the brownfields faster?

ASSISTANT COMMISSIONER KROPP: Yes.

Let me also say, for Tier 2, we're really still thinking it's going to be a very limited universe of cases. It's not all brownfields cases. It's

those that are in BDAs, brownfields designation areas, which is only about 300 of the brownfields cases. Those are the ones that get the HDSRF money for cleanup, as well as investigation. Most of the brownfields cases would be in the Tier 3 category, where they would be using the LSP almost exclusively. So we do think that there would be a lot of benefit when the 12,000 to 14,000 cases for us to ISRA and voluntary cleanup go through Tier 3 -- that it will free up the existing staff who are releasing HDSRF public funds for the highest priority brownfields and economic redevelopment cases, which is a very small universe compared to the overall.

SENATOR SMITH: Okay. Looking at the bill -- and, again, excuse my inability to analyze some of the language. I'm looking at Page 29 of 40. And it says, "Section 35 of Public Law 1993 is amended to read as follows--" And then it says "35(a) The Department of Environmental Protection shall adopt minimum remediation standards for soil, groundwater, and surface water quality necessary for the remediation of contamination of real property. The remediation standards shall be developed to ensure that the potential for harm to public health, and safety, and to the environment is minimized to acceptable levels, taking into consideration location of the surroundings, the intended use of the property, potential exposure to the discharge, and surrounding ambient conditions, whether naturally occurring or manmade."

And my question was -- as I read this -- this section, and others related to it -- it appeared that there was some new interplay between soil standards and the one-in-a-million standard. This is existing law. I understand that.

But in terms of what this bill does, what is it that the DEP can do with regard to the question of the removal of on-site contamination? I mean, right now, as I understand it, the applicant can say, "I meet the one-in-a-million standard, end of discussion." How does that change under this bill?

ASSISTANT COMMISSIONER KROPP: It's not working.
(referring to PA microphone)

SENATOR SMITH: I'm sorry.

ASSISTANT COMMISSIONER KROPP: You can hear me?

SENATOR SMITH: You can hit the button too.

ASSISTANT COMMISSIONER KROPP: Okay. We did not change that section of the statute to deal with expanding the Department's authority to disapprove a remedy. We changed Section 12(g) in the Brownfields and Contaminated Site Act. The original language said the Department shall not disapprove a remedy if it's protective. And we changed it to allow us to have the authority to disapprove a remedy whenever there's childcare, schools, or residential.

SENATOR SMITH: So it's only in those four cases -- three cases.

ASSISTANT COMMISSIONER KROPP: Correct. I think there was a fourth, which is, if it leaves the property undevelopable for eternity -- if you're going to come up with a protective remedy, but it basically means you're entombing the entire site, no one can ever redevelop it. So I believe there was four: childcare, residential, school, and rendering the property totally undevelopable.

SENATOR SMITH: Right. And at this point, there's no-- This would be a rule-making process, where you would decide what the instances are where you would have a higher standard, or is it a case-by-case? How are you going to do it?

ASSISTANT COMMISSIONER KROPP: We believe it should be part of the goal, future goal. The criteria would be set forth as to when and why.

SENATOR SMITH: Okay. All right, so which section is it -- on Page 31 of 40: The Department shall develop remediation standards for soil, groundwater, and surface water--

Is this existing law, or is this the--

I'm going to save the other questions, because I'm not sure if I should ask these questions or not yet.

But how about other Senators? Would they like to ask a question?

Senator Bateman.

SENATOR BATEMAN: Mr. Chairman, thank you.

And I'm happy to hear that we're going to have some time to review this over the Summer, because this is significant legislation.

Irene, one of the concerns I've had, and frustrations at times, trying to help constituents and businesses get NFA letters out of your Department-- I notice in the legislation that the Department is going to retain jurisdiction over that, unlike other states. Massachusetts allows the LSPs to do it. But there's no timeframe in the legislation on the period in which you have to issue those letters.

I think that's important. I think it's important for the community, the business community, the individuals who are cleaning up sites. I think we need to have a timeframe. Is there a reason why you didn't adopt the entire Massachusetts framework?

ASSISTANT COMMISSIONER KROPP: I think the key is, I have no clue what that timeframe should be right now. I absolutely don't have a problem, going forward, talking about the Department having required timeframes for issuance of an NFA once everything has been received and been deemed complete. But right now, it's so up in the air as to how this is going to happen through a transitionary period, much less when we have final certification. So I think after we have final certification of an LSP, that's definitely something that should be put on the table. But right now, who knows what's going to happen in the next six months to a year after it gets adopted.

SENATOR BATEMAN: I understand. I would just urge you to--

I think it's fair to everyone involved, Mr. Chairman -- the rules of the game -- that everyone knows the rules of the game up front. And I think it's very important that we have it in the legislation.

Thank you.

SENATOR SMITH: Senator Van Drew.

SENATOR VAN DREW: Thank you, Mr. Chairman.

I commend DEP and the Chairman for going forward. This obviously has needed to be done for a long time.

I have a few questions. Let me say at the outset that I, through the Chairman, agree with Senator Bateman that I think we need a

timeframe. And we need some predictability because of the issues that we've had in the past. And I, for one, would very much like to see that in the legislation if that could be worked on throughout the Summer.

Secondly, ranking all these -- there's 20,000 of them. Any sense of how long that would take, when we speak about-- Because that's quite an ominous task. Is that something you think could be done in a relatively rapid timeframe, or do you think that there is a timeframe, or again, as far as predictability -- even once we were to pass this legislation, we would want to know that for years we're not going to continue on just with the ranking system.

ASSISTANT COMMISSIONER KROPP: It's a great question. We actually have a GIS-based prioritization system that's up and running in the Department right now and being ground-trooped. So we've actually put all 20,000 cases -- minus the homeowners, because they have to happen quickly -- through that system. So I anticipate within the next three to six months that would be a system that is absolutely complete and could be used for the ranking system. And when you rank them, it literally takes like two to three hours. All the cases are in the system, we push the button, and it's all IT related, and it kicks them out.

SENATOR VAN DREW: Good. So it should be relatively quick.

And Tier 1, Tier 2, if I understand you correctly -- that would be handled by the Department directly. And if I understood you correctly too -- and I just wanted to refresh and reinforce those notions -- they could be done in a way -- because other staff would be cleared up. Because this is different than the Massachusetts program. And I don't want to put words

in your mouth. But would my assumption be correct that rather than even let that be done through -- similar to the Massachusetts system -- through the LSP, that you decided to do that on your own as an increased safety check to make sure that nothing untoward happens with the new system?

ASSISTANT COMMISSIONER KROPP: Yes. First of all, LSPs would still work in all those cases. And LSPs would be required to certify any document that came in.

SENATOR VAN DREW: But they couldn't issue the no further action--

ASSISTANT COMMISSIONER KROPP: But the Department oversight would be greater in those cases, which is actually similar to what Massachusetts did when they first started. They don't do it now, because they have 15 years of experience. So hopefully before 15 years from now we can release the Tier 1s and Tier 2s also strictly to LSP. But I think in kicking off the program with the uncertainty as to how it would work in New Jersey right now -- that these are cases that are (indiscernible) egregious responsible parties, or major economic redevelopment priorities for the administration and Legislature, and major economic redevelopment cases under the existing brownfields designation area sites. So we thought that they should still have that oversight, including schools, childcare, and residential for right now.

SENATOR VAN DREW: Okay. And then my final question would be the cost involved with this. Could you relate the cost of -- what it costs to go through our system -- our proposed system -- as opposed to what the costs are in the Massachusetts system?

ASSISTANT COMMISSIONER KROPP: Do you mean cost to the State or cost to the person that might be conducting the remediation?

