TO: Members of the Senate and Assembly Environment Committees
FROM: David Brogan, Vice President, NJBIA
DATE: February 26, 2009
RE: NJBIA Position on S-1897/A-2962 SCS – Licensed Site Professional Bill

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 SUPPORT for S-1897/A-2962, sponsored by Senators Smith and Oroho, and Assemblymen McKeon and Cryan respectively. S-1897/A-2962 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. We would urge the committee members to vote “YES” on this bill when it comes before the joint committee on February 26, 2009.

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, consultants and other property owners. As such, in reviewing this bill, NJBIA must take into consideration the potential impact to all parties.

For the past two years, NJBIA has been part of a stakeholder group tasked with providing input on the reform of the State’s Site Remediation Program. One component of that reform was the concept of a Licensed Site Professional (LSP) program. With over 20,000 known contaminated sites and diminishing resources for the State Department of Environmental Protection, NJBIA supports the concept of allowing LSP’s to take on more responsibility in an effort to make the Site Remediation Program more efficient and effective.

While there is no perfect bill, and we still have some outstanding issues of concern, we believe the legislation provides the only viable solution to tackle the overwhelming number of contaminated sites in our State. Cleaning up these sites will not only benefit our environment and overall quality of life, such action is a critical component of the State’s economic development efforts.

As stated above, on behalf of the nearly 23,000 members of the NJBIA, I would like to express our SUPPORT for S-1897/A-2962 and urge the committee members to vote “YES” on this bill when it comes before the joint committee on February 26, 2009.

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.
- Instead of removing toxic materials from these sites, more polluters will “pave and wave” — essentially place an asphalt cap overttop the hazardous materials. According to every scientific study, these types of controls will fail. Caps will crack from the weight of buildings. Sewer lines have the potential to destroy the cap, unleashing toxic materials and gasses. Since there will be no real oversight, houses or apartments can be built on top of these sites.

- The polluter will not be held responsible after cleanup. The responsible party will not be required to have insurance and it is not mandated to establish an escrow account to protect the site’s future owner if more contamination is later found. It will be up to the homeowner or the taxpayer to clean up the additional pollutants, not the polluters or the developer.

- The state is planning to add a covenant not to sue. Once the site is deemed clean by the private consultant, the state will give up its right to sue the polluters if additional toxic waste is uncovered. The bill does not require licensed professionals to be subject to pay to play restrictions. It also eliminates Technical Assistance Grants, which are provided to towns to help them clean up contaminated sites.

We believe this bill in its current form violates federal laws CIRCLA and RCRA. The LSPs are not acting on behalf of the state they are acting instead of the state. On CIRCLA these are contaminated superfund sites could be included. You are removing due process from citizens and proper state oversight with this legislation. We believe it violates RCRA because the DEP is supposed to carry out the function of RCRA under the memorandum of agreement not outside contractors who are not accountable to the people of New Jersey.

The Sierra Club supports the redevelopment of brown fields but we believe those sites must be properly cleaned to protect public health and safety. If not, it will not only endanger the people who live and work there, but undermine the future efforts to bring appropriate development to brown fields.

The program needs to be fixed. DEP professionals should have the power to pick the remedies for cleaning up these sites. Public input in cleanup selection and redevelopment is essential. TAG grants should be restored and polluters must be required to have insurance. A privatized program should only be permitted in the cleanup of sites that exhibit small amounts of contamination, such as heating oil tanks. In that case, LSPs should be paid for by the polluters via escrow but monitored by the DEP.

As it stands now bill S1897/A2962 will allow the privatized cleanup of any site, even the most polluted in the state. It's worse than the fox guarding the henhouse; it's the fox also certifying that the henhouse is safe. Kill this bill before it kills us.

Sierra Club: For Our Families, For Our Future
"The 2009 – Site Remediation Reform Legislation Will not Protect Children at Proposed Sites for Schools, Day Care, and Recreational Centers"

Prepared by:
Roy L. Jones
Co-Chair and Coordinator
South Jersey Environmental Justice Alliance
NJ Healthy Schools Network

Date: February 26, 2009

Submitted to:
State and Assembly
Environmental Committee
Trenton, NJ

Harrison Avenue Landfill Site
(90 Acres)

KROC Center
(12 Acre KROC Center)

The proposed KROC Center includes day care center, indoor/outdoor recreational areas, after-school center, art center, and town hall plaza.
I. Introduction

Why Site Remediation Legislation should absolutely protect the health, safety, and welfare of children on sites proposed for schools, daycare centers, and recreational facilities.

The short answer is that “Children are powerless against many dangers in school and out, and they look to adults for protection. However, decisions that adults make frequently endanger our nation’s children. New schools are being built on or near chemically-contaminated land or near industrial facilities that release toxic emissions that contaminate the air children breath, the water they drink, and the soil they play in.”

(Comments from Lois Gibbs – Love Canal Leader, Executive Director Center for Health Environment and Justice – Oct 1, 2002)

In terms of the legislation before the committee, it will not fully protect the health, safety and welfare of children on sites proposed for schools, daycare centers, and recreational facilities. One major flaw in the legislation is that it allows the use of CAPS as an institutional control mechanism to manage contamination on polluted sites.

In New Jersey, not only has the clean-up of contaminated sites been an issue, but the use of CAPS is at best a questionable practice.

II. How widespread are the use of CAPS?

According to staff writer, Alex Nussbaum of the Berger Record CAPS was used at 540 sites statewide. The writer maintained that “Developers love CAPS because they save millions when they don’t have to dig up contamination and haul it away.” At a hearing in 2006, DEP Commissioner Jackson even said “that developers pursue the cheapest solutions in order to quickly get a profit.”

Children are more vulnerable to contaminants than adults and irreversible harm can occur. When public schools are built on contaminated land there is a potential source of chemical exposure and the use of CAPS does not represent the highest level of protection for children.

III. Health Effects, Environmental Exposure & Children

Many medical and scientific studies show that:

1. Children are more vulnerable to pollutants than adults
2. In New Jersey, children health is deteriorating
3. Children are completely defenseless to toxins because they have weaker immune systems, with immature body organs and tissues

Therefore, children are the first casualties from toxic exposure.

IV. Examples of Site Remediation Failures
specific to schools, recreational facilities and commercial development (existing & new facilities)

The Bergen Record article of 2007 indicates 14 schools used CAPS. In other articles about schools and contaminated sites, at least one reporter indicated that over 100 schools have been built on contaminated sites.

