

SENATE ENVIRONMENT COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR **SENATE, No. 39, ASSEMBLY, No. 2250 ACS, SENATE, Nos. 1815 and 1539**

STATE OF NEW JERSEY

DATED: JUNE 5, 1997

The Senate Environment Committee favorably reports a committee substitute for Senate Bill No. 39, Assembly Bill No. 2250 ACS, Senate Bill Nos. 1815 and 1539.

The intent of this committee substitute, the "Brownfields and Contaminated Site Remediation Act," is to remove impediments in the law, and to create incentives, in order to promote and facilitate the cleanup and reuse of New Jersey's older industrial sites. The redevelopment of these industrial sites, often referred to as "brownfields" will help protect the public health and environment, conserve open space, improve the economy, create jobs, and revitalize our cities and neighborhoods.

New Jersey began the process of facilitating the remediation and redevelopment of brownfields in 1993 when the Legislature enacted a comprehensive reform of its site remediation laws. Three years experience with that reform measure and the legislative actions and experiences of several other states have demonstrated that more changes are needed in order to further facilitate brownfield redevelopment.

This committee substitute was crafted with three predominant policy goals. First, the committee substitute is intended to result in more remediations being performed and brownfields being redeveloped. The achievement of this goal will protect the environment, alleviate local property tax burdens, create jobs, and improve the economy. Second, the committee substitute will not lessen any environmental or health standard. The strict standards set in the 1993 legislation and enforced by the Department of Environmental Protection (DEP) will remain in place. Finally, the persons responsible for the discharge will not be given any relief from liability. Only those "innocent" purchasers who either unknowingly buy contaminated property or who clean up a contaminated property that they have purchased will be given any liability protections.

There are four general areas that need to be addressed in order to facilitate brownfield remediation and redevelopment. These areas

include technical, legal, financial, and institutional policies. This committee substitute addresses each of these areas in a comprehensive manner in order to fully address the problems posed.

Technical Policy Issues

Allowing the person performing the remediation to select the remedial action to be implemented and providing incentives for the performance of permanent remedies - Under present law there is a preference for the performance of a permanent remediation. This preference is not changing. However, the existing legal mechanism to compel permanent cleanups, by requiring a cost test comparing permanent and nonpermanent remedies, has not worked. This committee substitute would eliminate this test and allow persons performing remediations to select the remedial action to be performed. The preference for permanence would be supported by a series of liability protections and financial incentives that are designed to result in the voluntary performance of more permanent remedies. If a person decides to implement a remedial action that involves engineering solutions, such as capping, together with institutional controls, the department would continue its role to oversee and approve these actions to ensure that they meet the State's strict health and environmental standards. Further, the person proposing a remedy has the burden of showing that it is effective. In order to ensure that the remedy works, and continues to work, the DEP is required to inspect each site that uses engineering or institutional controls at least once every five years.

Regulatory flexibility - The committee substitute contains a provision that requires the DEP's regulations to provide a mechanism for a person to deviate from the strict adherence to the regulations if that person can demonstrate that the deviation would be as protective of human health and the environment. The department would determine the situations when the deviation would be appropriate. The deviation would be, at the department's discretion, either in a variance procedure or by another method determined by the department. Additionally, the committee substitute requires that the department's remediation regulations be result oriented, risk based, and flexible.

Definition of permanent remedy - Under current law the only soil remediation that is considered to be permanent is one performed to a residential standard. This committee substitute would expand the definition of a permanent remedy to include soil remediations that have met the nonresidential standards. As long as these sites continue to be used for industrial or commercial purposes, a condition that is imposed by law, there are no further restrictions on the use of those sites and for all intents and purposes these remediations are permanent.

Permit by rule - The committee substitute provides that the DEP may adopt regulations whereby certain minor site remediations may be

performed and approved without the need for preapproval or the submission of extensive documents to the DEP for review.