SENATOR VAN DREW: Cost to the person that would be going through this -- the additional new 1 percent, and 5 percent, and some of those fees that are involved there.

ASSISTANT COMMISSIONER KROPP: Right. I guess there are two additional costs that would start to accrue, that being the surcharges, which again are in current legislation and apply to all companies except for those who can self-guarantee. So the cost would be strictly to the largest -- that 1 percent and the 5 percent. The 1 percent would be the largest companies right now, the ones that are able to self-guarantee. The 5 percent would be new. I haven't estimated the costs. I can do that for you. Through the Chair, we could provide something based on the costs.

But I think another serious component is that I do believe the cost to conduct the remediation will go up based on my discussions with environmental consultants. Right now, the environmental consultant community is very much told what to submit to the Department. And if their license is on the line, they've made it very clear that their submittals and their recommendations for cleanup will be more expansive and greater than it is now, which is a very good thing for the environment. But also, if they're moving through the system quickly, the cost should be offset by not languishing in the Department for 10 years, and getting a more comprehensive cleanup done in two to three years.

SENATOR VAN DREW: Does Massachusetts have that 5 percent?

ASSISTANT COMMISSIONER KROPP: No.

SENATOR VAN DREW: Thank you.

Thank you, Chairman.

SENATOR SMITH: Thank you.

Senator Gordon.

SENATOR GORDON: Thank you, Mr. Chairman.

First, I just want to reinforce what Senator Bateman said. I'm really concerned that -- with regard particularly to the Tier 2 kinds of projects -- that unless there is some kind of timeframe imposed, that even though you have more resources presumably freed up to focus on these projects, organizational cultures being what they are, we still may see additional requests for more information, and delays, and projects just not getting completed. So I think, as soon as we can, it's important to have some kind of timeframe imposed on the process.

Just a couple of other points. You referred to presumptive remedies in the case of particularly sensitive uses: childcare centers, schools. I'm thinking about the opposite, whether there should be presumptive remedies for those uses that are -- that involve limited human contact with the site. If someone is putting -- building a parking lot, some kind of industrial structure, solar panels, or something where there is not going to be a lot of interaction with a site, wouldn't that suggest that it might be appropriate to consider presumptive remedies that are not quite as onerous?

ASSISTANT COMMISSIONER KROPP: Actually, that's a great point. Right now, the presumptive remedy is really sort of a two-foot cap. So when we were talking about presumptive enhanced for sensitive

uses, we were talking about more like a three-foot or greater clean zone for residential, for homes, etc.

But one of the things that we did talk about internally was: If you are an industrial facility, and you are going to be an industrial facility for the next 50 to 100 years, how much do we want to spend time on maybe a single underground storage tank being pulled from that site? They take out the tank, take out the (indiscernible) product. If there is some remaining soil contamination -- as long as groundwater is not leaving the site -- maybe that's okay for right now. Because eventually the site will go through ISRA or whatever and undergo a more serious cleanup. So that is something that we have talked about also.

So I'm not sure we limited our ability to develop presumptive uses. But that's something we can talk about.

SENATOR GORDON: I've had some conversations with former environmental officials from other states. And I asked them, "How does New Jersey compare with what you do?" And there is more of that risk-based analysis that goes on. If there's going to be limited human contact, the standards for cleanup are less stringent.

And just finally-- Whenever I hear about fees being imposed-- And I understand what we're trying to do and establish a fund for cleanups. I'm just concerned that we might be creating financial disincentives for these parties to come forward and engage in the cleanups. Have you thought about that?

ASSISTANT COMMISSIONER KROPP: I have, and I don't necessarily see it. Because again, remediation funding sources are required now under existing legislation. We're just expanding to people who are

truly responsible parties, under the Spill Act, once they own the property. So we're expanding who has to.

The 5 percent is definitely out there as a disincentive, to incentive folks to look at unrestricted or limited-restricted uses. We had a lot of discussion about that, internally and with stakeholders. I think that there's the desire to get more unrestricted cleanups, but not a lot of ideas out there as to how to incentivize or disincentivize.

I also think that there will be huge cost savings associated with getting a site back into productive use more quickly than the 10 to 20 years it takes right now. So I think there is a trade-off, and I think it's a valid trade-off. I also think that the fund provides finality where it doesn't exist right now, and it provides protection -- especially for homeowners and homeowner associations. Which is our fear -- that you have a lot of developers who establish LLCs that will do the cleanup; they'll dissolve; then you have homeowners who need to have some sort of a protection going forward. And I think that this strikes that balance.

SENATOR GORDON: Thank you.

Finally, I just want to thank you for -- and everyone in the Department -- for all the work that has gone into that, as well as our staff.

Like my colleagues, I'm sure I'll spend some of the Summer reading these 50-some-odd pages and coming back with some more detailed questions.

Thank you very much.

ASSISTANT COMMISSIONER KROPP: You're welcome.

SENATOR GORDON: Thank you, Mr. Chairman.

SENATOR SMITH: I have one or two more questions. This is a pretty dramatic change for the DEP. Do you need any kind of a phase-in period for this to occur?

ASSISTANT COMMISSIONER KROPP: Yes. (laughter)

SENATOR SMITH: What do you recommend?

ASSISTANT COMMISSIONER KROPP: I think that we do need to phase it in. But again, we have success with the unregulated heating oil tank program. We're processing cases through that program right now. We have something to work off of.

SENATOR SMITH: So that one could start -- that could be -- that piece of it could be effective immediately if the bill passed.

ASSISTANT COMMISSIONER KROPP: Right.

SENATOR SMITH: But how about the more complicated portion? What is the phase-in time that you would recommend?

ASSISTANT COMMISSIONER KROPP: I would like to move as quickly as possible with the Tier 2 process, allowing consultants and companies to come into the Department right now, retract documents that exist, and resubmit them under an LSP program. I think the harder piece will be the Tier 1 cases. And I don't think that we're going to put anybody in Tier 1, Day 1 -- but slowly over time. And I think the Tier 2 cases are business as normal. So I think probably about six months to allow the culture changes within the Department, culture changes with the consultant community, culture changes with the clients and the RFPs to sort of tap in and allow us to provide training so that everyone understands what is required. So probably six months.

SENATOR SMITH: All right. So Tier 1 and Tier 2, six-month transition; Tier 3 and Tier 4, immediate.

ASSISTANT COMMISSIONER KROPP: Right.

SENATOR SMITH: Okay.

There was one line in this bill that had me a little crazy, and I want to just ask you if I read it correctly. And that is, there seems to be, for the first time in the history of the State, an absolution of a responsible party from future liability, under certain circumstances.

Is that true? If it is true, what are the conditions? And what's the policy reason?

ASSISTANT COMMISSIONER KROPP: It would only apply if a responsible party cleaned up a site to an unrestricted, or limited-restricted use standard. Unrestricted being: they cleaned up to unrestricted, and now the property is being used for something other than industrial. Limited-restricted use: They cleaned it up to a limited-restricted use, and now it's still being used for industrial. And it was -- only when there is a soil standard change of an order of magnitude or more. So one of the policy components of this is to provide finality to the regulated community, because that is something that they have said publicly, through testimony, etc., doesn't exist. If I clean up a site, and I walk away, and 20 years from now it gets converted -- or 30 years, or 40 years -- to residential use, why would you come back to me when I did what I was supposed to do at that time?

So as an incentive to clean up to a permanent remedy, or a limited-restricted use, and as a mechanism to provide finality in this limited circumstance, we would allow the Remediation Guarantee Fund to provide

grants to current property owners to cover any change in order of magnitude of soil standards.

SENATOR SMITH: Okay. Any other questions from Senators? (no response)

And I'm sure you're going to stick around to hear the comments from the various witnesses.