1. Early Childhood Education Center (ECDC) – Camden, NJ
   a. Built on former landfill industrial site and surrounded by other contaminated sites
   b. School for special education and health / learning-impaired children
   c. Arsenic found at site 10,000 times national standard
   d. CAP used as an institutional control remedy
   e. Facility houses: 400 children and approx. 85 adults

2. KROC Community Center – Camden, NJ
   a. Harrison Ave. Landfill
   b. Site served as a municipal landfill for 35 years (1952-1971)
   c. KROC Center consists of 12 acres of an 85-90 acre site – which means 72 acres that surround center still a landfill, etc.
   d. Is still a source of ground water contamination
   e. CAPS also used
   f. KROC Center to host: daycare center, indoor / outdoor recreational facilities, town plaza, family service center, and school programs
   g. Over 3000 children and 1000 adults will use facility each year.
   h. Landfill near other industrial facilities

3. Martin Luther King School – Trenton, NJ
   a. New school had to be torn down because site contained contaminated soils – after construction found
   b. Nearly $24 million spent to rebuild school second time

4. Kiddie Kollege Daycare Center – Franklinville, NJ
   a. Mercury contamination – spawned Kiddie Kollege law
   b. Issue led to lawsuits and new state legislation to protect children in daycare centers

5. Meadowlands Development – Encap Fiasco
   a. Commercial / residential development
   b. Multiple abuse-site remediation / clean-up/investigations

6. Vailsbury Middle School – Newark City, NJ (existing school, 2008)
   a. Vapor intrusion occurred when fumes from contaminated soil or ground water seeped through cracks and holds in foundation / slabs of buildings and accumulated in basements, crawl spaces, or occupied areas
   b. Sampling revealed highest levels of PCE, TCE in soil beneath cafeteria
   c. Indoor air results revealed PCE and benzene at their highest levels in cafeteria
Report prepared by South Jersey Environmental Justice Alliance (SJEJA)
listed up to 49 schools in the state either build on or near contaminated sites
HEALTH EFFECTS: Harrison Ave. Landfill
Site (Brownfield/Superfund) Certain Toxins/Chemicals Found at Site

Chlorobenzene
http://www.weblakes.com/toxic/CHLOROBENZENE.HTML

1. In children
   a. Unconsciousness
   b. Cyanotic and muscle spasms
   c. Can recover completely

2. In adults
   a. Acute
      i. Narcosis
      ii. Restlessness
      iii. Tremors
      iv. Muscle spasms
   b. Chronic
      i. Neurotoxicity- numbness, cyanosis, hyperesthesia
         (increased sensation), muscle spasms
      ii. Headaches
      iii. Irritation of mucosa of upper respiratory tract and eyes
      iv. CNS, liver, and kidney damage

Dichlorobenzenes (child and adult exposure effects similar)
http://www.atsdr.cdc.gov/tfacts10.html#bookmark05

1. Inhalation
   a. Burning and tearing of eyes
   b. Coughing
   c. Difficulty breathing
   d. Upset stomach
   e. Dizziness
   f. Headaches
   g. Harmful to liver

2. Ingestion
   a. Skin blotches
   b. Anemia
   c. Harmful to kidney, blood, thyroid, pituitary, and liver
Industrial Chemical Waste: Effects on Children vs. Adults

http://www.ncchem.com/ChemicalWastes.htm

➢ will have heavier exposures than adults to any toxicants that are present in water, food, or air (based on pound-for-pound body weight & metabolism)

➢ ability to metabolize, detoxify, and excrete many toxicants is different from that of adults

➢ in some instances, children are actually better able than adults to deal with environmental toxins, but more commonly they are less able to deal with toxic chemicals and thus are more vulnerable to them

1. In children
   a. Respiratory Impairment
      i. Asthma
      ii. Pneumonia
      iii. Other respiratory infections
   b. Childhood Cancers
      i. Leukemia
      ii. Brain cancer
      iii. Wilm’s tumor (of the kidney)
      iv. Testicular cancer
   c. Neurodevelopmental Impairments
      i. Learning disabilities
      ii. Mental retardation
      iii. Dyslexia
      iv. ADHD
      v. Autism
   d. Reproductive Impairment
      i. Hypospadias (birth defect where urethra opening is located on the underside of the penis, instead of at the tip of the penile head)
      ii. Testicular cancer
      iii. Early puberty
      iv. Early menarche (beginning of menstrual cycle)
The Camden Ray and Joan Kroc Corps Community Center has moved one step closer to construction. Camden Kroc Center Administrator, Major Paul Cain, has announced that the project is moving into the final design phase. “We’re very pleased with all that’s been accomplished toward the completion of the project,” Cain said, “We’re on track for a ground-breaking in late 2008.”

In January 2004, it was announced that the Salvation Army USA would be receiving a historic bequest of nearly $1.6 billion from the estate of Mrs. Joan Kroc, whose husband Ray Kroc founded McDonald’s. Following a rigorous, competitive application development process, Camden was chosen as one of eight locations in the Salvation Army USA’s Eastern Territory to receive funding for the construction and operation of a Ray and Joan Kroc Corps Community Center. The Camden Kroc project will receive a total of $54 million; $27 million for the construction of the facility and $27 million to partially fund an operational endowment.

Major Cain states, “It is important to note that it was not Mrs. Kroc’s intent to provide 100% of the required funding, but rather to challenge the local community to provide matching funds and invest in and take responsibility for the success of the Center.

We will need to expand our local fund-raising efforts and embark upon a campaign later this year to secure an additional $10-15 million in endowment funds to meet the Kroc Challenge.”

**Kroc Center To Include**

A Family Enrichment Center to offer low-cost, high-quality child care; after-school programs; family enrichment programs; parenting and child development education; a teen center; and senior citizens programs.

A Learning and Technology Center to include a library resource center, computer technology access and training; and multipurpose classrooms. Programs may include GED courses; literacy programs for adults and families; life skills workshops; English as a Second Language; after-school education and tutoring; and work-force development.

Visual and Performing Arts Theater programs to include public performances, exhibits, movies, receptions, music and choral education, arts and crafts education, special youth, adult and senior theatre programs; and dance education programs.

A Town Plaza to include a community gathering and reception area, along with a coffee shop and information booth.

An Aquatic Center to offer opportunities for lap/competition, family/leisure swimming and therapeutic services for rehabilitative needs. Program opportunities will include lifeguard certification, swim lessons and training, swim meets and an indoor water park.

A Recreation Center to include a wellness center offering services (e.g., fitness center, educational programs, aerobics classes, personal training and group classes); instruction in a variety of sports; league play; a gymnasium for basketball and volleyball; and senior recreation.

For more information and to see architectural renderings, please go to our website: www.camden.salarmonykroc.org
Vailsburg Middle School
Newark City, Essex County
PIE # G000004877
25 February 2009

PDF Version of this site info sheet [13 Kb]

Overview

The New Jersey Department of Environmental Protection (DEP) began remedial activities on July 28, 2008 to address potential impacts to the former Vailsburg Middle School from vapor intrusion. Vapor intrusion occurs when fumes from contaminated soil or ground water seep through cracks and holes in foundations or slabs of buildings and accumulate in basements, crawl spaces or occupied areas. DEP initiated this remediation after elevated levels of benzene, tetrachloroethene (PCE) and trichloroethene (TCE) were detected in ground water, soil gas and indoor air samples collected by the Getty Service Station located across the street from the school. The Getty Service Station is not believed to be the source of the PCE and TCE in ground water.

History

In January 2008, soil gas and indoor air sampling was conducted by Getty at various locations on the school grounds including the cafeteria/kitchen and several classrooms. During the soil gas testing, samples of the air from the soil below the building foundation were collected and analyzed for volatile organic compounds (VOCs). The indoor air sampling measured levels of VOCs present in the air inside the building.

