# 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:** February 2, 2009
10:00 a.m.

**MEMBERS OF COMMITTEE PRESENT:**

Senator Bob Smith, Chair
Senator Jeff Van Drew, Vice Chair
Senator James Beach
Senator Robert M. Gordon
Senator Christopher "Kip" Bateman
Senator Andrew R. Ciesla

**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***
**The Office of Legislative Services, Public Information Office,**
**Hearing Unit, State House Annex, PO 068, Trenton, New Jersey**

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# New Jersey State Legislature

## SENATE ENVIRONMENT COMMITTEE

STATE HOUSE ANNEX
PO BOX 068
TRENTON NJ 08625-0068

## COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE ENVIRONMENT COMMITTEE

FROM: SENATOR BOB SMITH, CHAIRMAN

SUBJECT: **COMMITTEE MEETING - FEBRUARY 2, 2009**

*The public may address comments and questions to Judith L. Horowitz or Algis P. Matioska, Committee Aides, or make bill status and scheduling inquiries to Daria H. Deakins, Secretary, at (609)292-7676, fax (609)292-0561, or e-mail: OLSAideSEN@njleg.org. Written and electronic comments, questions and testimony submitted to the committee by the public, as well as recordings and transcripts, if any, of oral testimony, are government records and will be available to the public upon request.*

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**The Senate Environment Committee will meet on Monday, February 2, 2009 at 10:00 AM in Committee Room 10, 3rd Floor, State House Annex, Trenton, New Jersey.**

**Mark Mauriello, the Acting Commissioner of the Department of Environmental Protection, has been invited to address the committee and discuss the State's environmental priorities for 2009.**

The following bill will be considered:

| | |
|---|---|
| S-2475<br>Smith, B/Buono | Makes several changes to the Environmental Infrastructure Financing Program. |

FOR DISCUSSION ONLY:

| | |
|---|---|
| S-1897<br>Smith, B | Establishes licensed site professional program for site remediation and makes various changes to site remediation laws. |

The public may request copies of a proposed committee substitute for Senate Bill No. 1897 from the committee aides.

Issued 1/26/2009

For reasonable accommodation of a disability call the telephone number or fax number above, or TTY for persons with hearing loss (609)777-2744/toll free in NJ (800)257-7490. The provision of assistive listening devices requires 24 hours' notice. Real time reporter or sign language interpretation requires 5 days' notice.

For changes in schedule due to snow or other emergencies, call 800-792-8630 (toll-free in NJ) or 609-292-4840.

# SENATE, No. 1897

# STATE OF NEW JERSEY

## 213th LEGISLATURE

INTRODUCED JUNE 5, 2008

**Sponsored by:**
**Senator BOB SMITH**
**District 17 (Middlesex and Somerset)**

**Co-Sponsored by:**
**Senators Weinberg and Oroho**

**SYNOPSIS**

Establishes licensed site professional program for site remediation and makes various changes to site remediation laws.

**CURRENT VERSION OF TEXT**

As introduced.

**(Sponsorship Updated As Of: 11/25/2008)**

**AN ACT** concerning site remediation, and amending and supplementing various parts of the statutory law.

**BE IT ENACTED** *by the Senate and General Assembly of the State of New Jersey:*

1. (New section) As used in sections 1 through 22 of this act:

"Business firm" means any corporation, association, firm, partnership, sole proprietorship, trust or other form of commercial organization.

"Certified subsurface evaluator" means a person certified to perform services at the site of an underground storage tank or an unregulated heating oil tank pursuant to P.L.1991, c.123 (C.58:10A-24.1 et seq.) as a subsurface evaluator.

"Environmental crime" means any criminal violation of one of the following State laws: R.S.12:5-1 et seq.; P.L.1975, c.232 (C.13:1D-29 et al.); the "Solid Waste Management Act," P.L.1970, c.39 (C.13:1E-1 et seq.); section 17 of P.L.1975, c.326 (C.13:1E-26); the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et al.); P.L.1989, c.151 (C.13:1E-99.21a et al.); the "New Jersey Statewide Mandatory Source Separation and Recycling Act," P.L.1987, c.102 (C.13:1E-99.11 et al.); the "Pesticide Control Act of 1971," P.L.1971, c.176 (C.13:1F-1 et seq.); the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.); the "Toxic Catastrophe Prevention Act," P.L.1985, c.403 (C.13:1K-19 et seq.); "The Wetlands Act of 1970," P.L.1970, c.272 (C.13:9A-1 et seq.); the "Freshwater Wetlands Protection Act," P.L.1987, c.156 (C.13:9B-1 et al.); the "Coastal Area Facility Review Act," P.L.1973, c.185 (C.13:19-1 et seq.); the "Air Pollution Control Act (1954)," P.L.1954, c.212 (C.26:2C-1 et seq.); the "Water Supply Management Act," P.L.1981, c.262 (C.58:1A-1 et al.); P.L.1947, c.377 (C.58:4A-5 et seq.); the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.); P.L.1986, c.102 (C.58:10A-21 et seq.); the "Safe Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et al.); the "Flood Hazard Area Control Act," P.L.1962, c.19 (C.58:16A-50 et seq.).

"Immediate environmental concern" means a condition at a contaminated site where: there is confirmed contamination at levels at or above the ground water remediation standards adopted by the department from a discharge of a hazardous substance in wells used for potable purposes; subsurface contaminants from a discharge are confirmed to have migrated into an occupied or confined space producing a toxic or harmful atmosphere resulting in an unacceptable human health exposure, or producing an oxygen-deficient atmosphere, or resulting in demonstrated physical damage

**EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

to essential underground services; or a condition where there is analytical data that documents that either dermal contact or ingestion of a contaminated material could result in an acute human health impact.

"Local government unit" means a county, municipality, or other political subdivision of the State, or any agency, authority, or other entity thereof.

"Person" means any individual or business firm.

2. (New section) a. The Department of Environmental Protection shall establish a licensing program for site remediation professionals. The department shall establish licensing requirements for site remediation professionals and shall oversee their licensing and performance.

b. The department shall establish standards for education, training and experience that shall be required of any person who applies for a license or a license renewal. The department shall conduct examinations to certify that an applicant possesses sufficient knowledge of the State regulations, standards and requirements applicable to site remediation and the applicant is qualified to obtain a license or a license renewal.

The department shall also adopt standards for the professional conduct for licensed site remediation professionals. The department shall require an applicant to submit references to assure that the applicant meets the standards established for professional conduct by licensed site remediation professionals.

c. Application for a license shall be made in a manner and on such forms as may be prescribed by the department. The filing of an application shall be accompanied by an application fee that shall cover the costs of processing the application and developing and conducting the examinations. The department may also charge an annual license fee that shall cover the costs of the licensing program.

d. An applicant for a site remediation professional license shall demonstrate to the department that the applicant:

(1) holds a bachelor's degree or higher in natural, chemical or physical science, or an engineering degree, from an accredited institution of higher learning;

(2) has 10 years of continuous full time employment in the field of contaminated site remediation during which the applicant has been responsible for managing the remediation of the sites on which the applicant has worked;

(3) has a minimum of 5,000 hours of experience over the five years immediately prior to the submission of the application, of work on contaminated sites within the State;

(4) has attended and completed the minimum environmental health and safety education and training no more than 12 months

prior to the submission of an application for a license pursuant to this section;

(5) has attended and completed the course approved by the department on the State's regulations concerning the technical requirements for site remediation no more than 12 months prior to the submission of the application;

(6) the applicant has financial responsibility assurance as provided in subsection e. of this section;

(7) the applicant has not been indicted for, convicted of, or plead guilty to, an environmental crime or any similar or related criminal offense under federal or state law; and

(8) has not had a state license revoked by any state licensing board or any other licensing agency within the previous 10 years.

e. As a condition for the issuance of a license or license renewal of a site remediation professional, a licensee shall be required to provide the department with evidence of financial responsibility for the performance of services provided pursuant to P.L.1993, c.139 (C.58:10B-1 et seq.). Financial responsibility shall be in an amount to be determined by the department but in no case less than:

(1) for bodily injury - $2,000,000 per occurrence and $5,000,000 aggregate;

(2) for property damage - $2,000,000 per occurrence and $5,000,000 aggregate;

(3) for professional liability, errors and omissions - $2,000,000 per occurrence and $5,000,000 aggregate;

(4) for pollution or property damage - $5,000,000.

The licensee shall promptly notify the department of any cancellation or change in coverage. A failure to so notify the department may be grounds for a license suspension or revocation. Financial responsibility in the amount and form required by the department shall be maintained for the term of the license.

f. No person may obtain a license unless that person satisfactorily completes the examination and meets the standards established for training, experience, and education required in subsection b. of this section, provides evidence of financial responsibility as required pursuant to subsection e. of this section, meets standards for professional conduct established pursuant to subsection b. of this section, and satisfies any other requirements established by the department to assure that licensed site remediation professionals meet the requirements established pursuant to this section, and are in compliance routinely and on a continuing basis with all standards and requirements applicable to site remediation professionals.

g. In order to maintain a license issued pursuant to P.L. , c. (C. ) (pending before the Legislature as this bill), every licensed site professional shall meet the continuing education requirements as established by the department.

3. (New section) a. Each license issued pursuant to section 2 of P.L. , c. (C. ) (pending before the Legislature as this bill) shall be issued to an individual, shall be valid only for the individual to whom it is issued and shall not be transferable. Each license issued pursuant to section 2 of P.L. , c. (C. ) shall be valid for a period not to exceed three years, unless a shorter period is specified therein, or unless suspended or revoked.

b. A licensed site professional shall submit an application for a license renewal no more than 90 days prior to the expiration of the license. The department shall establish standards for the renewal of the site remediation professional license and may require training or continuing education, experience or other requirements as a condition for the renewal of a license. The department shall also establish standards and requirements for the renewal of a site remediation professional license after a site remediation professional's license has been suspended or revoked. The filing of an application for a license renewal shall be accompanied by a nonrecoverable application fee.

4. (New section) Notwithstanding the provisions of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.) to the contrary, the department shall adopt, after notice, interim rules and regulations establishing a program for the licensing of site remediation professionals pursuant to the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill), and establishing oversight requirements and mandatory timeframes as provided in sections 18 and 19 of P.L. , c. (C. ) (pending before the Legislature as this bill), a no more than 180 days after the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill). The rules and regulations shall be effective as regulations immediately upon filing with the Office of Administrative Law and shall be effective for a period not to exceed two years, and may, thereafter, be amended, adopted or readopted by the department in accordance with the provisions of the "Administrative Procedure Act."

5. (New section) a. The Department of Environmental Protection shall issue a temporary site remediation professional license. A person who meets the requirements set forth in this section to the satisfaction of the department shall be issued a temporary license. All applications for a temporary site remediation professional license, together with any applicable fees, shall be submitted to the department no later than three months after the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill).

b. An applicant for a temporary site remediation professional license shall demonstrate to the department that the applicant:

(1) holds a bachelor's degree or higher in natural, chemical or physical science, or an engineering degree, from an accredited institution of higher learning;

(2) has 10 years of continuous full time employment in the field of contaminated site remediation during which the person has been responsible for managing the remediation of the sites on which the applicant has worked;

(3) has a minimum of 5,000 hours of experience over the past five years of work on contaminated sites within the State;

(4) possesses at least one of the following certifications:

(a) Certified Hazardous Materials Manager from the Institute of Hazardous Material Management;

(b) Certified Ground Water Professional from the National Ground Water Association;

(c) Licensed Professional Engineer from the National Council Of Examiners For Engineers;

(d) Licensed Professional Geologist from any state's professional geologist licensing board;

(e) Certified Environmental Professional from the Academy of Board Certified Environmental Professionals;

(f) Qualified Environmental Professional from the Institute of Professional Environmental Practice;

(g) state license to perform remediation work from a licensing program determined by the department to be comparable to the licensing program established pursuant to P.L. , c. (C. ) (pending before the Legislature as this bill);

(5) has attended and completed the minimum environmental health and safety education and training no more than 12 months prior to the submission of an application for a temporary license pursuant to this section;

(6) has attended and completed the course approved by the department on the State's regulations concerning the technical requirements for site remediation no more than three years prior to the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill);

(7) the applicant has financial responsibility assurance as provided in subsection d. of this section;

(8) the applicant has not been indicted for, convicted of, or plead guilty to, an environmental crime or any similar or related criminal offense under federal or state law; and

(9) has not had a state license or any other certification required pursuant to paragraph (4) of this subsection revoked by any state licensing board or any other licensing agency within the previous 10 years.

c. Any certification or license required pursuant to paragraph (4) of subsection b. of this section shall be maintained in good standing. The loss or lapse of a certification or license provided in

order to qualify for a temporary license pursuant to this section shall be grounds for immediate loss of the temporary license.

d. (1) An applicant shall provide with their temporary license application, a list of site remediation projects on which the applicant worked as the manager of the site within the last 10 years that meets the requirement set forth in paragraph (2) of subsection b. of this section. The list shall include name and address of the site, the identifying numbers for the sites, the applicant's dates of participation, and the state or federal environmental agency under whose oversight the projects were conducted. For each referenced project, an applicant shall provide a brief description of the specific activities the applicant performed with respect to the project.

(2) An applicant shall provide with their temporary license application, a list of site remediation projects conducted under the oversight of the department on which the applicant worked within the State during the five years prior to the application date. For each referenced project, the applicant must provide a brief description of the specific activities the applicant performed with respect to the remediation and the rules that were applicable to the site. The remediation work performed as required pursuant to paragraph (3) of subsection b. of this section shall demonstrate the applicant's knowledge of, and application of, all applicable rules and regulations regarding site remediation.

(3) As a condition for the issuance of a temporary license pursuant to this section, an applicant shall provide the department with evidence of financial responsibility for the performance of services provided pursuant to P.L.1993, c.139 (C.58:10B-1 et seq.). Financial responsibility shall be in an amount to be determined by the department but in no case less than:

(a) for bodily injury - $2,000,000 per occurrence and $5,000,000 aggregate;

(b) for property damage - $2,000,000 per occurrence and $5,000,000 aggregate;

(c) for professional liability, errors and omissions - $2,000,000 per occurrence and $5,000,000 aggregate;

(d) for pollution or property damage - $5,000,000.

An applicant employed by a local government unit or by the federal government shall not be required to maintain financial responsibility assurance as provided in this section. Any applicant so employed shall not be authorized to perform licensed site professional work for any person other than their government employer.

The licensee shall promptly notify the department of any cancellation or change in coverage. A failure to so notify the department may be grounds for a license suspension or revocation. Financial responsibility in the amount and form required by the department shall be maintained for the term of the license.

e. A temporary site remediation professional license issued pursuant to this section shall expire 180 days after the adoption of interim rules pursuant to section 4 of P.L. , c. (C. ) (pending before the Legislature as this bill) establishing the licensing requirements for site remediation professionals.

6. (New section) Any person certified to perform services at the site of an underground storage tank or an unregulated heating oil tank pursuant to P.L.1991, c.123 (C.58:10A-24.1 et seq.) as a subsurface evaluator may perform site remediation services at underground storage tank sites or unregulated heating oil tank sites except under the following conditions:

a. the conditions at the site pose an immediate environmental concern;

b. Contaminated groundwater exists within 100 feet of a potable well, whether the well is located on the property of beyond the property boundaries of the site;

c. Groundwater contamination has migrated beyond the property boundaries of the site;

d. A vapor intrusion investigation is required pursuant to the technical rules for site remediation;

e. Contamination from the site impacts any surface water body or wetlands; or

f. The person responsible for conducting the remediation is implementing a restricted use remedial action or a limited restricted use remedial action at the site.

7. (New section) a. No more than 90 days after the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill), any submissions concerning the remediation of a contaminated site shall be signed and certified by a licensed site professional, or by a subsurface evaluator as provided in subsection d. of section 11 of P.L. , c. (C. ) (pending before the Legislature as this bill).

b. A licensed site professional or a subsurface evaluator, as appropriate, that signs and certifies submissions to the department concerning the remediation of a contaminated site shall certify that the work was performed, that the licensed site professional, or the subsurface evaluator, as appropriate, managed, supervised, or performed the work that is the basis of the submission, and that the work and the submission conform to the technical requirements for site remediation adopted by the department.

8. (New section) a. The Department of Environmental Protection shall issue a certification of authorization to a business firm that shall authorize the business firm to provide services for the remediation of contaminated sites.

b. A business firm may file an application with the department, on forms designated by the department for a certification of

authorization for the business firm. The business firm shall provide the following information on its application and any renewal thereof:

(1) the name and address of the business firm and its satellite offices;

(2) the name, home address, and signature of all officers, corporate board members, directors, and principals and any licensed site professionals who are responsible for the provision of licensed site professional services through the business firm;

(3) any other information as may be required by the department to ensure compliance with P.L. , c. (C. ) (pending before the Legislature as this bill).

The department may charge a fee for the issuance or renewal of a certification of authorization to a business firm pursuant to this section.

c. No business firm shall offer to provide licensed site professional services in the State unless the department has issued a certification of authorization to the business firm pursuant to this section.

d. The certificate of authorization shall designate one or more State licensed site professionals. The licensed site professional shall be responsible for the provision of site remediation services and the submission of documents to the department. All final documents concerning the remediation of a contaminated site, when submitted to the department by the business firm or filed for public record, shall be signed and sealed by the State licensed site professional who is responsible for the remediation.

e. Any change to the information submitted to the department pursuant to subsection b. of this section shall be reported to the department no more than 30 days after the change.

f. The business firm shall notify the department upon a change at a business firm of the licensed site professional designated on the certificate of authorization. If a licensed site professional who is designated by the business firm on the certificate of authorization, leaves the business firm, fails to renew his license, or has his license suspended or revoked, the business firm shall not continue to provide licensed site professional services until it has notified the department of the licensed site professional responsible for site remediation at the business firm.

9. (New section) The Department of Environmental Protection shall establish a ranking system for all contaminated sites. Contaminated sites shall be ranked in one of four tiers. The department shall use the following criteria for the classification of sites:

a. the potential impact posed to the public health and the environment as determined by the department using its relative ranking system, including any receptor evaluation;

b. the length of time the site has been undergoing remediation without completing a remedial investigation;

c. the compliance history of the person responsible for conducting the remediation; and

d. any other data deemed necessary by the department to distinguish the tier classification based on impact to public health, safety and the environment.

10. (New section) a. The department shall classify a site as a tier 1 site if it meets the following criteria:

(1) the person responsible for conducting the remediation has a history of non-compliance with environmental statutes and regulations as evidenced by the receipt of multiple formal enforcement actions issued by the department over a four year period;

(2) the person responsible for conducting the remediation has repeatedly failed to meet the remediation timeframes established by the department by rule or regulation or pursuant to an administrative or court order; and

(3) the person responsible for conducting the remediation has failed to complete a remedial investigation of the entire site at least 10 years or more after discovery of the discharge and has failed to complete a remedial investigation for the entire site to the department's satisfaction two years after the effective date of P.L. , c. (C ) (pending before the Legislature as this bill).

b. The department shall classify a site as a tier 2 site if it meets the following criteria:

(1) the site poses a significant detrimental impact on public health, safety and the environment as determined by a receptor evaluation;

(2) the site is within a brownfield development area or other economic development priority area;

(3) the site affects a licensed childcare facility, school or other sensitive population;

(4) the site remediation is subject to federal oversight; or

(5) the site is in an environmentally sensitive area, or is a high priority for economic development purposes.

c. The department shall classify a site as a tier 3 site if the site does not meet the criteria established for classification as a tier 1, 2 or tier 4 site.

d. The department shall classify a site as a tier 4 site if it meets the following criteria:

(1) the site involves the remediation of a leak from an unregulated heating oil tank; and

(2) the remediation does not pose an immediate environmental concern, ground water contamination is not within 100 feet of a potable well, ground water contamination has not migrated beyond the property boundaries of the property on which the discharge

occurred, or the site has not posed a vapor intrusion concern inside a building.

e. The department, in its sole discretion, may change a site's tier classification based the compliance history of the person responsible for conducting the remediation of a contaminated site, or on new information received from the certified subsurface evaluator or licensed site professional on behalf of the person responsible for conducting the remediation, or on information from any other source.

11. (New section) a. Except as provided in subsection d. of this section, all documents concerning the remediation of a site classified as a tier 1 or a tier 2 site, shall be submitted, signed, and certified by a licensed site professional. The licensed site professional shall submit a preliminary assessment, a site investigation report, a receptor evaluation, a remedial investigation workplan, a remedial investigation report, a remedial action workplan, a remedial action report and progress reports, including any changes or additions made to the reports or other documents. The department may require additional reports or data as appropriate. In addition, the person responsible for conducting the remediation and the licensed site professional shall submit any certifications required by the department.

b. Except as provided in subsection d. of this section, all documents concerning the remediation of a site classified as a tier 3 site shall be submitted by a licensed site professional. The licensed site professional shall submit any screening documents and certifications required by the department, a receptor evaluation, a remedial investigation report, a remedial action workplan, and a remedial action report including any changes or additions made to the reports or other documents. The department may require additional reports or data as appropriate.

c. Except as provided in subsection d. of this section, the documents required to be submitted for a site classified as a tier 4 site may be submitted by a licensed site professional or a certified subsurface evaluator. The licensed site professional or the subsurface evaluator shall submit any checklists and certifications required by the department and a remedial action report.

d. Any person responsible for conducting the remediation of a contaminated site who seeks a no further action letter based solely on the review of a preliminary assessment and site investigation that indicates that no contamination above an applicable standard exists on the site for which the person is seeking the no further action letter, may submit the preliminary assessment and site investigation report to the department.

12. (New section) a. For all sites classified as tier 1 sites:

(1) the department shall review and issue an approval or a denial of all documents submitted by the licensed site professional for the site;

(2) the department shall select the remedial action for the site;

(3) the person responsible for conducting the remediation shall establish a remediation funding source in the form of a remediation trust fund pursuant to subsection c. of section 25 of P.L.1993, c.139 (C.58:10B-3); and

(4) the department shall approve all disbursements of funds from the remediation trust fund prior to payment;

(5) the licensed site professional shall provide all submissions required by the department, to the department and the person responsible for conducting the remediation simultaneously;

(6) the person responsible for conducting the remediation shall implement a public participation plan, as required by the department, to receive public comment from the residents of the surrounding community concerning the remediation of the site.

b. For all sites classified as tier 2 sites, the department shall review and issue an approval or a denial of all documents submitted by the licensed site professional for the site.

c. For all sites classified as tier 3 sites, the department shall review screening documents and certifications submitted by a licensed site professional for the site.

d. For all sites classified as tier 4 sites, the department shall review required checklists and certifications.

13. (New section) a. The department shall audit the remediation of any site classified in tier 3 or tier 4 as follows:

(1) If the department's review of a screening document or checklist indicates the licensed site professional or certified subsurface evaluator conducting the remediation of the site did not comply with the technical requirements for site remediation, the department may conduct a review of any document submitted to the department or developed by the licensed site professional or certified subsurface evaluator;

(2) If the department's review conducted pursuant to paragraph (1) of this subsection indicates the data upon which the remedial investigation, remedial action workplan, or remedial action is based, raises concerns about the quality of the work conducted by the licensed site professional or certified subsurface evaluator, the department will conduct a field audit of the site and a more comprehensive review of submitted documents and site conditions;

(3) If the results of the department's field audit indicate that the licensed site professional or certified subsurface evaluator did not conduct the remediation in accordance with all applicable environmental statutes and regulations, the department shall notify the licensed site professional or certified subsurface evaluator in

writing, of any additional remediation activities the licensed site professional or certified subsurface evaluator shall conduct at the site and the deadlines by which the work must be conducted.

b. If the department issued a no further action letter to the person responsible for conducting the remediation based on the documents submitted or the field activities performed by the licensed site professional that the department found to be deficient, the department may revoke the no further action letter.

c. The department shall post the name and license number of all licensed site professionals receiving a notification of deficiencies pursuant to paragraph (3) of subsection a. of this section, on the department's official website.

14. (New section) a. A licensed site professional may be audited by the department at least once during the three-year licensing period.

b. Every licensed site professional shall cooperate with the department in the audit and provide any information requested by the department.

c. Every licensed site professional shall maintain all data, documents and information concerning remediation activities at each contaminated site the licensed site professional has worked on, including but not limited to, technical records and contractual documents, raw sampling and monitoring data, whether or not the data and information, including technical records and contractual documents, were developed by the licensed site professional. The licensed site professional may assert a privilege regarding the documents, but shall agree not to assert any confidentiality or privilege claims with respect to any data related to site conditions, sampling or monitoring.

d. The licensed site professional shall preserve for a minimum of 10 years after the date the department issues a no further action letter concerning a site at which the licensed site professional has conducted remediation, all data and information required to be maintained pursuant to this section in his possession or in the possession of the licensed site professional's divisions, employees, agents, accountants, contractors, or attorneys that relate in any way to the contamination at the site. After the expiration of the 10-year period, the licensed site professional may make a written request to the department to discard the documents. The request shall be accompanied by a description of the documents involved, including the name of each document, date, name and title of the sender and receiver and a statement of contents. Upon receipt of written approval by the department, the licensed site professional may discard only those documents that the department does not require to be preserved for a longer period. Upon receipt of a written request by the department, the licensed site professional shall agree to submit to the department all data and information required to be

maintained pursuant to this section. The licensed site professional may assert any privilege regarding the data or information, but shall agree not to assert any confidentiality or privilege claims with respect to any data related to site conditions, sampling, or monitoring.

e. The department may order a licensed site professional to correct any deficiencies, errors or omissions found as a result of the audit, including deficiencies found in complying with applicable laws, rules or regulations.

f. The department may revoke or suspend the license of a licensed site professional as a result of the audit pursuant to the provisions of sections 16 and 17 of P.L. , c. (C. ) (pending before the Legislature as this bill).

15. (New section) a. There is established a code of professional conduct which shall be binding on every licensed site professional and certified subsurface evaluator.

b. Each licensed site professional or certified subsurface evaluator is required to have knowledge of and familiarity with the provisions of the code of professional conduct set forth in this section, and shall have an understanding of these provisions.

c. Each licensed site professional or certified subsurface evaluator shall act with reasonable care and diligence, and shall apply the knowledge and skill ordinarily exercised by licensed site professionals or certified subsurface evaluators in good standing practicing in the State at the time the services are performed.

d. A licensed site professional or certified subsurface evaluator shall not provide professional services outside the areas of professional competency, when this competency is based on education, training, or experience, unless the licensed site professional or certified subsurface evaluator has relied upon the technical assistance of one or more professionals whom the licensed site professional or certified subsurface evaluator has reasonably determined are qualified in these areas by education, training or experience.

e. A licensed site professional or certified subsurface evaluator shall correct all deficiencies in a submitted document identified by a notice of deficiency issued by the department which shall be provided in the timeframes established for resubmittal.

f. A licensed site professional or certified subsurface evaluator may complete any phase of remediation based on remediation work performed under a previous licensed site professional or certified subsurface evaluator, and the workplan or report generated by the previous licensed site professional or certified subsurface evaluator may be relied upon as sufficient to protect public health, safety, welfare, or the environment, only if the successor licensed site professional or certified subsurface evaluator has: (1) reviewed all available documentation known to the successor licensed site

professional that describes previous discharges, remediation and results; (2) conducted a site visit to observe current conditions and to verify the status of as much of the work as is reasonably observable; and (3) concluded, in the exercise of independent professional judgment, that the successor licensed site professional or certified subsurface evaluator has sufficient information upon which to complete any additional phase of remediation and prepare workplans and reports related thereto.

g. A licensed site professional or certified subsurface evaluator who has taken over the responsibility for the remediation of a contaminated site from another licensed site professional pursuant to subsection f. of this section shall correct all deficiencies in a document submitted by the previous licensed site professional or certified subsurface evaluator identified by a notice of deficiency issued by the department which shall be provided in the timeframes established for resubmittal.

h. A licensed site professional or certified subsurface evaluator shall hold paramount the protection of the public health, safety and the environment in the performance of professional services.

i. A licensed site professional or certified subsurface evaluator shall sign a workplan, report or any other required submittal only when the licensed site professional or certified subsurface evaluator has managed, supervised or actually performed the work that is the basis of the submittal, or has periodically reviewed and evaluated the performance by others of the assessment.

j. In providing professional services, a licensed site professional or certified subsurface evaluator shall: (1) exercise independent professional judgment; (2) adhere to the requirements and procedures set forth in the applicable provisions of P.L. , c. (C. ) (pending before the Legislature as this bill); (3) make a good faith and reasonable effort to identify and obtain the relevant and material facts, data, reports and other information evidencing conditions at a site that the client of the licensed site professional or certified subsurface evaluator possesses or that is otherwise readily available, and identify and obtain whatever additional data and other information as the licensed site professional or certified subsurface evaluator deems necessary to discharge the professional obligations under the provisions of P.L.2005, c.365 (C.58:10B-23.1 et seq.); and (4) disclose and explain in any workplan, report or other required document the material facts, data, other information, and qualifications and limitations known by the licensed site professional or certified subsurface evaluator which may tend to support or lead to a workplan, report or required document contrary to, or significantly different from, the workplan, report or required document completed by the licensed site professional.

k. If a licensed site professional or certified subsurface evaluator identifies a discharge or threat of discharge that in the independent professional judgment of that person meets the

definition of an immediate environmental concern at a particular site at which the person is working as a licensed site professional or certified subsurface evaluator, then the licensed site professional or certified subsurface evaluator shall: (1) immediately verbally advise the client of the need to notify the department of the discharge or potential discharge; and (2) immediately notify the department of the discharge or threat of discharge by calling the department's telephone hotline.

l. If a licensed site professional or certified subsurface evaluator obtains knowledge of a condition that in the independent professional judgment of that person requires notification to the department, then the licensed site professional or certified subsurface evaluator shall promptly notify the client of the existence of the condition and thereupon notify the department pursuant to subsection k. of this section.

m. If a licensed site professional or certified subsurface evaluator has knowledge of an action taken or a decision made by that person's client with respect to a particular aspect of the work of the licensed site professional or certified subsurface evaluator that significantly deviates from any scope of workplan or report the licensed site professional or certified subsurface evaluator has developed to meet the requirements of P.L.2005, c.365 (C.58:10B-23.1 et seq.) or any rules or regulations adopted pursuant thereto, or an order of the department, the licensed site professional or certified subsurface evaluator shall promptly notify the client in writing of the deviation.

n. A licensed site professional or certified subsurface evaluator shall not reveal facts, data or information obtained in a professional capacity without the prior consent of the client, except as may be authorized or required by law, if the facts, data or information are claimed to be confidential by the client in a written communication to the licensed site professional or certified subsurface evaluator, and these facts, data or information are not in the public domain.

o. If subsequent to the date a licensed site professional or certified subsurface evaluator completes a report concerning a phase of remediation that person learns that material facts, data or other information existed at the time the phase of remediation was conducted which may tend to support or lead to a workplan or report contrary to, or significantly different from, the one completed, the licensed site professional or certified subsurface evaluator shall promptly notify the client in writing of these circumstances.

p. If subsequent to the date a successor licensed site professional or certified subsurface evaluator is engaged that person learns of material facts, data or other information which existed at the date of completion of a phase of remediation by a predecessor licensed site professional or certified subsurface evaluator that was not disclosed in that phase of remediation workplan or report, the

successor licensed site professional or certified subsurface evaluator shall promptly notify the client in writing of these circumstances.

q. A licensed site professional or certified subsurface evaluator shall not allow the use of that person's name by, or associate in a business venture with, any person that the licensed site professional or certified subsurface evaluator knows or should know is engaging in fraudulent or dishonest business or professional practices relating to the professional responsibilities of a licensed site professional.

r. Every licensed site professional or certified subsurface evaluator shall cooperate fully in the conduct of investigations by the department by promptly furnishing, in response to formal requests, orders or subpoenas, whatever information the department, or persons duly authorized by the department, deems necessary to perform its duties. In any investigation by the department of applications or disciplinary complaints, a licensed site professional shall not: (1) knowingly make a false statement of material fact; (2) fail to disclose a fact necessary to correct a material misunderstanding known by the licensed site professional to have arisen in the matter; (3) knowingly and materially falsify, tamper with, alter, conceal, or destroy any document, data record, remedial system, or monitoring device that is relevant to the investigation, without obtaining the prior approval of the department; or (4) knowingly allow or tolerate any employees, agents, or contractors of the licensed site professional to engage in any of the foregoing activities.

s. A licensed site professional or certified subsurface evaluator who is involved in a management or review capacity at a disposal site shall be considered jointly responsible with a second licensed site professional or certified subsurface evaluator for a violation of this code of professional conduct committed by the second licensed site professional or certified subsurface evaluator if the licensed site professional or certified subsurface evaluator: (1) orders, directs, or formally ratifies professional services or an opinion being conducted or prepared by the second licensed site professional or certified subsurface evaluator; (2) recognizes that the professional services or opinion violate an obligation or prohibition contained in this code of professional conduct; and (3) fails to take reasonable steps to attempt to avoid or mitigate the violation.

t. A licensed site professional or certified subsurface evaluator shall comply with all conditions that are imposed on that person's license or certification as a result of a disciplinary proceeding.

u. In any communication with a client or prospective client, including but not limited to communications with respect to a proposed scope of services or proposed contract, it is the responsibility of the licensed site professional or certified subsurface evaluator to inform the client or prospective client of the relevant and material assumptions, limitations, or qualifications underlying the communication. Evidence that a licensed site

professional or certified subsurface evaluator has provided the client or prospective client with timely written documentation of these assumptions, limitations, or qualifications shall be deemed by the department to have satisfied the requirements of this subsection.

v. In any communication with a client or prospective client, a licensed site professional or certified subsurface evaluator shall not state or imply, as an inducement or a threat, an ability to improperly influence a government agency or official.

w. In any description of qualifications, experience, or ability to provide services, a licensed site professional or certified subsurface evaluator shall not knowingly: (1) make a material misrepresentation of fact or law; (2) omit a fact necessary to make the description, when considered as a whole, not materially misleading; or (3) make a statement that, in the opinion of the department, is likely to create an unjustified expectation about results the licensed site professional or certified subsurface evaluator may achieve, or state or imply that the licensed site professional or certified subsurface evaluator may achieve results by means that violate the provisions of applicable environmental laws, rules or regulations, including the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill).

x. A licensed site professional who becomes obligated to make any of the notifications required under the provisions of this act shall make the required notification even if that licensed site professional is discharged by the client prior to doing so.

y. A licensed site professional or certified subsurface evaluator shall not accept compensation, financial or otherwise, for professional services pertaining to a site from more than one person having significant conflicting or adverse interests unless the circumstances are fully disclosed and agreed to by all clients engaging that person with regard to that site.

z. A licensed site professional or certified subsurface evaluator shall not be a salaried employee of the person responsible for conducting the remediation for which that person is providing remediation services.

aa. A licensed site professional or certified subsurface evaluator shall not allow any ownership interest, compensation, or continued employment affect the professional services of that person to the extent that the professional services fail to meet the standards set forth in this act.