Thank you so much for your hard work on this.

ASSISTANT COMMISSIONER KROPP: Thank you.

SENATOR SMITH: Our first witness is Lawrence Powers, Esq., New Jersey Society of Professional Engineers.

Mr. Powers.

LAWRENCE P. POWERS, ESQ.: Good afternoon, Senator.

SENATOR SMITH: How are you doing?

MR. POWERS: My name is Larry Powers, and I'm--

SENATOR BATEMAN: You have to push the button, Larry.
(referring to PA microphone)

MR. POWERS: Push the button?

How is that?

My name is Larry Powers, and I'm Counsel for the New Jersey Society of Professional Engineers, and I'm also representing the New Jersey Society of Consulting Municipal Engineers today.

I'm here today because both of the societies that I represent-- While they think the bill is admirable, and it's good that the State is moving things forward in an expedited fashion -- that there are some issues with respect to the language in the bill that give them a little cause for concern.

Those are-- First of all, you look at the purpose of licensures to protect the public health, safety, and welfare. Well, now you're proposing creating another class of licensed professionals, another layer of bureaucracy. You're creating another class of licensed professionals that really are not subject to any ethical constraints or the regulation of the State Board of Professional Engineers.

If you look at the purpose of site remediation, it's to remediate a site. Under the New Jersey Engineering Practice Statute, the only person who can prepare a site plan for site remediation is a licensed professional engineer. And when we looked at the language of who qualifies to be a licensed site professional, the licensed professional engineer is conspicuously absent, except as an exception for a license of limited duration. And it's our concern that -- and this is very similar to a concern that we had a couple of years ago, when the DEP created a number of proposals -- rule-making proposals to prequalify people for all different kinds of permits. And when we took a look at that, we communicated our concerns to OLS and to the State boards that they were proposing licensing people to do things that might not actually have a license to practice professional engineering in the State of New Jersey, might not actually have a degree in engineering. Here you can have a degree in natural sciences or chemical science. You could be a chemical engineer, I suppose. And if you had the appropriate work experience, you could be a licensed site professional.

So our concern was that when you're taking a look at the 50-odd pages over the Summer, and OLS is looking at it over the Summer, that you take a look at the practice statute governing the practice of professional engineering, and that there be more coordination between the practice

statutes governing the practice of professional engineering and this proposal to license people who aren't professional engineers to submit permit applications for site plans which, at the end of the day, can only be signed and sealed by professional engineers. Civil engineers are trained in hydrology, geology. And the State has already said that if anyone could do it, you would need a license. You have to be licensed to do that as a professional engineer.

Those are our major concerns.

SENATOR SMITH: Any particular language change you'd like to see?

MR. POWERS: We actually have submitted in prior proposals, for prior rule-making for prequalifying people in other legislation, that I can resubmit.

SENATOR SMITH: Do you mind digging up the old letter, and putting a new date on it, and sending it to us? (laughter)

MR. POWERS: I think I can do that.

SENATOR SMITH: We'd like to take a look at it.

MR. POWERS: Right. And the New Jersey Society of Professional Engineers, in particular, would be more than happy to work with OLS and work with the Committee to coordinate the language so that it matches up with the practice statute. That's our major concern. I don't know that they have the same concern in Massachusetts. But it's the Society's concern.

SENATOR SMITH: Thank you for your testimony.

MR. POWERS: Thank you.

SENATOR SMITH: Jeff Tittel, Sierra Club, opposed.

Mr. Tittel.

J E F F T I T T E L: Thank you.

I know that the program in DEP is broken and needs to be fixed, but we at the Sierra Club believe that this isn't the way to do it.

First, we should be looking at the overall institutional reforms that are necessary before we start outsourcing a program that's already broken. And I think that's really our concern.

But I'm going to start off on the bill with some things that I think are missing up front. One is that there needs to be a clear and firm ethical standard in this legislation. My concern is that firms that will be doing the work for cleanups can be working for the same companies at other sites or other places, putting them in a conflict of interest. That's a real problem we have with this bill from the beginning, and this concept.

If the State is going to look at outsourcing or privatization, it should be done through an escrow system, where the people are working for the escrow account overseen by the State and not working for the polluters. And I have a real concern about that up front. One, because they can cut corners or do things as part of this program, or look the other way, because they're going to get other businesses in other places. So I think that the companies that are going to be overseeing cleanups minimally should either be through an escrow system -- but should be banned from doing work for those companies that they're now overseeing. Our concern is that here you are overseeing a cleanup at this place, but you're going to be their engineer for their site plan in front of a planning board somewhere else.

I also have a concern within the DEP that there is not going to be any kind of revolving door, where people who are in charge of audits or

overseeing the overseers will end up leaving the Department and working for them. And I need-- I think there needs to be a ban on revolving doors.

I also am concerned that there should be pay-to-play language in here as well. Again, when we look at the Cleanup Star program, certain firms that seem to be the larger, bigger contributors tend to get the bulk of the work out of that program. That could be a coincidence, but it's, again, a concern that we have.

I also have a couple of questions, because I was listening to the numbers from Irene. And she mentioned that there are 20,000 contaminated sites, and there are 100 to 200 in Tier 2 -- I mean 100 to 200 in Tier 1, 1,000 to 2,000 in Tier 2, 14,000-- It seems like there are some sites missing in adding it all up. And I have concerns on some of the definitions in Tier 3. I think if there are sites that are going to be impact to groundwater, they should not be included. Again, it's-- We're going through this bill, and there's a lot here to go through.

I also have concerns on -- I'm just trying to read all my notes. I'm sorry. I've been going through this pretty quickly.

I do agree with the one part in the bill where if you are going to go to an unrestricted cleanup, you become a priority. Though in listening to Irene Kropp, I saw schools and childcare centers, but I didn't see residential in that. And maybe it's just the different versions of the bill. So I think residential should be included if they're not.

All in all, I think that we have a program that needs a lot more work than just outsourcing the problems that we have. And I think there's a lot of work to be done. And I really have a concern for the -- what are called the level three sites.

The other thing, too, is on brownfields. You're talking about creating this fund. There's also another bill, because there seems to be a package of bills floating around that includes permit extension, this, and a bunch of other things. One of those bills would allow brownfields moneys to be extended to other purposes. So if moneys are going to be coming in through this fee structure, it should only go to brownfields and not to Smart Growth developments, or whatever they're going to be called, because there are those other bills that are kicking around.

And again, I really think that we need to fix the entire system, not just outsource the problem. And I really have a concern, especially with level three projects going out as part of this.

Thank you.

SENATOR SMITH: Thank you for your testimony.

Eric DeGesero and John Donahue, from the Fuel Merchants, seeking amendments.

ERIC DeGESERO: Chairman, members of the Committee, thank you.

I'm Eric DeGesero, Fuel Merchants Association of New Jersey.

There will be other testimony given later on today that deals with what I would call *30,000-foot* questions about the bill. And we're going to go on record as supporting those of the Site Remediation Industry Network.

We'll limit our discussion here with you specifically, on behalf of FMA, as it relates to underground storage tank remediation, residential, and commercial, and the interplay between the existing Subsurface Evaluator Program and the proposed legislation regarding LSPs. Our

members are both responsible parties as well as -- we have a number of members who are certified as SSEs.

I've asked John Donohue to come here with me today. John has 20-plus -- well, maybe 20-plus-plus years of experience in UST installation, operation, testing, and remediation at both residential and commercial sites. And John, in the interest of disclosure -- although he is not here in this capacity today -- is also the Executive Director of the Petroleum Equipment Contracts Association of New Jersey, which is the group that represents tank and pump contractors, primarily in the service station and residential business.