Aquifer contamination delineation - The committee substitute requires the DEP to investigate and determine the extent of contamination in the State's aquifers and to enter this information on the geographic information system. The bill appropriates \$3 million in bond funds from the 1996 bond act earmarked for site remediation purposes. The information derived from the investigation may be used by persons performing remediations. The committee substitute is specific, however, that the department will not be compelled to reclassify any aquifer as a result to the information that is learned.

Presumptive remedies - The law presently requires the DEP to list certain remedial actions that the DEP deems to be effective. The committee substitute provides that a person can use any of these remedies without needing further departmental approval of that choice.

Innovative technologies - The committee substitute 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, and other regulatory changes.

Historic fill - Although the law already contains a provision providing that the presumptive remedy for historic fill is capping, previous regulatory proposals of the DEP could have had the effect of negating the intent of the law. The committee substitute provides that no regulation of the DEP may be adopted that has the effect of shifting the burden the presumption places on the DEP. The committee substitute also provides that the date fill material is placed on land is irrelevant for it to be considered "historic". Additionally, because each person who is performing a remediation has the burden to prove that historic fill exists on that person's property, often a costly and time consuming endeavor, the committee substitute requires the department to investigate and map known areas of historic fill. The committee substitute appropriates for this study \$2 million dollars from the 1996 bond act from funds earmarked for site remediation purposes. The information derived from the investigation may be used by persons performing remediations.

Elimination of the requirement for ecological evaluations at residential heating oil underground storage tank sites - Under recently adopted regulations, all sites undergoing a remediation must perform a baseline ecological evaluation to determine if there is the potential that the discharge may have caused any damages to natural resources. These assessments are to be used for the possible assessment of ecological damages. Because the size of residential tanks and because heating oil is generally not considered a substance that could have an ecological impact as defined by the department, there is no need to require the owners of these residential tanks to perform these evaluations. This provision only applies to tanks used

for one to four family residential buildings.

Notification before excavation - The committee substitute requires that a person who has engineering or institutional controls on his property as a result of a remediation notify any person proposing to perform an excavation on his property about the contamination that exists and methods to avoid exposure.

Elimination of homeowner UST notice prior to a remedial action being commenced - Recently adopted regulations of the DEP require that before anyone may implement a remedial action 45 days notice must be given to a municipality. The committee substitute prohibits the department from requiring any such notification to a municipality if the remedial action is to be performed on an underground storage tank storing petroleum located at a one to four family residential dwelling. This provision is not intended to preempt local ordinances that may require notification.

Legal Liability

Purchaser protection from additional liability - Earlier this session, the Legislature enacted certain provisions of law to limit the liability of an innocent person who acquires land which was contaminated but is later remediated. That limit on liability, however, only applied to properties in qualified municipalities. This committee substitute expands these protections to all properties in the State. Additionally, the committee substitute expands and clarifies the liability protections of purchasers so that if a purchaser unknowingly acquires contaminated property after performing a proper investigation or knowingly acquires contaminated property and performs the required remediation, the purchaser would not be liable to the State or to any other person, under the Spill Compensation and Control Act or under common law, for the discharged contamination even if additional contamination is discovered or if the standards change. Because the purchaser is provided with a defense to liability in the statute, any tenants or operators who use the land will also benefit from these protections.

Covenants not to sue - The committee substitute 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 spells out the limits of legal liability that exist once a site is remediated. The covenant protects the person performing the remediation from further cleanup liability to the State if a permanent remedy is employed or so long any engineering and institutional controls that may be required are maintained. The covenant does not protect the discharger or other liable parties for undiscovered contamination or for changes in the remediation standards by an order of magnitude. The covenant would protect subsequent purchasers as well as tenants and operators on the property. If engineering or institutional controls are to be used, the person who owns the property has the burden of maintaining those

controls. The covenant would be revoked if the conditions upon which it were issued were violated. However, if the covenant is revoked, only the current property owner or operator and the original responsible parties would be liable for any additional contamination. Additionally, the covenant would protect “innocent” property owners, those who were not liable for original discharge, from liability for any natural resource damages.