16. (New section) a. (1) Whenever, on the basis of available information, the department finds that a person is in violation of a provision of P.L. , c. (C. ) (pending before the Legislature as this bill), or any rule, regulation, plan, information request, code of conduct, or order adopted or issued pursuant thereto, or who knowingly has made any false statement, representation, or

certification in any documents or information required to be submitted to the department, the department may:

(a) Revoke or suspend the license of a licensed site professional in accordance with subsection b. of this section;

(b) Bring a civil action in accordance with subsection c. of this section;

(c) Issue an administrative order in accordance with subsection d. of this section;

(d) Bring an action for a civil penalty in accordance with subsection e. of this section; or

(e) Assess a civil administrative penalty in accordance with subsection f. of this section.

The exercise of any of the remedies provided in this section shall not preclude recourse to any other remedy so provided.

(2) A person who purposely, knowingly, or recklessly violates a provision of this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a monitoring report, or any portion thereof, required pursuant to this act, shall be guilty, upon conviction, of a crime of the third degree and shall, notwithstanding the provisions of subsection e. of this section, be subject to a fine of not less than $5,000 nor more than $75,000 per day of violation, or by imprisonment, or both.

(3) Any person who negligently violates this act, including making a false statement, representation, or certification in any application, record, or other document filed or required to be maintained under this act, or by falsifying, tampering with, or rendering inaccurate any monitoring device or method required to be maintained pursuant to this act, or by failing to submit a discharge monitoring report, or any portion thereof, required pursuant to this act, shall be guilty, upon conviction, of a crime of the fourth degree and shall, notwithstanding the provisions of subsection e. of this section, be subject to a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment, or both.

b. (1) The department may revoke or suspend a licensed issued to a licensed site professional. The department may not revoke or suspend a license until a violator has been notified by certified mail or personal service. The notice shall: (a) identify the statutory or regulatory basis of the violation; (b) identify the specific citation of the act or omission constituting the violation; (c) identify the license to be revoked or suspended; and (d) affirm the right of the violator to a hearing on any matter contained in the notice and the procedures for requesting a hearing.

(2) A violator shall have 20 days from receipt of the notice within which to request a hearing on any matter contained in the notice, and shall comply with all procedures for requesting a hearing. Failure to submit a timely request or to comply with all procedures set forth by the department shall constitute grounds for denial of a hearing request. After a hearing and upon a finding that a violation has occurred, the department shall issue a final order revoking or suspending the license specified in the notice. If a violator does not request a hearing or fails to satisfy the statutory and administrative requirements for requesting a hearing, the notice of intent to revoke or suspend the license shall become final after the expiration of the 20-day period. If the department denies a hearing request, the notice of denial shall become a final order, revoking or suspending the license, upon receipt of the notice by the violator.

c. The department is authorized to institute a civil action in Superior Court for appropriate relief from any violation of the provisions of this act, or any rule, regulation, plan, information request, code of conduct, or order adopted or issued pursuant thereto. Such relief may include, singly or in combination, a temporary or permanent injunction.

d. Whenever the department finds that any person is in violation of any provision of this act, the department may issue an order (1) specifying the provision or provisions of this act, or the rule, regulation, or code of conduct of which the person is in violation; (2) citing the action which caused the violation; (3) requiring compliance with the provision or provisions; and (4) giving notice to the person of the person's right to a hearing on the matters contained in the order.

e. Any person who violates the technical rules for site remediation or a court order issued pursuant thereto, or who fails to pay a civil administrative penalty in full or to agree to a schedule of payments therefor, shall be subject, upon order of a court, to a civil penalty not to exceed $50,000 per day of the violation, and each day during which the violation continues shall constitute an additional, separate, and distinct offense. Any civil penalty imposed pursuant to this subsection may be collected with costs in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

f. (1) The department may assess a civil administrative penalty of not more than $50,000 for each violation of the provisions of this act, or any rule, regulation, plan, information request, code of conduct, or order adopted or issued pursuant thereto, and each day during which each violation continues shall constitute an additional, separate and distinct offense.

Prior to assessment of a penalty under this subsection, the person committing the violation shall be notified by certified mail or personal service that the penalty is being assessed. The notice shall:

(a) identify the statutory or regulatory basis of the violation; (b) identify the specific citation of the act or omission constituting the violation; (c) state the basis for the amount of the civil penalties to be assessed; and (d) affirm the right of the violator to a hearing on any matter contained in the notice and the procedures for requesting a hearing.

(2) (a) A violator shall have 20 days from the receipt of the notice within which to request a hearing on any matter contained in the notice, and shall comply with all procedures for requesting a hearing. Failure to submit a timely request or to comply with all procedures set forth by the department shall constitute grounds for denial of a hearing request. After a hearing and upon a finding that a violation has occurred, the department shall issue a final order assessing the amount of the civil administrative penalty specified in the notice. If a violator does not request a hearing or fails to satisfy the statutory and administrative requirements for requesting a hearing, the notice of assessment of a civil administrative penalty shall become a final order after the expiration of the 20-day period. If the department denies a hearing request, the notice of denial shall become a final order upon receipt of the notice by the violator.

(b) Payment of the assessment is due when a final administrative enforcement order is issued or the notice becomes a final order. The authority to levy a civil administrative order is in addition to all other enforcement provisions, and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. The department may compromise any civil administrative penalty assessed under this section in an amount and with conditions the department determines appropriate. A civil administrative penalty assessed, including a portion thereof required to be paid pursuant to a payment schedule approved by the department, which is not paid within 30 days of the date that payment of the penalty is due, shall be subject to an interest charge on the amount of the penalty, or portion thereof, which shall accrue as of the date payment is due. If the penalty is contested, no additional interest charge shall accrue on the amount of the penalty until after the date on which a final order is issued. Interest charges assessed and collectible pursuant to this subsection shall be based on the rate of interest on judgments provided in the New Jersey Rules of Court.

(3) The department may assess and recover, by civil administrative order, the costs of any investigation, cleanup or removal, and the reasonable costs of preparing and successfully enforcing a civil administrative penalty pursuant to this subsection. The assessment may be recovered at the same time as a civil administrative penalty, and shall be in addition to the penalty assessment.

g. A licensed site professional may not apply for a new license for ten years following the date of revocation of the license by the department. At the conclusion of the license revocation, the licensed site professional shall follow the application procedures for licensure in accordance with section 2 of P.L. , c. (C. ) (pending before the Legislature as this bill).

h. Upon the second revocation of license, a licensed site professional shall be disqualified from making an application for a license in this State.

i. If a person violates any of the provisions of this act, or any rule, regulation, plan, information request, code of conduct, or order adopted or issued pursuant thereto, the department may institute a civil action in a court of competent jurisdiction for injunctive or other appropriate relief to prohibit and prevent the licensed site professional from engaging in remediation activities.

17. (New section) a. Within 30 days from the receipt of notification from the department suspending or revoking a license, or receipt of an administrative order, or a notice of civil administrative penalty issued by the department pursuant to section 16 of P.L. , c. (C. ) (pending before the Legislature as this bill), the person may request an adjudicatory hearing to contest the action by submitting a written request therefor to the department. The request shall include the following information:

(1) The name, address, and telephone number of the licensee;

(2) The license number (if applicable);

(3) The licensee's factual position on each question alleged to be at issue, its relevance to the department's decision, specific reference to contested conditions as well as suggested revised or alternative conditions;

(4) The date the licensee received the document from the department containing the decision being contested;

(5) A copy of the decision document and a list of all issues being appealed;

(6) An admission or denial of each of the findings of fact, or a statement of insufficient knowledge;

(7) The defenses to each of the findings of fact contained in the document that the licensee received from the department containing the decision being contested;

(8) Information supporting the licensee's factual position and proposed conditions and copies of other written documents relied upon to support the request for a hearing;

(9) An estimate of the time required for the hearing, expressed in days or hours; and

(10) request, if necessary, for a barrier-free hearing location for disabled persons.

b. If a written request for a hearing is not received within 30 days from the receipt of notification from the department

suspending or revoking a license, the department shall deny the request for a hearing.

c. A written request for a hearing shall be deemed to be filed with the department in accordance with the procedures set forth herein:

(1) If hand-delivered during regular business hours, it shall be deemed filed on the day delivered;

(2) If hand-delivered during non-business hours, it shall be deemed filed on the next regular business day;

(3) If mailed by placing in U.S. mail, it shall be deemed filed on the date so post-marked; and

(4) A delivery by a bonded delivery service shall be treated as a hand delivery.

d. If the licensee fails to include all the information required pursuant to subsection a. of this section, the department may deny the request for a hearing.

e. If a request for a hearing is granted, the department shall file the request for a hearing with the Office of Administrative Law. The hearing shall be held before an administrative law judge, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), or any rules or regulations adopted pursuant thereto.

f. Pending the decision on appeal to the department a person shall not act, advertise, or otherwise make representations as being a licensed site professional.

18. (New section) The owner or operator of an industrial establishment or any other person required to perform remediation activities pursuant to P.L.1983, c.330 (C.13:1K-6 et al.), or a discharger, a person in any way responsible for a hazardous substance, or a person otherwise liable for cleanup and removal costs pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), shall comply with the oversight requirements established pursuant to rules and regulations adopted pursuant to the provisions of section 4 of P.L. , c. (C. ) (pending before the Legislature as this bill), unless the person is required to enter into an administrative consent order or a judicial consent order. The oversight requirements shall include but shall not be limited to, the following requirements:

a. the person shall hire a licensed site professional or subsurface evaluator certified to conduct all remediation at the site;

b. the person shall remediate all contamination at, or emanating from, the site in accordance with the technical requirements established by the department;

c. the person shall perform the remediation in accordance with the mandatory timeframes established pursuant to the provisions of section 19 of P.L. , c. (C. ) (pending before the Legislature as this bill);

d. the person shall conduct the remediation pursuant to the department's oversight;

e. the person shall establish a remediation funding source pursuant to the provisions of section 25 of P.L.1993, c.139 (C.58:10B-3);

f. the person shall pay all applicable fees and oversight costs as required by the department;

g. the person shall provide access to the department to all areas of the contaminated site; and

h. the person shall provide access to the department to all documents associated with the remediation of the contaminated site.

19. (New section) a. The owner or operator of an industrial establishment or any other person required to perform remediation activities pursuant to P.L.1983, c.330 (C.13:1K-6 et al.), or a discharger, a person in any way responsible for a hazardous substance, or a person otherwise liable for cleanup and removal costs pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), and the designated licensed site professional or certified subsurface evaluator shall comply with the mandatory timeframes for remediation and reporting as provided in subsection b. of this section and as established pursuant to rules and regulations adopted pursuant to the provisions of section 4 of P.L. , c. (C. ) (pending before the Legislature as this bill).

b. The department shall establish mandatory timeframes for, at a minimum, the following:

(1) The initial evaluation of the risks that the contaminated site poses to the public health and safety and to the environment;

(2) Interim remedial measures to eliminate immediate risks to the public health and safety and to the environment, and any contaminant removal or stabilization of the contaminated site necessary to properly manage the risks the contamination poses;

(3) Reports for each phase of the remediation; and

(4) Other activities necessary to effectuate timely remediation to protect the public health and safety and the environment.

c. In establishing the timeframes as required in subsection b. of this section, the department shall differentiate conditions that warrant different response times and expedited actions. When establishing timeframes as required in subsection b. of this section, the department shall take into account the following factors:

(1) the risk to the public health and safety and to the environment the contamination poses based on (a) potential and actual exposure of humans to the contamination, via direct contact, exposure to drinking water and air, and (b) the proximity of the contaminated site to wellhead protection areas, potable wells, structures where vapor intrusion could be a source of unacceptable exposure, and to sensitive populations including, but not limited to,

persons in daycare facilities, educational facilities, hospitals, and nursing homes; and

(2) the complexity of the contaminated site based on media impacted, ground water contamination in bedrock and multiple aquifers, contaminant toxicity, presence of free and residual product or radiological materials, buried drums or chemical production or other high contaminant level waste in soil, the magnitude of contamination, and offsite migration of contamination.

d. The department may grant extensions from the mandatory timeframes based upon a demonstration by the person subject to this section, and the designated licensed site professional or certified subsurface evaluator, that extraordinary cause beyond the reasonable control of the person subject to the provisions of this section, exists and that the extension of time would not extend any unacceptable risk to the public health and safety or to the environment. The department may grant an extension for additional time necessary:

(1) as a result of a delay in receiving state funding for remediation, provided that there was a timely filing of the application for such funding;

(2) to obtain access to property, provided the person subject to the provisions of this section can demonstrate that access was denied, and a complaint was filed with Superior Court, in accordance with department rules; and

(3) extraordinary circumstances when the person subject to the provisions of this section can demonstrate that that person has been implementing the remediation in a timely manner.

e. The person requesting the extension of a mandatory timeframe shall specify the precise cause of any delay, the measures taken to minimize the delay, and the risks associated with the contamination, along with an explanation of how much additional time is necessary to complete the task.

f. The department may require, on a site-specific basis, the expedited performance of:

(1) a remedial investigation at a site or area of concern that poses a significant risk to the public health and safety, or to the environment, based on the complexity of the contaminated site; or

(2) a remedial action that is necessary to protect the public health and safety, or the environment.

g. If the person subject to the provisions of this section and the designated licensed site professional or certified subsurface evaluator fail to comply with the mandatory timeframes or site-specific timeframes established by the department, the person subject to the provisions of this section and the designated licensed site professional or certified subsurface evaluator shall be subject to an enforcement action. The department may also reclassify the site as a tier 1 contaminated site, and the department may evaluate the performance of licensed site professional in accordance with the

licensing provisions of section 2 of P.L. , c. (C. ) (pending before the Legislature as this bill).

20. (New section) For any site for which a grant, loan or other financial assistance is awarded from a public fund for the remediation, a licensed site professional or subsurface evaluator, as appropriate, shall provide written documentation to the Department of Environmental Protection of any work performed by a person other than the licensed site professional or subsurface evaluator, as appropriate. The licensed site professional or subsurface evaluator, as appropriate, shall certify that the work was properly completed in accordance with the requirements of all applicable laws, rules and regulations.

21. (New section) No person shall take retaliatory action if a licensed site professional:

a. discloses, or threatens to disclose to the department an activity, policy or practice of the licensed site professional that the licensed site professional reasonably believes; (1) is in violation of a law, or a rule or regulation adopted pursuant to law, including any violation involving deception of, or misrepresentation to, any client customer, the department or any governmental entity; or (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation that the licensed site professional reasonably believes may defraud any client, customer, the department, or any governmental entity;

b. provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into any violation of law, or a rule or regulation adopted pursuant to law, by the client or customer, with whom there is a business relationship, including any violation involving deception of, or misrepresentation to, any client, customer, the department or any governmental entity, or, in the case of a licensed site professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of remediation of a contaminated site; or

c. objects to, or refuses to participate in any activity, policy or practice which the licensed site professional reasonably believes; (1) is in violation of a law, or a rule or regulation adopted pursuant to law, including any violation involving deception of, or misrepresentation to, any, client, customer, the department or any governmental entity, (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the licensed site professional reasonably believes may defraud any client, customer, the department, or any governmental entity, or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

22. (New section) No person shall knowingly employ a person who is not a licensed site professional pursuant to the provisions of P.L. , c. (C. ) (pending before the Legislature as this bill) or who is not otherwise authorized to perform remedial activities pursuant to this act, or a business firm that has not been issued a certification of authorization pursuant to section 8 of P.L. , c. (C. ) to conduct the remediation of a contaminated site or submit any documents regarding a remediation to the department for approval on that person's behalf. Any person violating provisions of this section shall be subject to penalties as prescribed in section 16 of P.L. , c. (C. ) (pending before the Legislature as this bill).

23. Section 6 of P.L.1976, c.141 (C.58:10-23.11e) is amended to read as follows:

6. a. Any person who may be subject to liability for a discharge which occurred prior to or after the effective date of [the act of which this act is amendatory] P.L.1976, c. 141 (C.58:10-23.11 et seq.) shall immediately notify the department. Failure to so notify shall make persons liable to the penalty provisions of section 22 of [this act] P.L.1976, c.141 (C.58:23.11u).

b. Any person who may be subject to liability for a discharge that occurred prior to or after the effective date of P.L.1976, c. 141 (C.58:10-23.11 et seq.), shall clean up and remove the discharge pursuant to rules adopted by the department, unless the department, pursuant to section 7 of P.L.1976, c.141 (C.58:10-23.11f), has directed a person who may be subject to liability for the discharge to arrange for the cleanup and removal of the discharge. If the person who may be subject to liability for the discharge fails to submit a report of the remedial action to the department within 180 days after the discharge occurred, the department may order that person to clean up and remove the discharge pursuant to rules adopted by the department. If the discharge occurred prior to the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill), a report of the remedial action undertaken shall be submitted to the department no more than 180 days after the effective date of P.L. , c. (pending before the Legislature as this bill) .

(cf: P.L.1979, c.346, s.3)

24. Section 25 of P.L.1993, c.139 (C.58:10B-3) is amended to read as follows:

25. a. [The] Except as provided below, the owner or operator of an industrial establishment or any other person required to perform remediation activities pursuant to P.L.1983, c.330 (C.13:1K-6 et al.), [or] a discharger, a person in any way responsible for a hazardous substance, or a person otherwise liable for cleanup and

removal costs pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.) who has been issued a directive or an order by a State agency, who has entered into an administrative consent order with a State agency, or who has been ordered by a court to clean up and remove a hazardous substance or hazardous waste discharge pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.), or any person who voluntarily conducts a remediation, shall establish and maintain a remediation funding source in the amount necessary to pay the estimated cost of the required remediation. [A person who voluntarily undertakes a remediation pursuant to a memorandum of agreement with the department, or without the department's oversight, or who performs a remediation in an environmental opportunity zone is not required to establish or maintain a remediation funding source. A person who uses an innovative technology or who, in a timely fashion, implements an unrestricted use remedial action or a limited restricted use remedial action for all or part of a remedial action is not required to establish a remediation funding source for the cost of the remediation involving the innovative technology or permanent remedy.] A person responsible for conducting the remediation at the site of an unregulated heating oil tank, a childcare facility, an educational facility, or at any site that is classified as tier 4 pursuant to section 10 of P.L. , c. (C. ) (pending before the Legislature as this bill), is not required to establish a remediation funding source. A person required to establish a remediation funding source pursuant to this section shall provide to the department satisfactory documentation that the requirement has been met.

The remediation funding source shall be established in an amount equal to or greater than the cost estimate of the implementation of the remediation (1) as approved by the department for tier 1 sites, (2) as determined by the licensed site professional pursuant to guidance established by the department for tier 2 and tier 3 sites, (3) as provided in an administrative consent order or remediation agreement as required pursuant to subsection e. of section 4 of P.L.1983, c.330, [(3)] (4) as stated in a departmental order or directive, or [(4)] (5) as agreed to by a court, and shall be in effect for a term not less than the actual time necessary to perform the remediation at the site. Whenever the remediation cost estimate increases, the person required to establish the remediation funding source shall cause the amount of the remediation funding source to be increased to an amount at least equal to the new estimate. Whenever the remediation or cost estimate decreases, the person required to obtain the remediation funding source may file a written request to the department to decrease the amount in the remediation funding source. The remediation funding source may be decreased to the amount of the new estimate upon written approval by the department delivered to the person who established the remediation funding source and to

the trustee or the person or institution providing the remediation trust, the environmental insurance policy, [or] the line of credit, the letter of credit or the surety bond, as applicable. The department shall approve the request upon a finding that the remediation cost estimate decreased by the requested amount. The department shall review and respond to the request to decrease the remediation funding source within 45 days of receipt of the request. Upon submission of a remedial action workplan that proposes to implement a restricted use remedial action or a limited restricted use remedial action, the person responsible for performing the remediation shall, on an annual basis, estimate the costs of the remediation required for 20 years after the approval of the remedial action workplan, including the costs of operation, monitoring and maintenance of the remedial action proposed and shall include those costs in the remediation funding source.

b. The person responsible for performing the remediation and who established the remediation funding source may use the remediation funding source to pay for the actual cost of the remediation. [The department may not require any other financial assurance by the person responsible for performing the remediation other than that required in this section. In the case of a remediation performed pursuant to P.L.1983, c.330, the remediation funding source shall be established no more than 14 days after the approval by the department of a remedial action workplan or upon approval of a remediation agreement pursuant to subsection e. of section 4 of P.L.1983, c.330 (C.13:1K-9), unless the department approves an extension. In the case of a remediation performed pursuant to P.L.1976, c.141, the remediation funding source shall be established as provided in an administrative consent order signed by the parties, as provided by a court, or as directed or ordered by the department.] The remediation funding source shall be established (1) for tier 1 sites, no more than 60 days after departmental approval of the plan for the remedial investigation, (2) for sites subject to an administrative consent order, prior to the execution of the order, (3) for sites subject to a remediation agreement pursuant to subsection e. of section 4 of P.L.1983, c.330 (C.13:1K-9), no more than 60 days after the approval of the remediation agreement; and (4) for all other sites, prior to the implementation of the remedial investigation. The establishment of a remediation funding source for that part of the remediation funding source to be established by a grant or financial assistance from the remediation fund may be established for the purposes of this subsection by the application for a grant or financial assistance from the remediation fund and satisfactory evidence submitted to the department that the grant or financial assistance will be awarded. However, if the financial assistance or grant is denied or the department finds that the person responsible for establishing the remediation funding source did not take reasonable action to obtain the grant or financial

assistance, the department shall require that the full amount of the remediation funding source be established within 14 days of the denial or finding. The remediation funding source shall be evidenced by the establishment and maintenance of (1) a remediation trust fund, (2) an environmental insurance policy, issued by an entity licensed by the Department of Banking and Insurance to transact business in the State of New Jersey, to fund the remediation, (3) a line of credit from a [person or] financial institution regulated pursuant to State or federal law and satisfactory to the department authorizing the person responsible for performing the remediation to borrow money, [or] (4) a self-guarantee, (5) a letter of credit from a financial institution regulated pursuant to State or federal law and satisfactory to the department authorizing the person responsible for performing the remediation to borrow money, or (6) a surety bond guaranteeing payment, issued by an entity licensed by the Department of Banking and Insurance to transact business in the State, or by any combination thereof. Where it can be demonstrated that a person cannot establish and maintain a remediation funding source for the full cost of the remediation by a method specified in this subsection, that person may establish the remediation funding source for all or a portion of the remediation, by securing financial assistance from the Hazardous Discharge Site Remediation Fund as provided in section 29 of P.L.1993, c.139 (C.58:10B-7).

c. A remediation trust fund shall be established pursuant to the provisions of this subsection. An originally signed duplicate of the trust agreement shall be delivered to the department by certified mail within [14 days of receipt of notice from the department that the remedial action workplan or remediation agreement as provided in subsection e. of section 4 of P.L.1983, c.330 is approved] within the time as required pursuant to subsection b. of this section or as specified in an administrative consent order, civil order, or order of the department, as applicable. The remediation trust fund agreement shall conform to a model trust fund agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department. The trustee shall be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or New Jersey agency.

The trust fund agreement shall provide that the remediation trust fund may not be revoked or terminated by the person required to establish the remediation funding source or by the trustee without the written consent of the department. The trustee shall release to the person required to establish the remediation funding source, or to the department or transferee of the property, as appropriate, only those moneys as the department authorizes, in writing, to be released. The person entitled to receive money from the remediation trust fund shall submit documentation to the

department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination by the department that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement of moneys from the remediation trust fund in the amount of the documented costs.

The department shall return the original remediation trust fund agreement to the trustee for termination after the person required to establish the remediation funding source substitutes an alternative remediation funding source as specified in this section or the department notifies the person that that person is no longer required to maintain a remediation funding source for remediation of the contaminated site.

d. An environmental insurance policy shall be established pursuant to the provisions of this subsection. An originally signed duplicate of the insurance policy shall be delivered to the department by certified mail, overnight delivery, or personal service within [30 days of receipt of notice from the department that the remedial action workplan or remediation agreement, as provided in subsection e. of section 4 of P.L.1983, c.330, is approved] the time as required pursuant to subsection b. of this section, or as specified in an administrative consent order, civil order, or order of the department, as applicable. The environmental insurance policy may not be revoked or terminated without the written consent of the department. The insurance company shall release to the person required to establish the remediation funding source, or to the department or transferee of the property, as appropriate, only those moneys as the department authorizes, in writing, to be released. The person entitled to receive money from the environmental insurance policy shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation.

e. A line of credit shall be established pursuant to the provisions of this subsection. A line of credit shall allow the person establishing it to borrow money up to a limit established in a written agreement in order to pay for the cost of the remediation for which the line of credit was established. An originally signed duplicate of the line of credit agreement shall be delivered to the department by certified mail, overnight delivery, or personal service within [14 days of receipt of notice from the department that the remedial action workplan or remediation agreement as provided in subsection e. of section 4 of P.L.1983, c.330 is approved,] the time as required pursuant to subsection b. of this section, or as specified in an administrative consent order, civil order, or order of the department, as applicable. The line of credit agreement shall conform to a model agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department.

A line of credit agreement shall provide that the line of credit may not be revoked or terminated by the person required to obtain the remediation funding source or the person or institution providing the line of credit without the written consent of the department. The person or institution providing the line of credit shall release to the person required to establish the remediation funding source, or to the department or transferee of the property as appropriate, only those moneys as the department authorizes, in writing, to be released. The person entitled to draw upon the line of credit shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement from the line of credit in the amount of the documented costs.