The January soil gas samples revealed the highest levels of PCE and TCE in the soil beneath the cafeteria. These results were 895 µg/m³ of PCE and 1090 µg/m³ of TCE. These results exceed the Soil Gas Screening Levels of 34 µg/m³ and 27 µg/m³, respectively. Please note, however, that soil gas is air underneath the building, and would not be the air that a person would be breathing while in the building or standing outside in the parking lot. Indoor air results revealed PCE and benzene at their highest levels in the cafeteria where PCE measured at 5.6 µg/m³ and benzene at 3.2 µg/m³, which exceeded the Indoor Air Screening levels of 3 µg/m³ and 2 µg/m³, respectively. TCE was not detected in the indoor air. An exceedance of air screening levels does not necessarily mean that a building is unsafe, rather an exceedance of screening levels is cause for further evaluation, and if necessary, remediation.

Current Actions

The New Jersey Department of Health and Senior Services reviewed the indoor air data and concluded that the contaminant concentrations detected in the indoor air do not present any immediate health risk. However, to prevent the contaminated air detected in the soil gas from entering the building, DEP is installing a Perimeter Soil Vapor Extraction System. The system is designed to reduce the levels of TCE, PCE and benzene in the air below the slab by continuously ventilating the contaminated air beneath the building to the exterior of the structure.

Key Construction Activities

- Construction activities at the site began July 28, 2008. These activities were scheduled for the summer months for the safety of the children.
- Site activities at the school included excavation in the paved areas to allow for installation of the Perimeter Soil Vapor Extraction System (system).
- The system was operational on September 25, 2008. Although the Newark Public Schools chose not to renew their lease, the system remains operational as the owner of the property seeks either new tenants or a buyer.
- DEP resampled the indoor air and subslab soil gas on December 11 and 12, 2008 to ensure the system is reducing the levels and is working effectively. Results of this testing indicates that the system is working efficiently and the indoor air results reveal no exceedances of DEP's Residential Indoor Air Screening Levels for the contaminants of concern associated with the site. In addition, no background contaminants were detected in the six indoor air samples in excess of DEP's Residential Indoor Air Screening Levels.
- Most of the system is not visible because the equipment is primarily installed under the ground with the exception of a small garden shed used to house the above-ground equipment.

Off-site Investigation

In addition to remedial activities at the former Vailsburg Middle School, DEP initiated an off-site investigation in September 2008 to determine if vapor intrusion is occurring in buildings in the surrounding neighborhood. DEP sampled eight homes and results from these air samples indicate that vapor intrusion is not occurring at any of the homes tested.
For Immediate Release:
February 19, 2008

Office of The Attorney General
- Anne Milgram, Attorney General

Attorney General Files Suit to Recover Cost of East Orange School Site Clean-Up

Complaint 280kb

TRENTON -- Attorney General Anne Milgram announced today that the state has filed a lawsuit in Superior Court seeking to recover the cost of cleaning up and restoring a contaminated property that is the site of a planned school for the arts in East Orange.

Filed on behalf of the New Jersey Schools Development Authority, the lawsuit focuses on contamination of an eight-acre property on North Arlington Avenue that once housed a dry cleaning business, Carriage Trade Cleaners. The property is currently the site of construction work on the East Orange school district’s Cicely Tyson School of Performing Arts and Fine Arts. An SDA-funded project, the school is scheduled for completion in 2009.

According to the state’s lawsuit, the property was contaminated over a period of years with tetrachloroethylene (PCE), a chemical compound regularly used in dry cleaning, and required extensive clean-up and soil removal work that was paid for by the state. Named as defendants in the lawsuit are former property owners Joseph Marcantuone of Verona and Robert Gieson of Livingston and operator Sang Hak Shin of Paramus.

“We are seeking reimbursement from these defendants for what the state has had to spend to clean-up their property,” Attorney General Milgram said. “Public dollars should not be used to clean up and restore properties contaminated by private industry.”

Scott Weiner, chief executive officer of the SDA, said the lawsuit is part of an important initiative, launched in late 2006, to recover costs from responsible parties for environmental remediation, as well as for design errors and project delays.

“In collaboration with the Attorney General’s Office, the SDA will continue an aggressive effort in 2008 to recover costs that rightfully should be paid by those who bear responsibility, not New Jersey taxpayers,” said Weiner.

Also named as defendants in the state’s lawsuit are JRM LLC d/b/a Carriage Trade Cleaners, of Paramus, and a variety of “ABC” corporations and individual “John Does.” The ABC Corporations and John Doe defendants are owners, operators or parties otherwise in control of the Carriage Trade Property at the time of the discharge of hazardous waste who could not be identified by name as of the filing of the lawsuit on February 1, 2008.
Attorney General Milgram noted that the lawsuit is being brought under the New Jersey Spill Compensation and Control Act. Under the Act, a governmental entity such as the state is exempt from liability for clean-up and removal costs related to pre-existing contamination at a property it acquires by eminent domain or condemnation for redevelopment purposes. The state’s lawsuit notes that $629,000 in SDA funding was used by East Orange to acquire the property via condemnation, and that a portion of that funding -- $182,000 -- was ordered held in escrow by the court to cover the cost of any environmental remediation.

The lawsuit seeks to have the defendants held legally responsible for PCE contamination at the North Arlington Avenue property. It also asks that the $182,000 being held in escrow be released to the state.

The Cicely Tyson School of Performing Arts and Fine Arts is a demonstration project proposed by the East Orange School District and the City of East Orange. The project features a new, 280,095-square-foot pre-K through grade 12 performing arts/music magnet school on a 12-acre campus within the city’s Main Street redevelopment area. Students from the 100-year-old Washington School and the existing Cicely Tyson School will attend the school. A September 2009 opening is scheduled.

Demonstration projects are school facilities projects that incorporate community design features and are coordinated with wider community economic redevelopment. Six were authorized under the Educational Facilities Construction and Financing Act of 2000. The East Orange demonstration project is managed by the City of East Orange as the redevelopment entity and Joseph Jingoli & Son, Inc. as the redeveloper. Jingoli is also the construction manager/general contractor. The SDA provides 100 percent funding and oversight.

The SDA (then known as the SCC) awarded East Orange a grant for design and construction of the new school in December 2004. The Carriage Trade Cleaners property was subsequently acquired via condemnation, and a follow-up investigation revealed PCE contamination. The contaminated soil was excavated and properly disposed of in 2006. A subsequent consulting study found the remediation effort to have been sufficiently completed. The Department of Environmental Protection approved the consultant’s Remedial Action Report on the site in March 2007.

DAG Michael McMahon, of the Division of Law’s Cost Recovery and Natural Resource Damages section, handled the lawsuit on behalf of the state.

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http://www.state.nj.us/lps/newsreleases08/pr0090719a.html 7/1/2008
Comments on Re: SCS S1897 / A2962 (2.20.09 draft):
Bill is Fatally Flawed and Should Be Held

Testimony of Adam Liebtag, Lead Staff Representative

On behalf of 16,000 members state-wide, including state, county and municipal workers, and on behalf of the members who work in the Site Remediation Program, CWA Local 1034 testifies strongly against this bill.

It may sound dramatic to say this bill is one of the worst degradations of environmental protection the DEP has ever suffered, but it is true.

