

APPENDIX

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June 25, 2008

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

RE: S-1897 (LSP Legislation)

Dear Chairman Smith:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,



John F. Donohue
Managing Member

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



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Initial talking points on S1897 – Site Remediation Reforms

Senate Environment Committee

June 16, 2008

Bill Wolfe, Director

Public Employees for Environmental Responsibility

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

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

On the bill - Ideas we can support with amendments:

Section 21 – whistleblower protections –

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

Section 27 – unrestricted use RA presumptive remedy

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

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

Section 9 – DEP ranking system

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

Section 10

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

Section 12

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

Section 15 –

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

Section 19 – mandatory timeframes

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

Sections we oppose:

Section 1 –

- IEC too narrow – confirmed VI – Section 6 criteria (100 feet of wells, property boundary)
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Section 4 –

- Emergency Rules prohibit public participation in program design

Outstanding issues that must be included in reform package

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