The department shall return the original line of credit agreement to the person or institution providing the line of credit for termination after the person required to establish the remediation funding source substitutes an alternative remediation funding source as specified in this section, or after the department notifies the person that that person is no longer required to maintain a remediation funding source for remediation of the contaminated site.

f. A person may apply to the department to self-guarantee a remediation funding source for up to $1,000,000. [upon the submittal of] The person shall submit documentation to the department demonstrating that the estimated cost of the remediation [as estimated in the remedial action workplan, in the remediation agreement as provided in subsection e. of section 4 of P.L.1983, c.330, in an administrative consent order, or as provided in a departmental or court order, would] does not exceed [one-third] one-tenth of the [tangible net worth] equity of the person required to establish the remediation funding source, and that the person has a cash flow sufficient to assure the availability of sufficient moneys for the remediation during the time necessary for the remediation. [Satisfactory documentation of a person's capacity to self-guarantee a remediation funding source shall consist of] A person who applies to self-guarantee a remediation funding source pursuant to this subsection, shall satisfactorily document their capacity to self-guarantee by submitting audited financial statements, in which the auditor expresses an unqualified opinion, including a statement of income and expenses or similar statement of that person and the balance sheet or similar statement of assets and liabilities as used by that person for the fiscal year of the person making the application that ended closest in time to the date of the self-guarantee application[, or in] . In the case of a special purpose entity established specifically for the purpose of acquiring and redeveloping a contaminated site, and for which a statement of

income and expenses is not available, the person shall submit a statement of assets and liabilities certified by a certified public accountant. The self-guarantee application shall be certified as true to the best of the applicant's information, knowledge, and belief, by the chief financial, or similar officer or employee, or general partner, or principal of the person making the self-guarantee application. The department's approval of an application to self-guarantee a remediation funding source shall be based upon a review of the financial statements provided, including, but not limited to, an evaluation of the net cash provided by operating activities included in the cash flow statement. A person shall be deemed by the department to possess the required cash flow pursuant to this section if that person's [gross receipts exceed its gross payments] net cash provided by operating activities in that fiscal year is in an amount at least equal to the estimated costs of completing the [remedial action workplan schedule] remediation activities scheduled to be performed in the 12-month period following the date on which the application for self-guarantee is made. In the event that a self-guarantee is required for a period of more than one year, applications for a self-guarantee shall be renewed annually pursuant to this subsection for each successive year. The department may establish requirements and reporting obligations to ensure that the person proposing to self-guarantee a remediation funding source meets the criteria for self-guaranteeing prior to the initiation of remedial action and until completion of the remediation.

g. (1) If the person required to establish the remediation funding source fails to perform the remediation as required, the department shall make a written determination of this fact. A copy of the determination by the department shall be delivered to the person required to establish the remediation funding source and, in the case of a remediation conducted pursuant to P.L.1983, c.330 (C.13:1K-6 et al.), to any transferee of the property. Following this written determination, the department may perform the remediation in place of the person required to establish the remediation funding source. In order to finance the cost of the remediation the department may make disbursements from the remediation trust fund [or] , the line of credit , the letter, the surety bond guaranteeing payment, or claims upon the environmental insurance policy, or may make a demand for monies provided by a self-guarantee, as appropriate[, or, if sufficient moneys are not available from those funds, from the remediation guarantee fund created pursuant to section 45 of P.L.1993, c.139 (C.58:10B-20)].

(2) [The transferee of property subject to a remediation conducted pursuant to P.L.1983, c.330 (C.13:1K-6 et al.), may, at any] Any time after the department's determination of nonperformance by the [owner or operator] person required to

establish the remediation funding source, any other person may petition the department, in writing, with a copy being sent to the owner [and operator] of the property and the person required to establish the remediation funding source, for [authority] approval to perform the remediation at the [industrial establishment] site. The department, upon a determination that the [transferee] person who filed the petition is competent to do so, may grant that petition which shall authorize the [transferee] person to perform the remediation [as specified in an approved remedial action workplan, or to perform the activities as required in a remediation agreement,] and to avail itself of the moneys [in the remediation trust fund or line of credit or to make claims upon the environmental insurance policy for these purposes] available in the remediation funding source established by the person who failed to perform the remediation . The petition [of the transferee] shall not be granted by the department if the [owner or operator] person who established the remediation funding source continues or begins to perform its obligations within 14 days of the petition being filed with the department.

(3) After the department has begun to perform the remediation in the place of the person required to establish the remediation funding source or has granted the petition of [the transferee] another person to perform the remediation, the person required to establish the remediation funding source shall not be permitted by the department to continue its performance obligations except upon the agreement of the department or the [transferee] other person, as applicable, or except upon a determination by the department that the [transferee] other person is not adequately performing the remediation.

h. A letter of credit shall be established pursuant to the provisions of this subsection. A letter of credit shall allow a person to borrow money up to a limit established in a written agreement in order to pay for the cost of the remediation for which the letter of credit was established. An originally signed duplicate of the letter of credit agreement shall be delivered to the department by certified mail, overnight delivery, or personal service within 14 days of receipt of notice from the department that the remedial action workplan or remediation agreement as provided in subsection e. of section 4 of P.L. 1983, c. 330 (C.13:1K-9) is approved, or as specified in an administrative consent order, civil order, order of the department, or restricted use cleanup, as applicable. The letter of credit agreement shall conform to a model agreement as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department.

A letter of credit agreement shall provide that institution providing the letter of credit shall release to the person required to

establish the remediation funding source, or to the department or transferee of the property as appropriate, only those moneys as the department authorizes, in writing, to be released. The person entitled to draw upon the letter of credit shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement from the letter of credit in the amount of the documented costs.

The department shall return the duplicate original letter of credit agreement to the institution providing the letter of credit for termination after the person required to establish the remediation funding source substitutes an alternative remediation funding source as specified in this section, or after the department notifies the person that that person is no longer required to maintain a remediation funding source for remediation of the contaminated site.

i. A surety bond for a payment guarantee shall be established pursuant to the provisions of this subsection. An originally signed duplicate of the surety bond shall be delivered to the department by certified mail within 14 days of receipt of notice from the department that the remedial action workplan or remediation agreement as provided in subsection e. of section 4 of P.L. 1983, c. 330 (C.13:1K-9) is approved or as specified in an administrative consent order, civil order, order of the department, or restricted use cleanup, as applicable. Under the terms of the bond, the surety will become liable on the bond obligation when the person establishing it fails to perform as guaranteed by the bond. Under the terms of the bond, all amounts paid by the surety under the bond will be deposited directly into the standby trust fund in accordance with instructions from the department. The surety bond guaranteeing payment shall conform to a model surety bond guaranteeing payment as established by the department and shall be accompanied by a certification of acknowledgment that conforms to a model established by the department. The surety company issuing the bond must be among those listed as acceptable sureties on federal bonds in the latest Circular 570 of the United States Department of the Treasury.

The surety bond guaranteeing payment shall provide that the insurer shall release to the person required to establish the remediation funding source, or to the department or transferee of the property, as appropriate, only those monies as the department authorizes, in writing, to be released. The person entitled to receive money from the surety bond guaranteeing payment shall submit documentation to the department detailing the costs incurred or to be incurred as part of the remediation. Upon a determination by the department that the costs are consistent with the remediation of the site, the department shall, in writing, authorize a disbursement of

moneys from the remediation surety bond guaranteeing payment in the amount of the documented costs.

The department shall return the original surety bond guaranteeing payment to the insurer for termination after the person required to establish the remediation funding source substitutes an alternative remediation funding source as provided in this section or the department notifies the person that that person is no longer required to maintain a remediation funding source for remediation of the contaminated site.

j. Any person who has established a remediation funding source or financial assurance prior to the effective date of P.L. , c. (C. ) (pending before the Legislature as this bill) shall make any changes as required by the department pursuant to the provisions of P.L. , c. (pending before the Legislature as this bill) upon the renewal date of the currently posted remediation funding source or financial assurance.

k. Upon the issuance of a no further action letter for the entire site, the department may authorize termination of the remediation funding source if an unrestricted use remedial action was implemented for the site. Upon implementation of a limited restricted use remedial action or a restricted use remedial action, the person responsible for conducting the remediation shall pay a surcharge equal to 5% of the actual cost of the remedial action, except that an owner or operator of an unregulated heating oil tank or an underground storage tank used to store heating oil for on-site consumption in a one to four family residential building or the owner of a site on which a regulated childcare facility or educational institution is located shall not be required to pay the 5% surcharge. The 5% surcharge shall be deposited into the Remediation Guarantee Fund. Upon payment of the 5% surcharge, the 1% annual surcharge shall no longer be imposed. Except as provided in this subsection, the person responsible for conducting the remediation shall make this 5% surcharge payment regardless of case type or tier and regardless of whether a remediation funding source is required to be established.

(cf: P.L.2003, c.224, s.2)

25. Section 26 of P.L.1993, c.139 (C.58:10B-4) is amended to read as follows:

26. a. There is established in the New Jersey Economic Development Authority a special, revolving fund to be known as the Hazardous Discharge Site Remediation Fund. Except as provided in section 4 of P.L.2007, c.135 (C.52:27D-130.7), moneys in the remediation fund shall be dedicated for the provision of financial assistance or grants to municipalities, counties, redevelopment entities authorized to exercise redevelopment powers pursuant to section 4 of P.L.1992, c.79 (C.40A:12A-4), and persons, for the purpose of financing remediation activities at sites

at which there is, or is suspected of being, a discharge of hazardous substances or hazardous wastes.

b. The remediation fund shall be credited with:

(1) moneys as are appropriated by the Legislature;

(2) moneys deposited into the fund as repayment of principal and interest on outstanding loans made from the fund;

(3) any return on investment of moneys deposited in the fund;

(4) **[**remediation funding source surcharges imposed pursuant to section 33 of P.L.1993, c.139 (C.58:10B-11)**]** Deleted by amendment, P.L. , c. (pending before the Legislature as this bill);

(5) moneys deposited in the fund as repayment of recoverable grants made by the New Jersey Redevelopment Authority for brownfield redevelopment;

(6) moneys deposited into the fund from cost recovery subrogation actions; and

(7) moneys made available to the authority for the purposes of the fund.

(cf: 2007, c.135, s.1)

26. Section 33 of P.L.1993, c.139 (58:10B-11) is amended to read as follows:

33. a. There is imposed upon every person who is required to establish a remediation funding source pursuant to section 25 of P.L.1993, c.139 (C.58:10B-3) a remediation funding source surcharge. The remediation funding source surcharge shall be in an amount equal to 1% of the required amount of the remediation funding source required by the department to be maintained. No surcharge, however, may be imposed upon **[**(1) that amount of the remediation funding source that is met by a self-guarantee as provided in subsection f. of section 25 of P.L.1993, c.139 (C.58:10B-3), (2)**]** that amount of the remediation funding source that is met by financial assistance or a grant from the remediation fund**[**, (3) any person who voluntarily performs a remediation pursuant to an administrative consent order, (4) any person who entered voluntarily into a memorandum of understanding with the department to remediate real property, as long as that person continues the remediation in a reasonable manner, or as required by law, even if subsequent to initiation of the memorandum of understanding, the person received an order by the department or entered into an administrative consent order to perform the remediation, (5) any person performing a remediation in an environmental opportunity zone, or (6) that portion of the cost of the remediation that is specifically for the use of an innovative technology or to implement a limited restricted use remedial action or an unrestricted use remedial action**]**. The surcharge shall be based on the **[**cost of remediation work remaining to be completed**]** amount of the required remediation funding source and shall be paid

on an annual basis as long as the remediation continues and until (1) the Department of Environmental Protection [issues a no further action letter for the] determines that an unrestricted use remedial action has been implemented for the entire property subject to the remediation , or (2) the 5% surcharge has been paid as required pursuant to subsection k. of section 25 of P.L.1993, c.139 (C.58:10B-3). The remediation funding source surcharge shall be due and payable [within 14 days of the time of the department's approval of a remedial action workplan or signing an administrative consent order or as otherwise provided by law] upon the establishment of the remediation funding source and annually thereafter, on the date on which the remediation funding source was established . The department shall collect the surcharge and shall remit all moneys collected [to the Economic Development Authority] for deposit into the [Hazardous Discharge Site Remediation] Remediation Guarantee Fund.

b. By February 1 of each year, the department shall issue a report to the Senate Environment Committee and to the Assembly [Agriculture and Waste Management] Environment and Solid Waste Committee, or their successors, listing, for the prior calendar year, each person who owed the remediation funding source surcharge, the amount of the surcharge paid, and the total amount collected.

(cf: P.L.1997, c.278, s.16)

27. Section 35 of P.L.1993, c.139 (C.58:10B-12) is amended to read as follows:

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 the location, the surroundings, the intended use of the property, the potential exposure to the discharge, and the surrounding ambient conditions, whether naturally occurring or man-made.

Until the minimum remediation standards for the protection of public health and safety as described herein are adopted, the department shall apply public health and safety remediation standards for contamination at a site on a case-by-case basis based upon the considerations and criteria enumerated in this section.

The department shall not propose or adopt remediation standards protective of the environment pursuant to this section, except standards for groundwater or surface water, until recommendations are made by the Environment Advisory Task Force created pursuant to section 37 of P.L.1993, c.139. Until the Environment Advisory

Task Force issues its recommendations and the department adopts remediation standards protective of the environment as required by this section, the department shall continue to determine the need for and the application of remediation standards protective of the environment on a case-by-case basis in accordance with the guidance and regulations of the United States Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. s.9601 et seq. and other statutory authorities as applicable.

The department may not require any person to perform an ecological evaluation of any area of concern that consists of an underground storage tank storing heating oil for on-site consumption in a one to four family residential building.

b. In developing minimum remediation standards the department shall:

(1) base the standards on generally accepted and peer reviewed scientific evidence or methodologies;

(2) base the standards upon reasonable assumptions of exposure scenarios as to amounts of contaminants to which humans or other receptors will be exposed, when and where those exposures will occur, and the amount of that exposure;

(3) avoid the use of redundant conservative assumptions. The department shall avoid the use of redundant conservative assumptions by the use of parameters that provide an adequate margin of safety and which avoid the use of unrealistic conservative exposure parameters and which guidelines make use of the guidance and regulations for exposure assessment developed by the United States Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 42 U.S.C. s.9601 et seq. and other statutory authorities as applicable;

(4) where feasible, establish the remediation standards as numeric or narrative standards setting forth acceptable levels or concentrations for particular contaminants; and

(5) consider and utilize, in the absence of other standards used or developed by the Department of Environmental Protection and the United States Environmental Protection Agency, the toxicity factors, slope factors for carcinogens and reference doses for non-carcinogens from the United States Environmental Protection Agency's Integrated Risk Information System (IRIS).

c. (1) The department shall develop residential and nonresidential soil remediation standards that are protective of public health and safety. For contaminants that are mobile and transportable to groundwater or surface water, the residential and nonresidential soil remediation standards shall be protective of groundwater and surface water. Residential soil remediation standards shall be set at levels or concentrations of contamination for real property based upon the use of that property for residential

or similar uses and which will allow the unrestricted use of that property without the need of engineering devices or any institutional controls and without exceeding a health risk standard greater than that provided in subsection d. of this section. Nonresidential soil remediation standards shall be set at levels or concentrations of contaminants that recognize the lower likelihood of exposure to contamination on property that will not be used for residential or similar uses, which will allow for the unrestricted use of that property for nonresidential purposes, and that can be met without the need of engineering controls. Whenever real property is remediated to a nonresidential soil remediation standard, except as otherwise provided in paragraph (3) of subsection g. of this section, the department shall require, pursuant to section 36 of P.L.1993, c.139 (C.58:10B-13), that the use of the property be restricted to nonresidential or other uses compatible with the extent of the contamination of the soil and that access to that site be restricted in a manner compatible with the allowable use of that property.

(2) The department may develop differential remediation standards for surface water or groundwater that take into account the current, planned, or potential use of that water in accordance with the "Clean Water Act" (33 U.S.C. s.1251 et seq.) and the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.).

d. The department shall develop minimum remediation standards for soil, groundwater, and surface water intended to be protective of public health and safety taking into account the provisions of this section. In developing these minimum health risk remediation standards the department shall identify the hazards posed by a contaminant to determine whether exposure to that contaminant can cause an increase in the incidence of an adverse health effect and whether the adverse health effect may occur in humans. The department shall set minimum soil remediation health risk standards for both residential and nonresidential uses that:

(1) for human carcinogens, as categorized by the United States Environmental Protection Agency, will result in an additional cancer risk of one in one million;

(2) for noncarcinogens, will limit the Hazard Index for any given effect to a value not exceeding one.

The health risk standards established in this subsection are for any particular contaminant and not for the cumulative effects of more than one contaminant at a site.

e. Remediation standards and other remediation requirements established pursuant to this section and regulations adopted pursuant thereto shall apply to remediation activities required pursuant to the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.), the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.), P.L.1986, c.102 (C.58:10A-21 et seq.), the "Industrial Site Recovery Act," P.L.1983, c.330 (C.13:1K-6 et al.), the "Solid Waste Management Act," P.L.1970,

c.39 (C.13:1E-1 et seq.), the "Comprehensive Regulated Medical Waste Management Act," P.L.1989, c.34 (C.13:1E-48.1 et seq.), the "Major Hazardous Waste Facilities Siting Act," P.L.1981, c.279 (C.13:1E-49 et seq.), the "Sanitary Landfill Facility Closure and Contingency Fund Act," P.L.1981, c.306 (C.13:1E-100 et seq.), the "Regional Low-Level Radioactive Waste Disposal Facility Siting Act," P.L.1987, c.333 (C.13:1E-177 et seq.), or any other law or regulation by which the State may compel a person to perform remediation activities on contaminated property. However, nothing in this subsection shall be construed to limit the authority of the department to establish discharge limits for pollutants or to prescribe penalties for violations of those limits pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.), or to require the complete removal of nonhazardous solid waste pursuant to law.

f. (1) A person performing a remediation of contaminated real property, in lieu of using the established minimum soil remediation standard for either residential use or nonresidential use adopted by the department pursuant to subsection c. of this section, may submit to the department a request to use an alternative residential use or nonresidential use soil remediation standard. The use of an alternative soil remediation standard shall be based upon site specific factors which may include (1) physical site characteristics which may vary from those used by the department in the development of the soil remediation standards adopted pursuant to this section; or (2) a site specific risk assessment. If a person performing a remediation requests to use an alternative soil remediation standard based upon a site specific risk assessment, that person shall demonstrate to the department that the requested deviation from the risk assessment protocol used by the department in the development of soil remediation standards pursuant to this section is consistent with the guidance and regulations for exposure assessment developed by the United States Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 42 U.S.C.s.9601 et seq. and other statutory authorities as applicable. A site specific risk assessment may consider exposure scenarios and assumptions that take into account the form of the contaminant present, natural biodegradation, fate and transport of the contaminant, available toxicological data that are based upon generally accepted and peer reviewed scientific evidence or methodologies , and physical characteristics of the site, including, but not limited to, climatic conditions and topographic conditions. Nothing in this subsection shall be construed to authorize the use of an alternative soil remediation standard in those instances where an engineering control is the appropriate remedial action, as determined by the department, to prevent exposure to contamination.

Upon a determination by the department that the requested alternative remediation standard satisfies the department's regulations, is protective of public health and safety, as established in subsection d. of this section, and is protective of the environment pursuant to subsection a. of this section, the alternative residential use or nonresidential use soil remediation standard shall be approved by the department. The burden to demonstrate that the requested alternative remediation standard is protective rests with the person requesting the alternative standard and the department may require the submission of any documentation as the department determines to be necessary in order for the person to meet that burden.

(2) The department may, upon its own initiative, require an alternative remediation standard for a particular contaminant for a specific real property site, in lieu of using the established minimum residential use or nonresidential use soil remediation standard adopted by the department for a particular contaminant pursuant to this section. The department may require an alternative remediation standard pursuant to this paragraph upon a determination by the department, based on the weight of the scientific evidence, that due to specific physical site characteristics of the subject real property, including, but not limited to, its proximity to surface water, the use of the adopted residential use or nonresidential use soil remediation standards would not be protective , or would be unnecessarily overprotective, of public health or safety or of the environment, as appropriate.

g. The development, selection, and implementation of any remediation standard or remedial action shall ensure that it is protective of public health, safety, and the environment, as applicable, as provided in this section. In determining the appropriate remediation standard or remedial action that shall occur at a site, the department and any person performing the remediation, shall base the decision on the following factors:

(1) Unrestricted use remedial actions, limited restricted use remedial actions and restricted use remedial actions shall be allowed except that unrestricted use remedial actions and limited restricted use remedial actions shall be preferred over restricted use remedial actions. [The department, however, may not disapprove the use of a restricted use remedial action or a limited restricted use remedial action so long as the selected remedial action meets the health risk standard established in subsection d. of this section, and where, as applicable, is protective of the environment.] <u>The department shall give a higher priority to any site where the person responsible for conducting the remediation proposes to implement an unrestricted use remedial action. The department shall require the use of an unrestricted use remedial action, a presumptive remedy, or an enhanced remedy at a site where there is new residential construction, new construction involving a sensitive</u>

population such as a childcare facility or a school, or where there is a change in use of the site to residential, school purposes, or childcare purposes. The choice of the remedial action to be implemented shall be made by the person performing the remediation in accordance with regulations adopted by the department and that choice of the remedial action shall be approved by the department if all the criteria for remedial action selection enumerated in this section, as applicable, are met. The department may not require a person to compare or investigate any alternative remedial action as part of its review of the selected remedial action The department shall have the authority to disapprove the selection of a remedial action for a site on which the proposed remedial action will render the real property inappropriate for future use;

(2) Contamination may, upon the department's approval, be left onsite at levels or concentrations that exceed the minimum soil remediation standards for residential use if the implementation of institutional or engineering controls at that site will result in the protection of public health, safety and the environment at the health risk standard established in subsection d. of this section and if the requirements established in subsections a., b., c. and d. of section 36 of P.L.1993, c.139 (C.58:10B-13) are met . The department may require the removal or treatment of contaminated material that poses an acute hazard in the event of failure of an engineering control;

(3) Real property on which there is soil that has not been remediated to the residential soil remediation standards, or real property on which the soil, groundwater, or surface water has been remediated to meet the required health risk standard by the use of engineering or institutional controls, may be developed or used for residential purposes, or for any other similar purpose, if (a) all areas of that real property at which a person may come into contact with soil are remediated to meet the residential soil remediation standards [and] , (b) it is clearly demonstrated that for all areas of the real property, other than those described in subparagraph (a) above, engineering and institutional controls can be implemented and maintained on the real property sufficient to meet the health risk standard as established in subsection d. of this section , and (c) a presumptive remedy or an enhanced remedy as established by the department has been approved as required in paragraph (1) of this subsection;

(4) Remediation shall not be required beyond the regional natural background levels for any particular contaminant. The department shall develop regulations that set forth a process to identify background levels of contaminants for a particular region. For the purpose of this paragraph "regional natural background levels" means the concentration of a contaminant consistently present in the environment of the region of the site and which has not been influenced by localized human activities;

(5) Remediation shall not be required of the owner or operator of real property for contamination coming onto the site from another property owned and operated by another person, unless the owner or operator is the person who is liable for cleanup and removal costs pursuant to P.L.1976, c.141 (C.58:10-23.11 et seq.);

(6) Groundwater that is contaminated shall not be required to be remediated to a level or concentration for any particular contaminant lower than the level or concentration that is migrating onto the property from another property owned and operated by another person;

(7) The technical performance, effectiveness and reliability of the proposed remedial action in attaining and maintaining compliance with applicable remediation standards and required health risk standards shall be considered. In reviewing a proposed remedial action, the department shall also consider the ability of the owner or operator to implement the proposed remedial action within a reasonable time frame without jeopardizing public health, safety or the environment;

(8) The use of a remedial action for soil contamination that is determined by the department to be effective in its guidance document created pursuant to section 38 of P.L.1993, c.139 (C.58:10B-14), is presumed to be an appropriate remedial action if it is to be implemented on a site in the manner described by the department in the guidance document and applicable regulations and if all of the conditions for remedy selection provided for in this section are met. The burden to prove compliance with the criteria in the guidance document is with the person performing the remediation;

(9) (Deleted by amendment, P.L.1997, c.278).

The burden to demonstrate that a remedial action is protective of public health, safety and the environment, as applicable, and has been selected in conformance with the provisions of this subsection is with the person proposing the remedial action.

The department may require the person performing the remediation <u>to conduct expanded public participation or</u> to supply the information required pursuant to this subsection , as is necessary for the department to make a determination.

h. (1) The department shall adopt regulations which establish a procedure for a person to demonstrate that a particular parcel of land contains large quantities of historical fill material. Upon a determination by the department that large quantities of historic fill material exist on that parcel of land, there is a rebuttable presumption that the department shall not require any person to remove or treat the fill material in order to comply with applicable health risk or environmental standards. In these areas the department shall establish by regulation the requirement for engineering or institutional controls that are designed to prevent exposure of these contaminants to humans, that allow for the

continued use of the property, that are less costly than removal or treatment, which maintain the health risk standards as established in subsection d. of this section, and, as applicable, are protective of the environment. The department may rebut the presumption only upon a finding by the preponderance of the evidence that the use of engineering or institutional controls would not be effective in protecting public health, safety, and the environment. The department may not adopt any rule or regulation that has the effect of shifting the burden of rebutting the presumption. For the purposes of this paragraph "historic fill material" means generally large volumes of non-indigenous material, no matter what date they were emplaced on the site, used to raise the topographic elevation of a site, which were contaminated prior to emplacement and are in no way connected with the operations at the location of emplacement and which include, but are not limited to, construction debris, dredge spoils, incinerator residue, demolition debris, fly ash, and non-hazardous solid waste. Historic fill material shall not include any material which is substantially chromate chemical production waste or any other chemical production waste or waste from processing of metal or mineral ores, residues, slags or tailings.

(2) The department shall develop recommendations for remedial actions in large areas of historic industrial contamination. These recommendations shall be designed to meet the health risk standards established in subsection d. of this section, and to be protective of the environment and shall take into account the industrial history of these sites, the extent of the contamination that may exist, the costs of remedial actions, the economic impacts of these policies, and the anticipated uses of these properties. The department shall issue a report to the Senate Environment Committee and to the Assembly Agriculture and Waste Management Committee, or their successors, explaining these recommendations and making any recommendations for legislative or regulatory action.

(3) The department may not, as a condition of allowing the use of a nonresidential use soil remediation standard, or the use of institutional or engineering controls, require the owner of that real property, except as provided in section 36 of P.L.1993, c.139 (C.58:10B-13), to restrict the use of that property through the filing of a deed easement, covenant, or condition.

i. The department may not require a remedial action workplan to be prepared or implemented or engineering or institutional controls to be imposed upon any real property unless sampling performed at that real property demonstrates the existence of contamination above the applicable remediation standards.

j. Upon the approval by the department of a remedial action workplan, or similar plan that describes the extent of contamination at a site and the remedial action to be implemented to address that contamination, the department may not subsequently require a

change to that workplan or similar plan in order to compel a different remediation standard due to the fact that the established remediation standards have changed; however, the department may compel a different remediation standard if the difference between the new remediation standard and the remediation standard approved in the workplan or other plan differs by an order of magnitude. The limitation to the department's authority to change a workplan or similar plan pursuant to this subsection shall only apply if the workplan or similar plan is being implemented in a reasonable timeframe, as may be indicated in the approved remedial action workplan or similar plan.

k. Notwithstanding any other provisions of this section, all remediation standards and remedial actions that involve real property located in the Pinelands area shall be consistent with the provisions of the "Pinelands Protection Act," P.L.1979, c.111 (C.13:18A-1 et seq.), any rules and regulations promulgated pursuant thereto, and with section 502 of the "National Parks and Recreation Act of 1978," 16 U.S.C. s.471i; and all remediation standards and remedial actions that involve real property located in the Highlands preservation area shall be consistent with the provisions of the "Highlands Water Protection and Planning Act," P.L.2004, c.120 (C.13:20-1 et al.), and any rules and regulations and the Highland regional master plan adopted pursuant thereto.

l. Upon the adoption of a remediation standard for a particular contaminant in soil, groundwater, or surface water pursuant to this section, the department may amend that remediation standard only upon a finding that a new standard is necessary to maintain the health risk standards established in subsection d. of section 35 of P.L.1993, c.139 (C.58:10B-12) or to protect the environment, as applicable. The department may not amend a public health based soil remediation standard to a level that would result in a health risk standard more protective than that provided for in subsection d. of section 35 of P.L.1993, c.139 (C.58:10B-12).

m. Nothing in P.L.1993, c.139 shall be construed to restrict or in any way diminish the public participation which is otherwise provided under the provisions of the "Spill Compensation and Control Act," P.L.1976, c.141 (C.58:10-23.11 et seq.).

n. Notwithstanding any provision of subsection a. of section 36 of P.L.1993, c.139 (C.58:10B-13) to the contrary, the department may not require a person intending to implement a remedial action at an underground storage tank facility storing heating oil for on-site consumption at a one to four family residential dwelling to provide advance notice to a municipality prior to implementing that remedial action.

o. A person who has remediated a site pursuant to the provisions of this section, who was liable for the cleanup and removal costs of that discharge pursuant to the provisions of paragraph (1) of subsection c. of section 8 of P.L.1976, c.141

(C.58:10-23.11g), and who remains liable for the discharge on that site due to a possibility that a remediation standard may change, undiscovered contamination may be found, or because an engineering control was used to remediate the discharge, shall maintain with the department a current address at which that person may be contacted in the event additional remediation needs to be performed at the site. The requirement to maintain the current address shall be made part of the conditions of the no further action letter issued by the department.
(cf: P.L.2004, c.120, s.81)

28. Section 36 of P.L.1993, c.139 (C.58:10B-13) is amended to read as follows:

36. a. When real property is remediated to a nonresidential soil remediation standard or engineering or institutional controls are used in lieu of remediating a site to meet an established remediation standard for soil, groundwater, or surface water, the department shall, as a condition of the use of that standard or control measure:

(1) require the establishment of any engineering or institutional controls the department determines are reasonably necessary to prevent exposure to the contaminants, require maintenance, as necessary, of those controls, and require the restriction of the use of the property in a manner that prevents exposure;

(2) require, with the consent of the owner of the real property, the recording with the office of the county recording officer, in the county in which the property is located, a notice to inform prospective holders of an interest in the property that contamination exists on the property at a level that may statutorily restrict certain uses of or access to all or part of that property, a delineation of those restrictions, a description of all specific engineering or institutional controls at the property that exist and that shall be maintained in order to prevent exposure to contaminants remaining on the property, and the written consent to the notice by the owner of the property. The notice shall be recorded in the same manner as are deeds and other interests in real property. The department shall develop a uniform deed notice that ensures the proper filing of the deed notice. The provisions of this paragraph do not apply to restrictions on the use of surface water or groundwater;

(3) require a notice to the governing body of each municipality in which the property is located that contaminants will exist at the property above residential use soil remediation standards or any other remediation standards and specifying the restrictions on the use of or access to all or part of that property and of the specific engineering or institutional controls at the property that exist and that shall be maintained;

(4) require, when determined necessary by the department, that signs be posted at any location at the site where access is restricted or in those areas that must be maintained in a prescribed manner, to

inform persons on the property that there are restrictions on the use of that property or restrictions on access to any part of the site;

(5) require that a list of the restrictions be kept on site for inspection by governmental enforcement officials; and

(6) require a person, prior to commencing a remedial action, to notify the governing body of each municipality wherein the property being remediated is located. The notice shall include, but not be limited to, the commencement date for the remedial action; the name, mailing address and business telephone number of the person implementing the remedial action, or his designated representative; and a brief description of the remedial action.

b. If the owner of the real property does not consent to the recording of a notice pursuant to paragraph (2) of subsection a. of this section, the department shall require the use of a residential soil remediation standard in the remediation of that real property.

c. Whenever engineering or institutional controls on property as provided in subsection a. of this section are no longer required, or whenever the engineering or institutional controls are changed because of the performance of subsequent remedial activities, a change in conditions at the site, or the adoption of revised remediation standards, the department shall require that the owner or operator of that property record with the office of the county recording officer a notice that the use of the property is no longer restricted or delineating the new restrictions. The department shall also require that the owner or operator notify, in writing, the municipality in which the property is located of the removal or change of the restrictive use conditions.

d. The owner or lessee of any real property, or any person operating a business on real property, which has been remediated to a nonresidential use soil remediation standard or on which the department has allowed engineering or institutional controls for soil, groundwater, or surface water to protect the public health, safety, or the environment, as applicable, shall maintain the engineering or institutional controls as required by the department. An owner, lessee, or operator who takes any action that results in the improper alteration or removal of engineering or institutional controls or who fails to maintain the engineering or institutional controls as required by the department, shall be subject to the penalties and actions set forth in section 22 of P.L.1976, c.141 (C.58:10-23.11u) and, where applicable, shall be liable for any additional remediation and damages pursuant to the provisions of section 8 of P.L.1976, c.141 (C.58:10-23.11g). The provisions of this subsection shall not apply if a notification received pursuant to subsection b. of this section authorizes all restrictions or controls to be removed from the subject property.

e. Notwithstanding the provisions of any other law, or any rule, regulation, or order adopted pursuant thereto to the contrary, whenever contamination at a property is remediated in compliance

with any soil, or any groundwater or surface water remediation standards that were in effect or approved by the department at the completion of the remediation, no person, except as otherwise provided in this section, shall be liable for the cost of any additional remediation that may be required by a subsequent adoption by the department of a more stringent remediation standard for a particular contaminant. Upon the adoption of a regulation that amends a remediation standard, or where the adoption of a regulation would change a remediation standard which was otherwise approved by the department, only a person who is liable to clean up and remove that contamination pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g), and who does not have a defense to liability pursuant to subsection d. of that section, shall be liable for any additional remediation costs necessary to bring the site into compliance with the new remediation standards except that no person shall be so liable unless the difference between the new remediation standard and the level or concentration of a contaminant at the property differs by an order of magnitude and that person did not implement an unrestricted use remedial action. The department may compel a person who is liable for the additional remediation costs to perform additional remediation activities to meet the new remediation standard except that a person may not be compelled to perform any additional remediation activities on the site if that person can demonstrate that the existing engineering or institutional controls on the site prevent exposure to the contamination and that the site remains protective of public health , safety and the environment pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12). The burden to prove that a site remains protective is on the person liable for the additional remediation costs. A person liable for the additional remediation costs who is relying on engineering or institutional controls to make a site protective, shall comply with the provisions of subsections a., b., c. and d. of this section.