And with that, I'm going to hand it off to John to offer some comments.

Thank you.

JOHN F. DONOHUE: Thank you for your time today.

As I've gone through the bill -- and it is somewhat lengthy, so we've had a short time to work with it -- but there were a couple of things that sort of jumped out with respect to the regulated underground storage tanks. That's been a long health program, and the responsible parties in that program are subjected to a significant regulation which imposes on them the requirement to contract with certified individuals. And in addition to that, within that program is a certification program for experience training, exams for the individuals who have been performing services there. And those responsible parties also have a financial responsibility requirement attached to their continued operation. And the State, in fact, has a separate program for their compliance and enforcement.

So as we looked initially, in the early sections of the bill, Section 6 specifically seems to set forth an area where the subsurface evaluator continues to perform services on the regulated fuel tank. And there are some areas which set out circumstances where there may be a more complex site or more involved -- provide a higher risk where the purview of the proposed LSP would come into place.

So as we go in further through the program, on the report submittals for the Tier 3 accounts particularly, it sort of specifies that every document has to be submitted by an LSP and doesn't provide any provision for the SSE to submit these documents. I think this is an oversight which needs correction. Because for the low-priority, regulated, underground storage tanks, failure to do that would end up in a duplicative effort and redundant effort, and impose even more costs on the regulated tank owner.

The other thing that we looked at in this regard was -- concerned the remediation funding source, including all Tier 3 sites. And for the regulated tank owner, as I said, there are levels of financial assurance which are mandated under the current regulation and registration requirement. So we would suggest that the remediation funding source requirement be limited to the point where the financial assurance mechanism would be exceeded, to avoid, again, another duplicate level of funding and cost for those owners.

And the last point that I'd like to bring out is, as we look at the Tier 4 sites -- which is the unregulated homeowner site -- and the trial program is underway, which seems to be effective -- there are carve outs for the more complex sites -- concerns on potable wells, off-site impacts, which are appropriate. But in the proposal, as we see it right now, it would require

that any of those sites would then -- were exceptions to the Tier 4 category -- become a Tier 3. And those homeowners would then be burdened with having to select an LSP. And we feel that-- In fact, in those cases, the Department should retain the oversight in the best interest of the homeowner. And those would protect them, because most are very uninformed about navigating the realm of environmental regulations, and provide the Department greater ability to monitor the performance of those individuals who are certified on that site.

SENATOR SMITH: Thank you for your testimony.

Any questions? (no response)

Then our next witness is Mike Pisauero, from the New Jersey Environmental Lobby.

M I C H A E L L . P I S A U R O J R . , E S Q . : I'd like to thank Senator Smith for starting this conversation and agreeing to continue it on throughout this year.

I'd like to echo the comments that Jeff made, and had a few of my own.

In Section 12(b)-- In 12(a) it talked about some of the protections for Tier 1 and Tier 2. Given the definition of Tier 2, I think it would be appropriate to have the same protections as Tier 1 has. For example, the Department selecting the remedial action, conducting public meetings, especially in the redevelopment and brownfields area -- something these urban communities should have -- input in understanding of what's going on in their backyard.

I'm also somewhat concerned on Section 14. The licensed site professional should be subject to audits at any time, randomly. And I'm

not sure if this is supposed to be a limit or, merely, it's going to happen at least once.

SENATOR SMITH: At least once. It's not a limit that it can only be once. It could be every month.

MR. PISAURO: Appreciate that.

Also, in Section 15(n), the document submitted by the licensed site professionals-- These are the documents the DEP is relying on. The public is relying on DEP to do its job. And it should not be confidential. It should be public. Sections 15(o) and (p), if I'm understanding it right, it affects (indiscernible) to indicate that reports that were submitted previously were inaccurate. The licensed site professional has the responsibility to notify its client but no responsibility to notify DEP. I think we have seen, time and time again, where the information may not have been accurate. And just to pass it on to the client and not get it to the people who are in charge of protecting our public health is a mistake. So I would suggest that once that new information comes it gets transmitted simultaneously not only to the client, but to DEP.

And I want to emphasize one thing that Jeff said. Especially for Tier 1s and Tier 2s -- and I agree with Tier 3s -- the licensed site professionals should not be selected by the responsible party. It should be DEP. They should have the control to avoid any sense of impropriety or conflict.

But I look forward to reviewing this bill in more detail and thus continuing this conversation.

Thank you.

SENATOR SMITH: Thank you, Mike.

Mike Egenton, State Chamber; Dave Brogan, BIA.

MICHAEL EGENTON: Thank you, Chairman.

I appreciate the opportunity to provide some brief comments.

Obviously, you saw my slip. I wrote, "It's a work in progress," as opposed to seeking amendments, which we fully understand.

One of our professional colleagues that was very much engaged in the stakeholder process is a gentleman by the name of Stu Abrams, with Langan Engineering. Stu couldn't be here today, but he wanted me to at least provide some of his thoughts in the beginning of the process. And, again, recognizing that this is a work in progress -- and we'll work over the Summer on this legislation.

Stu e-mailed me this morning, and these were his remarks. He said, "The LSP program promotes professionalism--"

By the way, I should say, just for the information of the Committee members, Stu worked on the Massachusetts program. He had clients up there. So he's in the trenches. He has first-hand experience.

"LSP promotes professionalism, and it will also promote more collaboration and flexibility by the DEP. By making it punitive, it does not bring out the most creative and proactive thinking among environmental professionals. This bill, as introduced, does not currently achieve that.

"In Massachusetts, their DEP seems always ready to help an LSP in his or her remedial strategy. We think this will be a key cultural change we need to achieve. This bill, as currently written, does not promote this. It continues to make it prescriptive.

"What constitutes an unresponsive and uncooperative responsible party needs to be made clear, not subjective. Make sure you do

not pull into the unresponsive category anyone who is struggling to afford their cleanup costs.

“Most Fortune 500 company-type responsible parties want to be responsible, but they are frustrated by the lack of flexibility from DEP. The culture seems dominated by people who believe that the remediation process is linear. For example: delineation, then remediation. This bill still perpetuates this approach.”

Stu Abram’s experience, as I said, up in Massachusetts with RPs is that they seek to quantify the risk and attack the largest liabilities. Sources impacted off-site receptors.

Finally, in his ending notes to me via e-mail, he said, “The financial assurance requirements do not take into account the ability to change gears over the course of a cleanup or how long it really takes.”

So in a nutshell, Chairman, we at the Chamber -- and I believe David will make some comments on behalf of BIA -- support the concept of creating an LSP program here in New Jersey. As a matter of fact, our own benchmarking study -- which we provided copies to the Committee members several months ago -- called for the implementation of the Massachusetts model.

We also recognize, as I said earlier, that this is a work in progress, and we want to embrace the intent of this legislation. However, there are key areas that need to be fine-tuned, and some of these concerns have been highlighted previously by other testifiers as well. We are in agreement with the comments that will be provided shortly by Tony Russo, representing the SRIN organization.

We understand the meticulous process in getting there.

We remember, Chairman, 10 years ago, that this was the same process that Senator McNamara and Assemblyman Paul DiGaetano put us through in introduction of their brownfields bill; and actually, 10 years prior to that, the changes that were made from ECRA to ISRA.

So we look forward to working toward the goal of establishing a workable LSP program that will clean up properties and, hopefully in the end, improve the process at the Department. And we will commit to work with you and the staff to improve the bill.

Thank you, Chairman.

SENATOR SMITH: Thank you.

SENATOR VAN DREW: Mr. Chairman.

SENATOR SMITH: Yes, sir.

SENATOR VAN DREW: I just have one remark for Michael.

SENATOR SMITH: Sure.

