

**APPENDIX**



50 West State Street • Suite 1117 • Trenton, New Jersey 08608  
609-392-1000 • Fax 609-396-4231 • www.njua.com

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.

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.

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**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.

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## **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 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

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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.

GOVERNMENT AFFAIRS TEAM

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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*. NJBIA 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.

ATTORNEYS AT LAW

THOMAS P. FRASCELLA\*  
MICHAEL L. PISAURO, JR.\*

\* Admitted in NJ & PA

SUITE 209  
100 CANAL POINTE BOULEVARD  
PRINCETON, NEW JERSEY 08540  
609-919-9500  
609-919-9510 (FAX)  
www.fplegal.com

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.

23x

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.

|       |                | <b>Mass. 2007 Level 2 and Level 3<br/>Audit Results</b> |                         |                        |                      |
|-------|----------------|---|-------------------------|------------------------|----------------------|
|       |                | <u>Jan -<br/>March</u>                                  | <u>April -<br/>June</u> | <u>July -<br/>Sept</u> | <u>Oct -<br/>Dec</u> |
| 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 public's safety and health. The NJ Constitution provides that it is the responsibility of Government to protect, 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 to: 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.<sup>1</sup> Further, engineering controls are not effective over the long run. They are especially ineffective without monitoring and

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<sup>1</sup> 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 be 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 for 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 pursuit 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. Pisauero, 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 through a funding source, when it could otherwise 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 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.

Contact: Elvin Montero  
609.392.4214  
[emontero@chemistrycouncilnj.org](mailto:emontero@chemistrycouncilnj.org)

## **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.

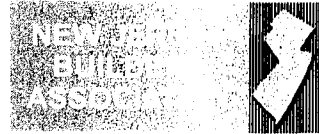
From the beginning, CCNJ has expressed that the goal of the legislation should be to expedite cleanups and reduce the backlog of 20,000 remediation cases. While CCNJ supports the concept of licensing environmental consultants to help with the backlog, CCNJ stresses that along with the licensing, there 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.



STEPHEN A. PATRON  
*President*

MICHAEL H. KARMATZ  
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*2nd Associate Vice President*

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POLITICAL ACTION COMMITTEE  
OF NEW JERSEY

FOUNDATION FOR HOUSING

**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.