

ASSEMBLY AGRICULTURE AND WASTE MANAGEMENT
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 2724

with committee amendments

STATE OF NEW JERSEY

DATED: JUNE 16, 1997

The Assembly Agriculture and Waste Management Committee favorably reports Assembly Bill No. 2724 with committee amendments.

The intent of this bill, the "Brownfields Redevelopment Act," is to revise the law, and to create incentives, in order to promote, streamline, expedite and facilitate the cleanup and reuse of New Jersey's older industrial sites. The redevelopment of these industrial sites will help protect the public health and environment, conserve open space, improve the economy, create jobs and revitalize our cities and neighborhoods.

New Jersey has many properties formerly used for industrial or commercial purposes but which are, today, either abandoned or underutilized. Many of these properties are contaminated with hazardous substances or at least suspected of being contaminated. Most of these properties are located in the State's urban areas. These former industrial sites, are often referred to as "brownfields."

As amended, this bill addresses four general areas that need to be addressed in order to facilitate brownfields remediation and redevelopment. These areas include technical, legal, financial and institutional policies.

Technical Policy Issues

Elimination of preference for residential soil remediations and remedy selection choice - Under present law, there is a preference for the performance of a soil remediation to residential limits as opposed to nonresidential limits or the use of engineering controls. This preference exists even if the property is to be used for industrial or commercial purposes, although a cost limitation does exist. This bill eliminates the preference and allows a person to select the remedial action to implement, provided health standards and Department of Environmental Protection (DEP) regulations are met. In order to

ensure that the remedy will be effective, and continue to be effective, the DEP is required to inspect at least once every five years each site that uses engineering or institutional controls.

Permit by rule - The bill provides that the DEP should develop guidance allowing site remediations to be performed and approved without requiring extensive document review or preapproval.

Aquifer delineation - Under existing law and practice of the DEP, aquifers that are contaminated and not used as a drinking water resource can be classified as such and the DEP will allow contamination in the aquifer to be remediated through natural attenuation (e.g., the natural breakdown of contaminants over time). The bill requires the DEP to investigate and determine which aquifers meet this standard and to plot those aquifers on the geographic information system (GIS). Five million dollars of \$70 million designated for site remediation purposes from the bond act approved by the voters in November, 1996 (P.L.1996, c.70) will be used for this purpose. The bill also requires the DEP to develop remediation policies that allow for the natural attenuation of groundwater.

Presumptive remedies - The law presently requires the DEP to list certain remedial actions that the DEP deems to be effective. The bill provides that a person using any of these remedies shall be assumed to have demonstrated the technical performance and reliability of the remedial action. The presumptive remedies shall be historically acceptable technologies for similar sites and contaminants and are to be based on historical patterns of remedy selection and the department's scientific and technical evaluation of performance data.

Innovative technologies - The bill contains several provisions designed to encourage the use of innovative technologies, including the elimination of the requirement to post financial assurance, the provision of 25% matching grants, expedited review and other regulatory changes.

Historic fill - Although the law already contains a provision providing that the presumptive remedy for historic fill is capping, recent regulatory proposals of the DEP may have the effect of negating the intent of the law. The bill provides that no regulation, guidance or rule shall have the effect of shifting the burden the presumption places on the DEP and that there is no date before which the fill must have been placed on the land in order to be considered "historic."

Reports and regulations - Several reports and regulations required in P.L.1993, c.139 have not yet been issued or adopted. These include the liability report to be issued by the DEP, the risk report to be issued by a special commission and the remediation standards, technical rules and large contaminated area regulations to be issued by the DEP. The bill provides new time limits for the issuance of these reports, guidance and regulations. If they are not issued by the set date, the relevant General Assembly and Senate committees are instructed to hold a joint

public hearing to determine why the report, guidance or regulations were not issued.

