

## Flaws in cleanup laws

### 1. Selection of remedy [cap] vested solely in polluter - DEP required to approve

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."

### 2. High levels of contamination allowed to be left on site

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. "

### 3. DEP prohibited from requiring complete cleanup unless DEP can prove cap has failed

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.**"

4. feasibility study was eliminated by definition- no federal consistency

"24. a. The department shall, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), adopt rules and regulations establishing criteria and minimum standards necessary for the submission, evaluation and approval of plans or results of preliminary assessments, site investigations, remedial investigations, and remedial action workplans and for the implementation thereof. The documents for the preliminary assessment, site investigation, **remedial investigation, and remedial action workplan** required to be submitted for a remediation, **shall not be identical to the criteria and standards used for similar documents submitted pursuant to federal law**, except as may be required by federal law. In establishing criteria and minimum standards for these terms the department shall strive to be result oriented, provide for flexibility, and to avoid duplicate or unnecessarily costly or time consuming conditions or standards.

5. Burden placed on DEP to inspect caps at 5 year frequency - instead of on polluters/annually - NJSA 58:10B-13 g.

"g. Whenever the department approves or has approved the use of engineering or institutional controls for the remediation of soil, groundwater, or surface water, to protect public health, safety or the environment, **the department shall inspect that site at least once every five years in order to ensure that the engineering and institutional controls are being properly maintained and that the controls remain protective of public health and safety and of the environment.**

6. DEP prohibited from establishing environmental or ecological based standards until the Environmental Advisory Task Force makes recommendations. I don't know that this Task Force was ever established.

NJSA 58:13B-12 a.

**"The department shall not propose or adopt remediation standards protective of the environment** pursuant to this section, except standards for groundwater or surface water, until recommendations are made by the Environment Advisory Task Force created pursuant to section 37 of P.L.1993, c.139. Until the Environment Advisory Task Force issues its recommendations and the department adopts remediation standards protective of the environment as required by this section, the department shall continue to determine the need for and the application of remediation standards protective of the environment on a case-by-case basis in accordance with the guidance and regulations of the United States Environmental Protection Agency pursuant to the "Comprehensive

Environmental Response, Compensation and Liability Act of 1980," 42 U.S.C. s.9601 et seq. and other statutory authorities as applicable"

7. - DEP prohibited from considering multiple pollutants or synergistic or cumulative effects:

NJSA 58:10B-12 d.(2)

"The health risk standards established in this subsection are for any particular contaminant and **not for the cumulative effects of more than one contaminant at a site.**"

8. Soil cleanups privatized with no DEP oversight

"c.To the extent practicable and in conformance with the standards for remediations as provided in section 35 of P.L.1993, c.139 (C.58:10-12), the department shall adopt rules and regulations that allow for certain remedial actions to be undertaken in a manner prescribed by the department **without having to obtain prior approval from or submit detailed documentation to the department.** A person who performs a remedial action in the manner prescribed in the rules and regulations of the department, and who certifies this fact to the department, shall obtain a no further action letter from the department for that particular remedial action.

9. riances allowed to avoid strict compliance with standards

"b.The regulations adopted by the department pursuant to subsection a. of this section shall provide that **a person performing a remediation may deviate from the strict adherence to the regulations, in a variance procedure or by another method prescribed by the department,** if that person can demonstrate that the deviation and the resulting remediation would be as protective of human health, safety, and the environment, as appropriate, as the department's regulations and that the health risk standards established in subsection d. of section 35 of P.L.1993, c.139 (C.58:10B-12) and any applicable environmental standards would be met. Factors to be considered in determining if the deviation should be allowed are whether the alternative method:

10. DEP encouraged to weaken groundwater standards based on use

"2) The department may develop differential remediation standards for surface water or groundwater **that take into account the current, planned, or potential use of that water** in accordance with the "Clean Water Act" (33 U.S.C. s.1251 et seq.) and the "Water Pollution Control Act," P.L.1977, c.74 (C.58:10A-1 et seq.).

11. Polluters given option to evade protective standards by use of site specific alternate remedial standards

f. (1) A person performing a remediation of contaminated real property, in lieu of using the established minimum soil remediation standard for either residential use or nonresidential use adopted by the department pursuant to subsection c. of this section, may submit to the department a request to use an alternative residential use or nonresidential use soil remediation standard. The use of an alternative soil remediation standard shall be based upon site specific factors which may include (1) physical site characteristics which may vary from those used by the department in the development of the soil remediation standards adopted pursuant to this section; or (2) a site specific risk assessment. If a person performing a remediation requests to use an alternative soil remediation standard based upon a site specific risk assessment, that person shall demonstrate to the department that the requested deviation from the risk assessment protocol used by the department in the development of soil remediation standards pursuant to this section is consistent with the guidance and regulations for exposure assessment developed by the United States Environmental Protection Agency pursuant to the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 42 U.S.C.s.9601 et seq. and other statutory authorities as applicable. A site specific risk assessment may consider exposure scenarios and assumptions that take into account the form of the contaminant present, natural biodegradation, fate and transport of the contaminant, available toxicological data that are based upon generally accepted and peer reviewed scientific evidence or methodologies , and physical characteristics of the site, including, but not limited to, climatic conditions and topographic conditions. Nothing in this subsection shall be construed to authorize the use of an alternative soil remediation standard in those instances where an engineering control is the appropriate remedial action, as determined by the department, to prevent exposure to contamination.

12. DEP may not require additional cleanup when there is change in standards needed to protect public health or environment if site is capped

NJSA 58:10B-13 e.

The department may compel a person who is liable for the additional remediation costs to perform additional remediation activities to meet the new remediation standard except that **a person may not be compelled to perform any additional remediation activities on the site if that person can demonstrate that the existing engineering or institutional controls on the site prevent exposure to the contamination and that the site**

**remains protective of public health, safety and the environment  
pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12).**