There is no doubt that people say the Site Remediation Program is broken...but is the appropriate solution handing 20,000 contaminated sites to polluters and their consultants to clean up with less government oversight? The latest draft of the LSP bill is privatization and deregulation, and we reject the very concept of the bill.

However, in response to this latest draft, we testify to ask for the bill to be held until it addresses several critical issues.

There is a misperception that the Department supports the creation of this LSP bill, which is in fact not the case. Although the Administration and upper management at the Department supports this bill, it is important to understand that the Department overall does not actually support this bill. In fact, the vast majority oppose this bill for the same reasons you hear from environmental advocacy, environmental justice, and labor groups today.

The environmental experts at the DEP – research scientists, geologists, case managers, Site Remediation enforcement and others – vehemently oppose the bill in its current form because they deal with cleanup of these sites every day and know what lies on the other side of passing this terrible legislation. The environmental experts who have been given the difficult task of overseeing cleanups, who are in the best position to know whether deregulating toxic site cleanups is wise, speak out against this legislation.

Again, although we reject the proposition of deregulation by privatizing environmental oversight, we find three major problems with this bill:

1. Consultants should not regulate themselves.
   The DEP environmental experts and professionals know about their backlog better than anyone, and they know why the backlog exists and how it accumulated. They deal with poor quality submissions every day from consultants who do not sufficiently delineate plumes of contamination, who do not adequately sample a site, who propose shortened cleanups, and in some cases who submit falsified information. Based on their experience with these
consultants and these issues, I have over 150 signatures from rank and file DEP workers on petitions opposing this legislation.

The DEP is charged to protect the health of the hundreds of thousands of residents who live near the average of 30 contaminated sites in each town in New Jersey. They interact with consultants and responsible parties more than any of us in this room do, and they are scared and disturbed that this legislation enables bad actors to act badly, with less or zero oversight from the Department.

DEP case managers and other technical professionals deal with overbilling by consultants every day, with insufficient site plans, with faulty sampling data, and with falsified reports. DEP is not an obstacle to cleaning up these sites, it is fulfilling government’s responsibility to oversee and ensure that the consultants do what they are supposed to do. Now, with this legislation, DEP will be handcuffed from the oversight necessary, and we will lose the assurance that someone is watching over the cleanup.

2. The LSP universe should be limited to least-dangerous clean up projects first
Neither the Department nor the State can point to how much money this legislation will cost, or how much money is would save. I have seen no analysis of financial impact or personnel impact to implementing this legislation. Even after months of debate between the various interests, no one has determined the real operational and budgetary impact of this bill.

During early discussion of this bill, the Department wanted to include the least complex, lowest contamination sites in the LSP program. These would be homeowner oil tanks and the like that are frustrating for the public, can delay the sale of a home, and are often made low priority compared to multimillion dollar commercial or brownfields redevelopment. If LSP is to go forward, these homeowner and low-level sites should be the test cases to determine if the program works, if there is adequate oversight by the Department, and how auditing works. Instead the bill proposed today is a wholesale deregulation that allows all 20,000 sites to be handled outside government oversight.

3. Auditing 10% of sites is not enough.
This bill puts as many as 20,000 contaminated sites into the hands of polluters and contractors for remediation. A 10% audit rate means that as 2,000 sites will have auditing by DEP - which is not the same as direct oversight or direction – and 18,000 sites will not be audited. This is an unacceptably low standard for auditing.

Auditing 10% of sites overseen by LSPs requires a suspension of disbelief that the public, the kids who learn or live or play near a contaminated site, the people who work in or near a site, that 90% of the LSP sites are cleaned up adequately. Given DEP’s experience with existing consultant work, it is impossible to take it on faith.

The adage “don’t let the perfect be the enemy of the good” doesn’t apply to this bill. This legislation is not only imperfect, it isn’t even good. Wholesale deregulation, privatizing DEP’s authority over 20,000 sites – an average of 30 in each town – is unconscionable and the bill should be held. If it is not held, this legislation will create new public health hazards and more ticking time bomb sites where contamination is found after the fact. This is not the kind of “reform” Site Remediation needs.

For more information, contact:
Adam Liebtag, CWA Local 1034 phone (609) 530-0060

CWA Local 1034 represents environmental professionals in the DEP, including the Site Remediation Program, whose work is deregulated and privatized by the LSP bill.
TO: ASSEMBLYMAN JOHN F. MCKEON, CHAIRMAN, SENATE ENVIRONMENT AND SOLID WASTE COMMITTEE
FROM: OLGA POMAR, SOUTH JERSEY LEGAL SERVICES
RE: SITE REMEDIATION LEGISLATION
DATE: FEBRUARY 24, 2009

I. INTRODUCTION

Please accept these written comments, provided upon the committee’s request, to supplement the discussion of the Bill on February 9, 2009 and in anticipation of the public hearing to be held on February 26, 2009.

I am an attorney at South Jersey Legal Services, a private non-profit legal services program that provides free legal assistance to low-income persons in seven counties in southern New Jersey. Our office represents several community organizations concerned about environmental contamination in their neighborhoods, including the South Jersey Environmental Justice Alliance, a coalition group dealing with environmental justice and public health issues in predominately low income, African-American and Hispanic communities, including Camden City, throughout the southern section of the state.

There is general consensus that the DEP’s site remediation program (SRP) is not functioning effectively, as sites are not being cleaned up in a timely manner and remediation is too often inadequate to be fully protective of public health. Environmental justice advocates welcome the legislature taking on this complex issue through this and other legislation intended to reform the SRP. They are greatly concerned, however, that this Bill proposes to transfer oversight and responsibility for the remediation of contaminated sites from the NJ DEP, the public agency charged with the mission of protecting human health and the environment, to private entities working on behalf of developers and responsible parties who are not accountable to the public and who have a direct financial interest in the clean-up. It is especially troubling because of the history in this state of inadequate investigation and clean-up done by some of these very same entities.

Thus, while this Bill contains some measures that could improve the effectiveness of the SRP — instituting permits for engineering and institutional controls, giving DEP authority to require unrestricted use and presumptive remedies at sites of particular concern, imposing timelines for clean-ups, establishing a ranking system for sites, and giving DEP greater authority to manage clean-up over a targeted universe of problem sites — these positive reforms are largely rendered meaningless if the DEP cannot effectively exercise its new authority under this new privatized system. Indeed, the Bill would greatly weaken DEP’s ability to enforce existing laws and fulfill its mission to make sure that the public health and natural resources are protected. The specific provisions of the Bill which would make it virtually impossible for the DEP to exercise proper oversight over site clean-up are discussed in detail below, and some suggested revisions are proposed.

II. ENVIRONMENTAL JUSTICE CONCERNS
As the committee is aware, the issue of site remediation is of special concern to environmental justice advocates. The proliferation of contaminated sites in our urban communities, such as Camden City, Salem, Carneys Point, Penns Grove, Gloucester City, and Westville, has a significant effect upon health and quality of life. Many contaminated sites in these communities date back to the time that these cities were industrial centers. In more recent years, many of these cities became dumping grounds for undesirable, polluting uses which increased contamination levels. At the same time, the sites found in lower-income EJ communities tend to receive minimal attention and be allocated scant resources for remediation. It is imperative that the SRP be reformed so that these sites will be cleaned up quickly and to standards fully protective of public health.