Nothing in the provisions of this subsection shall be construed to affect the authority of the department, pursuant to subsection f. of this section, to require additional remediation on real property where engineering controls were implemented.

Nothing in the provisions of this subsection shall limit the rights of a person, other than the State, or any department or agency thereof, to bring a civil action for damages, contribution, or indemnification as provided by statutory or common law.

f. Whenever the department approves or has approved the use of engineering controls for the remediation of soil, groundwater, or surface water, to protect public health, safety or the environment, the department may require additional remediation of that site only if the engineering controls no longer are protective of public health, safety, or the environment.

g. Whenever the department approves or has approved the use of engineering or institutional controls for the remediation of soil, groundwater, or surface water, to protect public health, safety or the environment, the department shall inspect that site at least once every five years in order to ensure that the engineering and institutional controls are being properly maintained and that the controls remain protective of public health and safety and of the environment.

h. A property owner of a site on which a deed notice has been recorded shall notify any person who intends to excavate on the site of the nature and location of any contamination existing on the site and of any conditions or measures necessary to prevent exposure to contaminants.

(cf: P.L. 1997, c.278, s.18)

29. Section 45 of P.L.1993, c.139 (C.58:10B-20) is amended to read as follows:

45. a. There is created in the Department of Environmental Protection [and Energy] a special, revolving fund to be known as the Remediation Guarantee Fund. The fund shall be credited with the 5% surcharge imposed pursuant to section 25 of P.L.1993, c.139 (C.58:10B-3), the remediation funding source surcharge imposed pursuant to section 33 of P.L.1993, c.139 (C.58:10B-11), all moneys appropriated to it by law, all moneys collected in subrogation actions to recover moneys expended from the fund, and all moneys earned from the investment of the moneys in the fund.

b. [The Commissioner of Environmental Protection and Energy shall appoint and supervise an administrator of the fund. The administrator shall be the chief executive of the fund, shall approve all disbursements of moneys from the fund, and shall ensure the proper deposit of all moneys authorized to be deposited into the fund.] Deleted by amendment, P.L. , c. (pending before the Legislature as this bill) .

c. (1) Moneys in the fund shall be used by the Department of Environmental Protection [and Energy] to remediate, or contract for the remediation of, any real property for which a person was required to establish a remediation funding source pursuant to section 25 of P.L.1993, c.139 (C.58:10B-3) and where that person fails to conduct or properly conduct that remediation.

(2) Moneys in the fund may be disbursed by the department as grants to persons, homeowner associations, or government entities:

(a) who own property for which the department has issued a no further action letter for a restricted use remedial action and (i) there is a failure of the remedy, (ii) the person, homeowner or government entity did not cause the discharge of the hazardous substance that is the subject of the no further action letter, (iii) the person, homeowner or government entity maintained the engineering control that was implemented as part of the remedial

action at the site, and (iv) there is no financially viable or existing responsible party. The person, homeowner association, or government entity may use only use the grant money to evaluate and repair the failed remedy;

(b) who own property for which the department has issued a no further action letter for an unrestricted use or limited restricted use remedial action and a remediation standard upon which the no further action letter was based has changed by an order of magnitude or more, to conduct remediation activities to determine if the remedial action is no longer protective of public health, safety and the environment due to the change in the remediation standard. Persons, homeowner associations, or government entities may obtain grants from the fund to implement another remedial action at the property pursuant to this paragraph, provided that the remediation activities reveal that the remedial action is no longer protective of public health, safety and the environment due to the change in the remediation standard;

(c) who own property for which the department has issued a no further action letter for a restricted use remedial action where a remediation standard upon which the no further action letter was based has changed by an order of magnitude or more, to conduct remediation activities to determine if the remedial action is no longer protective of public health, safety and the environment due to the change in the remediation standard provided that the person, homeowners association or government entity did not cause the discharge of the hazardous substance that is the subject of the no further action letter and there is no financially viable or existing responsible party. Persons, homeowner associations, or government entities may use money from the fund to implement another remedial action at the property provided that the remediation activities reveal that the remedial action is no longer protective of public health, safety and the environment due to the change in the remediation standard.

d. Any moneys expended by the department from the fund pursuant to this section shall constitute a debt of (1) the person required to establish the remediation funding source if the person fails to perform the remediation and the person bars the department from gaining access to the moneys in the remediation funding source to conduct the remediation, and (2) against the discharger if the discharger implemented a restricted use remedial action at the site. The debt shall constitute a lien on all property owned by the person required to establish the remediation funding source and against the discharger to the same extent and in the same manner as provided for liens in subsection f. of section 7 of P.L.1976, c.141 (C.58:10-23.11f).

e. Whenever the department expends moneys from the fund for a remediation, it shall have a cause of action to recover from the person required to establish the remediation funding source or from

any other person liable for the discharge pursuant to section 8 of P.L.1976, c.141 (C.58:10-23.11g) triple the amount of moneys expended for the remediation.

f. Moneys in the fund may be appropriated to pay for the costs to administer the fund except that those appropriations may not exceed the amount of moneys deposited into the fund earned from the investment of moneys in the fund.

g. The balance of the fund shall not exceed $100,000,000. When the balance of the fund equals $100,000,000, all surcharges collected pursuant to subsection k. of section 25 of P.L.1993, c.139 (C.58:10B-3) and the remediation funding source surcharge imposed pursuant to 33 of P.L.1993, c.139 (C.58:10B-11) shall be deposited into the Hazardous Discharge Site Remediation Fund and shall be used for the purposes of that fund. When the balance of the Remediation Guarantee Fund is reduced to $100,000, all surcharges shall be deposited in the Remediation Guarantee Fund.

(cf: P.L.1993,c.139, s.45)

30. This act shall take effect immediately.

STATEMENT

This bill would establish a licensed site professional program within the Department of Environmental Protection (DEP). No more than 90 days after the effective date, any submissions concerning the remediation of a contaminated site shall be signed and certified by a licensed site professional, or by a certified subsurface evaluator. The bill also authorizes the issuance of a temporary site remediation professional license that would be effective upon issuance and would remain effective for 180 days after the adoption of rules establishing permanent standards for the licensed site professional program. The bill establishes a code of professional conduct for licensed site professionals and subsurface evaluators and provisions for license suspension or revocation. Further, the bill provides for penalties for violations of the act.

The bill would also establish criteria for a ranking system for contaminated sites. The bill provides for varying levels of oversight depending on the ranking of the site. The bill allows the DEP to audit a licensed site professional at least once during the three year licensing period and provides for the audit of cases.

The bill would also make changes to the provisions of the "Brownfield and Contaminated Site Remediation Act" to change the oversight requirements for persons who clean up contaminated sites and the requirements for the establishment of a remediation funding source. The bill would impose a 1% annual surcharge on persons responsible for conducting a remediation and would require the payment of a surcharge of 5% of the total cost of the remedial

action when a limited restricted use or a restricted use remedial action is implemented. The surcharges would be deposited in the Remediation Guarantee Fund and may be used by the department to conduct remediation when a person fails to do so. The moneys in the fund may also be awarded as grants by the department to an individual, homeowner association or government entity for additional remediation activities required due to changes in the remediation standards, or when an engineering control is no longer protective of the public health, safety and the environment. The bill would also make numerous other changes to the laws concerning the cleanup of contaminated sites.

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## APPENDIX (continued):

**SENATOR BOB SMITH (Chair):** We have Senate 1897.

And on that note, maybe we should have Irene up.

This piece of legislation has been now under consideration for two-and-a-half years. You may remember that golden moment when Commissioner Jackson came in -- former Commissioner Jackson came in and said site remediation is broken and needs to be fixed. And this Committee has been working through many, many hearings, many iterations of the legislation, to try and come up with that solution.

My guess today is everybody is going to be unhappy with this bill -- which means we are really going in the right direction.

That being said, the bill is on for discussion only today. It is not up for release. We're hoping to have a thorough review today, but we are finishing by 12:30. We're hoping by the end of February to have a final bill for release. We've had all kinds of hopes like this in the past, so that's not a promise, it's a hope.

We would ask everybody, as you testify today, to be succinct, to be direct. And if you've brought printed testimony-- If you're planning to read testimony, don't do that. Don't punish us and yourselves. If you only have one copy, our Committee Aide will make copies. But we actually do read what you give to us. So we'd be happy to read anything that you have in printed form.

And I would ask you, in your oral testimony, to summarize your point. If the point has been made over, and over, and over again, please -- we have enough dead horses on the floor. Let's not beat any more dead horses to death. Make your point if it hasn't been made before. Tell us something new that we're missing on the bill so that we can correct it.

With that being said, Irene, I'm going to ask you to do the two-minute warmer-upper, and then we're going to get people up to testify.

ASSISTANT COMMISSIONER IRENE KROPP: Thank you, Mr. Chairman and members of the Committee.

I think it's appropriate that it's Groundhog Day today, because I feel like I'm in a bad Bill Murray movie. I'm here again. (laughter)

So S-1897 includes statutory amendments, new legislation that the DEP believes is critical to improvement of the Site Remediation Program. As Assistant Commissioner -- as Commissioner Mauriello has stated, we feel strongly that the bill represents a comprehensive reproach to reform that is needed now, and is based on the challenges that DEP and New Jersey face today, especially in light of the economic stimulus initiative.

I believe we're very close to finalizing a bill, but there are some key issues that warrant further discussion. And I'm sure everyone speaking today will raise the same exact issues.

First and foremost, is the Department privatizing site remediation? As previously stated, the Site Remediation Program has much more work than it can process today. As such, there are many cases that are not being worked on now. And in order to ensure that all cases move forward through the remedial process, we need a new solution. In order to ensure that the highest priority environmental and economic cases are receiving the attention deserved, we need a new solution.

I think S-1987 is the solution. We are not giving up our involvement through implementation of the LSP program. The DEP is establishing a new business operating process by which all cases can receive

DEP oversight and the worst cases can get the greatest attention, for the first time.

The DEP needs to have the ability to hold consultants accountable for their work. This bill does that. We are allowing economically important redevelopment projects, as well as environmentally sensitive projects, to proceed at a pace that will not jeopardize the environment and not jeopardize funding.

Is the bill establishing new taxes? One of the most controversial parts of this bill involves modifications that we are making to current statutory requirements related to the remediation funding source. Current law requires the establishment of RFSs. Current law requires a 1 percent annual surcharge on those remediation funding sources. S-1897 changes the *who* with regard to it exempts small businesses, homeowners, governmental agencies, educational facilities, child care facilities, and developers who have purchased property prior to enactment of the bill. The only new entities who will be required to post an RFS are true Spill Act dischargers -- to get at the legislators' intent of polluters pay for cleanups, not residential tax dollars -- and developers who purchase after enactment.

We are decreasing the amount of RFS as is currently in statute so that it is only posted at the end of the remedial process and covers construction. S-1897 also changes how much an RFS can be self-guaranteed for a very good reason. Large corporations can self-guarantee the remediation funding sources. The Department does not have the ability to access that money. So you're changing the self-guarantee so that a person can only self-guarantee 50 percent of the cost of the remediation funding source.

There is a new 5 percent surcharge included in S-1897. As the Legislature has declared, there's a permit for preference in cleanups in New Jersey. We're including this language in the law. To support the statutory preference for permanence, it includes a 5 percent premium for all entities that clean up using a restricted-use remedial action: that is, an engineering control and typically a cap. The DEP believes that the 5 percent premium may serve as a disincentive for restricted-use cleanups. And, again, we are exempting small businesses, homeowners, governmental agencies, child care, and educational facilities. We are also considering, in discussions later this afternoon, whether we should exempt operational facilities that will remain operational and only apply the 5 percent premium when there is a conversion of use to residential, school, or daycare.

Another controversial issue is that S-1897 eliminates the Department's issuance of covenant not to sue. Developers feel very strongly that this is something that needs to be in the existing law. They believe that it will impact brownfields redevelopment going forward, as the Department will not be issuing NFAs. We have eliminated our issuance of the covenant not to sue. And I understand the concerns of the developers. I'm assuming that will be part of our discussions this afternoon also.

The makeup of the board: We have included in this bill a licensing board. The current makeup of the board is the Commissioner, State Geologist, a member of academia, a member of industry, two environmentalists, and five LSPs. The consultant community would like more LSPs to be in the bill. The environmental community would like there to be less LSPs in the bill. That will be a fun discussion this afternoon.

Direct oversight: There is a part of S-1897 that allows the Department to place sites in the category of direct oversight. Persons conducting a cleanup who fall into this category essentially relinquish control of the cleanup to the DEP. These are recalcitrant parties and the highest environmental concern parties. We pick the remedy in the DEP, and we control the remediation funding source, which is in the form of a trust fund. So we would be paying for the cost of cleanup and the cost of the LSP. Needless to say, no one wants to be in this category. And therefore, the criteria in the bill which determines who is included is a concern to many, mostly industry folks.

Lastly, there is a concern with regard to how the Department develops its standards. In current legislation, we have a 10-to-the-minus-6 health risk. We believe that we need to maintain the 10-to-the-minus-6 health risk. But the environmental community would like to have discussions with regard to point of compliance -- the industrial community -- points of compliance and how we actually apply those standards.

So with that being said, those, I think, are the major controversial issues. I'm not going to do the same old dog and pony since we've heard it all before.

Any questions, I'm here.

SENATOR SMITH: I would appreciate, Irene, if you would take the seat to your left. And as people come forward, we might turn to you and say -- ask you for a response or reaction to the comment.

I've tried to put people in favor, people opposed, or people with no position in alternating order.

Again, if you have written testimony, just give it to us and circulate it. Talk to us, focus in on the points, and try not to be repetitive.

Why don't we start with Ryan Tookes, the New Jersey Utilities Association, in favor if amended.

Mr. Tookes.

**RYAN L. TOOKES:** Good morning, Mr. Chairman and members of the Committee.

I am Ryan Tookes. I'm the Manager of Government and Public Affairs at the New Jersey Utilities Association, NJUA. It is the state trade association for 16 investor-owned utilities; utility companies that safely and reliably deliver regulated natural gas, electricity, wastewater, and telecommunication services to New Jersey residents and businesses 24 hours a day, every day of the year.

I'm here today representing the views of our member companies that will be affected by S-1897, specifically Elizabethtown Gas, South Jersey Gas, New Jersey Natural Gas, PSEG, Orange & Rockland, and so forth. These companies are responsible for and have completed various and multiple site remediation projects throughout the state. While we are supportive of the changes to the law that would help expedite remediations without compromising environmental protection, for reasons I will detail in a moment our affected member companies have specific concerns.

I will just start by saying, first, I'm glad you guys opened up this bill for discussion only, just so we can work together to get some the changes that are necessary to make it palatable to all interested parties.

My first point will be speaking to defining *recalcitrant* in the Site Remediation Program. Section 28 speaks to triggers when the DEP would

take control of a site. While we definitely believe that there's value in having that language, it is critically important not to deem a company recalcitrant for their inability to meet specified timeframes through no fault of their own. Specifically, our member companies deal with very complicated sites. And what immediately springs to mind is manufactured gas plants. I don't know if you're aware, but manufactured gas plants were -- came about prior to the introduction of gas pipelines. So these sites -- some of these sites are more than 100 years old. So as you can imagine, the environmental safeguards and standards that were in place 100 years ago are not nearly to the level or the capacity that they are today. So there are a panoply of issues that would go into the remediation of a site like that.

So the timeframes that are specifically in this bill would make it difficult for some of our member companies to not be recalcitrant, even if they're acting in all diligence.

SENATOR SMITH: Irene, what do you say to that?

ASSISTANT COMMISSIONER KROPP: I guess I say we have not specified what the timeframes are, so it's hard for someone to predict that the timeframes are going to impact their ability to meet them. The only thing that is in S-1897 is the ability for the Department to establish a mandatory timeframe. And our goal was to establish them based on areas of concern and the size of the site. So without having any knowledge of what those timeframes are, I find it hard to believe that it's difficult -- that it's a problem in the bill -- just establishing them. The opportunity to comment on what the timeframes are would be when regulations are proposed.

SENATOR SMITH: And as I understand, the intention of DEP is to not punish anyone who is actually working on the cleanup or putting forward ideas on how the cleanup should be done. The problem is when you have somebody warehousing the site and not doing anything with it. Correct?

Do you have any specific language that you would suggest on that problem?

MR. TOOKES: Let me just respond briefly to what our member companies are thinking.

SENATOR SMITH: You have to press it one more time. (referring to PA microphone)

MR. TOOKES: Oh, it went off. I didn't realize it goes off.

Specifically, in terms of the timeframe issue, there is language in the bill that speaks to -- "extensions may be granted at the discretion of the DEP." And just that discretion -- that discretionary language -- I think that if we're acting in all diligence that shouldn't be *may*, definitely it should be -- like those extensions should absolutely be granted. So that's what I'm specifically speaking to. And I kind of outlined that going forward. I don't want to belabor the point. I know there are a lot of people who want to get in on this. And I will speak to the timeframe issue.

My throat keeps acting up.

SENATOR SMITH: Go ahead.

MR. TOOKES: The bill, as presently drafted, indicates that timeframes for remediation will be established by the DEP. While it is reasonable, like I previously said, that the State expect diligence on the part of responsible parties, it is equally reasonable to expect diligence on the part

of DEP. Conspicuous by its absence is the fact that no timeframes are established for DEP's review and approval of document submittals.

SENATOR SMITH: Wait a minute -- different bill. This is site remediation reform. Your companies are going to be hiring licensed site professionals, putting together an evaluation of the site, deciding what the cleanup plan would be, supervising the cleanup, and certifying that it's clean. There's no DEP approval. (indiscernible) control is gone in this. There's no DEP approval. They will audit you at the end to make sure you've done it properly, probably, especially if it's a complicated site. But other than that, it's not-- The nickel-- The ball doesn't go to DEP to review anything. They're not going to hold you up on the cleanup. The whole point of this is to expedite the cleanup.

MR. TOOKES: Right.

What I was trying to express is that in terms of once -- like you say -- say one of our member companies hires an LSP, they're the person who is strictly in control, and their processes will be audited by DEP.

SENATOR SMITH: At the end.

MR. TOOKES: At the end.

SENATOR SMITH: When it's certified to be clean.

MR. TOOKES: Okay. I just want to make sure.

SENATOR SMITH: So we're not holding you up.

MR. TOOKES: Okay.

SENATOR SMITH: DEP will not hold you up.

MR. TOOKES: Okay. That's excellent. That makes it clear.

SENATOR SMITH: Good.

MR. TOOKES: And also, I want to speak to the limits on self-guarantees. The bill limits a company's ability to self-guarantee a cleanup.

SENATOR SMITH: Right.

MR. TOOKES: The ability to self-guarantee 100 percent should be an option for companies able to demonstrate that they're financially sound.

SENATOR SMITH: Let me stop you for one second there. The problem with the self-guarantee is that that also gives the company the option to warehouse the property. They never have to put any money up, they never have to spend, they never have to do anything. The problem with-- And the solution I think the DEP came up with in this bill is, by saying that you have to put up half as a self-guarantee, now the meter is running. Now you actually have some encouragement. I'm not saying that your member companies are in this category, but we do have some companies in New Jersey who don't get off their duffs. They would rather sit on a contaminated property and let it sit there for a million years -- just leave it on their books. They don't want to deal with it and the pollution only gets worse. So this was seen as a way to stimulate the big guys in the game, the big companies, to actually get off their duffs and start cleaning it up. And that's why the 50 percent self-guarantee. All right?

MR. TOOKES: Okay.

SENATOR SMITH: It's a little different. It's not a function of somebody trying to punish anybody. It's trying to incentivize you to do something.

MR. TOOKES: Okay.

Given that-- My point would be, given that utilities are regulated by the BPU, a process that enables the State -- this is speaking to the fact that demonstrating financial soundness-- And your point is very well-taken. I just wanted to put this on the record -- that given the fact that utilities are regulated by BPU, the process that enables State government to oversee the financial integrity of the utilities; and given that the expense associated with the purchase of additional insurance and high-cost of credit-- It just seems unnecessary to place that additional burden on any of our member companies. And we just respectfully request that the Committee reinstate the ability to self-guarantee without restrictions.

SENATOR SMITH: What happens if we took a self-guarantee from Lehman Brothers? (laughter)

UNIDENTIFIED SPEAKER FROM AUDIENCE: It wouldn't be worth the paper it's printed on.

MR. TOOKES: That would present--

SENATOR SMITH: It would present a problem.

SENATOR CIESLA: That would be okay. (laughter)

MR. TOOKES: Well, it all depends on how you look at it, but that would definitely be a problem.

But my point with respect to our member companies is that we're regulated by BPU, so they know our financial status, in terms of--

SENATOR SMITH: The Federal government knew the financial status of Lehman Brothers, and they still went under.

MR. TOOKES: Right.

SENATOR SMITH: All right?

So anyway, we appreciate the thoughts.

Anything else?

MR. TOOKES: No, that was all, sir.

SENATOR SMITH: Thank you, sir.

MR. TOOKES: Thank you.

ASSEMBLYMAN SMITH: Steve Senior and Nick DeRose.

I think you'll need to bring up one other chair.

Licensed Site Professionals.

NICHOLAS DeROSE: Good morning.

Good morning, Senator, and to the rest of the Committee.

Thank you for having us here this morning.

Just a couple of pieces of logistics: I've prepared two handouts that you have. I will not review them in any detail. I'm here on behalf of the LSP Consultant Coalition; as well as Steve Senior, of the law firm Riker Danzig, who we have retained. And you've met us before. So I thank you again.

The one handout that I'm not going to speak to directly, but I hope you will be able to review it, is the Massachusetts framework handout. We put that together -- Steve; myself; as well as Duff Collins, who is the LSP from Massachusetts. I believe it's a good primer on explaining how the roles of that board of the Massachusetts -- in the Massachusetts LSP program works with the department and with the LSPs. So we have really focused on attempting to emulate that to get the process correct in terms of aligning responsibilities of each. And that is our main concern.

We recognize there have been substantial revisions in both the form and substance of Senate Bill 1897 that we now look at, and we recognize the effort and hard work by everybody.

I need to make it clear that from our perspective, as future folks who would be regulated, our concerns, we believe, are aligned with the intent of the bill, as we understand, to reform the remediation process, not the standards. Having said that, we are not taking the position that the standards are fine, but we understand that's off the table for now.

Our concerns are fundamentally centered around defining consistent roles and responsibilities for DEP, LSPs, and the regulated community. We believe we are not seeking perfection, but we are looking to ensure success with that goal in mind. So these are fundamental concerns that still remain.

For the bill to accomplish the goal of licensing remediation activity, and to result -- in terms of increasing the pace of cleanup in New Jersey -- LSPs must not only be charged with the authority to act as agents of the DEP, but must also be provided the ability to access the latest science and technical resources; focus on remediation, not just investigation, that includes exercising professional judgement within defined standard.

Finally is a couple of words about the Massachusetts model and how they approach this. They have a performance standard, called the Response Action Performance Standard, that describes the types of diligent work that is needed to ensure compliance with the DEP's site cleanup requirements and regulations.

Under this framework, the LSPs apply a vast array of tools for site investigation and cleanup, unhampered by delays often associated with regulatory review, as is consistent with the model.

An LSP code of conduct administered by the board requires LSPs to employ the Response Action Performance Standard. And I will say,

you can audit every one of the submittals. As long as it's done by the board, we have no issue with being audited. That's not--

SENATOR SMITH: You're saying don't have the audits by the DEP?

MR. DeROSE: That wouldn't be consistent with the roles and responsibilities that we understand are appropriate. And that is correct.

SENATOR SMITH: My understanding of the Massachusetts program is that they do audit the sites.

MR. DeROSE: Sites, yes. Not the LSP himself.

SENATOR SMITH: Oh, I see. I didn't understand the distinction.

MR. DeROSE: There is a section in the bill, Section 24, which says the DEP may audit LSPs. And that would be one specific comment that we would like to talk about.

SENATOR SMITH: Okay.

MR. DeROSE: But I agree, Senator, the DEP should be able to audit sites.

And finally, I'll just say, why is the use of the Performance Standard concept so important? Field of site investigation and site cleanup has only been around for a couple of decades. Technology available to engineers and scientists to assess and clean up waste sites expands every year. The cost in the field is constantly evolving and improving. There's opportunity for systematic incorporation of changes as we recognize improvements, and our understanding of waste sites and the cleanups released into the environment.

So that's one point on this Remedial Action Performance Standard. And I'm certainly interested to hear from Irene if you feel that's appropriate.

The other point that I have on my list is these triggers that the previous gentleman was talking about for DEP oversight, not auditing. I'm still a bit confused. There are two sections of that -- of the bill. One talks about what I see as recalcitrants, based on the behavior of the responsible party. There is another set of triggers which are tied to certain environmental conditions. And those environmental conditions don't necessarily have to do with a party being recalcitrant. For example, one of the conditions says that if I have impact to sediment or surface water with PCBs or arsenic, I may be subject to direct Department oversight. And I may not understand it, but it sounds like very broad language from an LSP's perspective. It creates uncertainty as -- in the project I'm working on -- might it be subject to direct oversight? Do I have a responsibility to make that determination? I just don't understand the intent of that.

So those are my two comments. Steve will have a few more.

SENATOR SMITH: Well, before Steve goes forward, Irene, maybe you could respond to that last comment in particular.

ASSISTANT COMMISSIONER KROPP: The intent of the direct oversight section was for the Department to make the determination as to who would be in the direct oversight category. So there would be nothing required of the LSP to make that determination. The Department would make that determination. And one of the reasons direct oversight is necessary for a lot of the river projects is, there are not a lot of people

cleaning up the rivers right now. That's something we learned in Passaic. We need to be the ones that step up and make sure that we're doing that.

SENATOR SMITH: Right. I think this is the category-- When we looked at the broad spectrum of sites out there, there are probably about 400 sites that are so complicated, difficult, whatever, that the DEP has to be doing command and control. There are the other sites that are not even on the same scale, where there's a great deal of comfort with the LSP handling the cleanup, the planning, and ultimately certifying whether it's clean. So I think that's the site side of the issue.

There are going to be some sites that will remain under the jurisdiction of LSPs -- or under DEP. And you don't have to make that certification. They'll make that decision.

MR. DeROSE: Can I just ask one clarifying question? With PCBs, the level of detection and things going lower, and lower, and lower -- so, again, without having some better definition-- From my own personal experience, we have a number of sites where you have PCBs, and they accumulate in sediments. So many of the sediment sites we have are PCB releases that may be from a single transformer -- may not rise, in my mind, to the degree of severity. So how do we-- That's a concern we have about the growing trigger there.

SENATOR SMITH: And I think what we try to do is keep discretion in the legislation so that DEP would be able to make that decision. As you say, there may be very minor contamination from the PCBs as opposed to a hundred acres covered with tons of this stuff. So it really depends, and that's why there's some discretion in the bill.

MR. DeROSE: Okay. Thank you.

SENATOR SMITH: Okay.

Sir.

**S T E V E N T. S E N I O R, ESQ.:** Good morning.

Thank you.

My name is Steve Senior. I'm an environmental attorney with Riker Danzig. And the majority of my practice relates to site remediation.

But I've been working with this LSP Consulting Coalition to improve the recommendations of the bill and make sure that it will perform as intended. We provided a number of specific comments to the DEP and to legislative staff. I understand from the process of writing legislation that many of those have not yet been considered or fully, potentially reflected in the bill. So we'll continue to work to see that those specifics are addressed.

So I'll just hit a couple of high points right here.

The concerns of the Coalition are not parochial, narrow interests of professionals who will be licensed for the first time now -- by the way, they are the only ones being affected in this way -- but to try and improve the program. Nick has mentioned a couple of those, and one, specifically -- this idea of RAPs. You've heard us say that term before. And it's a way to allow consultants to exercise judgement in the process of deciding how to remediate sites -- not a change to cleanup standards, but how to exercise judgement. And the current regulations don't really provide for that. So we need to address that issue. And we've provided specific language.

Similarly, because of the process, the requirements, the responsibilities that are placed on these LSPs, we have concerns about the types of penalties and liability considerations for LSPs. The penalties in the

bill are the same penalties that are assessed against polluters, people who actually put contamination in the environment and fail to clean it up. Those are not the penalties that ought to be appropriate to a licensed site professional who's being put into a role to try and assist. And we've tried to work with the DEP and suggest specific things. In the statute, right now, penalties are up to $50,000 per day.

I'll just offer, as examples: in Massachusetts, the licensing board has penalty authority up to $1,000 against licensed site professionals. So there's a huge disconnect there. For example, under the professional engineers law, the penalties are significantly less than those set forth in this statute. So we don't think that the penalties are appropriate to the role of the licensed site professional. And we're going to make some specific suggestions along those lines and with respect to liability.