SENATOR VAN DREW: I didn't know he was old enough to have these decades of history. (laughter)

MR. EGENTON: I only go as far back--

SENATOR VAN DREW: Ten years before, 10 years before that.

MR. EGENTON: In the mid-'90s, Judy and I--

Dave, I think you were on staff. You worked on--

But you know, it's interesting. It's ironic it's a 10-year cycle. ECRA to ISRA was about 10 years, ESRA to the brownfields legislation in the mid-'90s was about 10 years, and we're about 10 or 11 years now. So we seem to go back and hopefully tinker a little bit more to improve the process.

And I think that's the bottom line, Senator. That's what we want to look to do. We're not being overly critical of the Department, but a lot of the testimony that's been provided here and in previous hearings-- There's something broken there. We need to fix it, we need to do something better. Massachusetts has a good model. We commend the Senator for introducing it. And hopefully, during the course of the Summer, we can, as I said, fine-tune it.

DAVID BROGAN: Thank you.

David Brogan, NJBIA.

We, too, support the DEP's efforts toward establishing the licensed site professional program.

When I listened to the Massachusetts representatives come in and testify, it was clear that a good working relationship between the LSPs and the Department was critical to making this thing -- this program work.

One of the things that gave us pause were the penalty provisions. We worked very hard on the penalty bill that was previously done. I believe it was S-2650 last session. As an example, under this bill there are criminal penalties for minor violations once again. So we would ask that in that section -- at least for the negligent standard -- that those be taken out.

I will focus on some specific things, because Mike did cover a lot of the broader issues.

Having the rule-making process we've done in 180 days, for a program that's going to revamp the whole site remediation process, is very troubling for us. Under the bill, it says that upon notice, they would have 180 days. There's nothing in there about public comments. So it doesn't

follow the Administrative Procedures Act as would currently be done. And we would ask that even if the Department doesn't take our comments into consideration, they be in there for the record.

I think Senator Bateman mentioned the timeframes being placed on the licensed site professionals. We too would like to see some timeframes be placed on the Department. They can be extended or what have you, but there does need to be a limited duration, especially given that in Tier 1, one of the criteria to be in Tier 1 is to have -- if you haven't finished the remedial investigation of the entire site within 10 years, then you get swept into Tier 1. And that would be -- create a much more difficult process for the responsible parties. So as such, we would ask for those timeframes to be established.

I know that Tony Russo, for SRIN, is going to talk about the surcharges, so I won't go into that other than to say we do have some concerns about both surcharges, the 5 percent and the 1 percent.

With that, we do look forward to working with you in the Summer. And if there's any information we could provide, we'd be more than happy to do so.

SENATOR SMITH: Thank you, both.

MR. BROGAN: Thank you.

SENATOR SMITH: Tony Russo, Site Remediation Industry Network, opposed.

T O N Y R U S S O: Good afternoon, Mr. Chairman, members of the Committee.

Thanks for the opportunity to present our views on S-1897.

I represent a group called the Site Remediation Industry Network, which is about 20 companies that deal with nothing but site remediation issues. They're site remediation professionals.

As I testified previously, the SRIN group, as it's called, has been involved with the stakeholder process since the beginning. And we were very excited to be part of a process that would bring about reform to really accelerate the cleanups in New Jersey, which would put sites back into good use and protect the public and the environment.

Before I get into the specific concerns of the bill, I just want to commend Irene, and her staff, and the Commissioner for undertaking this initiative, because I know it's not easy. It's a very complicated program, and we look forward to supporting the Department in this effort.

I'll start with the 5 percent tax that Dave and Mike mentioned. And the reason why this is not good is-- First of all, it has nothing to do with accelerating cleanups in New Jersey. When a responsible party chooses a restricted remedy, it's an industrial site and, more than likely, will remain an industrial site. So therefore, they clean up to restricted standards. Right off the bat, this bill would mandate that a 5 percent tax be set aside for that cost of the remedy. And the interesting thing here is, the language in the bill takes the responsible party out of the decision making as far as that cost remedy. If you look at the way the Tier structure is put together, Tier 1 -- it's definitely the DEP that decides the cost of that remedy. Tiers 2 and 3, it's the LSP that decides the cost of that remedy. I'm not sure how the responsible party would factor into that.

The other concern we have with the remediation funding source is -- and there's really no basis here, but the Department wants to remove or

limit the self-guarantee to \$1 million. A lot of the companies that I represent are obviously Fortune 500 companies. Self-guarantee -- a remediation makes sense for multiple reasons. If you think about the fact that now you're going to eliminate that, they have to go out and purchase an insurance policy or a line of credit. You've just added another cost onto a very expensive process.

In addition, that 1 percent per year-- I heard back from a couple of our companies. It would be -- just their companies alone would be an extra million dollars a year -- just that 1 percent surcharge.

And with all due respect to the goals of what the money would be used for, I've pointed out in prior testimony at the DEP that there are pots of money. The Hazardous Discharge Site Remediation Fund has about \$80 million to \$90 million in there that municipalities could tap into if they have concerns with a piece of property. The Corporate Business Tax that a lot of our companies pay is set aside for underground storage tank purposes. Again, it's a pot of money that they could use in addition to all of the NRD settlements out there -- which I believe some of the money that is paid on an NRD settlement goes into that Hazardous Discharge Site Remediation Fund. So utilize that money first, appreciate the fact that these companies do pay taxes in New Jersey, and realize that self-guarantee is a good thing and not a bad thing. So hopefully that will be reinstated.

Just a couple of comments on the way that the DEP is going to rank and tier their sites. Again, if you look at the spirit of the Massachusetts LSP, they basically transferred the decision making into the LSPs' hands. And he or she will make that decision, render an opinion, and

close out that case. And the DEP up there is basically relegated to an audited program.

The way it's structured right here, I believe most of the sites -- industrial sites -- would be in the top three tiers. And Tier 1 and Tier 2 have significant oversight. Tier 3 you would have oversight for a (indiscernible) document. I'm not sure what that means. But unless you change the fact that the DEP has to now weigh in on every report, you're really not going to advance the ball down the field.

More importantly, the licensed site professional has to abide by the current technical requirements or the tech regs, and have to meet the current standards. And as I mentioned, again previously, chasing every molecule when you're doing an investigation at a site or you clean up a site -- really, you're never going to cross the finish line. And I think that's apparent with the 20,000 case backlog. So you've got to look at the standards, you've got to look at the process. And if you just deputize LSPs to now do the work without changing the process, I'm afraid we're going to be back here a year from now talking about the same thing.

And in closing, there are a couple of other issues, as far as the penalties. I know Dave mentioned it. The fact that with the mandatory timeframes -- I just want to echo the Committee members by saying that if we're going to have timeframes on LSPs to submit documents, there should be timeframes for when the DEP has to review these approvals and also issue the NFAs.

With that, thank you.

SENATOR SMITH: Any questions for Mr. Russo? (no response)

Thank you.

Stefanie Loh and Andy Robins, from the New Jersey Builders Association.

STEFANIE LOH: Good afternoon.

My name is Stefanie Loh. I'm Director of Government Affairs for the New Jersey Builders Association.

With me today is Andy Robins, who is shareholder at the firm Giordano, Halleran & Ciesla, and NJBA's Environmental Counsel.

I'd like to defer to Andy, if it's all right with you, Mr. Chairman, to present our initial assessment on the bill.

ANDREW B. ROBINS, ESQ.: Good afternoon.

I want to commend this Committee for having this hearing to start the process going. I also want to commend the Department for the effort that has been put in to getting us to this point.

I'm not going to go over every aspect of our positions. I'll refer to our prior testimony given last April before the Joint Committee, where we touched upon the LSP program -- the comments we've offered in the stakeholder process.