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 committee substitute amends the law to limit public entity liability for contaminated property they acquire by any means. The committee substitute also extends this immunity from liability to third party suits.

Immunity for holders of security interests for discharges from underground storage tanks - The committee substitute clarifies the law by explicitly providing that persons who hold security interests in property on which there is an underground storage tank will not be liable for discharges for that tank. Additionally, the holder of the security interest would be required, in certain circumstances, to perform a temporary closure of that tank in order to prevent any discharge from occurring.

Requirement that a responsible person perform a remediation when standards change and the site is no longer safe to use - Under existing law a person who is liable for a discharge is liable for any subsequent change in the standard after a remediation has occurred. The committee substitute provides that if the standards change and the condition of the site is such that it is no longer protective of human health or the environment, that the responsible party would be liable for any necessary additional remediation. If, however, the site is safe because the contamination is under a building, a cap, or other such condition exists, the responsible party would only be liable for filing the required notices to restrict the use of that property as is required by law.

Maintenance of discharger address with the department - The committee substitute provides that a discharger or other responsible party who remediates a site shall maintain their address with the Department of Environmental Protection in the event additional remedial work needs to be done.

Financial Issues

Incentives for permanent remedies - The committee substitute provides several incentives for persons who perform permanent remedies. The incentives are the availability of 25% matching grants, up to \$100,000, for the implementation of a permanent remedy if a

person has less than \$2 million in assets; the elimination of the requirement to post a remediation funding source for permanent remedies; and the allowance of up to 15 year property tax exemptions in environmental opportunity zones if a permanent remedy is to be employed. Additionally, liability protections are substantially greater for those persons who perform permanent remedies and in the case of a permanent soil remediation, no deed notice is required.

Limitation on fees - The committee substitute provides that cleanup and removal costs under the Spill Compensation and Control Act are not to include administrative indirect costs unless the costs are being assessed in a cost recovery action. This will have the effect of lowering the fees assessed by the DEP to review a remediation and thus the cost for a person to perform a remediation. Over the past several years the fees for site remediation reviews have increased exponentially as more indirect and unrelated costs are being recouped by the imposition of fees.

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 committee substitute expands the law so that the properties may also be used for residential or other productive uses.

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 committee substitute would give the EDA more authority to shift moneys from one category to another when the demand warrants it.

Incentives for innovative technologies - The committee substitute provides that persons who propose to use an innovative technology for a remedial action may receive a 25% matching grant, up to \$100,000, if that person has assets of less than \$2 million. Additionally, no remediation funding source would be required for innovative technology remedial action. The DEP is also required to formulate regulations that encourage the use of innovative technologies.

Reimbursements for remediations from additional taxes - The committee substitute provides that where new taxes are to be realized from the redevelopment of a brownfield site, the Commissioner of Commerce and Economic Development can enter into a redevelopment agreement with the site developer to reimburse the developer for up to 75% of the costs of the remediation. The Commissioner is given broad discretion in deciding whether or not to enter into these agreements and what the conditions in the agreements should be.

Institutional Issues

The creation of the “Brownfields Redevelopment Task Force” - The committee substitute would create a task force, consisting of State officials and private sector representatives. The Tank 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.

County Improvement Authorities - County Improvement Authorities are given an expanded and defined role to help coordinate, fund, and market the remediation and redevelopment of contaminated sites.

Findings and declarations - The committee substitute adds findings and declarations to the law that promote changes in the way State government has responded to brownfields and to establish more efficient, cost effective, flexible, timely, and risk based regulatory decision making.

Risk based corrective action legislative study commission - The committee substitute requires that a legislative study commission be formed to study the policy implications of New Jersey implementing a risk based corrective action program for petroleum releases. The study commission will issue its report and recommendations within six months of its first meeting.