The last area is roles and responsibilities. The DEP has a role, the Licensing Board has a role, the LSP has a role, and the remediating party has a role. And the bill models some of those roles, in our view. We understand from Massachusetts' LSPs that having clear roles, clear lines of responsibility and authority, are essential to making this work. And there's a lot of-- Our program is a little different than Massachusetts, at least as reflected in this bill, but those roles are muddled. And we ought to be clear that the Licensing Board will regulate the licensed site professionals, the DEP will regulate the responsible party. And because of the process we're setting up, a responsible party or a mediating party has to hire a licensed site professional -- again, that's done properly. And we'll make some specific suggestions along those lines too.

Thank you.

SENATOR SMITH: Irene, in Massachusetts, does the LSP pick up liability?

ASSISTANT COMMISSIONER KROPP: Yes, the LSP does have liability in Massachusetts.

And just to the point of the penalties, we did take the penalties that are in the Enforcement Enhancement Act and mirrored those penalties in this legislation. However, the Board will be the one establishing regulations that will define what the penalties are for the licensed site professional, not the DEP. So they can go up to a certain amount, but they may choose not to go that high. But that's up to the Board to develop those regulations.

SENATOR SMITH: Okay.

Yes, Senator.

SENATOR VAN DREW: Just a brief question: So those penalties are just a framework, but they aren't the actual, specific penalty that would be established?

ASSISTANT COMMISSIONER KROPP: Correct. The actual penalty for a violation is not spelled out at all in the legislation.

SENATOR VAN DREW: Okay. But it would be up to that amount. The Licensing Board would be the one that would set the specific--

ASSISTANT COMMISSIONER KROPP: It could be up to that amount. That's the maximum. They could-- The Board could decide not to go that high.

SENATOR SMITH: We are going to talk about this later. But do you have any response to the comment of the RAPs issue -- the RAPs

issue being the degree of flexibility that the licensed site professional has dealing with the method of cleanup?

ASSISTANT COMMISSIONER KROPP: I support us maintaining the 10-to-the-minus-six standard.

SENATOR SMITH: Right.

ASSISTANT COMMISSIONER KROPP: I support the licensed site professional using a hierarchy of the cleanup standards and tech regs developed by the Department, as well as the statutes and law developed by New Jersey.

However, I agree that there are documents in guidelines or that are EPA regulations, or might be other State, or things like the ITRC -- the International Technical, I can't remember what it's called, consultant group -- that have come up with guidelines for cleanups -- that it's appropriate to use those documents. I think putting RAPs in the statute may give us more authority in requiring folks to comply with the guidelines that we have right now. So I think it's a good idea.

SENATOR SMITH: Explain to me, though, the concept of the hierarchy. Are you saying that if the LSP is choosing the method of cleanup, he or she must use the 10-to-the-minus first, and then the tech reg second, then any guidelines third?

ASSISTANT COMMISSIONER KROPP: Correct. That's exactly what I'm saying.

SENATOR SMITH: Okay. Thank you.

Gentlemen, anything else?

MR. DeROSE: Actually, I would like to clarify something that I heard stated at previous hearings, for the record. The LSP board in

Massachusetts has received and processed complaints from the DEP and public at large, and took over 30 disciplinary actions, including license revocations, suspensions, and public censure.

Thank you.

SENATOR SMITH: Great.

Next is Melanie Worob, Edison Wetlands Association.

Melanie, do I have your name right?

**MELANIE WOROB:** Yes, Melanie Worob.

Can I bring Dana Patterson?

SENATOR SMITH: Sure. You're both Edison Wetlands?

MS. WOROB: Yes.

SENATOR SMITH: Okay.

MS. WOROB: Thank you.

If you don't mind, Dana is going to make the first remarks.

Thank you.

**DANA PATTERSON:** Good morning, Mr. Chairman and members of the Committee.

My name is Dana Patterson, and I'm the Toxics Program Coordinator at the nonprofit Edison Wetlands Association. And I'm going to be submitting comments on behalf of Robert Spiegel, the Executive Director of the Edison Wetlands Association.

I'm going to try to summarize it. I'm not going to read off of the paper.

SENATOR SMITH: Please.

MS. PATTERSON: As you all know--

I'm going to start off with one example. I'm not going to try to go back and discuss what we've already discussed.

One example where the Site Remediation Program has failed is at the Akzo Nobel chemical site in Edison, New Jersey.

The Edison Wetlands Association has invested hundreds of thousands of dollars, as well as filed a Federal lawsuit, to attempt to get this toxic nightmare cleaned up. This site can serve as a poster child for more stringent oversight by the NJDEP. At the Akzo Nobel site, over and over again, NJDEP took the word of the polluters and their consultants that the site was remediated, only to have dramatic levels of a witch's brew of highly toxic chemicals streaming into the Raritan River that went unabated.

I'm going to start off with a little history of the Akzo Nobel site. There have been 53 areas of concern that have been identified at the site. In 1987, Akzo Nobel began cleaning up the site. They submitted a plan that was approved by NJDEP that the Akzo Nobel's consultants had formulated, including excavation of redeposit of chemical waste into unlined disposal areas that lie between the active plant and the Raritan River.

EWA submitted a plan that outlined deficiencies this plan had. And it was proven to us in 2007 when we discovered noxious chemical seep emanating from waste deposits that made up the bank of the Raritan River adjacent to the southern border of the Akzo Nobel/Basell facility, just 100 yards from the popular Edison Boat Basin. The chemical waste included benzene, corrugated asbestos sheets, and black viscous tar. The seep created an oily sheen on the water that was discharging into the Raritan River, along with highly pungent chemical odor.

The Edison Wetlands Association has done seven sampling investigations, and has monitored the site, and has found discharge of volatile organic compounds, semi-volatile organic compounds, and metals flowing into the Raritan River. Sampling by Akzo's consultants has also confirmed our finding, finding carcinogens benzene at over 860 times acceptable of State levels and arsenic over 550 times above NJDEP's surface water criteria.

In January of 2008, Akzo's consultants submitted a substandard plan again, and it was approved by NJDEP to address the seep and the waste. In February of 2008, Akzo Nobel implemented a plan and, once again, the consultant's easy-way-out approach has failed miserably at the expense of the river's ecological health and the potential impact to many of the families who fish, crab, boat, clam, swim, and jet ski in the waters right next to the chemical seep.

This failed program implemented by Akzo Nobel has failed to stop the seep, and it's actually worse now because there's an oily discharge coming out of the seep with concentrations of hazardous substances exceeding New Jersey's surface water -- groundwater criteria, and it's still discharging into the Raritan River.

It's very disheartening to see these contaminants down at the river. Personally, I've lived in Edison my entire life, and I used to go down to the Edison Boat Basin and play, and fish, and swim, and walk along the beach. And to know that there's toxic waste coming right out of the site is very disheartening.

There's also a significant amount of wildlife. Bald eagles have been present along the Raritan River. And the seep is exposing them to these hazardous substances.

I just want to also note that this is not the first time that the Site Remediation Program has failed. Similar problems have occurred at sites such as the Ford PCB scandal in Edison and the W.R. Grace case in Hamilton.

Similar legislation, as we discussed, was passed in Massachusetts. A source noted that three-quarters of the contracted work was found to be deficient, and much remediation had to be repeated -- costing undue economic impacts for taxpayers across the state.

I really urge you that in this difficult economic climate, NJDEP utilize a fee collection from regulated parties as a revenue-generator to fully staff the NJDEP: for every staff hour used by NJDEP personnel, they charge the regulated party, with the money going back into the General Fund instead of the NJDEP. These funds could enable NJDEP to have more case managers. We also reject the notion that there needs to be staffing cuts at NJDEP. Instead, proper use of fees collected, and the leadership at the top to provide guidance and vision is necessary.

Please resist this temptation, and reconsider the decision to outsource site remediation by leaving the critical remediation decisions that will impact the health of New Jersey families up to polluters and developers. It has already created significant endangerment to human health and the environment, and cases like the one I mentioned earlier will grow exponentially if this bill is passed.

In the testimony, I submitted pictures so everyone can see the seep at the Akzo Nobel site. And I also invite every one of you to come down to the site yourself to see the seep and the chemicals that are going into the Raritan River.

SENATOR SMITH: Great. Thank you for your comments.

Irene, I know it's difficult to comment about any specific cases before the DEP. But if you want to tell us anything about Akzo Nobel, I'd be happy to hear it.

ASSISTANT COMMISSIONER KROPP: Sure.

And I agree with the Edison Wetlands Association, that there are problems in the Site Remediation Program. That's why we're here today. I disagree that just because Edison Wetlands Association has a case that they're focused on, that should be the highest priority for the Department. Akzo Nobel has spent over $16 million remediating their site. They're currently in the ISRA program. They have not received an NFA. They are still working on the site. They are completely in compliance with all the requirements that the case manager has asked of them. The case manager has been on the site numerous times. There is a seep. There's benzo gas coming out of that seep at lesser degrees than in a can of Coke. So there's no major environmental concern right now at this particular point in time.

SENATOR SMITH: Thank you.

Thank you so much for coming in.

Our next witness is--

MS. WOROB: Actually--

I'm sorry. I would like just one small statement aside from that.

SENATOR SMITH: One small statement?

MS. WOROB: One small statement.

SENATOR SMITH: Go ahead.

MS. WOROB: Is it on? (referring to PA microphone)

It is on. Oh, it's red.

SENATOR SMITH: This is Trenton. Red means go.

MS. WOROB: Got it. It's confusing. (laughter)

Thank you for having us, and for being able to comment.

My name is Melanie Worob. I'm Program Supervisor with the Edison Wetlands Association.

In addition to what Dana commented on for Bob Spiegel, I would like to submit a very brief additional recommendation on behalf of the dozens of grassroots community groups that we assist through our Community Assistance Remediation Program, which we call CARP -- these underprivileged groups across the state, from Ringwood to Long Branch, from Camden to Bloomfield -- with getting cleanups of dangerous sites that have gone decades without any action before EWA got involved.

One example of these communities of color is the New Jersey Natural Gas plant in Long Branch, where decades of contamination in Troutman's Creek -- which is a very popular swimming and fishing spot -- are poisoned by New Jersey Natural Gas coal tar pollution that was overlooked by the polluter's consultants. It took independent sampling and advocacy to make NJDEP aware of this massive contamination oversight.

Passing the self-certification bill, we believe, would create thousands more sites like this unnecessarily, with New Jersey families left facing consequences.

Thank you.

SENATOR SMITH: Thank you for your comments.

Dave Brogan, Mike Egenton, Jorge Berkowitz -- NJBIA, State Chamber, Langan Engineering.

I think we need-- Bring up one more chair, guys.

**D A V I D B R O G A N:** Thank you, Senator.

My name is David Brogan. I'm Vice President of Environmental Policy with the New Jersey Business and Industry Association.

I did provide you with written testimony, and some of the issues have been mentioned, so I will try to keep my comments as brief as possible.

NJBIA represents nearly 23,000 companies in the State of New Jersey, and probably the largest number of interested parties affected by this bill. They include responsible parties, developers, engineers, and the property owners. And as such, we need to take into consideration the impact that this bill would have on them.

I would like to say we appreciate the work that Irene and her staff has done, that you personally have done, and OLS as well. We do support some of the changes that were made, including the small business exemption from remediation funding sources, more LSPs on the LSP board, and the concept of the permit following the site. And to be clear, we do support the LSP program concept.

We still have some issues with this bill. A couple of them were mentioned earlier. With regard to the taxes, we just feel that adding to the cost of doing a remediation, especially in this economic climate, will not help the process. And I know we have a difference of opinion on that, and I appreciate your position as sponsor.

On the limits on self-guarantees, your example of Lehman Brothers is well-taken. But we still don't know the universe of sites that are being "warehoused." We've asked that of the Department, and we just don't have a good grasp of-- If you're going to create two new taxes -- or a new tax and then expand an existing tax, we would just like to see the universe of sites that you're trying to go after in this bill.

There was a mention of the recalcitrants and the low bar for recalcitrants. We do have an issue with that.

With regard to what I believe Ryan mentioned, in terms of the DEP reviewing documents, there is a section of the bill -- I think Section 21 -- that basically says that DEP must review all documents or shall review all documents. I don't know if that just needs to be tweaked a little bit to address the concerns that were raised, or perhaps some other language could be added.

Again, with recalcitrants, the ability for the Department to select a remedy, impose fines, and take over remediations is difficult for us only because the bar is set so low.

There is a statute of limitations increase, and we have concerns about that.

And what appears to be eminent domain language, or language that would allow any person to take over remediation if they petition the Department-- And I'm just-- We are very concerned about that.

My colleagues will go over, in more detail, those issues. But I'd like to touch upon the issues that were brought up by the Commissioner and Assistant Commissioner as to why this program is necessary and what we agree with. Simply put, the State doesn't have the resources, whether it be the money or the manpower, to appropriately address the caseload that's out there. And that number of cases is growing on a daily basis. An LSP is probably the only viable solution.

And while consultants would be given more authority to move with the cleanup process more efficiently, I think this -- and it was mentioned by Irene that there is no change in standards. And we see press release after press release about putting people in danger. And there simply is no change in standards in this bill. And from our perspective, a site that is getting cleaned up to any standard is more protected than a site that lays fallow. So even with the current language in the bill now, this program is moving in the right direction.

There are limits where residential housing and schools will be built. There's greater emphasis on permanent remedies -- and I will finish very briefly -- greater enforcement by the DEP, and they will be able to focus on more complex sites. And that's something that's a positive.

Once again, I'd just like to express our appreciation for the work that Irene and her staff has done, you have done, and OLS. This is a very difficult issue. But we would like to talk to you further about some other changes.

Thank you.

SENATOR SMITH: Mike.

SENATOR BATEMAN: Mr. Chairman, we did not receive his comments.

SENATOR SMITH: Put them in writing.

**M I C H A E L E G E N T O N:** You don't want them. They're all a mess. (laughter)

MR. BROGAN: No, no, I have other copies.

SENATOR SMITH: He may have e-mailed them. If that's the case, we'll get them circulated.

MR. EGENTON: Chairman, I'm not going to repeat a lot of the issues that Dave brought up.

SENATOR SMITH: That would be great. (laughter) Talk about the new issues.

MR. EGENTON: But just to reemphasize--

SENATOR SMITH: Reemphasize is saying it again.

MR. EGENTON: I'll do it in short: taxes, self-guarantees, the recalcitrant language.

My only other point that I'll bring up before I introduce Jorge is, we already made a lot of concessions too, as this bill has gone through changes. For instance, I know that the Assistant Commissioner was kind enough to add in the Board makeup that-- It was originally supposed to have a representative both from NJBIA and the State Chamber. I understand there was a little heat and people said, "Why do they get preferential treatment?" or whatever. And we said, "Fine. Have just an industry person." The bottom line is, there has to be a qualified

representative on there representing LSPs that knows this world inside and out, not just somebody who is just going to raise a flag every time some kind of decision has to be made. So I'm amenable to making changes as long as it stays within the guidelines of the bill.

That being said, you know Jorge Berkowitz. He's part of the Chamber Environment Committee. He's been working very hard with Irene. If we don't placate individuals like Jorge and his firm who would become potential LSPs, then where are we going with this issue? So I would ask you to -- if you could give your undivided attention to his concerns.

Thank you.

**J O R G E H. B E R K O W I T Z, Ph.D.:** Good morning, Mr. Chair, Senators.

I find myself in an unusual position in that I don't know that I have a heck of a lot to add that hasn't already been said.

SENATOR SMITH: Thank you for your comments. (laughter)

DR. BERKOWITZ: You're very welcome.

But that's never slowed me down before. So I do want to talk about three issues -- reiterate. All of them, I guess, have been mentioned.

And the first is the understanding of the bifurcation of the responsibility between the Board and the DEP, and where that places the licensed site professional. I think it's very important to have that firm, bright-line test; that the LSP is regulated and answers to the Board of Licensed Site Professionals, and that the responsible party and the sites answer to the DEP. If the DEP has issues with how the LSP conducted themselves in doing the site work for the responsible party, they have the

opportunity to go to the Board and make the case, and say, "These people are not worthy of being an LSP." And then let us open up the hearing process. Let the Board evaluate whether or not sanctions are responsible -- appropriate, whether penalties are appropriate, whether the loss of a license is appropriate. That's number one.

Number two is: We feel that-- We don't do this reform effort every year. We don't even do it every 10 years. So to squander an opportunity to enhance technical abilities for my profession, our profession, to do the work that's necessary, to put DEP or New Jersey back in the forefront of site remediation, would be a squander.

What do we mean by that? Right now, we have a toolbox, and that toolbox is the technical regulation. We do have some other tools in the toolbox. Every now and then DEP realizes that to promulgate a regulation is very time-consuming and difficult. And by the time you do that, it may be outdated. So there is guidance, such as vapor intrusion guidance, that DEP does adopt and allows us to use. That's what we want. We want a list of guidance documents that DEP reviews, defines, and says, "You know what? Aside from that technical regulation toolbox, you also have this other toolbox that is a response action performance standard. And you can use those as you can justify them and be accountable for them." That's number two.

And then finally, the Board: We moved from an LSP having three members on the Board to having five members on the Board, and I thank you very much for that. Last Wednesday, in the snow, we had 210 consultants come out -- in the snow -- to hear people from Massachusetts's LSP to talk about their program. And one of them said, "If you had to

change anything, what would it be?" It would be the composition of the board. They have five LSPs on their board as well. They have to understand the same science, they have to understand the same regulations, they have to understand the same techniques that I use in order to make a judgement -- in many cases a value judgement -- of whether I've done my job professionally or not. The people most equipped to do that are the site professionals. We urge you to consider having a majority of site professionals on the Board.

Thank you very much. I appreciate the time.

SENATOR SMITH: Thank you.

SENATOR BATEMAN: Mr. Chairman, could Irene address that issue, because that's come up from several different sources?

SENATOR SMITH: The composition of the Board?

SENATOR BATEMAN: Yes, why you want to have a majority.

ASSISTANT COMMISSIONER KROPP: I'm in an odd position here.

I understand the LSPs request for the majority of the Board to be licensed site professionals. That's very much what the PE Board does. But in order to have a compromise position, we had a variety of different discussions with who should be on the Board. Environmentalists felt very strongly that it's the fox watching the henhouse. So we wanted to make sure that there was some environmental oversight. The Commissioner felt very strongly that she wanted the State Geologist to be a part of it -- so somebody with strong technical background but not necessarily an SRP person. There is no SRP staff on the Board. We would just be support to the Board for their actions.

To Jorge's point with regard to our taking actions against the LSPs, the bill does specifically state that the Department's role is to recommend the investigation of an LSP. So we would not be doing those investigations or taking any action. So I think the Board is something that we can continue to discuss. I'm not 100 percent sure what the exact mix is. I think that the mix we have now is fairly balanced.

SENATOR SMITH: What about Jorge's comments concerning the RAPs, the guidance documents? Is it DEP's intention, under this new world, to issue more guidance documents? And his comment was that they'd like to have the flexibility to use the guidance documents when they can justify it. How does that-- What kind of reaction do you have to that?

ASSISTANT COMMISSIONER KROPP: I'm in agreement. We have, in the past in the tech regs, required the Department to come in -- required a responsible party to come in and ask for a variance from the technical regulations. In reality, with the amount of work we do and the lack of exact science when it comes to remediation, we do allow consultants to vary from the tech regs without a sign-off or final approval from the Department.

One of the things that we talked about doing in our screening of the documents as they come in is to allow a consultant to say, "No, I didn't comply exactly with the tech regs," check a box and say, "Here's what I did, and why." So I think that we're building that into the implementation of the program. That's not necessarily spelled out in the bill, which is why I think it's a good thing to have RAPs in there.

SENATOR SMITH: Okay.

SENATOR VAN DREW: Chairman, can I?

SENATOR SMITH: Sure, Senator.

SENATOR VAN DREW: Just two quick questions: one, can you go over the 1 percent surcharge real quickly again -- what that's about -- and if there are exemptions for that 1 percent surcharge. And the second question was -- I won't hold you to it, but just an overview of the way the Board would be currently configured now in its latest derivation.

ASSISTANT COMMISSIONER KROPP: I'm going to do the Board first, since that is easiest. The Commissioner would be on the Board, State Geologist, one person from academia, one person from industry, two environmentalists, and then five LSPs. So five of the 11 members would be LSPs.

With regard to the 1 percent: Under current statute, anyone who establishes a remediation funding source, but for those who can self-guarantee -- so those are the larger corporations -- must pay a 1 percent annual surcharge. So for all intents and purposes, it's your smaller businesses and those who cannot self-guarantee that are paying a 1 percent surcharge.

Currently, under law, that 1 percent surcharge goes to the HDSRF fund, which is the fund that we use to provide grants to municipalities for brownfields redevelopment. What we're recommending is that -- and municipalities are exempt from that, and folks in the voluntary cleanup program are exempt. What we're recommending, going forward, is that whoever has to establish an RFS -- which would include voluntary cleanup folks, because there's no more volunteer, it's an obligation to clean up -- that everyone would pay an RFS, but for municipalities, child cares, schools, small businesses, and anyone who

purchased property prior -- any developers who purchased prior to the act. My discussions with developers is they can build the 1 percent surcharge into the cost of the deal going forward. But not having had that opportunity, that they should be exempt under this statute. So the 1 percent would be whoever has to do it now, but more importantly every Spill Act discharger. Right now, a Spill Act discharger can go through the voluntary cleanup program, take as long as they want to clean up, not issue the RFS, and not pay the 1 percent. So we're trying to make all the Spill Act dischargers the same.

Another difference: This 1 percent would not go into the HDSRF fund for brownfields redevelopment. It would go into a new fund -- actually, it was established by the Legislature years ago but never used -- the Remediation Guarantee Fund. And that money would be used to protect homeowners, homeowners associations, and subsequent property owners, going forward. If they are residential that was built on a brownfields or commercial and manufacturing, there is a responsibility to conduct O&M -- make sure that caps are in place and valid, and make sure that there's no change in order of magnitude of soil standard that would impact.

Our fear, the Department's fear, is that a lot of the development on brownfields sites are done by limited liability corporations that absolutely could dissolve shortly after a site is remediated. And the O&M functions -- even though we're maintaining the need for a permit going forward -- O&M functions, or catastrophic failure, or changes in order of magnitude may require additional investigation or cleanup. And we do

not want to see that put on the homeowners or the residents of New Jersey, homeowners associations, or subsequent property owners.

SENATOR SMITH: What is the 1 percent of?

ASSISTANT COMMISSIONER KROPP: What does the 1 percent cover?

SENATOR SMITH: No, what is the 1 percent of cost?

ASSISTANT COMMISSIONER KROPP: The 1 percent is the cost of the remediation funding source. Right now, the remediation funding source required under law covers from the beginning of remediation to the end of the cleanup. We're limiting that. The RFS will now only cover the cost to actually do the construction of the cleanup. So it will be a much smaller duration of time that it has to be put up and a smaller amount of money that has to be put up.

SENATOR SMITH: So I think the one point that has to be made-- Number one, you made the universe smaller in the sense that you've taken out the small business, the daycare, the homeowner, the whatever. And you've also-- You're now applying the 1 percent against just the cost of the cleanup, not the whole process. So the comment, that's a little disingenuous, from some of our earlier witnesses is that this is a new expanded tax. It's actually been reduced in scope and also in amount. The only thing that is new is the 5 percent at the end. The 5 percent at the end, I think Irene was saying -- we want to give, especially the bigger companies, an incentive to go for an unrestricted cleanup as opposed to a restricted. You really don't want to have -- in the words of Jeff Tittel -- pave and wave. We'd like to have the stuff taken out of the site if at all possible, and

processed at the appropriate facility, and have the site cleaned up to, hopefully, unrestricted standards, which is our cleanest standard.

SENATOR VAN DREW: Chairman, the only question I had for you is the 1 percent-- I think I understand -- and actually there would be less folks affected under this. Who would be the new folks who are affected by the 1 percent? The 5 percent I understand. Only the Spill Act discharge folks? That's it?

ASSISTANT COMMISSIONER KROPP: The Spill Act responsible parties and any developer who purchases contaminated property going forward after enactment of the act.

SENATOR SMITH: Right. And also be advised, the 1 percent doesn't apply to all of the really large companies who self-guarantee. They never have to put a penny up. There's absolutely no incentive to do anything. That's the problem.

Senator.

SENATOR GORDON: Thank you, Mr. Chairman.

First, a technical question regarding the membership of the LSP Board: this one member from the business community -- is any particular organization noted in the bill? With all due respect to the BIA, the Chamber is a major player; as is the Commerce and Industry Association, which is particularly important in North Jersey and has been very active in environmental business committee. So I just wanted to make sure that the membership was open to all those parties.

Secondly, a more general comment: I'd like to echo a comment made by Dave Brogan about the standards. And I know that as the Chairman has said, if we dealt with that--

SENATOR SMITH: We're never going to get a bill.

SENATOR GORDON: --never get a bill. And I appreciate that.

But I do have a concern that I voiced before, which is that our standards are among the most stringent, if not the most stringent, in the country. And they bear no relationship to the risk or the land use. And I would hope that this Committee would address that issue at some point. Because what I'm concerned about is that we may make all these process improvements, but if we're still adhering to no molecule left behind, we may not get to the finish line in a lot of these projects.

SENATOR SMITH: Senator, just so you know, no good turn goes unpunished. (laughter) I think you have our legislative situation with all-terrain vehicles under control. And once we get past this issue, we're going to be getting into that. But since you have that under control, I'd ask if you would undertake to begin that process meeting with the appropriate parties so that there can be a subsequent piece of legislation. But I know that if we tried to put it in this, we're never going to get to the finish line.

Senator Bateman.

SENATOR BATEMAN: Mr. Chairman, thank you.

You indicated, through Irene, that the universe is smaller with the I percent. Do we know what that collects on an annual basis? And are those funds safeguarded? Are they dedicated? They're not going to end up being taken by one of the administrations to support the general budget, are they?

ASSISTANT COMMISSIONER KROPP: Let me say that right now we have $1.4 billion in remediation funding sources. And I think

the amount we annually get is-- I think the 1 percent equates to about $1.5 million per year. That money, right now, goes into the HDSRF fund, which is protected, because the majority of that money is from the CBT. I can't speak for future administrations as to how they may handle the money if it's in the Remediation Guarantee Fund.

SENATOR SMITH: No, but you can also point out that the CBT funding is constitutionally dedicated and the remediation funding source is $1.4 billion. Those are securitized instruments, right?

ASSISTANT COMMISSIONER KROPP: Correct.

SENATOR SMITH: So it's not that you can reach in and take -- send the check.

Thank you for your comments.

Ed Wengryn, New Jersey Farm Bureau, in favor.

**E D W E N G R Y N:** (speaking from audience) Well, we haven't read all the amendments yet, Mr. Chair.

SENATOR SMITH: All right, he's taking back the *in favor*.

MR. WENGRYN: This is an important bill for everybody: for the environment, for economic growth and development, and--

SENATOR SMITH: Hit the button. (referring to PA microphone)

MR. WENGRYN: It's on.

SENATOR SMITH: Oh, it's on. Okay.

MR. WENGRYN: I just pushed it too far away.

SENATOR SMITH: There you go.

MR. WENGRYN: So we'd like to see the bill move forward. We are going to review the amendments. We have other bills moving

through the Legislature that are going to expand the universe that is going to be required to do site remediation. Having the site professional program is going to just make that program work.

Thank you all for your good work. And keep going and just keep listening to everybody, because I think we're getting there.

SENATOR SMITH: Okay. Thank you, sir.

Mike Pisauro, New Jersey Environmental Lobby.

**J E F F T I T T E L:** We have joint comments, but he'll go first. (indiscernible)

SENATOR SMITH: You know what? I set the agenda, but this time we'll make an exception. (laughter)

MR. TITTEL: Thank you very much.

Well, Moe, Larry, and Curly went so--

SENATOR SMITH: And you do, just for the record-- Even though we've known you a thousand years, you need to say your name and your affiliation so that it goes into the transcript.

Go ahead.

**M I C H A E L L. P I S A U R O JR., ESQ.:** Sure. My name is Mike Pisauro. I represent the New Jersey Environmental Lobby group in New Jersey, representing other environmental organizations, businesses, and individuals.

I'd like to thank the Committee for taking the time today to hear our concerns.

I'd like to thank Irene Kropp and her staff, who have been most generous with their time and comments.

I know this bill is a lot different than what we've seen in the past, especially from last year, but we still have our concerns.

Jeff, Dave, and I have submitted written comments. I want to focus just on a couple of areas.

One: the Massachusetts problem. And I say *problem*, because I think that's accurate. They have three levels of audits, and they audit 20 percent of the universe of sites that come in each year. There's a Level 1, Level 2, and a Level 3. And it is somewhat of a pure random audit, because you can get to a Level 3 audit, which is the most stringent, and it's still random. It's not because you failed a Level 1 or 2. And in our comments, I pulled out their chart -- Massachusetts' chart. Something like 75 percent of the sites that have received a Level 3 audit failed for one or more reasons.

Massachusetts also did a study. Fifty percent of the RAOs had issues. Forty percent of that 50 percent required more work. And 10 percent of those RAOs were invalidated. Now, we all agree that site remediation is broken, and we need to fix it because we do need to get sites cleaned up. But I think it is much more efficient, it is better protective of the environment, and a more efficient use of our resources and money both from the business perspective and from the State's perspective, to do it right the first time than having to go back and redo it, and redo it. Not only is it going to be more costly to do it over and over again, but how many people have been exposed to substances that may cause them harm in the meantime? So what is the cost to the families, the workers, the school children? I mean, 27 times the legal level of mercury was found at Kiddie Kollege that our children were exposed to.

That's not acceptable. Batting 500 is great in baseball, not so good in site remediation. Children-- And our standards--

Senator Gordon, with all due respect, our standards are set for a healthy male adult. They're not set for the exposure levels of children or elderly. So our children who are developing muscular systems, neurological systems have a much different threshold that they're going to be exposed to and suffer detrimental effects. They're growing much faster than we are. Their bodies are developing much faster than we are. So what is safe for me now is probably not safe for my 7-year-old child. And if we're going to allow restricted cleanups at daycares, educational facilities, or residences, we have to keep that in mind. I think, as I read this bill, we can do a restricted cleanup at those sites. I think that needs to change. I think those sites need to be an unrestricted cleanup. It's just too important, to protect our kids, not to.

Another experience from Massachusetts: Even though they also have a preference for an unrestricted cleanup, less than a third of those sites actually do get cleaned up to an unrestricted level, because the LSP finds it not to be practical. And I think that bias is there.

I also think -- I've laid this out in our written comments. I appreciate the Department making changes to what will require an audit and what may require an audit. I've made some suggestions. I think a lot of what is in *may* require an audit, should be in *shall* require an audit. I think one of the examples is, if you're in violation of your timeframes we may audit you. Well, if you're already in violation, maybe we should take a deeper look at you. I think, also, if you're using an alternative standard

maybe we should take a harder look at you. And that should be a requirement.