Our members are in a somewhat unique position in this process. They possess an incredibly large wealth of experience and knowledge in this process, because they not only remediate, in some instances, in other instances they're relying on other parties who have remediated. They look at the process as far as someone who has to go through the process to get a site cleared, and also as someone who is relying on whether someone else did the job that they were supposed to do.

What we do know is that this is a program that we all should want to work. Our clients, the NJBA members, are increasingly becoming the driving force for getting remediation done in this state. As the amount of available land to develop is restricted, brownfields sites are becoming the target. And it's our clients who are bringing the capital to the process that's been lacking.

This concept that's being floated is a substantial change. My experience goes back to the interim ECRA rules, before ECRA became ISRA, and then ISRA to brownfields. I've seen the process advance by small steps, and often two steps forward, two or three steps back. The process has moved on, but the sites still don't move. There needs to be a change in the approach. And a lot of what the Department has outlined in this bill is that change in approach.

It's not outsourcing. It's taking the most responsible, most professional people we have out there and putting them on the line to make sure the work is done correctly, with Department oversight. It is a dramatic change, but it needs to be done. Because the program as it is now just does not work. And New Jersey is missing out. New Jersey is missing out on the capital investment that's occurring elsewhere in the country and certainly elsewhere in the world, where people are putting money into sites so that they can be returned back to use. And that's not happening in this state, and it's not going to happen unless we have a substantial change in process.

This bill goes a good part of the way, not enough of the way. There are a number of aspects that need to be provided greater guidance from the Legislature to the Department.

The Department needs to be able to have defined, at least in criteria -- not in detail, but in criteria -- what an LSP can rely upon. For example, in the interim phase, where there are existing cases that are going to be switched over to LSPs, the LSP should not have to redo every aspect of work that has already been approved by the Department. The LSP should be able to rely on approvals and NFAs that have already been issued.

There has to be the ability of the LSP to rely on certain sets of information. If the LSP is provided information by someone, by certification -- the property owner, the responsible party -- the LSP should be able to rely on that to a certain degree. And how that's done needs to be defined. We need to empower the LSPs at the same time we're vesting them with tremendous responsibility and putting their licenses on the line.

We need to attract the best LSPs. So the provisions for functioning have to make sense. The type of ideas that have been floated out, as far as restrictions on LSPs-- Some are of value. Our members who rely on cleanups want to make sure that the work is being done appropriately. But doing it to the point where the LSPs who are really of value -- the ones you want to have on these sites -- aren't available isn't going to move this ball forward.

There needs to be a much more defined set of circumstances where a case is taken out of Tier 3. As you've heard from others -- both from the environmental community and from the regulated community -- Tier 1 and Tier 2 aren't much of a difference in the way we do business today. There's an appropriate circumstance, one can see, for Tier 1 or Tier 2 cases, although that perhaps could be debated. But that's where the Department wants to go. It's understood.

But when cases go to Tier 1 and Tier 2 must be carefully defined. Otherwise, the Department is going to be under increasing pressure all the time to throw everything into Tier 2 or Tier 1. Everyone who has a NIMBY interest, a personal interest -- whatever the interest might be -- are going to want to push cases into Tier 1 and Tier 2. That's not changing the program. That's pretty much the same program we have now. And the Department has to be able to say, "No, these are the criteria for Tier 2. Here is the criteria for Tier 1." They're relatively narrow, they're focused and appropriate, but they need to be much more specifically defined.

There needs to be a lot more detail on criteria for presumptive remedies and for enhanced remedies. This is changing the one in 10 to the minus six and making it stricter. This is saying, "Notwithstanding the fact that you can prove that it's protective human health based on the 10 to the minus six standard today, we're going to make you do something more in certain circumstances." What type of circumstances and what the Department can require has to be somewhat prescribed. It has to be circumscribed in some way by the Legislature to say, "These are the factors we want to look into, because you're requiring the belt and braces approach." We're requiring you, even though an interim approach might be developed somewhere along the line as to, "This is what we'd like you to do," there needs to be specific criteria for the Department to use when they're saying to a regulated entity, "We don't necessarily care for this instance, whether it's protective of human health and the environment now. We're making you put in extra protections, because you're going to put in a school or residential. And we need you to go beyond that." Well, how far

beyond that needs to have some guidance from you, from the Legislature. There needs to be some stricture on there.

Throughout the stakeholder process, this has been one of my big points on behalf of -- I'm there representing the Builders Association. You can't give the Department the ability to pick a remedy after everything has been done. Because that destroys predictability, it destroys finality. No one is going to go into the process where they don't have an idea of what the remedy is going to be. If they're presumptive remedies, or if they're enhanced remedies that are defined -- but based on specific criteria -- that theoretically can work. But we need to see the detail.

I can't stress over and over again the need for a level of detail on this from the Legislature, not just the Department -- not just for the regulated community's sake, because as I said, we represent people who are doing work both as the regulated community cleaning up sites, but people relying on the cleanup, as well -- but to give the Department focus and protection from people using a NIMBY approach and saying, "I don't care if it's supposed to be in Tier 3, I'm going to use my whatever clout to put it into Tier 2 and Tier 1," because that's where the cases are going to end up. And then we'll be back where we are today. So there needs to be a lot more definition to the process.

But overall, we're optimistic, because we know we can't function today for the vast majority of the sites, and a change has to happen.

SENATOR SMITH: Thank you for your comments.

Bill Wolfe, from New Jersey PEER.

BILL WOLFE: Good afternoon.

Thanks for the opportunity to speak.

I'm Bill Wolfe. I'm the Director of New Jersey PEER. We represent the professionals and environmental agencies both at the Federal and State level.

Since history has come up, and we've talked about this 10-year cycle, I give you a little -- my view of history. I joined the Department in 1985, in the Corrective Action Program under the RCRA Federal Program, and worked on the Department's first attempts to implement the 1982 legislative amendments to the Spill Act that require the Department to establish a priority system. That was the first iteration of what is now called the *case management strategy*. I don't know what it's called now. But the point of the builders is that rational criteria and science-based criteria to establish rational risk-based priorities do not exist. And it really is a kind of structural flaw in the program.

But at any rate, the perspective on the licensed site professional program-- I have some conceptual problems with it because -- and I don't want to go into a lot of detail. But basically, the causes of the regulatory failure have not been diagnosed. And there is no showing that the establishment of a licensed site professional program, in the absence of that demonstration, is the appropriate policy response.

The Massachusetts program was developed in a period of a backlash against regulatory -- what was pejoratively called *regulatory command and control* in the early '90s. We've learned since that time -- policy makers throughout the world -- at the global level, the national level, and state level -- that we may have swung the pendulum a little too far in privatization and deregulation. And a licensed site professional program is a program whose

time has come and gone, in terms of privatization. And if you look at the statutory amendments, historically, in what you did in '93 in ISRA to ECRA -- ECRA to ISRA, and then later, in 1997, to the Brownfields Act, you see a trend that goes in the direction of giving more and more responsibility, and authority, and economic-based decision making to the private sector; and less and less power, and authority, and control by the Department of Environmental Protection. And that is the underlying logjam that has created the backlog.

No other environmental program in the Department is run this way. We don't do clean air or clean water this way. Nobody -- a permittee in any other program cannot negotiate with the Department and continually challenge the data requirements for sampling, for example -- six months, 12 months, 18 months of a debate over what parameters should be sampled, where, and how deep. That debate is the source of the problem. And what you're doing by delegating that problem to private entities who have a conflict of interest in protection of the environment and public health, as opposed to economic bottom line considerations, is you're just bypassing that fundamental debate and resolving it in the question of prioritizing economic development and economic activity over protection of environmental and public health.

