

March 15, 2006

Linda R. Greenstein, Assemblywoman, 14th District
7 Centre Drive
Suite 2
Monroe Township, NJ 08831

Re: legislative reforms of NJDEP site remediation program

Dear Assemblywoman Greenstein:

Per your request last evening, below is an outline of legislative reforms to prevent recurrence of the recent problems in NJDEP oversight of the cleanup of toxic waste sites. I also excerpt some of the most significant statutory flaws, and suggest issues where legislative oversight could improve DEP regulations.

Unfortunately, these are not isolated incidents, but are occurring more frequently on a statewide wide basis at hundreds of sites, especially as redevelopment accelerates. These problems force the Legislature to reconsider the premises and policies that have resulted in serious unintended consequences. One source of the problem is significant changes in law that were enacted in the 1990's to promote the redevelopment of "brownfields", streamline and privatize cleanup decision-making, and reduce the costs of cleanup.

I reviewed the package of reform bills you have co-sponsored with Assemblyman McKeon that were recently released from Committee. While they are important first steps, they do not address the underlying policy and legal flaws that have led to the implementation problems. Similarly, DEP's upcoming "public participation" rule proposal can not resolve the underlying problems which are statutory. It is important that these proposed legislative and regulatory reforms be revised to incorporate the concerns I discuss briefly below. I would be glad to meet with you and staff from Office of Legislative Services and NJDEP to discuss this in more detail and help draft the necessary legislative language.

One statutory source of flaws and loopholes is the Brownfield and Contaminated Site Remediation Act ("Act"), which severely limits NJDEP oversight powers. The Act vests remedy selection solely with the responsible party (polluter) or developer. Other changes in law, commonly known as "S1070", were enacted in 1993 to "streamline" DEP oversight and reduce cleanup costs. As a result of the Act and S1070:

- DEP lacks authority to compel a responsible party to implement a permanent remedy. The law literally forces DEP to approve incomplete “cap and cover” remedies. **The solution is to amend remedial laws to restore DEP’s authority to compel a permanent remedy. Assistant Commissioner Seebode recognized the need for such revisions last nite. Former Commissioner Campbell, concerned by inadequate capping of sites, made a commitment to work with Assemblyman Manzo on permanent remedy legislation due to serious problems at Jersey City chromium contamination sites (see attached 12/2/05 letter to Mayor Healy).**
- The selection of remedy is vested solely with polluter. **The solution is to amend remedial laws to vest remedy selection solely with DEP, based on public hearing comments.**
- Changes in law eliminated the “Feasibility Study”. A Feasibility Study identifies and evaluates cleanup alternatives and subjects these alternatives to public review. Under current law, DEP lacks power to compel a polluter to conduct a "feasibility study", which is a fundamental component of the cleanup process and is mandated by the federal Superfund program (40 CFR Part 300 – National Contingency Plan).. **The solution is to amend remedial laws to reinstate and mandate the Feasibility Study. A Feasibility Study includes public participation requirements - public notice to local government and the community and a public hearing on remedial alternatives BEFORE they are selected by DEP.**
- DEP can compel additional cleanup **ONLY IF** and **AFTER** the Department can prove that cap/institutional controls have failed, placing an inappropriate burden on DEP and jeopardizing public health.
- Changes in law effectively eliminated the prior preference for permanent remedies in remedial action selection and established new “cost tests” which elevate economic concerns and undermine protection of public health and the environment. **The solution is to restore the preference for permanent remedies and eliminate the cost tests.**
- Soil cleanups have been deregulated, and may be conducted “at risk” without prior DEP approval. **The solution is to eliminate at risk soil cleanups and mandate DEP oversight.**
- DEP lacks the resources and regulatory authority to field monitor compliance at the site with approved remedial action workplans to assure remediation is conducted safely and in accordance with approved workplans.
- DEP lacks the ability to field monitor compliance with private certifications that incomplete “cap” cleanups are working as designed and are protective of

the environment. Long run O&M and compliance monitoring at such “capped” sites will need to be done virtually in perpetuity.

- DEP lacks the ability to monitor compliance with “institutional controls”, such as deed restrictions. This virtually assures that “caps” will be breached in the future.
- DEP lacks authority to consider health risks of cumulative exposures to multiple pollutants or multiple sites;
- DEP currently lacks legal power to enforce cleanup standards for ecological impacts;
- Court decisions and changes in law have replaced DEP oversight with certifications by private consultants who work for responsible parties. Previously, cleanup consultants worked for DEP, and their work was paid for by the responsible party. This prevented abuses and leveraged DEP oversight resources. The legislature and the Department need to consider more effective mechanism to get control of the consultants. Auditing and higher penalties for false certifications is not sufficient.
- DEP has relaxed regulations on beneficial reuse, recycling, transportation and overall management and disposal of contaminated soils and construction and demolition waste, as well as the solid waste industry. While these policies were designed to promote recycling and preserve scarce landfill disposal capacity, they have gone to far in sacrificing needed protections and DEP oversight. At a minimum, highly contaminated materials generated as a result of site remediation should be subject to “cradle-to-grave” management along the lines of federal RCRA Subtitle C requirements.

Below I excerpt some of the flawed legislative provisions:

- The Act at NJSA 58:1 OB-12g(1) states:

*"Unrestricted use remedial actions, limited restricted use remedial actions and restricted use remedial actions shall be allowed except that unrestricted use remedial actions and limited restricted use remedial actions shall be preferred over restricted use remedial actions. The department, however, **may not disapprove the use of a restricted use remedial action** or a limited restricted use remedial action so long as the selected remedial action meets the health risk standard established in subsection d. of this section, and where, as applicable, is protective of the environment. **The choice of the remedial action to be implemented shall be made by the person performing the remediation** in accordance with regulations adopted by the department and that choice of the remedial action shall be approved by the department if all the criteria for remedial action selection enumerated in this section, as applicable, are met. **The department may not require a***

person to compare or investigate any alternative remedial action as part of its review of the selected remedial action."

- The Act at NJSA 58:1 OB-12g(2) states

*"Contamination may, upon the department's approval, be left onsite at levels or concentrations that exceed the minimum soil remediation standards for residential use if the **implementation of institutional or engineering controls** at that site will result in the protection of public health, safety and the environment at the health risk standard established in subsection d. of this section and if the requirements established in subsections a., b., c. and d. of section 36 of P.L.1993, c.139 (C.58:10B-13) are met. "*

The Act at NJSA 58:1 OB-13f states:

*"Whenever the department approves or has approved the use of engineering controls for the remediation of soil, groundwater, or surface water, to protect public health, safety or the environment, **the department may require additional remediation of that site only if the engineering controls no longer are protective of public health, safety, or the environment.**"*

I appreciate your leadership on this issue and favorable consideration of the above recommendations.

Sincerely,

Bill Wolfe, Director
NJ PEER