LSPs, if they want to go outside of the box -- I think the bill provides that. But I also think the bill provides the wrong burden of proof. The DEP, at least on the validation of an RAO, has to prove that the standards were violated and it's not protective. Well, if you're going to go outside the box and do something that is not according to the standards, the LSP needs to come in and explain how that is protective, how that is protective by a clean and convincing standard. So burden should be different. It shouldn't be on the DEP to prove that it's wrong; it should be on the LSP to prove what we're doing is right and is protective.

I think I'm going to leave my comments at that.

We look forward to working with you.

SENATOR SMITH: Mr. Tittel.

MR. TITTEL: Thank you very much. I thank everybody for their time.

I think as we've been debating this bill and going around in circles for the last two-plus years, I think we start losing site of what the whole program is and should be about, and that's to make sure these sites are clean. It's not about how many people are on a board or a lot of the other different pieces.

And one of the concerns we have -- because we get involved in a lot of contaminated sites around the state -- is that under the current system, we're finding not molecule left behind, but 35 drums left behind. We're finding that 75 percent of the soil on a site tests positive for higher

levels of PCBs than the standard. We're finding mercury under floorboards. And we know we need to change the system we have.

But the concern that I have is that even with DEP oversight, not little things slip through the cracks, but giant pools of liquid bituminous slip through the cracks. That happened in Princeton with the library. It cost them three times more money to actually build their library addition on the parking lot, which had been capped.

The point that I'm trying to make is that if we do it right the first time, and we clean these sites up, when they get redeveloped it goes a lot quicker and a lot cheaper. And I think that's the important part. Because when you find more contamination on a site, it means that you get slowed down, because now you have to come in, figure out what is the level of that contamination, how do you remediate it, how do you get it out of there, and then how do you go forward. They're costing that developer, redeveloper, more time. And time is money, plus more money. So I think that should be the first and foremost -- is how do we get to these sites, to get to be cleaned.

I don't have a problem with licensing professionals. I think it's a good idea. I think we should be looking at licensing all the different professionals that come in front of DEP, because we see in other parts of the program -- in land use and others -- people putting in slipshod work, misinformation, maybe even worse. So I think the idea of having licenses is a good thing.

I think the area where we have our concern is who has the fundamental control of that site and the fundamental approval for the final action on that site. And we believe that that authority has to rest within

the Department of Environmental Protection in the State. And that's where our concern lies.

For minor sites, for underground storage tanks for where you find maybe a barrel or two here or there -- I don't think there's a problem. I think it would be a good thing to try. I think it's when we get into these sites that are either more complex or historic fill -- which is now the new buzzword. Everything is historic fill, and it turns out there is tons of stuff buried there where we need to be more prudent.

I hear talk about maybe there are 500 sites, maybe a thousand sites that may come under the more -- more DEP scrutiny or oversight. I think that number may be a lot larger. According to DEP's own data that was given to the EPA, the 305(b) report says there are 3,500 contaminated sites in New Jersey that impact the groundwater, meaning they're getting into groundwater, they're getting near wells. The City of Camden is going to lose their well field because of the contamination in Camden that's headed toward their well field. It's already there in parts of it. So we have to make sure that where there's impacted groundwater, where there are soils that are going to get out into the community -- because of certain types of contamination, we have to make sure DEP keeps control.

One of the things that we'd like to see is insurance, so that if there are institutional controls, that there is an insurance policy or someone to go after to make sure--

SENATOR SMITH: Do we have--

MR. TITTEL: That was taken out. That was one of the things that was originally in the bill that has been removed.

We'd like to see insurance, or a bond, or something like that. We would like to see -- sort of the minor sites and the homeowners -- if you're going to do a licensing program -- if you're going to do this kind of program, then you should do an escrow system very similar to what you have in your local town. When a planning board needs to hire a wetlands expert to review an applicant's submission, they have the applicant put money into an escrow account. The town engineer manages it, and they make sure the money goes out and it's controlled.

The concern I have is that, on sites that are more than just a barrel or two, that the licensed professional is working for, in many cases, the responsible party; and is their job going to be the best interest of the State or the best interest of the persons hiring them?

And I've been involved. I was Chairman of the Ringwood Environmental Commission. And the way we could tell at the Ford site -- where there was more contamination -- we just got the consultant's map. And wherever he said it was clean, we went there and found more contamination. And that's the concern that I have -- that DEP needs to keep oversight on sites that have multiple contaminants, but also sites where there's impacted groundwater; the potential for residential, schools, and daycare centers as well.

I believe, quite frankly, that one of the ways that we can streamline the system is by creating a gold standard for companies that are willing to go to unrestricted cleanups. They should get first priority, and they should go through the system first. Commissioner Jackson was working on something like -- very similar in Jersey City with chromium. I think that's the kind of way we can help move the backlog forward. I also

believe that we need to get rid of the hiring freeze, because we do need to have more people, whether we get this bill or not, within that agency. We need to get a priority system in place that's real.

And we need to have real transparency in our cleanup, not this back and forth that goes on, where case managers don't have real authority to pick a remedy and it goes around in circles for a long time. We need to have a system where the buck stops -- that it takes -- that we get to come up with cleanup plans in a quicker way, giving the DEP staff people more authority on picking that -- on that cleanup -- plus giving incentives to go to unrestrictive. I think that's how we move it forward.

But I think as far as having this program for minor sites and for underground tanks and owners, I don't have a problem with it. But I think once we get beyond there, I think we need more DEP scrutiny.

I would also like to see pay to play reform.

And one last point I wanted to make is that in Massachusetts, they have another process that these sites have to go through, and that's a CEQA process, which is an overall environmental quality review for the entire site. It's a mini NEPA system. We don't have that in this State. Everything is compartmentalized: site remediation here, wetlands here, stream encroachment there. And I think their system not only gives it a better review on contamination in a lot of ways, but also on the entire site, and what happens to it, and why or how it should be developed, which we don't do.

Thank you.

SENATOR SMITH: Thank you for your comments.

Dennis Toft, NAIOP.

**DENNIS M. TOFT, ESQ.:** Thank you, Senator.

My name is Dennis Toft. I'm a partner with the firm of Wolff & Samson, in West Orange, New Jersey, where I head up the environmental practice.

I do have a written statement, which I will leave with you and won't review in detail.

But I did want to get back and focus on a couple of things, and maybe respond to some of the issues that have come up before dealing with remediation funding sources, surcharges, etc.

First, with respect to the 5 percent surcharge, I'm glad that the Assistant Commissioner has acknowledged that it may be appropriate to limit that to situations where there's a change in use of a property to residential or other similar-type use. It would seem to me that you have lots of industrial facilities that are going to remain industrial facilities where, in many instances, it is not physically possible, because of the history of the site, to remediate the site to an unrestricted use standard. And I agree with Senator Gordon that, in many instances, that is because the unrestricted use standards have been set at concentrations that may be overly protective when looking at industrial uses of sites. So I think that needs to be clarified. And the 5 percent surcharge, or any surcharge like that, tied into situations where there really is a need to have a mechanism to ensure, long-term, the success of a remedy, and the maintenance of a cap, and the protection of residents or others who may end up living on those properties. And, again, it's good that that's only going to be applied going forward -- not the folks who have purchased properties in the past.

I'll also note that, in that connection, if that surcharge is to be established, there should be coordination with the folks in the Department of Community Affairs who review condominium projects and filings, who now have established, without statutory basis, their own requirements for long-term funding for remedy failure, etc.

With respect to the funding source requirements and the 1 percent surcharges, I have the advantage of having been here throughout the history of ISRA in 1993, the brownfields law in 1998, and the creation of the voluntary cleanup programs that were associated with those statutes. And I can tell you that I have numerous clients who, when offered the choice by the State to enter into a voluntary cleanup with the promise that they would never have to put up a funding source or pay a surcharge -- they jumped at that opportunity rather than litigate whether they were a responsible party or not for a site.

So just to assume that we're going to do away with the voluntary cleanup program as a means for now imposing surcharges -- for parties who did step up to the plate when they were offered that opportunity and who are, in fact, continuing apace with cleanups and not warehousing, although NAIOP doesn't like that word, or not proceeding with their sites in a timely manner -- kind of misses the point. Those folks, in many instances, are devoting their dollars where they should be devoted, which is to get their sites cleaned up in a timely way. And frankly, in many instances, the only reason the sites haven't been completed is because the Department hasn't had the resources to review submittals in a timely way.

I submit to you that there's another big disadvantage in doing away with the voluntary cleanup program. And this is one of the things

that's not clearly addressed in the legislation. Right now, an innocent purchaser who wants to buy a contaminated piece of property, in order to establish their innocence needs to enter into an oversight document with the Department and then to proceed with the cleanup of the site in a timely way. In most instances, that's done under a memorandum of agreement, which allows that innocent purchaser to proceed to do the cleanup, to not have to post the funding source, to not have to pay surcharges; because, after all, the brownfields program was designed to encourage those folks to come in to clean up the properties.

Admittedly, going forward, if that is now a requirement for people to buy properties, they can factor that into the pro forma of the deal, which, of course, has the effect of devaluing all those brownfield sites and making them less valuable to their communities or to their sellers. But an innocent purchaser/developer can factor those into the equation when they're buying a property.

However -- I lost my train of thought for a second. However, to do away with any mechanism to be able to establish that you're an innocent party -- by doing away with the MOA program seems to be an issue that still needs to be looked at and considered, going forward, in the bill.

Most of my other comments are addressed in my written remarks. I look forward to continuing working, and NAIOP continues to look forward to working, with the Committee.

SENATOR SMITH: Tell me -- that last comment that you made -- innocent -- almost got it -- the very last comment.

MR. TOFT: With respect to the value of the property, Senator?

SENATOR SMITH: No, it was a little further.

ASSISTANT COMMISSIONER KROPP: No, it was the liability.

MR. TOFT: Oh, the liability. Right now, if I'm an innocent purchaser/developer and I'm interested in buying a piece of property, in order for me to maintain my status as an innocent purchaser -- which has implications to me not only for cleanup liability, it has implications for me for third-party claims -- I need, when I take title to that property, to be under an oversight document with the Department. For non-ISRA-subject sites, or sites that aren't already under an administrative consent order, the developer enters into a memorandum of agreement with the Department to agree to do the cleanup going forward; and as long as they continue with the cleanup, they maintain their status as an innocent purchaser. And that was one of the hallmarks, Senator, of the Brownfields Act that allowed for people to have liability protection and encouraged them, in fact, to acquire contaminated properties, since they knew if they finished the cleanup they would have protections.

SENATOR SMITH: I'm still missing it. What's the difference under the current legislation?

ASSISTANT COMMISSIONER KROPP: We were hoping, under the legislation as it exists now, and also as it's being amended, to establish liability in the statute itself. I don't think by virtue of getting an MOA you are given innocent-purchaser liability--

SENATOR SMITH: Status.

ASSISTANT COMMISSIONER KROPP: --status. It's actually the language in the statute that provides that. So what we had

talked about was making sure that the statutory language is such that I don't have to issue you an ACO, or an MOA, or any other document to compel you to clean up. You affirmatively do the cleanup as you're -- if you're the discharger or if you purchased the property. And your liability is spelled out in statute, as would be kind of related to the discussions we've had with covenant not to sue, and not having to have the covenant not to sue. So as long as the statute is clear on liability, I don't think that we need any oversight documents that provide the status.

SENATOR SMITH: Dennis.

MR. TOFT: Well, if that's the case, then the statute needs -- statutory language certainly doesn't clearly state that. All it does, essentially, is eliminate references to memorandum of agreement in the section dealing with funding sources and surcharges.

SENATOR SMITH: So you need that clarified.

MR. TOFT: That needs to be clarified. And also I think that needs to be vetted with folks in the banking and lending community. When you could show them a piece of paper, it was a lot easier to say, "Yes, I'm an innocent purchaser, because I signed this MOA." The other thing it does is, it may limit the Department's ability to collect oversight fees, which was one of the reasons MOAs were created -- is that it created the mechanism for folks to pay the Department for reviewing documents. So I think that also needs to be considered. Because I'm assuming that the Department still wants to collect oversight fees. In fact, I see now that they want to start collecting them for other agencies, which is another issue that's in my written comments that I think needs to be considered.

SENATOR SMITH: Thank you for your comments.

SENATOR VAN DREW: Chairman, may I--

SENATOR SMITH: Yes, sir.

SENATOR VAN DREW: Just quickly to Irene. Do you see the voluntary cleanup if there was no surcharge? Is it an incentive? And do you think by now having this surcharge, even in a voluntary cleanup, that it could be a disincentive? Do you see value in what he's saying there?

ASSISTANT COMMISSIONER KROPP: I always see value in what Dennis is saying.

I don't know that it absolutely is going to kill the voluntary cleanup program. I'm not sure how much of a disincentive-- It's something that we can continue to discuss. Maybe if it's the innocent-purchaser defense, or voluntary cleanup, it could be a lesser surcharge than the Spill Act liable parties.

SENATOR VAN DREW: Chairman, respectfully, I thought that might be worthy of continued discussion.

SENATOR SMITH: Absolutely.

SENATOR VAN DREW: Thank you.

SENATOR SMITH: Thank you, Dennis.

Kathleen Madaras, from the Fuel Merchants Association.

**K A T H L E E N R. M A D A R A S:** Good afternoon, Chairman and Committee members.

On behalf of FMA, the Fuel Merchants Assembly of New Jersey, we want to thank the New Jersey DEP and Senator Smith for working with us to amend the language for the subsurface evaluators in the underground storage tanks.

The other comments we are concerned about is the Section 28 with the taxes. And due to the interest of time, I will leave that to the comments being said and ones that will be forthcoming.

Thank you.

SENATOR SMITH: Thank you. You win the brevity-is-the soul-of-wit prize. (laughter)

Andrew Robins, New Jersey Builders Association.

Mr. Robins is in favor.

**ANDREW B. ROBINS, ESQ.:** I'm going to deviate from our remarks pursuant to your request and also pursuant to the fact that if you look at our comments from the last time we were here, a lot of them are verbatim. A lot of our concerns were not addressed in this draft. So that's why our statement says that we're in favor of the concept, but we're opposed to the language of the bill as it is.

I'd like to take a second, though, and just try to provide a little context that seems to get lost as we talk about the trees of this bill and getting lost -- the forest is getting lost.

Before there were legislative advancements -- and there are advancements, as far as getting sites cleaned up -- the only way that you could get private investment was: (*a*) someone was willing to take a tremendous risk and just hope that it would be okay; or (*b*) you had to go through what we developed working for our clients -- for what is now the Jersey Gardens Mall, but had been Elizabeth -- the City of Elizabeth's Kapkowski Road landfill -- a process working with the Department to go into court. The Department had to initiate a court case in Federal court. We had to then have a consent decree agreed to by the court, and then

have that be the level of protection. That changed when the Legislature took that process and made the reforms that ended up being the Brownfields Act.

A lot of those incentives are what made it possible, including the voluntary cleanup program later, for private investment to get involved. And I don't think we should lose site of the fact that we have recognized in the state that to get these sites cleaned up, we need private investment. It wasn't working with just enforcement, it wasn't working simply by waiting to have the recalcitrant party go through ISRA, or hoping that they have the money there. The private investment is what has made brownfield work in this state possible, for the large degree.

What this bill does is take a step back in a number of examples. The obstacle in the last couple of years certainly has been the backload at DEP. That, together with, in many instances, case managers caught in a system where they just needed more information for the sake of needing more information, regardless of the outcome, precluded private investment from looking at New Jersey, because New Jersey, obviously, isn't the only game. It's not the only one in the country, it's not the only one in the world, where you can invest capital hoping to get sites cleaned up so that you can buy them at a reasonable rate and get them redeveloped. We're not competing solely with ourselves, obviously.

What happened with that process is that you just added cost and time, which made it impossible to get predictability and finality. What this bill does, in many instances, is try to improve the product but not in a successful way, as the language has. And our remarks go into a number of

those issues. And a couple of other people have spoken to them, and I go into them briefly.

But the key thing here is to make sure that the system can work, that it provides the level of predictability and finality that private investment needs to be able to look at New Jersey as a place to invest money to clean up sites.

The bill doesn't get there in a couple of ways. And, in fact, it takes a different approach which, of course, is an approach that could be used, but we certainly wouldn't recommend it if you want to get sites cleaned up. The other approach is to say everyone who is involved in remediation is like they're on the most wanted list. They need to be supervised to the minute degree. They need to have everything questioned and go through the process. There's language in this bill that says that DEP has to review -- now it says *inspect*. It had been *screened*, now the word is *inspect* -- every report, but without an indication as to what the purpose of that inspection would be, where that inspection goes, the timeframe for that inspection, and the expectations of the party as to whether they would ever need or get feedback from DEP.

Given the current program that we've been operating under, it's going to be the case that many investors will say, "I can't rely on that system, because I don't know what that inspection is going to mean to me. I have an LSP or an LSRP that I can rely upon, but I cannot know what DEP is going to do. And therefore, how can I invest the money to do that?" That section certainly needs to be addressed.

The mandatory timeframe section needs to be addressed. As other people have alluded to, there are a lot of reasons why sites don't

move. I don't know, from mandatory timeframe language in the bill, whether it's intended to be on a site-by-site basis -- which, again, I don't know how that would work -- or whether it's going to be on a sort of overarching basis as to: these types of sites have to reach this timeframe, and another type of site has to meet a different timeframe -- and how you distinguish between those types of sites. Because there's no cookie-cutter sites -- they're all different. So that language needs to be clarified as to what those mandatory timeframes are going to be, how they're going to be established. But more importantly, there are sections of the bill that require you to initiate litigation, if you have problems with access, before you could ask for a discretionary extension.

If you have-- If I have a-- I live in a neighborhood where a lot of people have underground storage tanks. So it's not uncommon to have someone cleaning something up in the area. If someone is going to ask me for access, I'm going to make certain insistences upon them as to what they're going to do. This bill, in order for them to get their timeframe extended, would require that they bring me into court right away rather than talk it through. There are a number of other provisions like that throughout the bill.

Focusing on residential development, because I'm here for the New Jersey Builders Association, the bill adds tremendous disincentives to using brownfield redevelopment for residential. And I don't know what the State wants to do as far as where they want people to build. But we've been told not to build in Tiers 3, and 4, and 5 in the State plan -- to focus on 1 and 2. And I don't know of a site that's presumptively clean anywhere in the state, quite frankly, but also certainly not in Tiers 1 and 2. To presume

that a site is clean, that it's not agriculturally impacted, that it hasn't been impacted by historic fill -- which is ubiquitous throughout the state -- that it hasn't been impacted by a site-specific use-- There is disincentive after disincentive in this bill as it's phrased that precludes residential development. And that's fine. The Legislature can say, "We don't want redevelopment on brownfield sites for residential." I don't know how most mix-used developments would be successful without the residential component, but that is something -- a decision to be made. But I urge you, if you're not going to take that approach, that you relook at these disincentives.

The presumptive remedy language, although it has some improvements that we've asked over time, doesn't cut the mustard here. Right now, it's not clear whether the presumptive remedies that DEP would establish would be on a case-by-case basis or by regulation, whether they can require the presumptive remedy until there are regulations or not, whether the presumptive remedies would be based on something that's economically viable or not, whether a consultant -- right now, the way it's drafted, a consultant -- an LSRP, an LSP can't come in and say, "This alternative is equally as protective as your presumptive remedy." It doesn't allow that type of discretion. There are a number of aspects throughout the bill that are replete with this.

The requirement that if you put in a cap -- and from the site stakeholder process-- We know from DEP's own statements, 95 percent of the brownfield redevelopment for residential used a cap. It's just economically impractical to expect someone -- and I would suggest environmentally inappropriate -- to require everyone to dig up sites that --

where the contamination could be safely capped, and dump it in someone else's backyard. Because that's the alternative to pave and wave -- is to dig it up and dump it somewhere else and cause a different problem.

SENATOR SMITH: Dig and dump.

MR. ROBINS: There are situations where it's certainly not safe to keep it there, and there are certain situations where it is safe. But this bill puts a tremendous disincentive, besides the 5 percent surcharge -- which may not kill brownfield redevelopment -- certainly it's a disincentive. But besides that, there's the requirement to post additional financial insurance. And I don't know of an insurance product out there that would cover this. The insurance companies are famous for not providing coverage, quite frankly. I've litigated many of them in environmental context, with not much assistance from the State of New Jersey to get money into the process to clean up sites. That type of product isn't out there. To require someone to post a surety for what maintenance they already have to do to keep their site going is just a duplicative cost. And that's in the bill right now. So the bill has so many of these provisions that substantial work would need to be done before it meets the goal of getting these sites cleaned up.

And I'll just sum up with one last thing. Our membership, the members I'm here to speak on behalf of, do the cleanups and rely on other people to do the cleanups. Their stake in the game isn't from one side or the other. What they want to know is that they have a system that's both predictable and has finality, but also gets them out of the liability mix for something that they took care of. So having rigorous standards for cleanups is good, having rigorous standards for LSRPs is also good. But making the process work is most important.

Thank you.

SENATOR SMITH: Thank you.

ASSISTANT COMMISSIONER KROPP: Senator Smith, can I just raise two points?

SENATOR SMITH: Sure.

ASSISTANT COMMISSIONER KROPP: I guess with regard to the death of the voluntary cleanup program and the need for private investment-- The voluntary cleanup program had its place in its time. It was a Band-Aid fix to what the problems are that we're trying to fix in this legislation. We didn't have the staff to bring people into enforcement. We didn't have the staff to work on all the voluntary cases. Hence the, "Hey, come on in and do the work that you should probably be doing anyway as a Spill Act liable party." So with the changes to the statute that have an affirmative requirement for folks to clean up; with mandatory timeframes so that things don't languish in the system for 20, 25 years that they've been languishing; with the use of LSPs to compensate for the lack of DEP staff; and with the disincentives via the RFS and the self-guarantee, we shouldn't be in the position to need a voluntary cleanup program.

And let me also just speak very quickly about liability and private investment. I understand that private investment is important. However, a lot of times private investment is allowing responsible parties who should be paying for cleanups to get off the hook. One of the things that I've discussed in the past is, we have redevelopers who are indemnifying viable responsible parties who should be cleaning up their sites. And the developer is taking on that liability, voluntarily taking on that liability. And the reason is because we have the 75 percent

reimbursement program, where they're getting 75 percent of the cost of the remediation back into their pockets.

So I don't think that asking the responsible parties to do the cleanup, and holding developers who accept these properties to have RFSs, is a bad thing to do. And I don't think it's going to kill the program, again, because right now, redevelopers are voluntarily accepting liability from responsible parties.

MR. ROBINS: I'll just make one comment if I could, Mr. Chairman.

People who acquire properties that need remediation do not want to voluntarily take on the obligation of indemnifying the seller. The reason why they do it is because otherwise they can't get the land. And the reason why you can't get the land is because there isn't other land available in the State of New Jersey. So to be able to come up with the ability to develop in the State of New Jersey, sometimes you have to take on that responsibility. And if that party truly had the ability to do the remediation appropriately, there would be an incentive to be able to do that. And the provisions of the bill that encourage and require people to do remediation are good. That's fine. The more sites that are out there to be cleaned up, the better. But to suggest that people take on that because they have the 75 percent reimbursement -- which for our membership is not viable because of the prevailing wage requirement -- is not accurate.

SENATOR SMITH: Okay.

SENATOR VAN DREW: Chairman, can I ask--

SENATOR SMITH: Sure.

SENATOR VAN DREW: You gave an awful lot there. What would you say are the top three disincentives that exist under this legislation that weren't there before?

MR. ROBINS: Well, because it's unique to residential, I have to put presumptive remedies up there and the manner by which presumptive remedies are laid out, number one.

Number two, as we've laid out in our legislation, is the lack of identity between what we have now as the NFA and the RAO. And that's the covenant not to sue. And whether it's a piece of paper or it's much clearer language in the statute, I'm not sure. A lot of people are used to that covenant not to sue, and to tell them that the statute's been clarified might not get us there. I think we need to preserve the covenant not to sue. I think that would be the number two.

And the number three is to allow for the licensed site remediation professional to move along without knowing that DEP's going to be reviewing everything, or at least providing some criteria as to what the Department's doing with those inspections so that someone could say, "Okay. I will write the next check to my licensed site professional, because now I know the Department has done *X* because of one of the triggers that take place." Right now it's: the Department shall inspect; and then it's out there. And, quite frankly, if I'm spending a lot -- if I have a client who is investing a lot of money, they're going to look at that and say, "When do I get the answer from DEP to know that I'm okay going ahead?"

SENATOR VAN DREW: Thank you.

SENATOR CIESLA: Excuse me, Mr. Chairman.

SENATOR SMITH: Yes, sir, Senator.

SENATOR CIESLA: I'm sorry.

I just needed you to elaborate on point number two, on the covenant not to sue. Could you just elaborate on that again?

MR. ROBINS: Right now, the process is, when you complete your remediation -- whether it's a restricted use or whether it's a cap site -- you get a no further action letter, with appropriate conditions if it's appropriate. And that comes with a covenant not to sue, which is a promise by the State of New Jersey saying, "You did what we asked you to do. We're not going to sue you for that unless something else happens."

SENATOR CIESLA: Okay.

MR. ROBINS: The community is used to that. And right now, that's the gold medal, the brass ring, whatever you want to call it, that the investment community looks at and says, "I know we're going to get that covenant not to sue."

SENATOR CIESLA: And that doesn't occur under this system?

MR. ROBINS: Actually, the bill cancels that out once the LSP permanent program is in place.

SENATOR CIESLA: That could be a problem. No?

SENATOR SMITH: Well, in Massachusetts it's not. You don't get an NFA, you don't get an-- You get what's called a *remedial action outcome*. Banks have not had a problem lending money. It's just that you have to understand that it's the equivalent document.

SENATOR BATEMAN: You're calling it something else.

SENATOR SMITH: You're calling it something else pretty much.

SENATOR CIESLA: Okay.

SENATOR SMITH: Matt Halpin, Public Strategies Impact, New Jersey Society of Professional Engineers.

Amend the bill.

**MATTHEW S. HALPIN:** Thank you, Mr. Chairman.

I know you're running close to your 12:30 deadline, so I will be very quick in our remarks.

As you mentioned, I'm representing the Society of Professional Engineers, and we have a very narrow focus. It's not that we oppose the bill. We actually applaud it. We've been trying to accomplish it.

We've had the pleasure of meeting with Assistant Commissioner Kropp to air these concerns, but once again we wanted to bring them before the Committee.

The first is that we're concerned that this bill establishes a program for LSPs that basically -- to perform functions that -- which licensed professional engineers are already licensed to do in this state. They're setting up new requirements, as far as taking a test, documenting your experience, things like that. We don't oppose having to show this new board what our experiences are, what our credentials are, our education. We certainly don't oppose continuing education, things like that -- are required. We do, however, object to the fact that they would have to take another exam to show that they're capable of doing that which they're already licensed to do by the State. That's the first concern.

The second is similarly related, in that this State has a practice act, in statute, for professional engineers. We are concerned that some of the responsibilities that would be undertaken under this legislation by

licensed site professionals would actually circumvent that practice act. And there could be individuals licensed as LSPs who are doing the functions of a licensed professional engineer without the license.

We have encouraged, certainly, Assistant Commissioner Kropp to discuss this with the State Licensing Board of Professional Engineers. They have-- We're concerned that another offshoot of this legislation could be that LSPs are brought before the Consumer Affairs Board of Professional Engineers for practicing engineering. And what we'd like to see is that addressed in the language so that LSPs are not allowed to do the functions of a professional engineer.

SENATOR SMITH: Take a look at Section 16C. It's specifically prohibited.

I thank you for your comments.

MR. HALPIN: I haven't seen this today, so I will take a look.

SENATOR SMITH: Okay.

MR. HALPIN: Thank you.

SENATOR SMITH: Mr. Pringle, New Jersey Environmental Federation.

And it is 12:25. In five minutes, the carriage becomes a pumpkin.

**DAVID PRINGLE:** Thank you, Mr. Chairman.

Again, I'm David Pringle, of the New Jersey Environmental Federation. We did submit written comments with Mike Pisauro and Jeff Tittel. We also have a late sign-on to those comments: CWA 1034. And I agree also with the verbal comments Mike and Jeff made. And I will do my best not to repeat, and bring up some new points.

We keep hearing about how the standards aren't changing. No one is suggesting the standards are changing. The question is whether the standards are going to be met under this new process. And we submit the bill, as drafted, will have fewer sites meeting those standards moving forward than in the past.

We appreciate everyone's effort. This is a Herculean task and an uncomfortable position, because you do great work. But we're very uncomfortable with this bill, and it's our top priority. And we are going to have to continue opposing it strongly unless and until it's significantly strengthened.

We understand the problem is not of your making. The polluters created the problem, and the Corzine administration has rejected the right solution to provide good government and is, instead, proposing less government. And you're operating within that box. We reject that box, while we also understand that you're operating under that box. And we question the premise of why we would trust responsible parties to do the right thing, given the course of history. They created the mess in the first place; the State rightfully created strong laws to clean up these sites; the polluters said no; the laws were weakened in '91, '92, '93, and again in '97. They still said no. Governor Whitman gutted the site remediation program, roughly from 250 staff to 150 staff over the last 10 years, while the universe of sites it's responsible for has increased.

So they prevented the tools from getting the job done right. And now that they're operating in that (indiscernible), they're suggesting, given the polluter's history of delay and not cleaning up, we should further

empower them. And we just ask the question: Why should we trust them, given the track record over the last 30 years?

So we urge the Committee to revisit the decision to go along this route. Yes, they should be licensed, of course. Yes, DEP should have more oversight, which this bill does provide, but not nearly enough. The bill goes way further than licensing the LSPs -- but to then give them government decision making, which, again, we reject.

We understand that we are unlikely to win that argument and suggest that there's still lots of wiggle room to make the bill a lot better. Rather than have the premise be that sites are out of DEP jurisdiction, as opposed to inside DEP jurisdiction, we would suggest that the reverse should be true. This is a big effort, and we would suggest that it would be much better to be smaller scale, least problematic sites first: homeowner tanks, perhaps some of the lesser contaminated sites that haven't had groundwater contamination. DEP estimated, in the stakeholder process last year, that was roughly in the universe of 3,000 to 5,000 sites. We suggest that if you're going to go down this LSP route, at the very least it should be limited to those sites. Failing that, DEP needs to have much more *shalls* than *mays* in what sites stay within the program.

We appreciate there is some language in there, under environmental justice, permitting greater review than in the earlier drafts. But greater review is qualitatively different than remedy selection. And most of these sites are in low-income and minority communities -- the ones that matter the most, that are already cumulatively and disproportionately impacted. And we need to take a much closer look there.

In addition, on the remedy selection, there's been reference to the Kiddie Kollege II bill that was in the Assembly Environment Committee last week. There's a suggestion to tie bar passage of that bill to this bill. We would suggest that this bill should be tie barred to that bill. We support that bill and are very hopeful that residential developments would get the same protections as daycare centers and schools as a result of that legislation.