III. LSP LICENSING AND OVERSIGHT

The Bill creates a structure through which the licensed site professionals (LSPs) are not only fully responsible for clean-up of sites, but are responsible for policing themselves in doing this work. At the same time, the oversight Board is given no resources to equip it to conduct adequate oversight. The Bill also does not provide sufficiently strong deterrents to ensure that LSPs comply with all ethical and technical requirements.

- The licensing board is too heavily weighted with LSPs, representing 6 out of 11 members. (Section 3(b), pp. 6-7).
  ➢ There should have more representation on the LSP Board from government officials, the environmental community, and other persons who have no financial stake in the system and a concern for public health and the environment.

- The Bill imposes significant responsibility on the LSP Board to develop standards, approve and revoke licenses, investigate complaints, and perform audits. (Section 5, pp. 7-8). Not only does this create a system of self-regulation and self-policing, but the Bill does not allocate significant additional funding to provide staff and technical assistance to the LSP Board to perform these functions. Without such support, it is unfeasible to expect persons who are volunteering to serve on the Board and are presumably otherwise employed to be able to carry out all of these myriad functions.
  ➢ Some of the duties, including conducting audits, should be transferred to the DEP.
  ➢ The Bill needs to allocate funding for technical staff and support for the Board if it is to assume these duties.

- The Bill provides that an LSP shall not associate with a person in a business venture, if the LSP knows or should know that the person engages in fraudulent or dishonest business or professional practices regarding the professional responsibilities of a licensed site remediation professional (Section 15(p), p. 18). That language does not make it clear whether an LSP with a revoked license would still be able to do any work in New Jersey under another LSP’s supervision.
  ➢ The Bill should state that if an LSP has had their license suspended or revoked, that LSP is barred from doing any environmental work in this state
as an LSP, as an employee at an environmental firm which employs LSPs, as a consultant to another LSP, or any other capacity.

IV. DEP AUTHORITY AND OVERSIGHT OVER CLEAN-UP OF SITES

A. Bill does not authorize or require DEP to oversee remediation of contaminated sites, even sites requiring higher level of attention

The provisions addressing the role of the DEP in the remediation process are vague and provide for minimal involvement of the Department even for sites that are recognized as needing greater degree of attention.

- The Bill requires DEP to “inspect all documents” (Section 21(a), p. 26). It is not clear what that inspection entails and whether it is sufficient to ensure that proper submissions are made.

- The Bill gives a list of categories of sites for which the DEP “shall perform additional review of any document” or “review performance of remediation” (Section 21(b), pp. 26-27). The recognition that these types of sites deserve additional attention is positive; the requirement is so vague, however, as to not provide any assurance that the DEP’s oversight will be timely or meaningful. The Bill does not specify which documents must be reviewed or when. A site clean-up may generate hundreds of documents, but this provision could be satisfied by reviewing only one or two of these documents.
  - At the very least, the Bill should require DEP to review the Remedial Workplan which outlines the investigation of the site and proposes a remedy, before the remedial workplan is implemented, so that DEP can discover potential problems before it is too late.
  - The categories of sites in this list should be expanded to include all residential development, active recreation sites (ballfields, playgrounds, community centers), and any other sites where additional review is warranted, such as sites involving presumptive remedies and use of alternative remediation standards.

- The Bill also lists categories of sites where DEP “may” perform additional review (Section 21(a) and (c), pp. 26-27). This provision suffers from the same lack of specificity as to what and when would be reviewed. Most of the categories of sites listed present sufficient concerns that additional review should be required, rather than allowed. The use of “may” also implies that DEP does not have authority to conduct additional review if the site does not meet any one of these specific definitions.
  - Subsections 3, 6, 7, 8, 9, 10, and 11 should be moved from the “may review” to the “shall review” category
  - An additional subsection should be added to enable DEP to review “any site where the DEP determines in its discretion that additional review is warranted”
• The Bill requires DEP to review only a minimum of 10% of all documents submitted by LSPs. (Section 21(f), p. 27). Since one site may generate hundreds of documents, this level of review is virtually meaningless. The Bill also does not make clear whether the additional document review DEP is required to conduct pursuant to Section 26(b) counts toward the 10% minimum. If it does, then only a miniscule percentage of documents will ever be reviewed and sites not falling within the categories enumerated in Section 26 will be subject to no review at all.
  ➢ The Bill should make clear that this section requires review of additional documents besides those reviewed under the categories listed in Section 26
  ➢ The percentage of documents reviewed should be raised to a minimum of 20%.

• The Bill prohibits DEP from auditing sites if more than 3 years have passed since the LSP issued a Response Action Outcome (RAO) except under limited circumstances. (Section 25, p. 28). It is not clear why DEP is restricted from conducting any audit it determines in its discretion to be warranted.
  ➢ This provision should be deleted.

B. DEP is given broader authority to oversee complex sites but only a very limited universe of sites could come under DEP control

One of the more significant and positive measures of the Bill is the new authority given to DEP “to undertake direct oversight over remediation (Section 27, pp. 28-31). The provision is too limited in scope, however, to have significant impact on the effectiveness of the SRP.

• Under Section 27(a), the DEP is required to take over sites only if there is significant delay by the responsible party in cleaning up the site subsequent to the enactment of this Bill. Therefore, this provision will not be triggered for at least 5 years, even though there is already a large universe of contaminated sites that have languished for decades.
  ➢ DEP should be required, or at least allowed, to take over remediation of sites that are presently in violation of DEP enforcement orders, or at the very least, sites that are not brought into compliance within a short period of time of the enactment of this legislation.
  ➢ The universe of sites should be expanded to include complex sites that are determined to be of the highest ranking in terms of potential danger to public health and the environment.

• Section 27(b) of the Bill allows DEP to undertake direct oversight over a narrowly defined universe of sites. This is again a positive element of the Bill but very limited in its scope.
  ➢ Subsection 4 should be moved from Section 27(b) to 27(a), requiring DEP direct oversight
  ➢ Additional categories should be added to give DEP more flexibility to take over complex sites when warranted.

C. The Bill give DEP new authority to require more protective remedies but does not establish a sufficiently clear and strong preference for use of unrestricted use
remedies at sites where there is most risk of exposure for vulnerable populations, such as residences, schools, day cares, and active recreation sites.

A major flaw of the SRP is that responsible parties can easily avoid meeting clean-up standards by the use of engineering and institutional controls such as ceps and Classification Exception Areas (CEAs). Since such "restricted use remedial actions" and "limited restricted use remedial actions" are typically cheaper and easier to implement, they are almost always the remedy of choice of the party conducting remediation. As LSPs will be working for and paid by the entities cleaning up the site, they will also have a direct incentive to satisfy their client by using this less expensive, less cumbersome, "pave and wave" approach. These controls can fail, however, causing danger of exposure. In addition, they require continuous monitoring, and leave contaminants in place that may eventually spread off-site. The DEP has noted these problems and has sought greater statutory authority to mandate more protective remedies at sites which potentially pose higher public health risks.