You've got to frontally make that choice. And what you're creating here is what the policy once called a *partial privatization scheme*, where it's actually the worst of both worlds. And I agree with some of the comments of the BIA and the Builders -- is that you're retaining DEP jurisdiction to theoretically intervene in every step of the process. And yet at the same time you're giving the State's imprimatur to the financial

community -- that the remedy is appropriate and protective. And that's by keeping the NFA in the program. The Massachusetts program is very different. It has a private market-based -- they rely on purely a private representation. There is no state imprimatur. And that, as I understand the Department's testimony, is at the request of the financial community or the people that are putting up money and don't want liability for some of these concerns.

So anyway, I'd like to talk about some of the things in the bill that are good -- that are good ideas, that are unrelated pretty much to the licensed site professional program.

Section 21: whistle-blower protections for licensed site professionals. It's a wonderful idea. The basis for the protected activity is very good. And I would just recommend that those same protections be afforded to State DEP employees. I've long advocated whistle-blower protections for State employees. Why are we now creating them for private sector employees? Because the private sector employee would put his license on the line, whereas the DEP professional has to put their integrity on the line. So a DEP scientist has to put their own professional integrity on the line and get consistently overruled by political and economic criteria that are not science-based. Yet he can't complain along the lines that the licensed site professional could.

Section 27: unrestricted use presumptive remedy is good. I didn't see it, as Assistant Commissioner Kropp said, that three feet of soil would be adequate as a presumptive remedy for a nonrestricted use. I thought that was excavation, removal, or treatment, as the bill is drafted now.

Section 9: the ranking system. I explained there are some real flaws with that. You do need more detailed criteria as to what to base that system on. And there is no currently promulgated ranking criteria. As far as I'm aware, they have lapsed.

Section 10: The tiers include an amalgam of risk-based, economic-based, and I think backdoor politically based decision making. And you really need to clean that section up as to what characterizes the allocation of cases to the various tiers.

The term *significant detrimental impact* is used. That has no meaning, as far as I'm concerned, anywhere in regulation, in practice, or in law. I've never seen the word used, and it's highly significant the way it's used.

The brownfields development areas, the BDAs, they have no technical basis in land use or science. So I would really question the utilization of them as a criteria.

The term *Federal oversight* -- what type of Federal oversight? Is that RCRA Federal oversight, or is that CERCLA oversight? Any discharge of a hazardous substance is federally regulated under CERCLA, so it's very broad.

Again, the term *priority economic development* is used in that section. I don't know what that means. That, to me, means a phone call to the Governor's Office and over to the Commissioner's office. That's what a priority economic activity is to me.

Very quickly summarizing, I'll give you my talking points version of the review. I agree with the BIA's testimony. The emergency

rule-making procedure in the act is -- rules effective upon proposal does not allow for public comment in what will be a very important rule making--

And last, there's a series of additional issues that are outside the scope of this bill that need to be part of the reform effort. And before you put in place a licensed site professional program, you should have in place all the safeguards. You asked the phasing and timing question. The \$64,000 question -- answer to that was, "Well, we have to have in place the safeguards, in addition to changing the DEP culture to make this workable."

Thanks.

SENATOR SMITH: Bill, your understanding of the safeguards are the professional licensing boards, the review process, that kind of thing?

MR. WOLFE: Well, those would be more administrative things for the administration of the program. I'm thinking about standards, criteria, protections in place on the environmental and public health side. There's additional public participation that's not well defined. So I'm thinking about the structural elements that are going to protect the public interest -- to have those in place before you knowingly go into an arena where you know, in advance, that you're intentionally creating a program -- by giving people decision-making authority that have a known conflict of interest between their economic bottom line and the public interest.

SENATOR SMITH: Thank you.

Dave Pringle. (no response)

Dave, I guess, is not here.

UNIDENTIFIED SPEAKER FROM AUDIENCE: He said he'd be back later.

SENATOR SMITH: Well, we are going to continue this in the Fall, so Dave will certainly get an opportunity. And if it's something that we really need to get in quick, he can just send it to us in writing.

I have nobody else listed.

Let me thank everybody for participating today on 1897. There were a lot of good ideas discussed. We're going to take a look at them over the Summer. And in September, at our first meeting, we'll be talking about these issues in greater detail and maybe have some amendments for people to look at.

(MEETING CONCLUDED)

APPENDIX

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June 25, 2008

The Honorable Robert Smith, Chairman
Senate Environment Committee
216 Stelton Rd., Suite E-5
Piscataway, NJ 08854

RE: S-1897 (LSP Legislation)

Dear Chairman Smith:

These comments are being provided on behalf of the Fuel Merchants Association of New Jersey in follow up to the testimony presented before the Senate Environment Committee at its meeting June 16, 2008.

The Fuel Merchants Association of New Jersey (FMA) represents small businessmen and women who distribute heating oil, gasoline and diesel fuel in the state. Their members distribute heating oil to residential, commercial and industrial customers and distribute branded and unbranded gasoline and diesel fuel to service stations they own and to service stations they supply as well as to state and local governments and commercial fleets. FMA's members also install and service central heating and air conditioning equipment.

General Comments: FMA commends the Senate Environment Committee for its leadership and initiative in undertaking the complex issue of Site Remediation reform. S-1897 promises to be cornerstone legislation to this end, but is legislation that reads like regulation. It is understandable that the intent of the specificity of the legislation is to minimize the potential of interpretation when the NJDEP prepares companion regulation. However, mandating by statute items such as specific report submittals or specific insurance requirements which may seem appropriate today would require legislative amendment should need or process change in the future. There is general agreement that the current Site Remediation Program (SRP) is in need of reform, part of that reform should include change to the 'process'. The specificity of reporting enumerated for Tier 1 and Tier 2 sites memorializes the process through statute at a time when the

Department is evaluating the necessity of duplicative reporting requirements contained within the Tech Regs. It is important to construct the legislation such that the intent is not compromised through interpretive rulemaking, but we caution that excess specificity may mandate compliance with a 'process' which is admitted to be imperfect.

S-1897 is very prescriptive in its nature. This is particularly true with respect to the legislation as it addresses the responsibilities of the proposed LSP and of the responsible party (RP). Specific reports, timeframes, remedies and penalties are enumerated throughout the document as they relate to the aforementioned. Yet the legislation is often vague, if not silent, on the responsibilities, timeframes and performance criteria the Department must comply with. Specifically, items such as the timeframes for the review of submittals for all tiers, timeframes for the approvals of disbursements from the mandated remediation funding source (RFS) of cases affected, and the timeframes for issuance of NFAs are only a few examples. For Site Remediation reform to succeed, the Department must share in accountability. Effective site remediation reform must provide clarity of the Department's responsibility for timely and efficient management of the resolution of cases. The responsible party and the environmental consulting community are not solely liable for the current dysfunction of the program.

S-1897 imposes significant responsibility upon the Licensed Site Professional. However the governance of the program is left solely to the Department. The LSP is subject to strict professional standards, the potential of license revocation and significant penalty, yet no provision for a Board of Licensing is proposed. Creation of a Board of Licensing is paramount to the success and balance of the proposed program. It is understood that establishment of a Board may not be possible in the transition phase due to the timeline the Department wishes to pursue in implementing this program, but sufficient time is allotted for the adoption of the implementing regulation to support mandating creation of a Board of Licensing.