Just a few closing comments on-- There needs to be much greater oversight of the LSPs in addition to the comments we've already submitted in writing. The Board has a-- There's a controlling majority that has a financial stake in the program. The five LSPs and the business representative are six out of 11. There are two that would be -- I know it's horrible to stereotype -- but there's going to be two environmentalists versus six in the industry, and then three folks somewhere in the middle. So the Board, by design, is stacked against ensuring the strongest public health protections. And we urge that that be revisited.

In addition, the public, because of all the changes in the law around remedy selection in '97, have been shut out of the remedy selection process. There needs to be a way, especially if this is going to be privatized, for the public -- the community has the most at stake in these sites -- to have a say and have a role in the cleanup process and the redevelopment process.

And for that to be truly effective they need resources, and these communities don't. In Superfund, the polluters pay for technical assistance that the community hires. And that has been discussed. It's in the stakeholder process. And at some point, there was some interest in that.

But it's at least not yet in the bill. And we would urge for there to be some polluter-funded technical assistance for community groups around these sites.

There also needs to be more monitoring -- or independent monitoring -- not just auditing, but monitoring of water samples and such paid for by polluters that would be conducted by DEP. We had mentioned that to you, Mr. Chairman, a few months ago and haven't seen that yet in the bill. And we would encourage that to be put in there.

I think I will leave that as my primary comments. I think the Chairman really nailed it on the head earlier in the hearing when he -- of what our problems with the bill are. There is no DEP approval. This is the end of command and control. Hopefully, I emphasize, the responsible parties and the LSPs will get audited. But as currently designed, there won't be enough oversight. And it's just a question of when, not if, another Kiddie Kollege kind of situation happens. And we'd like to avoid that.

With that said, we look forward to continuing to work with everyone and hopefully come up with a different solution, or at least minimize the flaws in this bill.

Thank you.

SENATOR SMITH: Thank you for your comments.

Tony Russo, we did get your letter with the three points, which have been emphasized on 17 occasions today.

Is there anything new, Tony?

**ANTHONY RUSSO:** Yes.

SENATOR SMITH: Okay. (laughter)

MR. RUSSO: Good afternoon, Mr. Chairman, members of the Committee.

I'll get right to the points that were raised today that I just want to counter. One of them is the self-guarantees. The fact that this initiative was supposed to be about cleaning up sites, expediting it, and reducing the backlog -- eliminating one's ability to self-guarantee makes no sense. This whole notion of warehousing our sites is just not true -- it's flat out not true. And I can tell you, in this day, where Sarbanes Oxley and the new accounting standards -- when you have to carry over a liability year after year -- the last thing companies want to do is transfer that liability year after year. They want to get across that finish line. They want to get these sites cleaned up. And given the economy today, most of these sites that they own -- if they can make a profit on -- they want to turn it around and sell it. So it just doesn't make a lot of sense to attack one's ability to self-guarantee. It's going to add a cost.

It seems like, now, it's weekly we get notices from our members that they're laying off people. You read it in the paper, you see it on TV. This state is bleeding jobs. And now to add these taxes, whether it's 1 percent or half-a-percent, when there are moneys available-- And I can send this Committee a list of funds that I've looked at from the Treasury report from last year's budget -- to various environmental funds, where money goes unspent, that are supposed to be used for abandoned properties and homeowners associations. So the money is there. Spend that money. Don't attack our ability to self-guarantee. Don't assess these taxes.

On the recalcitrants section of the direct oversight-- The whole point here is -- and I think the consultants made the point -- that you want

to authorize these LSPs to go ahead and expedite these cases, with the end goal being that these sites are cleaned up. If you look at the criteria listed in the recalcitrant section, you're going to punish a lot of good actors through no fault of their own, when you look at -- if you have impact to a natural resource or if you have specific chemicals that you're trying to clean up.

We agree, as industry, that there are bad actors out there. Define who they are. The DEP has existing authority today to issue these administrative orders and clean up these sites. Go after the recalcitrants, go after the bad actors. Those are the sites you should have direct oversight on.

The concern that we have is, two administrations from now you're going to have the potential of somebody looking at the statute and saying, "Wow. You know what? They triggered this one criteria in this bill. Let's go ahead and seize control of that site, take control of their money, and select a remedy." I just think that's counterproductive and actually antithetical to what we want to do.

The mandatory timeframes: You heard Senator Gordon talk about chasing every molecule. The one question I've presented to Irene and the DEP is: If we have standards, and they can't be achieved, and I can't get my no further action letter or a response action outcome, what are these companies supposed to do? How are they supposed to cross that finish line? That's a question that needs to be asked -- is how they get across that finish line. If these standards cannot be achieved, if laboratories are having problems even detecting down to one part per billion-- And just to give you an idea of what one part per billion is -- an analogy -- it's one second in 34

years. A lot of our standards are in the parts per billion, now going into the parts per trillion.

And, Mr. Chairman, we discussed the whole idea of sustainable remediation with you. We could talk of climate change now -- very prevalent in today's society. And actually, the DEP -- Tom O'Neill is heading this sustainable remediation at the DEP. Is the view worth the climb? We have so many sites that pump and treat groundwater, chasing every molecule that uses power, energy, gas. You want sites to dig up soil, and excavate, and transport. You're going to create $CO_2$ emissions.

You have to look at, holistically, if what we're doing in this program makes sense. And what we proposed, and what you'll see in our language is -- and Massachusetts does this. If an LSP can demonstrate that those risks are addressed and monitored for the intended use of that property, then that case is closed out. And I don't think we have that in this bill.

I end with that.

SENATOR SMITH: Thank you for your comments.

Thank you, everybody, for participating.

See you on the 28th (*sic*).

**(MEETING CONCLUDED)**

# APPENDIX

NJUA
NEW JERSEY UTILITIES ASSOCIATION

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Statement of Ryan L. Tookes, Manager of Government and Public Affairs
New Jersey Utilities Association
on S 1897 before the
Senate Environment Committee
February 2, 2009

Good Morning, Mr. Chairman and members of the committee. I am Ryan Tookes, Manager of Government & Public Affairs with the New Jersey Utilities Association, NJUA. NJUA is the state trade association for 16 investor-owned utility companies that safely and reliably deliver regulated natural gas, electricity, wastewater, water and telecommunications services to New Jersey residents and businesses 24 hours a day, every day of the year.

I am here today representing the views of our member companies that would be affected by S1897, specifically, Elizabethtown Gas, South Jersey Gas, New Jersey Natural Gas, PSE&G, Orange & Rockland Utilities, Inc. These companies are responsible for and have completed various and multiple site remediation projects throughout the State. While we are supportive of changes to the law that will help expedite remediations without compromising environmental protection, for reasons I will detail in a moment, our affected member companies have serious concerns with some of the provisions of the bill in its present form.

We respectfully urge the committee to give additional consideration to the following provisions of S1897:

- **Defining Recalcitrance in the Site Remediation Program**: Section 28 of the bill establishes criteria or triggers when the NJDEP would seize control of a site. While we believe there is value in defining recalcitrance in the SRP, however, we are concerned that the criteria specified in the bill is too broad, and would permit such classification even when a responsible party is acting diligently. It is critically important not to deem a company to be recalcitrant when their inability to meet specified timeframes are due to no fault of their own. Responsible parties need certainty that their cases will not be seized by DEP where they are acting in conformance with DEP guidelines or delays are encountered because of forces outside of their control.

- **Timeframes:** The bill as presently drafted indicates that timeframes for remediation shall be established by the DEP. While it is reasonable for the State to expect diligence on the part of responsible parties, it is equally reasonable for us to expect diligence on the part of DEP. Conspicuous by its absence is the fact that no timeframes are established for DEP's review and approval of document submittals. Further, the bill indicates that obtaining an extension from DEP as a result of delays on the part of DEP are at its discretion. It is reasonable to obtain and expect an extension from DEP when

progress is delayed by the agency's inaction or circumstances beyond the company's control.

**Elimination or Reduction of Contemplated Taxes:** The taxes contemplated in this bill would be deposited into a Remediation Guarantee Fund. This fund is dedicated to assisting property owners if a remedy fails and there is no viable responsible party. While establishing a fund to provide these protections may be needed in circumstances where a responsible party has become insolvent, these are not circumstances applicable to utilities which have a statutory obligation to provide service and cannot cease operations absent a transfer of its obligations and assets to another entity with approval of the BPU. Imposition of this tax on utilities unnecessarily will increase the financial burden of the companies and their customers, customers who are already constrained to manage the costs of utility services. Given these facts, we respectfully request that the bill exempt regulated utility companies from the remediation tax.

- **Limits on Self-Guarantees**: The bill limits a company's ability to self-guarantee a cleanup. The ability to self-guarantee 100% should be an option for companies able to demonstrate that they are financially sound. The bill as presently drafted, limits the ability to self-guarantee to 50% of the cost of remediation. Given that utilities are regulated by BPU, a process that enables State Government to oversee the financial integrity of utilities, and given the expense associated with the purchase of additional insurance and the high cost of credit, it seems to us unnecessary to place this additional burden on our member companies. We respectfully request that the committee reinstate the ability to self guarantee without restrictions, at a minimum on entities over which the State has oversight of the companies' financial integrity.

Thank you for the opportunity to appear before you today. I would be glad to take any questions.

# SENATE BILL 1897
# February 2, 2009

## Introductory Remarks

- The LSP Consultant Coalition is uniquely qualified to provide input as a stake holder in the LSP process.

- The LSP Consultant Coalition is committed to working with NJDEP and the Legislature to ensure that NJ's program follows the Mass. LSP framework. We truly appreciate the efforts of all involved in the process in particular the legislative and regulatory personnel and specifically the dedication and efforts of Assistant Commissioner Irene Kropp and her staff.

- The LSP Consultant Collation recognizes that there have been substantial revisions in both form and substance have been made to Senate Bill 1897 and we feel these revisions have improved the bill, however, we still have significant concerns that the current bill does not fully reform NJDEP's regulatory framework to affect a successful shift to an LSP model.

- The inclusion of the 5% surcharge within this bill is of particular concern, given the additional fees it imposes and we are concerned that it;s inclusion in this bill provides a distraction from the goal of reforming the remediation process through establishment of a licensed site remediation professional program

- For the bill to accomplish the goal of increasing remediation activity and results in terms of cleanup within the NJDEP remediation program - LSPs must not only be charged with the authority to act as agents of NJDEP but also must be provided the ability to access the latest science and technical resources, focus on remediation (not investigation) and exercise professional judgment within defined standards.

## Remedial (or "Response") Action Performance Standard (RAPS)

- The Massachusetts program has codified a "performance standard," called the Response Action Performance Standard (RAPS) that describes the types of diligent work that is needed to ensure compliance with DEP site cleanup requirements and regulations.

- Under this framework, LSPs apply a vast array of tools for site investigation and cleanup, unhampered by delays often associated with regulatory review. The LSP Code of Conduct requires LSPs to employ the Response Action Performance Standard when making waste site cleanup opinions and, similarly, the DEP regulations require remediating parties to conform to the standard too. This is an important mechanism to align the obligation of the remediating party to the standard of care for the LSP.

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Why is use of a performance standard concept so important? The field of site investigation and site cleanup has only been around for a couple of decades. The technology available to engineers and scientist to assess and cleanup up waste sites expands every year. Because the field is constantly evolving and improving, there is opportunity for systematic incorporation of changes as we recognize improvements in our understanding of waste sites and the chemicals released into the environment. It is virtually impossible to manage this wide array of performance standard with static, prescriptive site remediation program regulations.

In order to effect the establishment of RAPS within New Jersey's LSRP Program, the following definition is recommended to be added to the legislation.

**The "Response Action Performance Standard" or "RAPS" is the level of diligence reasonably necessary to obtain the quantity and quality of information adequate to investigate a site, evaluate remedial action alternatives as necessary, and to design and implement remedial action(s) to protect public health and safety and the environment. The response action performance standard requires:**

**(a) consideration and/or implementation of site assessment and investigation protocols specified in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E.**

**(b) consideration of relevant remediation regulations, policies, technical manuals and guidelines issued or accepted by the department or the United States Environmental Protection Agency;**

**(c) use of accurate and up-to-date methods, standards and practices, equipment and technologies which are appropriate, available and generally accepted by the professional and trade communities conducting investigation and remediation under similar circumstances; and**

**(d) investigative practices which are scientifically defensible, and of a level of precision and accuracy commensurate with the intended use of the results of such investigations.**

**The response action performance standard encompasses a hierarchal consideration of polices, standards, methods and practices: (1) where site assessment and investigation protocols specified in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E are implemented, it is**

**presumed that an acceptable standard of care has been achieved; (2) where professional judgment dictates that site assessment and investigation protocols specified in the Technical Requirements for Site Remediation, N.J.A.C. 7:26E are not appropriate or optimal, justification for the implementation of alternative polices, standards, methods and/or practices is required to document that an acceptable standard of care has been achieved.**

In addition to including the RAPS definition, insertions presented below to:

1. Provide direction to NJDEP to review and modify regulations for consistency with LSRP process by taking prescriptive scientific methodologies and procedures out of regulation and placing these into guidance as is established convention in most regulatory programs.

2. Provide direction to NJDEP to allow for acceptance of published scientific guidance including from US EPA, ITRC and ASTM. These guidance should be available without requiring a variance of existing regulations.

39. Section 24 of P.L. 1993, c.139 (C. 58:10B-2) is amended to read as follows:

24. a. The department shall, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), adopt rules and regulations establishing criteria and **[**minimum**]** standards necessary for the submission, evaluation and approval of plans or results of preliminary assessments, site investigations, remedial investigations, and remedial action workplans and for the implementation thereof. The documents for the preliminary assessment, site investigation, remedial investigation, and remedial action workplan required to be submitted for a remediation, shall not be identical to the criteria and standards used for similar documents submitted pursuant to federal law, except as may be required by federal law. In establishing criteria and **[**minimum**]** standards for these terms the department shall strive to be result oriented, provide for flexibility, **and use performance based technical regulations** and to avoid duplicate or unnecessarily costly or time consuming conditions or standards.

**The department shall amend or adopt site remediation regulations, criteria and standards as necessary to implement the role of licensed site remedaiton professionals. The department shall develop or review and accept existing policies, technical manuals or guidelines to facilitate the development of a body of information available to licensed**

**site remediation professionals to perform professional services and employ the response action performance standard and to provide presumptive approaches to comply with N.J.S.A. 58:10B-1 et seq. and the regulations adopted pursuant thereto. These policies, technical manuals or guidelines may include those developed by the United States Environmental Protection Agency, other states or federal agencies, the Interstate Technology & Regulatory Council and other authoritative sources. The department shall involve stakeholders in the review, development and/or acceptance of such policies, manuals or guidelines.**

b. The regulations adopted by the department pursuant to subsection a. of this section shall provide that a person performing a remediation may deviate from the strict adherence to the regulations, in a variance procedure or by another method prescribed by the department, if that person can demonstrate that the deviation and the resulting remediation would be as protective of human health, safety, and the environment, as appropriate, as the department's regulations and that the health risk standards established in subsection d. of section 35 of P.L.1993, c.139 (C.58:10B-12) and any applicable environmental standards would be met. Factors to be considered in determining if the deviation should be allowed are whether the alternative method:

(1) has been either used successfully or approved by the department in writing or similar situations;

(2) reflects current technology as documented in peer-reviewed professional journals;

(3) can be expected to achieve the same or substantially the same results or objectives as the method which it is to replace; and

(4) furthers the attainment of the goals of the specific remedial phase for which it is used.

**A licensed site remediation professional may provide technical justification for forgoing any specific activity required by the regulations adopted by the department pursuant to subsection a. of this section, or set forth in the policies, technical manuals or guidelines, if in his or her professional judgment any particular requirement is unnecessary or inappropriate based upon the conditions and characteristics of a site or area of concern. The licensed site professional shall employ the response action**

**performance standard in determining whether any such activity is unnecessary or inappropriate. The licensed site remediation professional shall identify such activity and shall set forth the basis for such technical justification, in the relevant submittal.**

[The department shall make available to the public, and shall periodically update, a list of alternative remediation methods used successfully or approved by the department as provided in paragraph (1) of this subsection.]

## Refinement of Site Conditions that can Trigger NJDEP Oversight

The conditions suggested under Section 28 b. 2 and 3 of the proposed legislation regarding triggers for NJDEP direct oversight are overly broad and given the onerous requirements of this section, we respectfully recommend their deletion or refinement, As they exist in the current legislation, there would likely be many situations when LSRP's would not know when a site that they are working on might be subject to NJDEP Direct Oversight. Furthermore, there could potentially be a large number of sites that would be subject to NJDEP oversight that would not be characterized by substantial or imminent threat to human health or the environment.

Massachusetts LSP Program Framework
December 8, 2008

The Massachusetts DEP has implemented its site cleanup program under General Laws, Chapter 21E through a set of regulations known as the Massachusetts Contingency Plan or "MCP." The following summarizes key components of the Massachusetts LSP Program that the New Jersey LSP Consultant Coalition believes are necessary to adopt in New Jersey. With these concepts in mind, the Coalition has crafted suggested revisions to DEP's current recommendation for the pending LSP bill in New Jersey.

- The MCP lays out the Massachusetts state rules for conducting cleanups of contaminated sites. The MCP requires people who are responsible for cleanups to hire a Licensed Site Professional (LSP) to manage and/or oversee the required assessment and cleanup work.

- The LSP Board regulates the professional services provided by LSPs and has adopted Rules of Professional Conduct that all LSPs must meet.

- The Massachusetts program has codified a "performance standard," called the Response Action Performance Standard (RAPS), that describes the types of diligent work that is needed to ensure compliance with DEP site cleanup requirements and regulations.

- Under this framework, LSPs apply a vast array of tools for site investigation and cleanup, unhampered by delays often associated with regulatory review. The LSP Code of Conduct requires LSPs to employ the Response Action Performance Standard when making waste site cleanup opinions and, similarly, the DEP regulations require remediating parties to conform to the standard too. This is an important mechanism to align the obligation of the remediating party to the standard of care for the LSP.

- The standards and framework for compliance are established by DEP, and LSPs use professional judgment to accomplish the work within each step from spill notification to final sign off on cleanup.

These concepts are further outlined below.

The Massachusetts Waste Site Cleanup Program has been designed to safeguard public health and the environment. The DEP sets the standards for cleanups. The LSP Board requires LSPs to follow DEP's requirements for assessing and cleaning up a site and to exercise independent professional judgment in doing so. In addition, the LSP Board requires that LSPs provide services with reasonable care and diligence, applying the knowledge and skill expected of LSPs.

In Massachusetts, the LSP Board's oversight of LSPs works. Licenses have been issued to over 500 professional engineers and scientists. LSP applicants must meet stringent

education and experience standards set by the Board, and they must pass an examination that tests their technical and regulatory knowledge. The LSP Board also requires that LSPs take continuing education courses in order to maintain their licenses. These licensing and continuing education requirements, along with the LSP Board's ongoing disciplinary program, ensure that LSPs have the knowledge and experience to guide their clients properly through the assessment and cleanup process mandated by the state regulations.

The LSP Board also regulates the professional services provided by LSPs. It has adopted Rules of Professional Conduct that all LSPs must meet. The LSP Board investigates complaints that LSPs have failed to follow these rules. The LSP Board has received and processed complaints from DEP and the public at large and taken over 30 disciplinary actions, including license revocations, suspensions, and public censures.

Massachusetts use of the Response Action Performance Standard (RAPS) works well. The RAPS regulatory approach achieves compliance with DEP site cleanup requirements. Under this framework, LSPs apply a vast array of tools for site investigation and cleanup, unhampered by delays often associated with regulatory review and approval for each specific action. The standards and framework for compliance are established by DEP, and LSPs use professional judgment to accomplish the work within each step from spill notification to final sign off on cleanup.

This approach incorporates the duty of an LSP to meet the LSP Board requirements, to help DEP and the State ensure that remediating parties, informed by LSPs, do work in accordance with the DEP regulations and good technical practices, without specifying every minute detail in regulation. There are a LOT of details. To accomplish this, the DEP regulations include a requirement for LSPs to use RAPS when making waste site cleanup opinions. This RAPS standard accomplishes the objective of making LSPs follow the regulations and all applicable and appropriate guidance, in order to ensure that the remediation by the responsible person also complies with all requirements. An LSP Licensing Board enforceable "Standard of Care" results from a system based upon the need of both LSPs and remediating parties to conform to the RAPS.

Why is use of a performance standard concept so important? The field of site investigation and site cleanup has only been around for a couple of decades. The technology available to engineers and scientist to assess and cleanup up waste sites expands every year. Because the field is constantly evolving and improving, there is opportunity for systematic incorporation of changes as we recognize improvements in our understanding of waste sites and the chemicals released into the environment. It is virtually impossible to manage this wide array of performance standard with static, prescriptive site remediation program regulations.

As an example, the Massachusetts DEP, via its staff and various "working groups" under a statutory Waste Site Cleanup Advisory Committee, has partnered with organizations such as the Massachusetts LSP Association, Associated Industries of Massachusetts, Mass Municipal Association, NAIOP and many others to seek feedback and direction for

refining and improving the program. Several examples exist where development of policy, guidance, and regulation have been accomplished, which improved the performance standards for site investigation and cleanup during the tenure of the current LSP site cleanup program.

The Consultant Coalition believes that these principles and methods should be incorporated into New Jersey's proposed LSP program. Our specific comments and suggests for the bill reflect many of these components of the Massachusetts LSP program.

**Testimony of Robert Spiegel, Edison Wetlands Association**

February 2, 2009
New Jersey Senate Environmental Committee

Mr. Chairman and members of the Committee, my name is Melanie Worob, and I am the Program Supervisor for the non-profit organization, Edison Wetlands Association (EWA). Thank you for this opportunity to address the issue of the licensed site professional program for site remediation before this Committee.

In addition to EWA's Executive Director Robert Spiegel's comments, I would like to submit a very brief additional recommendation on behalf of the dozens of grassroots community groups we assist through our Community Assistance Remediation Program (CARP). Since 2002, our CARP initiative has assisted underprivileged groups across the state, from Ringwood to Long Branch to Camden to Bloomfield, with getting cleanups of dangerous sites that had gone decades without any action before EWA got involved. One example of how this industry self-certification rule would decimate communities of color is the New Jersey Natural Gas Plant in Long Branch, where decades of contaminants in Troutman's Creek, a popular swimming and fishing area and poisoned by New Jersey Natural Gas coal tar pollution were overlooked by the polluter's consultants. It took our independent sampling and advocacy to make NJDEP aware of this massive contamination oversight. Passing this self-certification bill, we believe, would create thousands more sites like this unnecessarily, with the New Jersey families left facing consequences.

**Testimony of Robert Spiegel, Edison Wetlands Association**

February 2, 2009
New Jersey Senate Environmental Committee

Mr. Chairman and members of the Committee, my name is Dana Patterson, and I am the Toxics Program Coordinator for the non-profit organization, Edison Wetlands Association (EWA). . Thank you for this opportunity to address the issue of the licensed site professional program for site remediation before this Committee. I would like to submit the following comments on behalf of Robert Spiegel, Executive Director of EWA who could not be here today due to a family emergency.

Founded in 1989, EWA is dedicated to protecting human health and the environment through conservation and the cleanup of hazardous waste sites. EWA is the recognized by the NJ Senate among nonprofits in getting contaminated waste sites remediated in a timely and thorough manner.

As you may know, currently there are over 20,000 contaminated sites in New Jersey. The New Jersey Department of Environmental Protection (NJDEP) has implemented a plan for two-thirds of these contaminated sites to outsource site remediation, allowing the responsible party to hire their own consultant to manage and certify sites as clean. We have encountered dozens of real-life examples in our on-the-ground work that show without a doubt that self-certification for industry and developers is unwise and dangerous. Many of the significant pollution problems our state is plagued with are a direct result of too little oversight not too much.

One obvious example where this program has failed is at the Akzo-Nobel Chemical site in Edison, New Jersey. Edison Wetlands Association so far has invested hundreds of thousands of dollars, as well file a federal lawsuit to attempt to get this toxic nightmare cleaned up. This site could serve as the poster child for more stringent oversight by the NJDEP. At the Akzo-Nobel site, over and over again, NJDEP took the word of the polluters and their consultants that the site was remediated, only to have dramatic levels of a witch's brew of highly toxic chemicals streaming into the Raritan River unabated. A brief history of the site will help explain and better your understanding on why outsourcing site remediation is not wise and will further endanger countless families across New Jersey.

53 Areas of Concern have been identified including significant groundwater contamination and areas of historic on-site waste disposal. In 1987, Akzo-Nobel began a site cleanup that was approved by NJDEP based on Akzo-Nobel's consultants formulating a cleanup plan including excavation and redeposit of chemical wastes into unlined disposal areas that lie between the active plant and the Raritan River.

EWA's comments at the time outlining the plan's serious deficiencies proved prescient when in early 2007, EWA discovered a noxious chemical seep emanating from waste deposits that made up the bank of the Raritan River adjacent to the southern border of the Akzo-Nobel/Basell facility, just 100 yards from the popular Edison Boat Basin. The chemical waste included benzene, broken corrugated asbestos sheets, and black, viscous tar. The seep created an oily

sheen on the water that was discharging into the Raritan River along with a highly pungent chemical odor.

EWA conducted a sampling investigation of the seep and found a discharge of volatile organic compounds, semi-volatile organic compounds and metals flowing into the Raritan River. Elevated levels of benzene exceeded New Jersey Surface Water Quality Standard, Aniline and 4-chloroaniline exceeded New Jersey Groundwater Quality Criteria, and antimony and lead exceeded respective Surface Water Standards and Groundwater Quality criteria.

Sampling by Akzo-Nobel's consultant, Sovereign Consulting, has confirmed EWA's sampling results. They found carcinogens benzene at over 860 times acceptable state levels and arsenic at over 550 times above NJDEP surface water criteria. In January 2008, Akzo's Consultants submitted a substandard plan again, and again it was approved by NJDEP to address the seep and waste. In February 2008, Akzo-Nobel implemented a plan and once again, the consultants' "easy way out" approach has failed miserably at the expense of the river's ecological health and the potential impact to the many families also fish, crab, boat, clam, swim and jet-ski the waters right near the chemical seep.

The failed program implemented by Akzo-Nobel, has failed to stop the seep. The seep's flow is actually worse now because oil discharges from the seep and the concentrations of hazardous substances exceeding NJ's surface and groundwater criteria are still discharging into the Raritan River. EWA had to file a lawsuit with Eastern Environmental Law Center in January 2008, charging Akzo Nobel Chemicals Inc., Akzo Nobel Inc., and Basell USA Inc. with violating the federal Resource Conservation and Recovery Act (RCRA). EWA has also conducted seven sampling investigations with Chapin Engineering that document ongoing seep and chemical discharge into the Raritan River.

It is very disheartening to see such contaminants flow into the Raritan River, the longest river solely in New Jersey. The site, as mentioned above, is just 100 yards from the Edison Boat Basin. This is an extremely popular place for families to recreate including commercial and recreational fishing, crabbing, swimming, and hiking along the shoreline. There is also a large presence of wildlife, as birds including bald eagles are routinely present on the mudflat adjacent to the seep at low tide exposing them to the hazardous substances. This site is a travesty, and a working tribute to what can happen when polluters' consultants have too much say in their own regulation.

This is not the first time this program has failed. Similar problems occurred with other NJDEP sites EWA is monitoring such as the Ford Plant PCB scandal, also in Edison, and the WR Grace case in Hamilton. Similar legislation was passed in Massachusetts, and the result was an outrageous three-quarters of the contracted work was found to be deficient. Much of the remediation work had to be repeated, causing undue economic impacts for taxpayers across the state. For the sake of public health, long-term fiscal sanity, and environmental protection, we sincerely hope you reject the urge to duplicate this type of failed program in New Jersey.

Finally, I also urge that in this difficult economic climate, NJDEP utilize fee collection from regulated parties as a revenue generator to fully staff the NJDEP. For every staff hour used by NJDEP personnel, they charge the regulated party, with the money going back in the general

fund instead of the NJDEP. These funds could enable the NJDEP to have more case managers. We reject the notion that there needs to be staffing cuts at the NJDEP. Instead, proper use of the fees collected and leadership at the top to provide guidance and vision is necessary.

I urge you today to resist the temptation, and reconsider the decision to outsource site remediation by leaving the critical remediation decisions that will impact the health of New Jersey families up to polluters and developers. It has already caused significant endangerment to human health and the environment, and cases like the one I mentioned earlier will grow exponentially if this bill is passed.

Speaking for myself I would also like to add a brief personal note. I have lived in Edison my entire life, and when I was younger I would go down to the Edison Boat Dock to watch the boats, skip stones, and play along the riverfront. This site is currently the only public access to this section of the Lower Raritan River. With constant cancer causing chemicals flowing into the river, and children playing on the shoreline, how can NJDEP claim that they are doing the right thing by allowing Akzo-Nobel to oversee the clean up their own toxic site? I invite the committee to see firsthand this site at low tide to see the result of decisions made in halls of Trenton.

New Jersey Business & Industry Association

NJBIA

GOVERNMENT AFFAIRS TEAM

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Senior Vice President

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Health & Legal Affairs

TO: Members of the Senate Environment Committee

FROM: David Brogan, Vice President, NJBIA

DATE: February 2, 2009

RE: NJBIA Position on S-1897 SCS – Licensed Site Professional Draft Bill

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The New Jersey Business and Industry Association (NJBIA), which represents nearly 23,000 businesses in the State of New Jersey, appreciates the opportunity to express our concerns with the new draft of S-1897, sponsored by Senator Smith. S-1897 would establish a Licensed Site Professional (LSP) Program in the State of New Jersey, in an effort to address the growing backlog of contaminated sites. Below I have outlined some key issues that we would like to highlight for the committee.

As an association, NJBIA represents the largest number of interested parties that will be affected by any change to the State's Site Remediation Program (SRP). They include responsible parties, developers, engineers, and other property owners. As such, in reviewing this bill, NJBIA must take into consideration the potential impact to all parties.

**General Concepts:** S-1897 is now in its third iteration. We do appreciate the work that has been done by the department in attempting to develop an LSP Program and we understand that it is a very daunting task. NJBIA strongly supports the concept of an LSP program, and we were hopeful that significant changes would have been made through this last rewrite to address the concerns we previously outlined. However, that is not the case.

The draft substitute for S-1897 goes well beyond a strict LSP framework. It includes: new taxes; new requirements and mandatory timeframes to be placed upon responsible parties; increased authority of the DEP to select a remedy, impose fines, and take over remediations; limits on self guarantees; and, an increase in the statute of limitations for natural resource damages.