Environmental Advisory Task Force - This task force was established by law in 1993 to determine if and how soil site remediation standards should be adopted that are protective of the environment. To date, some members of the task force to be appointed by the Governor have not been selected. The bill would eliminate the Governor's appointments if not selected in a defined period of time and would make it easier for the task force to convene.

Legal Liability

Limited remediation requirements for purchasers - The bill would provide liability protections for a person buying contaminated property as follows:

Any person who purchases property on or after September 14, 1993 on which there has been a discharge prior to the acquisition, who knew or should have known about the discharge, would be liable for the cleanup costs;

Any person who purchases property on or after September 14, 1993 on which there has been a discharge would not be liable to the State or to any other person for the discharged hazardous substance if the person can demonstrate by a preponderance of the evidence that the person acquired the property after the discharge, did not discharge the hazardous substance or is not in any way responsible for the hazardous substance, gave notice to the department of the discharge upon actual discovery, and the person satisfies one of the four following conditions as follows:

(1) at the time of acquisition they did not know or had no reason to know of the discharge,

(2) they acquired it by devise or succession,

(3) if the DEP issues a no further action letter for the site prior to the person becoming an owner or operator at the site and any institutional or engineering controls are maintained, then any person who is not otherwise liable for the discharge which occurred prior to the approval of the no further action letter shall not be liable for the cleanup of the discharge or for damages to any other person based solely on that person becoming an owner or operator of the site after the effective date of this bill, or

(4) at any site at which a discharge has occurred and at which the DEP has not issued a no further action letter, any person not other liable for a discharge that occurred prior to his ownership of the property, shall not be liable for the cleanup based solely on the person becoming an owner or operator after the effective date of this bill, if the person remediates any immediate, direct or imminent threat to acceptable levels based on the intended use of the site. To the extent that the person seeks to develop the site, the person is responsible for

obtaining a no further action letter consistent with the intended use of the site. A person who receives a no further action letter pursuant to this provision would not be liable for any changes in a remediation standard or for the subsequent discovery of a contaminant that was discharged prior to the person acquiring the property.

The bill also provides that notwithstanding any other provision of law to the contrary, the owner or operator of any property acquired after the effective date of this bill shall not be liable for any actions, claims or damages for on-site contamination, off-site contamination, or third party actions arising from contamination existing at the property prior to the the owner or operator taking title to the property or commencing operations on the property and which was not caused by that person.

Covenants not to sue - The bill provides that whenever the DEP issues a no further action letter for a remediation, it shall also issue a covenant not to sue. The covenant describes the limits on legal liability that exist once a site is remediated. The covenant protects the person performing the remediation from further cleanup liability to the State provided any engineering and institutional controls are maintained. The covenant does not protect the discharger or other liable parties for undiscovered contamination.

Public entity liability - Although the law generally provides that public entities are not liable for existing contamination on land they acquire through actions such as a tax lien or foreclosure, a public entity may be liable for knowingly and voluntarily acquiring contaminated property, even if for a public purpose such as redevelopment. The bill amends the law to limit public entity liability for contaminated property acquired by any means, with the exception of those engaged in a reasonably timely remediation or redevelopment process. The bill would establish a process whereby a person can go to court to collect treble damages in a contribution action.

Contribution treble damage awards - The bill would amend the "Spill Compensation and Control Act," ("Spill Act") P.L.1976, c.141 (C.58:10-23.11 et seq.) to delete the provision which requires the Department of Environmental Protection to authorize a person who cleans up or removes a hazardous discharge to seek treble damages from any other person liable for the discharge, but who is not involved in the cleanup.

Until 1991, the Spill Act provided that if the DEP ordered a party liable for a hazardous discharge to clean up and remove the discharge, and the party refused, thus requiring the expenditure of moneys from the Spill Compensation Fund to conduct the cleanup and removal, the DEP would seek damages from the responsible party in an amount equal to three times the amount (treble damages) expended by the DEP for the cleanup and removal. In 1991, the Spill Act was amended to enable private responsible parties performing a cleanup to seek treble damages from other responsible parties. As a result of that

1991 amendment, the Spill Act currently provides that any person seeking treble damages (the contribution plaintiff) from another discharger (the contribution defendant) must be authorized to do so by the DEP, and further provides that one-third of the amount of any treble damages recovered must be paid to the DEP for deposit in the Spill Compensation Fund. This bill would remove this requirement to obtain DEP authorization, thus allowing a contribution plaintiff to seek treble damages under the Spill Act.