Regulated UST Comment, Subsurface Evaluator: The NJDEP has an established Subsurface Evaluator (SSE) program which has been a component of the UST regulation for the past sixteen years. The requirements of the regulation mandate the regulated UST owner or operator engage the services of an SSE for the performance of all remedial investigation and remedial action activities necessary when closure, upgrade or replacement of USTs is undertaken. Chapter 13 of NJAC 7:14B establishes the education, experience, continuing education and will soon establish the professional standards requirements for individuals to qualify and retain their SSE certification. Within the regulation, the requirements for firm certification and financial responsibility are also established. It should also be noted the regulated UST facilities are subject to a three year registration and fee requirement, are subject of a Department compliance and inspection program, are subject to strict construction and operating requirements, have been required to significantly upgrade the integrity of their facilities over the past two decades and are required to maintain pollution liability insurance.

Therefore it is appropriate Section 6 of the proposed LSP legislation sets forth the circumstances under which the existing certified SSE can perform remediation services at

regulated sites. Since these sites are purported to comprise the second largest category of cases currently docketed within the DEP's backlog, and since the experience with these cases is well documented, and since the complexity of the majority of these case is of a lesser nature, and since the program's regulated UST facilities are comprised primarily of small sites of which the UST represents the sole area of concern, providing these well-regulated owner/operators a level of oversight commensurate with the risk relieves this regulated community from undue burden and redundant compliance while continuing to be protective of human health and the environment.

The proposed legislation provides further protection addressing environmental and risk concerns by limiting the circumstances under which the SSE can provide services through identification of site conditions which could be indicative of more complex risk to human health and the environment resultant from the release of the products stored.

Employing the delineation of proposed Tiers at section ten, one would surmise the majority of these sites would appear to fall into a Tier 3 designation provided the RP was not deemed to be recalcitrant or non-responsive in their action to remediate the site, or the circumstances of the release identified the site as potentially more complex or environmentally sensitive.

Section 11 of the proposed legislation establishes the documents required for submission in relationship to the Tier designation and also specifies qualifications of the individual submitting the document. However, Section 11 (b) which is specific to document submission for Tier 3 sites fails to provide for the SSE to submit the documents relative to the activities they are specially authorized to perform under the provision of Section 6 of this proposed legislation. This is a significant oversight and requires modification which clearly identifies the SSE as permitted to submit reports and documents for the services they are authorized to perform at regulated UST sites.

Failure to do so subjects the already highly regulated RP of an UST facility to duplicative oversight requirements and burdens the RP with redundant costs.

Regulated UST Comment, Remediation Funding Source: Section 25 of the proposed legislation provides for the establishment of a Remediation Funding Source and for a vast majority of sites would require establishment of this source prior to the commencement of the Remedial Investigation. This poses a significant impediment as the Remedial Investigation typically identifies the scope and magnitude of the Remedial Action required. It is difficult, if not impossible, to ascertain the cost of the remediation project prior to the completion of the delineation of the impairment to the site. Further, establishment of a Remediation Funding Source is imposed upon the Tier 3 sites. The regulated UST facility is already required to provide \$1,000,000 financial responsibility assurance by N.J.S.A. 58:10A-25a.(8) as a condition of operating the facility. Establishment of a Remediation Funding Source should not be required for the regulated UST facility until such time as it can be reasonably ascertained completion of the remediation will exceed the limits of the financial responsibility mechanism in place for the facility.

Unregulated UST Comment: DEP Oversight: Another concern with the disconnect between the language contained within Section 10, Delineation of Tiers, and Section 11, Submittal of Documents concerns the unregulated UST owner. It has been estimated the majority of unregulated heating oil tank releases will be classified as Tier 4 with the criteria of exception clearly specified. While it is agreed the additional reporting is needed for sites which do not meet the criteria of Tier 4, the Department should shoulder the responsibility of the requisite oversight. Since only a small number of homeowner cases are expected to be disqualified from the Unregulated Heating Oil Tank Program (URHOT), and while these cases may pose an elevated concern as compared to the majority of homeowner cases, the complexity pales when compared to the majority of Site Remediation Cases. The certified SSE should be empowered to continue to direct the remediation activities. The Department should provide the oversight and the Department should not require the involvement of an LSP.

It is sufficiently difficult now for a homeowner to navigate environmental regulation. The Department has recognized this by imposing the requirement any services provided on the unregulated heating oil UST be performed by certified individuals with the Department providing oversight of these certified individuals for the benefit and the protection of the homeowner. Subjecting homeowners to the additional burden of selecting a second professional to shepherd their case subjects these uninitiated parties to demands beyond their understanding and to costs which are duplicative and unwarranted. Further, by the Department providing the additional oversight required, the Department is better afforded the capability to monitor the performance of those entrusted with the proper remediation of the homeowner sites.

Sincerely,



John F. Donohue
Managing Member

cc: Senate Environment Committee
Lisa Jackson, Commissioner, NJDEP
Irene Kropp, Assistant Commissioner, NJDEP



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Initial talking points on S1897 – Site Remediation Reforms

Senate Environment Committee

June 16, 2008

Bill Wolfe, Director

Public Employees for Environmental Responsibility

Licensed Site Professionals – partial privatization is worst of both market and regulatory worlds.

- The causes of regulatory failure have not been diagnosed, thus it does not follow that an LSP program is the appropriate reform approach. Burden is on proponents to make this demonstration.
- Program management, regulatory, enforcement, and statutory reforms are more appropriate.
- There are conflicts between incentives for RP's and LSP and the public interest
- There is no demonstration that the LSP program will resolve the regulatory failures or the conflicts between RP's and the public interest.
- DEP regulatory approval w/no control over substance provides state imprimatur

On the bill - Ideas we can support with amendments:

Section 21 – whistleblower protections –

- Basis for protected activity is sound
- recommend that these same protections be granted to DEP employees, not limited to LSP private sector entities.

Section 27 – unrestricted use RA presumptive remedy

- Need to define “expanded public participation” to include alternatives analysis and public notice, comment, hearings

- DEP needs authority to compel unrestricted use/treatment removal at existing sites based on risk

Section 9 – DEP ranking system

- Existing law not implemented – DEP has no HRS – it has lapsed
- Delays and compliance history are not risk criteria

Section 10

- Tiers are not risk based?
- Ten years (plus 2) for RI is far too long
- Put Grace Period timeframes into the bill and make them mandatory
- “significant detrimental impact” vague, at best
- BDA have no technical basis and should not be a consideration
- Federal oversight? RCRA? All NJ sites are subject to CERCLA jurisdiction
- What does “priority economic development” mean? Invites abuse.
- DEP has not issued enforcement actions so con-compliance can’t be demonstrated
- Decision rules, criteria, and standards for balancing risks and economics is unclear

Section 12

- DEP provided authority to select remedy for Tier 1 – risks? Other tiers?
- “public participation plan” must include alternatives analysis and public hearings

Section 15 –

- Code of Professional conduct should include restrictions on pay to play (see McGreevey Executive Order #134 (9/22/04))
- Non-disclosure and confidentiality is a bad idea (client driven) – undermines transparency and accountability
- Conflicts of interest can be resolved by/among LSP and clients and private sector – need public disclosure

Section 19 – mandatory timeframes

- DEP may grant extensions – bad idea
- DEP may allow site specific timeframes – bad idea

Sections we oppose:

Section 1 –

- IEC too narrow – confirmed VI – Section 6 criteria (100 feet of wells, property boundary)
-

Section 4 –

- Emergency Rules prohibit public participation in program design

Outstanding issues that must be included in reform package

- Ecological Standards NJSA 58:13B-12a. – 15 years is enough delay – Environmental Advisory Task Force has not been appointed
- Impact to groundwater standards
- Alternate Remedial Standards – site specific loopholes
- On scene presence to monitor active phase of cleanup
- Management scheme for contaminated soils and cleanup/demolition debris
- Spill Act surcharges – funding
- Application to Existing sites – housing, schools – vapor intrusion, indoor standards – P.L. 2007, c.1 not working
- Timing – regulatory safeguards must be in place before LSP program is implemented