Primarily, NJBIA would prefer a strict LSP program modeled after the Massachusetts program. We respectfully request that any issue that does not directly pertain to an LSP program be removed from this bill and put into another piece of legislation. The goals of the program must be to clean up more sites, to do so more efficiently, and to shift much of the current and future caseload off the hands of the DEP and put it under the authority vested in the LSP's. In doing so, the economic and environmental benefits will come to fruition. **Having said that, this bill will not accomplish those goals.**

While I will outline some issues of concern below, I would like to highlight the changes we support:

1) **More LSP's on the LSP board.** There are now 5 LSP's on the 11 member board, along with one representative from business. The LSP board will be a professional board similar to what we have seen for engineers. As such, a large membership of the board should have first hand experience in understanding the complex nature of the LSP profession. As such, we support this change.
2) **Permit for sites with engineering and institutional controls**. This provides a mechanism whereby a permit can follow the site. This will ensure that the DEP, property owners and local officials, know the status of a site in order to ensure that an engineering control (such as a cap) is being maintained.
3) **Small business exemptions**. The concept of exempting small businesses from remediation funding source requirements is a positive step.
4) **Language explaining the integration of sites that are currently in the process of remediation**. The last bill did not address this issue, and any further clarification is a step in the right direction.

With regards to specific concerns we have with the bill, I have provided an outline below.

**Surcharges:** Both the 1% and 5% surcharges are still in the bill. The 1% fee is an annual fee and the 5% fee is characterized as a disincentive for cleanups that do not meet unrestricted (residential) standards. Realistically, the latter is an impossible standard to meet for industrial facilities. As such, it is a de facto tax on business. The 1% fee is an across the board tax.

NJBIA believes that the surcharges or taxes are not necessary. As it has been explained to us, the surcharges would go into a Remediation Guarantee Fund, which would then be used to assist homeowners, homeowner associations, and subsequent purchasers if a remedy fails and there is either no viable responsible party or the responsible party has cleaned up by implementing an unrestricted or limited restricted standard. The universe of people/entities this provision would help is unclear and the DEP has yet to give us a list of sites where this type of situation has occurred. Furthermore, we should look at existing funds that could be used for this purpose before we implement new taxes.

**At a time of economic instability, we should not be instituting new taxes on business.** The taxes should not be part of an LSP program, and are not part of what can be called "reform."

**Criteria for Recalcitrance:** We do not have an issue with the department's attempt to pursue recalcitrant parties. Establishing criteria for such recalcitrant parties is necessary, however there needs to be a clarification as to the types of sites that would fall into this category. The level of oversight, the various requirements, and the loss of control over the remediation for the responsible party are significant deterrents toward being classified as recalcitrant. As such, in order to ensure that non-recalcitrant parties do not get inadvertently placed into the recalcitrant category, the criteria must be tightened. For example, one criterion is that a company received two enforcement actions within the last five years. It is not clear what is meant by "enforcement actions." Another criterion is a timeframe within which a Remedial Investigation, for the entire site, must be performed. Delays can occur due to the department or other factors outside the control of the responsible party. Those issues need to be taken into consideration.

**Related Costs:** Throughout the bill, the DEP states that they should be able to recover the costs of the remediation "and related costs." This is simply too open ended. There has been much discussion about direct and indirect costs. This seems to go beyond that concept.

**Timelines:** The bill still states that timeframes shall be established by the DEP for remediations. NJBIA is troubled that no timeframes are required to be established for DEP's turnaround of document submittals. Furthermore, the bill states that the DEP "may" grant an extension to the mandatory remediation timeframes if there is a delay in receiving department review. NJBIA believes that if a delay is caused by the department, the DEP should be required to grant an extension, and thus, "may" should be changed to "shall."

**Language Authorizing a "Person" to Take Over a Remediation:** Section 41g (2) makes several changes pertaining to a "person's" ability to petition the DEP to take over a remediation. First, under current law, this authority was only allowed under the Industrial Site Remediation Act. Under this bill it applies to every site. Second, under current law, this authorization to petition the DEP was only provided to the transferee of the property. Under this bill, that authorization is given to any "person."

The purpose of this section is not clear. However, this authority should not be expanded to every site. Second, the authority should not be given to any "person." If this is an eminent domain issue, there is other legislation currently moving through the legislative process to deal with this issue. It should not be in a site remediation program reform bill.

**Unrestricted Use Remedial Action:** The bill states that the DEP will mandate unrestricted use remedial actions in cases where there is new residential construction, new construction that includes a sensitive population such as an educational or child care facility, or where there is a change in use of the site to residential, educational facility purposes or child care purposes. NJBIA is concerned that this "one size fits all" approach will limit development in urban areas, or other areas where there is historic fill. It is not clear whether this would prohibit mixed use developments or school construction in such areas, and we would ask for a clarification.

**Future Use**: The bill states that the DEP shall have the authority to disapprove selection of a remedial action for a site on which the proposed remedial action will render the real property *inappropriate for future use.* NBJIA is concerned with the authority given to the DEP to determine "future use." Future use is determined by the market, by the responsible party, or the developer who chooses to take that risk and invest in that property. NJBIA believes that such authority should not be given to a State agency under these circumstances.

**Statute of Limitations:** The statute of limitations for natural resource damages is extended under this bill. It should be noted that the SOL was extended two previous times, in order to give the DEP time to file necessary lawsuits. At each of the hearings when the legislation was considered, the legislature asked the DEP to take the necessary steps to adjudicate outstanding cases. It is not clear why the statute of limitations is, once again, being extended.

**Limits on Self Guarantees:** S-1897 limits self guarantees to 50% of the cost of constructing the remediation. When a company self guarantees a site, they demonstrate their financial viability and their ability to pay for that cleanup. Limiting self guarantees would simply add to the cost of a cleanup, and require an outlay of capital that would otherwise be unnecessary.

Once again, the goal of this bill is to expedite the cleanups of contaminated sites and remove some the caseload from the DEP staff so they may focus on the more complicated sites. **This bill, in its current form, does not accomplish that goal.**

We appreciate the opportunity to express our position on this important piece of legislation. Should you have any questions or need further information, please contact me at 609-393-7707, extension 236.

**Senate 1897**
**Testimony**
**Jorge H. Berkowitz, Ph.D.**
**Langan Engineering and Environmental Services**
**On Behalf of the Environmental Business Council**
**February 2, 2009**

Mr. Chairman, Senators:

Once again I thank you for the opportunity to comment on the revised version of S1897.

It has been nearly two and half years since we started this process designed to reform the Site Remediation program in order to bring about remediation of contaminated sites faster and more efficiently. During the process, all have looked to the Massachusetts program utilizing Licensed Site Professionals to streamline their cleanups. The program has been in place for over 15 years and has evolved into one which is recognized as being significantly improved by the process. Yet, it seems that we have turned our back on some of the salient features, features which help distinguish this program. S1897 continues to contain provisions which are unfair to those to whom you turn to make the program work, the licensed professional, confuses the line of authority to whom the licensed professional is responsible, holds the licensed professional as responsible as those who have created contamination problems and fail to grasp an opportunity to advance the program beyond the archaic, overly prescriptive use of the technical requirements.

In the latest version of this bill there is the ability of the Department to impose fines of up to $50,000 per day per violation. This is the same magnitude of a fine for which the Department can fine a polluting party. The legislation should bifurcate the responsibilities of the Licensing Board from that of the Department. The Licensing Board should be empowered to regulate the Licensed Professional while the Department should regulate the responsible or remediating party. This simple but significant difference will lend clarity to the lines of control and afford the professional the opportunity for its professional board to sit in judgment of their performance both technically and ethically. If the Department wishes to institute a complaint against a practicing professional, it, along with others have the right to do that. Upon finding that the complaint is valid, the Board should have a range of options depending on the severity of the violation of the licensed professional. The option could include the imposition of fines, sanctions, suspension or revocation of license.

The Board should have a majority of Licensed Professionals. These will be the people with whom the ability to practice in NJ will rest. They must be endowed with the ability to interpret the same science, the same technology, the same regulations and the same laws utilized by the professional in order to make sound judgments as to the appropriateness of a licensed professional's performance-technically or ethically. Any perspective short of that means that a Board member is not fully equipped to rule on all aspects which may come before them.

Finally, the opportunity to return the Site Remediation program back to the forefront of state programs is squandered in this bill. The art and science of site remediation is an ever evolving, expanding knowledge base. As new technologies emerge which improve upon the current status, they should be encouraged not discouraged. That is why we would recommend that the legislation require the Department to routinely identify those techniques, methods or science which expand and improve upon the existing technical requirements. These would be identified by the Department and recommended as guidance which, in the opinion of the licensed professional they may choose to use and be ready to justify it to the Department. The collection of guidance is referred to as Response Action Performance Standards in Massachusetts. This process is less burdensome than having to pass a regulation every time the Department would like to enhance its regulation, a process which requires from 9 months to a year. In fact, the Department already partially uses the approach which we refer to as RAPS in promulgating Guidance for the investigation of Vapor Intrusion and setting an Impact to Ground Water Standard.

As we draw close to a vote on the Site Remediation Improvement bill, we suggest that we not waste an opportunity to get it done right. We don't do this every year. In fact, we don't do it every 10 years. We think these suggestions will go a long way in improving upon the existing bill and commend them to you for your consideration.

FRASCELLA & PISAURO, LLC.

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February 2, 2009

Senate Environment Committee

Dear Chairman Smith and Committee Members:

On behalf of New Jersey Environmental Lobby, NJ Chapter of Sierra Club and the New Jersey Environmental Federation please accept our initial objections and thoughts on SCR for S. 1897. We look forward to working with the committee and DEP on reforming the site remediation program.

It is commonly accepted that the site remediation is broke. Neither the environmental community, the regulated community, the Dept nor the general public is happy with how contaminated sites are getting remediated. Everyone is in agreement there must be some changes, but there is disagreement on what those changes should entail.

The LSP portion of the bill is modeled after the Massachusetts version. A brief view of the Massachusetts experience shows that NJ should not adopted the LSP program as proposed. In a Mass. DEP review of RAOs, Mass DEP found that 50% RAOs required more work. Further, a review of Mass DEP's website shows the results of their Level 2 and Level 3 audits.

**Mass. 2007 Level 2 and Level 3 Audit Results**

| | | Jan - March | April - June | July - Sept | Oct - Dec |
|---|---|---|---|---|---|
| Audit | # | 74 | 89 | 94 | 78 |
| L2 | Violations | 17 | 24 | 24 | 18 |
| | % in violation | 22.97% | 26.97% | 25.53% | 23.08% |
| L3 | # | 40 | 30 | 42 | 68 |
| | Violations | 26 | 21 | 30 | 56 |
| | % in violation | 65.00% | 70.00% | 71.43% | 82.35% |

If 50% of the ROA issued in Massachusetts have to be reopened and 75% of all Level 3 audits reveal violations of the Standards, reason would encourage NJ not to adopt the program. We have already seen, in recent years, multiple instances where responsible parties and their consultants claimed sites or materials were clean which were in fact not. One must only look at Kiddie Kollege, W.R. Grace, Martin Luther Middle School in Trenton, Ford's Edison Plant, Ringwood and others. In the instance of

Kiddie Kollege, children were exposed to Mercury at 27 times the legal limit. What where the costs to the families whose children were exposed?

In NJ the quality of submissions, by responsible parties and others, to the Department is not acceptable. A large portion of documents submitted to the Department are inaccurate, incomplete or otherwise not in accordance with the applicable standards. There is nothing in the bill that directly addresses this situation. LSP should be responsible for the costs, to the department, of resubmissions arising out of the LSP's failure to submit documents that meet regulatory and technical requirements.

We believe that all professional involved in the remediation of sites should be licensed and subject to strict requirements. We believe that having properly trained LSP taking part in the remediation of contaminated sites will improve the quality of submissions to the DEP; thus resulting in less resources being dedicated by DEP to fixing mistakes and more resources to managing the cleanup of sites. Licensing site professionals does not mean that DEP can then turn over the clean up NJ to private entities.

According to the Department there are approximately 18,000 cases within DEP of which Underground Storage tanks make up a significant portion of the case load. The Dept should allow the removal and remediation of low level, modestly contaminated

UST sites to be cleanup under the LSP program. This would free DEP resources to concentrate on the more significant case.

The move to LSPs handling cleanups is also problematic in that Government has a constitutional duty to ensure the publics safety and health. The NJ Constitution provides that it is the responsibility of Government to protection, secure and benefit the people. A move to the LSP program is an abrogation of this duty.

We offer the following changes to SCS for S1897:

§3. While the board is comprised of 11 members, it is our concern that the responsible parties are all practical matters have a majority when it comes to the oversight and discipline of its professionals. The public should have a greater say in how those responsible for protecting their health and safety are doing.

§7(d)(6) and 13(b)(5). This section deals with the qualifications of the LSP. This section prevents an applicant who has a conviction for an environmental crime as unqualified. We propose that this section add any crime of dishonesty to the list, including but not limited: fraud, theft by deception, and forgery.

§14(a). This section requires a LSP to "manage, supervise or perform" the work. There is no definition of "manage" or "supervise." This opens up the process to abuse as these words are open to a broad range of interpretations from merely reading the

reports of others to being present while all samples are taken, reviewing the underlying data to all reports, etc.

§16(e) & (g). This section requires a LSP to correct a deficiency that is caught by the department. We propose that any time a deficiency is uncovered the LSP has a duty to correct it. There can be circumstances when a LSP notices that they made an honest mistake in a past submission, a correction wasn't made from a draft to the final version, a property owner or responsible party notes an issue. Further environmental organizations or community members may not an issue and bring it to the attention of the LSP and/or the department. In short a mistake is a mistake which should be corrected. The LSP should be able to wait to see if DEP catches the error.

§16(q)(1). This section should read, "knowingly *or recklessly* make a false statement of material fact"

§19(a). The provision provides that the Dept. *may* require periodic monitoring, inspections or maintenance of engineering or institutional controls. This should not be optional. Most institutional controls fail. This failure is the result of many factors including: people forget about or do not appreciate the significance of institutional controls; the owners cannot locate the deed and thus cannot reference the institutional controls, the deed restrictions were not filed, etc.[1] Further, engineering controls are not effective over the long run. They are especially ineffective without monitoring and

[1] 2001 Superfund Review, Environmental Law Institute (2001).

upkeep. The cause of failure are many. In some instances the failure is the result of improper installation, damage during installation, or the installation was not complete. In other instances the engineering controls fail because of interactions with the hazardous substances the controls are meant to cover. We must insure that these sites are monitored and that corrective action is taken upon the discovery of an institutional or engineering control has failed or is about to fail.

§19(c). Given that engineering and institutional controls are destined to fail over time, there should not a provision allowing child care facilities, educational facilities or residential projects to occur on property that has not been or is not going to remediated to an unrestricted standard. This risks to our health and safety is too great. It must also be remembered that all of our safe exposure levels to hazardous or toxic substances where set using a healthy adult male as the standard. All of these uses subject growing children to these chemicals. Children have growth rates and metabolisms that are greater than that of the healthy adult male. Neurological and other bodily systems are growing and developing. All of this makes our children even more susceptible to the effects of hazardous substances are levels that may be healthy for you and me.

§20(a). This section provides that the LSP only has to keep records for five years. This is too short, especially in light of the fact that LSP will be submitting their documentation to the Dept. in electronic format. Currently the statute of limitations is 6 years fro breaches of contract and 10 years under the statute of repose. If the five years

requirement where to stay then a former client may be hampered in their pursuant of claims under either a breach of contract or negligence theory. Therefore, LSP should be required to maintain their documents for a minimum of 10 years.

§21(b). It is helpful that DEP will be required to do reviews of LSPs under certain circumstances. First, the scope of the Dept's review is not explained and the number of triggers for a review is not broad enough. Those triggers found in §21(c)(2), (3), (4), (5), (7), (9), (10), and (11) should be found in the mandatory triggers and not the permissive triggers.

§22. This section provides that a non-presumptive remedy can be implemented and the Dept. has to prove that it is not protective enough. The burden of proof is misallocated. If a LSP wishes to undertake a remediation using an alternative remedy than it should be the LSP's burden to show by clear and convincing evidence, that the chosen remedy is at least as protective as the presumptive remedy.

§24. The Department should be required to audit at least 20% of submissions annually and that 20% cannot be comprised of any audits performed under the mandatory or permissive triggers found in §21.

§28. This section provides when the Department shall take direct oversight or when the Department may take direct oversight of the remediation of a site. Currently, it is merely permissive for the dept of oversee remediation of a site that is ranked by the

Dept. as requiring the highest priority. §28(b)(4). These sites should require Dept. oversight and should be moved to §28(a)(4).

§31(b). As noted above we do not believe that anything but an unrestricted clean up on childcare facilities, schools and residence should be permitted. Therefore, this section should be amended accordingly.

§33. The definition of "Natural Resources" is not broad enough to encompass plants, and other non-wildlife. Therefore, this section should be revised to encompass all life in the State.

§34. This section is very troubling. Currently, the State must provide notice to the public that it intends to issue a No Further Action letter to a site. This proposal removes this notification for NFAs and does not provide any notification of remedial action plan filed by a LSP or that the LSP intends to issue a ROA. We propose that when a LSP files a remedial action plan that notice of the filing is in the NJ register and in a publication of general circulation in the municipality of the cleanup in addition with complying with P.L. 2006 c. 65 by providing notice to the municipality, local and county health departments.. Further copies of the information should be available at the municipality for public review. Also, once a LSP proposal to issue a ROA for a site, that proposed ROA must be published in the NJ Register and a publication of general circulation in

the municipality for a 30 day comment period before the ROA can become final. Additional notice should go to the municipality, local and county health departments. §45(g). Again, for residential, childcare and school purposes there should not be a cleanup to anything less than unrestricted use.

Additionally, there is nothing in the Bill that would require the LSP to maintain insurance. What level of insurance is a LSP required to maintain. These should be addressed in the bill. Additionally, to avoid the situation of LSPs avoiding liability by forming companies to do individual remediation, the legislation should provide that the LSP is personally liable for violating the requirements of the law.

For the above reasons, we ask that this bill in its current form not be passed out of this committee.

Very truly yours,

Michael L. Pisauro, Jr.

**STATEMENT OF DENNIS M TOFT**

**REGARDING SCS FOR S1897**

**February 2, 2009**

On behalf of the New Jersey Chapter of NAIOP and several impacted clients, please accept these comments concerning the Senate Committee Substitute for S.1897

As an initial matter, it is noted that a number of the concerns we previously raised have been addressed in the proposed SCS. However, we note that a number of issues have yet to be addressed.

1. Section 16k of the bill will continue to have a chilling effect on the use of LSP's to undertake due diligence on behalf of a prospective purchaser of property. This provision requiring the LSP to notify NJDEP of a discharge will lead to a situation where a seller of potentially contaminated land will insist that a prospective purchaser either only use a non- LSP for due diligence, or that no investigation beyond a Preliminary Assessment will be allowed by a seller. This requirement should be deleted, and the reporting obligation should remain with the discharger, not the LSP.

2. The grandfathering provision added to Section 19 c of the bill is appropriate. An innocent purchaser who acquired property before the effective date of the bill should not be subject to funding source or surcharge requirements as proposed in the bill. NAIOP continues to support the permitting concept.

3. The Bill still relies to a great extent on NJDEP's adoption of presumptive remedies. Although these were called for in the Brownfields Act, the Department still has work to do to adopt them. NJDEP needs to be provided with sufficient resources to do so.

4. NAIOP supports the 3 year time limit on audits of response action outcomes found in Section 25.

5. Section 30 of the bill will create problems in the regulated community and unfairly imposes funding source requirements on parties who are both currently in compliance with remediation requirements, and have active ongoing remediation projects. This will create a situation where parties who are otherwise in compliance must tie up capital though a funding source, when it could other wise be used for cleanup or job creation. This section needs to be revisited.

6. The five percent surcharge in section 31 of the bill also needs to be limited. While it is helpful that current innocent purchasers are grandfathered, the surcharge would still be imposed on parties that have operating industrial facilities. Any surcharge should be limited to circumstances where a change of use occurs, and the amount of the surcharge should be established based upon the projected future costs, not a flat 5 percent.

7. Section 32 will have a chilling effect on brownfields transactions. Frequently the seller of a contaminated site will seek and indemnity and release from the buyer. This can be a critical component to make a deal work. Section 32 as proposed will make such brownfields buyers ineligible for state financial assistance. The legislature should understand this consequence of the language and that it will significantly limit brownfields incentives.

8. In Section 40, it is not clear what costs could be charged to the Department by other State agencies that would be come reimbursable by a person performing a cleanup. The State should not be able to use this to recover legal fees that it would not otherwise be entitled to be paid.

9. Section 41 of the SCS continues to create a substantial issue. Although the "grandfathering language helps those parties who are innocent purchasers and bought properties prior to enactment of the bill, the imposition of funding source requirements on other parties who are now or will in the future undertake voluntary cleanups is unwarranted. Parties that are in compliance with existing oversight documents should not be faced with new requirements that tie up capital and take dollars away from performance of cleanups or job creation. This section should be deleted, or substantially reworked. To the extent there is a concern about parties defaulting on cleanups, under an LSP regime, the private sector will take care of the problem as prudent LSP's will take steps to make sure they are paid. Moreover, any past concern about parties defaulting on cleanup obligations can be addressed in better ways by changing guarantee forms, etc. The surcharge requirements should not be expanded to voluntary cleanup parties who do not currently have an obligation to pay them.

We appreciate the opportunity to provide this input to the Committee and look forward to working with you to finalize the legislation.

CHEMISTRY COUNCIL OF NEW JERSEY

# Statement

**For Immediate Release**

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## THE CHEMISTRY COUNCIL OF NEW JERSEY (CCNJ) RAISES CONCERNS WITH THE REVISED SITE REMEDIATION BILL (S-1897)

**Feb. 2, 2009 -- (Trenton, NJ)** -- The Chemistry Council of New Jersey testified today before the New Jersey Senate Environment Committee to highlight concerns with that latest iteration of S-1897. For two years, the CCNJ has been part of the stakeholder process on this issue and advocating true reform to the Site Remediation Program within the New Jersey Department of Environmental Protection.

From the beginning, CCNJ has expressed that the goal of the legislation should be to expedite cleanups and reduce the backlog of 20,000 remediation cases. While CCNJ supports the concept of licensing environmental consultants to help with the backlog, CCNJ stresses that along with the licensing, there needs to be changes to the process itself. The cases currently in an indeterminate state need finality and closure, which ultimately will protect the public and the environment and can help strengthen our economy. Responsible parties are acting responsibly and will continue to act responsibly, but the state needs to do so as well.

The Chemistry Council of New Jersey is concerned that language in the bill will have a deleterious impact on New Jersey's employers and the economy.

The Chemistry Council of New Jersey highlighted the following concerns with S-1897:

- **Implementing a License Site Professional Program without revisiting the process and how the standards are applied is flawed, and will not reduce the backlog or expedite cases;**
- **Defining Recalcitrance in the Site Remediation Program:** The bill establishes criteria (Section 28) or triggers where the NJDEP seizes control of a site. The NJDEP would control the remedy selection and the money. While we believe there is value in defining recalcitrance in the SRP, the criteria/language specified in the bill is too broad and can be abused. There needs to be certainty in the bill that if an LSP is engaged that the NJDEP's role will be one of auditing to assure the remediation was conducted in accordance with all rules and laws. We need certainty that our cases will not be seized by the NJDEP, which would result in more of the status quo, something CCNJ is to change in this legislation. **This would be antithetical to the purpose of the bill, which is to expedite cleanups;**
- **Eliminate the Taxes:** The bill contains language which seeks to collect a 1% tax, annually, on companies that self guarantee. The 1% is assessed on the cost to clean up sites which can run into the millions of dollars depending on the specifics of a site. Additionally, the bill would impose a 5% tax on sites that utilize a restricted use remedy. These two taxes will generate hundreds of millions of dollars with no value added in expediting cases. Given the state of the economy, this will further strain industry and discourage future investment. **Imposing these taxes will do little to reduce the NJDEP's backlog;**
- **Limits on Self-Guarantees:** The bill limits a company's ability to self-guarantee a cleanup. As it exists today, financially sound companies have the ability to self guarantee its cleanups. They demonstrate to the NJDEP, through financial records, their ability to pay for the cleanup. In the bill, the NJDEP seeks to limit the ability to self-guarantee to 50% of the cost of remediation. This has nothing to do with reforming the process and will only add costs to an already expensive process because companies will have to purchase insurance products and/or establish lines of credit. **The ability to self guarantee, without restrictions, should be reinstated.**

CCNJ recommends that New Jersey adopt the Massachusetts Licensing Site Professional program in its entirety, which has proven that cases can be expedited, while protecting the public.

*The Chemistry Council of New Jersey (CCNJ), founded in 1955, is the premier trade and advocacy organization representing the interests of more than 85 New Jersey manufacturers in the business of chemistry. Our membership consists of large and small companies that are part of New Jersey's chemical, pharmaceutical, consumer packaged goods, petroleum, flavor & fragrances and precious metals industries. The CCNJ is committed to a better quality of life through science.*

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**TO:** **MEMBERS OF THE SENATE ENVIRONMENT COMMITTEE**

**FROM:** **STEPHEN A. PATRON, PRESIDENT**

**DATE:** **FEBRUARY 2, 2009**

**RE:** **Establishes Licensed Site Remediation Professionals Program S1897 (Smith/ Weinberg)**

The New Jersey Builders Association appreciates the opportunity to comment on the Senate Committee Substitute for S1897. The Licensed Site Remediation Professional (LSRP) program will significantly change how remediation and redevelopment projects are conducted in the State. Therefore, NJBA appreciates the ongoing efforts of the sponsors and the Department of Environmental Protection (Department) in further refining the proposed program in this third iteration.

As stated in prior testimonies, NJBA **strongly supports** the establishment of a LSRP program to remediate contaminated sites so that they no longer threaten human health and the environment, but instead are put to safe, productive use and revitalize local economies.

However, NJBA must **oppose** the bill as currently drafted. The concerns we expressed with prior versions of the bill have not been addressed. NJBA believes that there is little incentive for the homebuilding community to take up the responsibility for the cleanup of contaminated sites so that they can be used for residential purposes. Succinctly, the current bill does not present a workable framework that would encourage remediation and redevelopment of brownfield sites. To the contrary, the current bill lessens existing incentives for redevelopment capital to be invested in cleaning sites in New Jersey.

An overarching concern is that the current bill as drafted does not create a process where there is predictability and finality for the regulated community and its investors. There is an underlying, disconcerting notion that, despite having completed all the phases of the remediation process and conducted the requisite actions to investigate and clean up the site to the mandated standards, there is a strong possibility that the certified Response Action Outcome issued by the State-licensed site remediation professional can be of limited value. This type of framework will significantly lessen investment by the building and financial communities.

## LSRP vs. DEP Determinations

The NJBA emphasizes that the bill must ensure that any determination made by an LSRP has equal importance and effect as those issued by the DEP.

As drafted, the bill distinguishes between an LSRP rendered determination, referred to as a "Response Action Outcome" (RAO) and a DEP rendered determination, referred to as a "No Further Action" (NFA). Over the years, the public, and in particular the lending institutions, have learned to understand and accept the NFA. Adding a new, different term (RAO) will not be perceived in the same manner as the established and well-recognized NFA. We, therefore, recommend that the NFA term be used for the final determination. The distinction may be made that there are two types of NFA – one issued by the DEP and the other by the LSRP. Regardless, the law must make clear that the determinations are in effect the same and have the same bearing on remediation projects.

Section 22 empowers the Department to invalidate a RAO within 3 years of its filing or longer under certain situations. Accordingly, the bill leaves remediation and resulting redevelopment projects vulnerable to the possibility that the Department may at a future juncture invalidate a RAO. In our experience, decisions to invest capital will not be made in many instances if RAOs are subject to a long period of vulnerability.

## Covenants Not to Sue

While authorizing LSRPs to issue a RAO, the Department in turn proposes to eliminate its issuance of "No Further Action" (NFA) and Covenant Not to Sue (CNS) letters. These proposed changes will be of serious detriment to creating a successful remediation program in New Jersey.

NJBA had previously emphasized the importance of retaining the issuance of CNS and NFA letters by the Department. The CNS was an important incentive to 'innocent purchasers' and investors to support remediation and redevelopment projects when our economy was functioning fairly well. It makes no sense to remove that incentive in this downturn economy.

It will take some time for the general public and financial institutions, who are an important partner in the funding of brownfields remediation and redevelopment projects, to accept the RAO as having equivalent value to the Department's issuance of NFAs.

For the above reasons, NJBA urges for the continued issuance of CNS by the Department.

## Need for Finality and Predictability

Section 21 is too broadly written as it mandates the Department to "inspect all documents and information" submitted by a LSRP "upon receipt." The section indicates that the Department would be required to conduct "additional reviews" in certain instances and may do so in other cases. Specifically, the Department "may perform additional review of any document, or may review the performance of a remediation" where "the use of the contaminated site is changing from any use to residential or mixed use."

Clearly, greater procedural safeguards to focus any "additional reviews" must be included to provide predictability and finality to the remediation and redevelopment process. Specifically, the bill needs to clearly depict the process and the Department's responsibilities. The bill needs to include the use of checklists identifying the particular measures or standards from the Tech Regulations against which the submissions would be compared; the defined circumstances or "triggers" causing an invalidation of the RAO; and the timeframes for the DEP to inspect and inform the LSRP of any potential problems with the submissions.

**Presumptive Remedies**

The bill amends the Brownfields Act to mandate that an unrestricted use remedial action or a presumptive remedy be used where new residential construction will be developed or where the site is changed to residential use. In effect, the department is directing remediation actions that will be paid by others. This will seriously dissuade the private market from investing in the clean up and redevelopment of these contaminated sites.

Should this legislation continue to vest such authority in the Department, the bill should not mandate that presumptive remedies would be required until the Department has adopted presumptive remedies by formal rule adoption under the Administrative Procedures Act. Further, projects for which a remedial action has been approved or where remediation has already commenced must be grandfathered from the requirement for presumptive remedies.

DEP's authority to establish presumptive remedies must be more clearly structured and should be based on specific factors, such as "realistic potential exposure scenarios associated with each use" and "economically realistic approaches". Further, the LSRP should be able to seek approval (or approve on their own) "alternatives that provide equivalent levels of protection".

**Technical Regulations**

Based on the current draft bill, each LSRP would be required to adhere to the Technical Regulations for Site Remediation in its entirety without any leeway to take advantage of current science and best management practices that are utilized by the consulting community.

We encourage the Legislature to recognize that in creating a LSRP program, only those who demonstrate specified high technical expertise would be designated as LSRPs. The Department should grant these individuals a certain level of discretion to apply professional judgment in using technology that is not prescribed in the Tech Regs, but would achieve the same outcome of being protective of public health and safety and the environment. Further, the LSRP should be able to seek approval (or approve on their own) "alternatives that provide equivalent levels of protection".

**Guarantee Fund**

If surcharges are to be imposed, the Guarantee Fund must be constitutionally dedicated to ensure that the surcharges are used for the purposes detailed in the bill and not be pulled into the general treasury.

NJBA encourages the Legislature to continue providing the interested public with the opportunity to comment on specific recommendations to implement an effective LSRP program that meets the mandates of the Brownfields Act.