This legislation takes a step toward addressing this issue by creating a category of sites for which more than capping with minimal controls is required, but does not go far enough in promoting "unrestricted use remedial actions," nor does it provide any mechanism to give DEP sufficient oversight to see that such remedies are implemented.

- The Bill creates few financial or other incentives to use unrestricted use remedies. Section 25, p. 74 frees an entity that is implementing an unrestricted use remedy from creating a remediation funding source, but extends the exception to entities that are implementing a limited restricted use remedy as well.
  - The reference to "limited restricted use remedies" should be deleted or some other provision designed to create a distinction in the way these two remedies are treated.
  - More incentives are needed to encourage use of unrestricted use remedies.

- The Bill retains the statutory language that unrestricted use remedial actions and limited restricted use remedial actions shall be preferred over restricted use remedial actions (Section 47(g) (1), p. 89). A limited restricted use remedy is less desirable, however, than an unrestricted use remedy, as it allows contamination to remain on site, requiring ongoing monitoring and posing the risk of eventual spread of a contaminant plume.
  - The Bill should read that unrestricted use remedial actions are preferred over both limited restricted use remedial actions and restricted use remedial actions, and that limited restricted use remedial actions are preferred over restricted use remedial actions.

- The Bill contains a new provision that designates certain categories of sites as requiring use of an unrestricted use remedial action, a presumptive remedy or an alternative remedy, in specific, residential development, child care centers, schools, or another purpose that involves use by a sensitive population. (Section 47(g)(1), p. 89) This represents a significant reform in the SRP. However, unrestricted use remedies should be preferred over presumptive remedies. Also, the universe of sites is too narrow.
Finally, there is no mechanism for DEP to ensure that these more protective remedies are being implemented, as discussed above.

- The Bill should provide that the use of an unrestricted use remedial action will be required unless the entity conducting the remediation can demonstrate that such remedial action is unfeasible due to the specific conditions and the proposed uses at the site, in which case the DEP may approve the use of a presumptive remedy.
- The Bill should require DEP review and approval at the very least of the Remedial Action Workplan before the implementation of the remedy for these categories of sites.
- The category of sites should be expanded to include active recreation sites.

D. The Bill creates new authority for DEP to impose more protective “presumptive remedies” for residences, schools, and day cares, but provides insufficient guidance and no mechanism for DEP to enforce this authority.

- “Presumptive remedy” is not expressly defined in the Bill. The definitions section, Section 23, p. 70, only makes reference to Section 47(g) (10). That Section merely authorizes and requires DEP to establish presumptive remedies taking certain factors into account. (Section 47(g) (10), pp. 91-92). The Bill does not make clear how presumptive remedies will be different than unrestricted use remedies, other than allowing use of controls where there is historic fill, nor does it make clear how presumptive remedies would differ from typical restricted use remedies.
  - The Bill should specify that presumptive remedies are to be more protective than other restricted use and limited restricted use remedies.
  - The Bill should make clear that presumptive remedies are to be used only when it is demonstrated that an unrestricted use remedy is unfeasible.

- Presumptive remedies are required only for a narrow universe of sites, in specific, residences, child care centers, and schools. (Section 47(g) (10), p. 91).
  - The category should be expanded to include active recreation sites and other purposes that involve use by a sensitive population.

- The Bill presupposes that DEP can design presumptive remedies that will give sufficient guidance to an LSP to determine which presumptive remedy is applicable. The factors listed to be used by DEP to develop the remedies, however, seem very site specific. (Section 47(g) (10), p. 91). Without ongoing communication and guidance from the DEP, there would be considerable uncertainty about whether a particular remedy is acceptable, but, as previously discussed, the Bill only allows DEP to review documents for these sites without requiring any specific review or pre-approvals.
  - The Bill should require DEP to review and pre-approve at the very least the Remedial Action Workplan before remediation is done at a site requiring use of presumptive remedies.
• The Bill allows a party conducting the remediation to propose, for DEP review and approval, an alternative remedy would be equally protective over time as a presumptive remedy, if it can show that a presumptive remedy is impracticable. (Section 47(g) (10), pp. 91-92). It is not clear how the party would obtain DEP review and approval because, as discussed above, there is no requirement that DEP have ongoing oversight over these sites.
  
  ➢ **The Bill should require DEP to review and pre-approve at the very least the Remedial Action Workplan before remediation is done at a site where an alternative remedy has been proposed.**

• The Bill appears to recognize that there is a great risk that an LSP will conduct a clean-up without properly applying presumptive remedies, but rather than protecting against this from occurring, it creates a huge loophole — the Bill states that DEP cannot invalidate an RAO if a presumptive remedy was not used but the DEP determines that the remedial action used is as protective. (Section 22, p. 28). Since RAQO's are issued after the completion of the remediation, this provision presupposes that DEP will not have reviewed or pre-approved the remediation plan. Invalidation of a remedial action at that late stage would likely result in huge delays and added costs, which would place pressure upon DEP not to invalidate the remedy except under the most extreme circumstances. Furthermore, it is known that DEP has frequently approved minimal capping and use of controls as protective of health. Because of these factors, this provision creates an incentive to use alternatives to presumptive remedy without first seeking DEP approval.
  
  ➢ **This language should be deleted.**

E. The Bill creates new authority for DEP to require "hot spot" removal, but does not provide any mechanism for DEP to enforce this authority.

• Section 47(g) (2), p. 90, authorizes the DEP to require treatment or removal of contaminated material that would pose an acute health or safety hazard in the event of a failure of an engineering control. This appears to be a very significant reform in the law, but unfortunately it may end up being meaningless, as it is unclear how DEP could enforce this provision if it does not review site remediation documents to determine whether such “hot spots” exist. In addition, even if an LSP identifies the issue and considers hot spot removal, it appears there is no clear guidance as to what level of contamination would pose an acute hazard. The provision therefore could create uncertainty for LSPs and parties conducting remediation.
  
  ➢ **The Bill should require DEP to promulgate a guidance specifying, for each contaminant, what amount and/or level of concentration cannot be left on site. In situations where there has not been sufficient research to determine exactly what levels of acute exposure creates a health risk, DEP must set protective standards according to the best information available, erring on the side of caution.**

  ➢ **The Bill should, at the very least, require LSPs to report to DEP the presence of hot spots and should require DEP review of site investigation reports for sites which pose greatest public health risk, including**
residences, day cares, schools, and active recreation areas, to determine whether hot spots are present.

F. The Bill directly undermines the authority given in the statute to DEP to approve and/or oversee and monitor clean-up strategies involving alternative soil standards and historic fill.

- The statute in its present form allows a party conducting remediation to submit to the department a request to use an alternative soil remediation standard in lieu of the DEP’s established standards. (Section 47(f)(1), pp. 87-88). The party conducting the remediation has the burden of showing that the alternative standard will be protective of health. (pp. 87-88). The statute requires that DEP review and approve any such proposed alternative standards. The Bill does not alter this language, but it creates an inconsistency because it erodes the DEP’s authority to review and approve the use of alternative standards. Pursuant to the Bill, LSPs would make decisions regarding remedy selection without ongoing DEP review and approval, and the Bill does not create a special review and approval process if alternative standards are proposed. On the contrary, the Bill only allows, rather than requires, DEP to conduct “additional review of documents” if alternative soil standards have been proposed, and even then, it only requires DEP to review 10% of all documents submitted for all sites in a year, making it extremely unlikely that alternative standard sites will receive any meaningful review.