Financial Issues

Limitation on fees - The bill provides that cleanup and removal costs under the Spill Compensation and Control Act are not to include indirect costs. This will have the effect of lowering the fees assessed by the DEP to review a remediation, thus reducing the cost for a person to perform a remediation.

Environmental Opportunity Zone Act expansion - Last session, the Legislature enacted the Environmental Opportunity Zone Act in order to encourage the remediation of contaminated industrial sites by offering limited property tax exemptions. That law only applied to properties that were to be used for industrial or commercial purposes. Because many former contaminated industrial properties are located in areas that no longer make them suitable for industrial or commercial purposes, the bill expands the law so that the properties may also be used for residential or other productive uses.

Sales tax exemptions - The bill establishes a program whereby a person can recover 75% of remediation costs incurred. The reimbursement would be funded from the dedication of 50% of the sales tax collected from any new retail establishment built on the formerly contaminated property. State approval would be needed before a property could qualify for this benefit.

Hazardous Discharge Site Remediation Fund flexibility - Under existing law, the Economic Development Authority has limited discretion to move available moneys in the fund from one dedicated category to another. The bill would give the EDA more authority to shift moneys from one category to another.

Institutional Issues

DEP mission - The mission of the DEP, as well as its duties under the Spill Act, have been broadened to include coordination and facilitation of remediating and redeveloping the brownfields.

The "Brownfields Redevelopment Task Force" - The bill would create a task force, consisting of State officials and private sector representatives. The Task Force would inventory brownfields, coordinate State policy relating to their remediation and redevelopment, create a plan of action to bring these sites back to

productive use, target State resources to assess the contamination at these sites, actively market these sites for redevelopment, evaluate the performance of current public incentives for brownfield redevelopment, and make recommendations to the Governor and Legislature.

COMMITTEE AMENDMENTS

The committee amended the bill to remove a distinction between surface soil (top two feet) and subsurface soil (below two feet) which would have provided that subsurface soil contamination would only have to be remediated if a potential impact to groundwater or surface water exists.

The committee amendments delete a provision which would have established a Brownfields Environmental Risk Communication Council. The DEP is assigned the duties that would have been assigned to the council. The committee amendments establish a Brownfields Redevelopment Task Force, directed to prepare and update an inventory of brownfield sites in the State and to coordinate State brownfields redevelopment policy. The amendments delete a provision that would have established a separate office in the DEP to facilitate and expedite the investigation and remediation of selected brownfields sites. The DEP will handle these duties without a separate office.

The committee also amended the bill to:

(1) change the provision in the "Spill Compensation and Control Act" to establish a process whereby a plaintiff may seek contribution and treble damages in court from other responsible parties;

(2) make certain changes to the provisions regarding the covenant not to sue;

(3) delete provisions requiring the DEP to issue letters of no association;

(4) delete references in the bill regarding DEP guidance documents and retain references to DEP regulations;

(5) change the department's authority with respect to regulations governing remediation;

(6) add definitions for restricted and unrestricted remedies and state a policy preference for unrestricted remedies;

(7) prevent the department from requiring a person performing a remediation of an underground heating oil tank at a one to four family residence to notify the municipality prior to implementing a remedial action;

(8) require a property owner on which a deed notice has been recorded to notify any person excavating of the nature and location of any contamination on the site and any conditions or measures that may be required to prevent exposure to contaminants;

(9) add language to assure that remediations are performed

consistent with the requirements of the "Pinelands Protection Act;"
and

(10) make other various changes to the bill.