  - The Bill should clarify in Section 21, pp. 26-27 that the DEP must review and approval of documents proposing use of alternative soil standards.
  - The Bill should add further clarification in Section 47(f)(1) to specify that despite the delegation of authority to LSPs under this statute, use of alternative standards nevertheless requires DEP review and approval.

- The statute in its current form, allows an entity conducting remediation to demonstrate to the satisfaction of the DEP that certain contaminated material constitutes “historic fill.” (Section 47(h), p. 91). If DEP determines that it is historic fill, there is a rebuttable presumption that the department shall not require any person to remove or treat the fill material; that presumption can be overcome, however, by DEP showing by a preponderance of evidence that engineering and institutional controls would not be effective (p. 91). The Bill does not change this language, but it makes it impossible for DEP to exercise its authority in accordance with this statutory provision. The Bill does not require any DEP review of sites involving classification historic fill. With the DEP no longer involved in overseeing and approving remediation documents, there would be no way for DEP to determine whether materials were properly classified as historic fill. Furthermore, if DEP is not involved in overseeing the remediation, there is no opportunity for DEP to challenge the presumption that the material does not need to be treated or removed. What was intended as a presumption would therefore in reality become an absolute rule.

  - The Bill must require, in Section 21, that the DEP review and approve the classification of material as historic fill and that it determine whether
engineering and institutional controls are appropriate before the remediation is commenced.

➢ The Bill should also specify in Section 47(h) that despite the delegation of authority to LSPs under this statute, classification of historic fill and use of engineering and institutional controls require DEP review and approval.

G. The Bill improperly delegates DEP authority by deeming an RAO issued by a private entity to have the same legal effect as a covenant not to sue issued by the DEP.

The Bill states that if an LSP issues an RAO to a person responsible for conducting a remediation, the person shall be deemed, by operation of law, to have received a covenant not to sue from the DEP. (Section 31, p. 34). This provision is problematic for several reasons. The DEP would be being prevented from pursuing legal remedies against a party based upon certifications by a private entity employed by that party and without requirement of any review by any state official. There may be various legal impediments to such abdication of state functions and responsibilities. Furthermore, with DEP taken out of the process, the new procedures may create uncertainty about the effectiveness of clean-ups and impede approvals and funding for projects, as well as making development on contaminated sites less marketable. These issues underscore the potential pitfalls of delegating so much authority to LSPs and potentially deterring site clean-up.

V. OTHER ISSUES

➢ The Bill contains very few provisions about public participation and input into the site remediation process. It is unclear how the Bill will affect the newly promulgated regulations regarding public participation in site remediation, which presuppose that the DEP will be actively involved in the process rather than delegating most of its authority to LSPs. It is critical to inform, involve, and obtain the input of persons most directly affected by the contaminated site, including residents, workers, community-based organizations, and local officials. The Bill contains a provision for technical assistance grants to nonprofit groups to evaluate remediation methods and monitor site conditions at specific sites of public concern in the local community, a provision which EJ advocates strongly support, but contains no specifics about these grants (Section 51(c)(2), p. 102).

➢ The Bill should incorporate a process for notifying and involving the public in the site remediation process

➢ The Bill should expressly provide for a complaint process by which any concerned person can request an investigation by the LSP Board and by the DEP of a particular LSP or of the remediation of a particular contaminated site.

➢ The Bill should provide for DEP review, monitoring, and intervention in site remediation process when warranted based upon community input.

➢ The Bill should allocate adequate funding for technical assistance grants and require DEP to establish a program for administering these grants within one year of the enactment of the legislation.
• The Bill requires DEP to establish a ranking system for contaminated sites and to provide public access to information about the sites on its website. (Section 39, p. 67) This is a positive improvement in the law, as it is now virtually impossible to obtain any information about the nature and extent of contamination at a site without going through an OPRA review of the file. The law does not specify how the ranking system will be used.

  ➢ *The Bill should provide that the ranking system should be used to guide the DEP in determining the level of DEP oversight needed, the extent of public input and participation, and the allocation of resources to investigation and clean-up.*

• The Bill reforms the law by imposing a new prohibition against constructing single family residences, schools, or child care facilities on a landfill if it requires reliance on engineering controls. (Section 47(g) (12), p. 92). This is a significant and positive step, but the categories of sites should be expanded.

  ➢ *The Bill should also prohibit construction of any residences and any active recreation sites (playgrounds, ballfields, and community centers) on former landfills.*

Thank you for consideration of these comments.
MEMORANDUM

TO: Members of the Senate Environment Committee and Assembly Environment and Solid Waste Committee

FROM: Christina M. Genovese, Manager, Government Relations

RE: S-1897 (Smith) / A-2962 (McKeon)
Site Remediation Reform and Licensed Site Professional Bill

DATE: February 26, 2009

The Chamber of Commerce Southern New Jersey would like to express our support for the Site Remediation Reform and Licensed Site Professional Bill, S-1897 (Smith) / A-2962 (McKeon). The Chamber’s members include companies that own and/or operate facilities at properties undergoing cleanups, businesses seeking to purchase or sell Brownfield properties and consultants and contractors hired to perform the work necessary to complete cleanup activities and prepare the required reports documenting their efforts.

The Chamber believes that the current Site Remediation Program is broken and needs to be fixed. We applaud the New Jersey Department of Environmental Protection (NJDEP) for setting up a Stakeholder process to study the reasons why and to develop suggested reforms. We also appreciate Senator Smith and Assemblyman McKeon taking the initiative to propose much needed reform legislation.

The Chamber has reviewed the most recent version of the bill and is supportive of many of the changes that have been made. However, we would like to respectfully offer the following suggestions on how this legislation can be improved further:

- **Section 19** - Under the new permitting program for engineering and institutional controls, there is a new financial assurance requirement. The Chamber would like to suggest language be added to create a self guarantee option as well.

- **Section 21** - There is no process for the LSRP to find out if NJDEP has decided to review the report and no time limit to NJDEP's review. The bill allows the LSRP to continue work while NJDEP "reviews" a submission, but why would an LSRP do so if they know NJDEP is reviewing it and may require a change? If they stop work to await NJDEP review, they may run afoul of the "mandatory timeframes." This section needs some further clarity.
• **In section 21, subsection c,** NJDEP has the ability to "review" any case with groundwater contamination (under c (4)) and virtually any other case (under subsection c(10) or (11). The Chamber feels this is inconsistent with the purpose of LSRP review.

• **Section 25** - Response Action Outcomes (RAOs) may be audited by NJDEP up to 3 years after they are issued and under certain circumstances after that period. This creates uncertainty surrounding the issuance of an RAO for up to 3 years and in some cases longer. The Chamber believes this period should be shortened. Also, for those circumstances that could trigger an audit after the 3 year period, there should be a limited time frame after the triggering event within which the audit must be done.

• **Section 27** - The circumstances under which NJDEP "shall" undertake direct oversight still a concern. For example, a single failure to meet a mandatory timeframe triggers mandatory NJDEP direct oversight. Also, the subsection that triggers direct oversight upon failure to complete an entire site remediation within 10 years after discovery of contamination and 5 years after the date of enactment is also troublesome. This subsection does not provide an exception for delays caused by NJDEP review, which can be considerable.

• The Chamber also believes that **section 27** is confusing and deserves another look. Does **section 27** mean that regardless of how long a remediation has been in progress before the date of enactment, there will be an additional five years to complete the remediation after enactment? What if the bill is enacted tomorrow and then a discharge is discovered? Is it then ten years from discovery or five years from enactment? We respectfully ask that the sponsors revisit the language used in this section.

• **Section 27** also continues to require a feasibility study, allows NJDEP to select the remedy, and requires the establishment of a remediation trust fund for any site subject to direct oversight. The Chamber believes these are still troublesome provisions in the legislation. While there may be justification for letting NJDEP select the remedy in some circumstances under direct oversight, the Chamber feels this should not be in every case. Also, if there is going to be a remediation funding source required it should not be limited to the trust fund mechanism. Other options, including self guarantee, should be allowed, and the cost should be limited to the cost of the remedial action alone, not the "remediation," which includes investigatory costs.

• **Section 28** - The bill would require NJDEP to set mandatory time frames for each phase of a remediation. It is unclear why this requirement is necessary. NJDEP already specifies how long a party has to complete its work in responding to NJDEP comment letters and NJDEP already requires the inclusion of schedules in all submittals. If this is requirement is kept in the bill, a requirement for NJDEP to respond to submittals in a mandatory time frame should also be included. In addition, the condition that requires that a party seeking an extension on account of a property access delay must have filed a court action for access before the extension will be granted should be eliminated – why should a party that has a reasonable prospect of entering into an access agreement with a neighbor be forced to go to court?
• **Section 41** - This section has been revised to eliminate the proposed expanded coverage of remediation funding sources, which the Chamber supports. However, the Chamber would like to the remediation funding source requirement be broadened to include small businesses remediating their own business property.

• **Section 45** - The Chamber appreciates that the changes to this section, which deal with presumptive and alternative remedies, are now more flexible and workable. However, would ask the sponsors to consider allowing a LSRP to select and "approve" an alternative remedy without the need for separate NJDEP approval.

• **Section 48** - The bill once again changes the statute of limitations for filing natural resource damages claims. There is no justification for doing this again and it should not be included in a bill primarily directed at establishing an LSP program.

The Chamber appreciates the opportunity to comment on **S-1897 (Smith) / A-2962 (McKeon)**.
TO: MEMBERS OF THE SENATE ENVIRONMENT COMMITTEE & ASSEMBLY ENVIRONMENT & SOLID WASTE COMMITTEE

FROM: STEPHEN A. PATRON, PRESIDENT

DATE: FEBRUARY 26, 2009

RE: Site Remediation Reform Act
Establishes Licensed Site Remediation Professionals Program
S1897 (Smith, B.) / A2962 (McKeon/ Cryan)

The New Jersey Builders Association appreciates the extensive efforts of the sponsors, the Department of Environmental Protection (Department) and legislative staff in meeting with stakeholders and in responding to our concerns while developing the bill.

From the initial stakeholder discussions, NJBA has strongly supported the establishment of a Licensed Site Remediation Professional (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 which will revitalize local economies. We remain supportive of the LSRP concept and believe that it is a necessary initiative to tackle the extensive backlog of contaminated sites.

While significant improvements have been made from the originally proposed bill, there are some additional areas where the bill should be strengthened to achieve its environmental objective of cleaning up sites. NJBA is concerned that the unintended consequence of many of the program changes will be that residential development, particularly needed low and moderate income housing, will not be able to absorb the resultant increased costs and therefore simply will not be built.

NJBA remains supportive of providing the Department with robust auditing authority within specific bounds. However, the bill as currently drafted also allows for the Department to review documents submitted by the LSRP and to assess how the remediation is performed rather than to focus on whether the ultimate remedy is protective. The prospect of constant oversight through these reviews will inhibit remediation and redevelopment projects that produce residential housing from moving forward. Although the LSRP is to “continue to conduct the remediation” while additional review is being conducted, the prospect of remediation efforts being halted and in fact redirected down the road will only dissuade the financial investments needed to fund the remediation itself.

NJBA reiterates the need for a clear depiction of the process and the Department’s responsibilities. Procedural safeguards are needed to focus any “additional reviews” must be included to provide predictability and finality to the remediation and
redevelopment process. The bill should include that DEP must establish checklists that identify the particular circumstances that would cause the Department to alter the manner by which the LSRP is conducting a remediation and the timeframes for the DEP to inspect and inform the LSRP of any potential problems with the submissions.

**Presumptive Remedies**
Similarly, the bill mandates use of unrestricted use remedial action or presumptive remedies where new residential construction will be developed or where the site’s use changes to residential use.

The Department should ensure that the required level of remediation is not cost-prohibitive and impractical that the consequence would be that low and moderate affordable housing is not built. Presumptive remedies should be economically feasible and doable, and 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".

**Response Action Outcome and “Covenant Not to Sue”**
The NJBA remains steadfast in recommending that the “No Further Action” term be used for the final determination issued by the LSRP rather than the proposed “Response Action Outcome” (RAO). The basis for this position is that it would take the public, and in particular the financial community who are necessary partners in brownfields’ redevelopment projects, years to understand and accept the legal significance of the RAO, as it had taken for the NFA.

However, if the use of the RAO is to move forward, then the State must proactively educate the public that the RAO determination is in effect the same as a NFA and has the same bearing on remediation projects in terms of legal liability. It is not enough that this very detailed bill now includes language to this point.

The current bill also includes language that a person responsible for conducting a remediation is deemed to have received in turn a Covenant Not to Sue (CNS) letter by the issuance of a RAO. The NJBA appreciates the Committees’ responsiveness in recognizing the significant incentive that the CNS letter bears on “innocent purchasers” in voluntarily up taking remediation efforts.

The NJBA strongly encourages the Senate and Assembly Committees to issue a joint statement recognizing the equivalency of the RAO and CNS:

"Under the bill, the liability protections currently provided under law to recipients of No Further Action (NFA) determinations will also apply to parties issued a Response Action Outcome (RAO) by an LSRP including a Covenant Not to Sue."

Similarly, the Department should issue guidance to the redevelopment community on the practical applicability of the RAO.

**Next steps**
As you work through the implementation of the new LSRP program, NJBA encourages you to commit to restoring prior mechanisms and incentives and instituting new incentives that will ensure that the sites that are ultimately cleaned up will be redeveloped to provide affordable housing.
Submitted by David Brogan, Vice President, Environmental Policy and Small Business Issues, New Jersey Business and Industry Association: 
David Brogan, “New Jersey needs licensed site professionals to clean up land,” APP.com, February 24, 2009.

Submitted by Michael Egenton, Vice President, Environment and Transportation, New Jersey Chamber of Commerce: 

Submitted by Roy L. Jones, Co-Chair and Coordinator, South Jersey Environmental Coalition: 
Alex Nussmaum, “Are ‘capped’ trash sites safe?” Bergen Record, April 1, 2007.


