

Needed Amendments to State Toxic Clean-Up Laws
October 23, 2006
Public Employees for Environmental Responsibility (PEER)

The following statutory changes are designed to –

1. Restore the feasibility study and alternatives analysis to the cleanup process
2. Restore DEP's power to select the remedy, based on public comments
3. Mandate a public hearing on the feasibility study to allow meaningful public participation

*NJSA 58:1 OB-12g(1) is amended to read (new language is ***bold underline***, deletions are *[in brackets]*):

"Unrestricted use remedial actions, limited restricted use remedial actions and restricted use remedial actions shall be allowed except that unrestricted use **permanent** remedial actions **shall be required for any day care center, school, or residential land use or development** and [limited restricted] **unrestricted use** remedial actions shall be preferred over restricted use remedial actions. **Except for day care center, school, or residential land use or development,** 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 **Department** [person performing the remediation] in accordance with regulations adopted by the department and that choice of the remedial action shall be **based upon** [approved by the department if] all the criteria for remedial action selection enumerated in this section, as applicable [, are met]. The department **shall** [may not] require a person to compare or investigate [any] alternative remedial action as part of its review of the selected remedial action. **The Department shall conduct a public hearing and consider and respond to public comments on alternative remedial actions prior to selecting the appropriate and protective remedial alternative.**"

"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, **feasibility studies, alternatives analyses, public participation procedures,** and remedial action selection [workplans] and for the implementation thereof. The documents for the preliminary assessment, site investigation, remedial investigation, **feasibility study, alternatives analyses public participation procedures,** and remedial action **selection** [workplan] required to be submitted for a remediation, shall [not] be **more protective or at provide at least equivalent protective** as [identical to] the criteria and standards used for similar documents submitted pursuant to federal law **pursuant to the "National Contingency Plan adopted pursuant to the Comprehensive Environmental Response,**

Compensation and Liability Act of 1980," 42 U.S.C. s.9601 et seq, 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.]

4. Prohibit high levels of contamination to be left on sites used for or converted to r day care centers, schools, or residential development

*NJSA 58:1 OB-12g(2)

"Contamination may, upon the department's approval, be left onsite at levels or concentrations that exceed the minimum soil remediation standards for [residential] **industrial** 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.

5. Establish eligibility criteria and performance standards to strengthen and avoid abuse of the voluntary cleanup program

New Law (concept only)

“Participants in the “Voluntary Cleanup Program” shall demonstrate the technical resources and financial ability to comply with and implement the terms of the Voluntary Memorandum of Agreement (MOA) in a timely fashion. The Department shall revoke a voluntary MOA and issue enforcement penalties upon failure to timely comply with the cleanup schedule and/or adequately perform milestones in the MOA. The Department shall not enter into a Voluntary cleanup agreement at any site that is ranked a moderate or greater risk pursuant to the Hazardous Site Risk Ranking and Priority criteria mandated pursuant to (section X – NJSA 58:10-23.16).

The Department shall propose and adopt regulations to define eligibility criteria, performance standards, and enforcement penalties for the Voluntary Cleanup Program within 180 days.”

6. Restore remedial Priority Risk Ranking

Amend N.J.S.A. 58:10-23.16) which required the Department to “*prepare and adopt a master list for the cleanup of hazardous discharge sites. ... the master list shall comprise an inventory of all the known hazardous discharge sites... identified as in need of cleanup, or which will be cleaned...and a ranking, based on criteria established by the department, of the sites in the order in which the department intends to clean up the sites.*”

The Department shall propose and adopt regulations and a master list mandated by this subsection within 180 days.

7. Public notifications and prohibitions to protect public health

New law (concepts only)

“The Department shall provide written notice to all property owners located within 400 feet of a known contaminated site. Notification shall provide information regarding (i) the presence of contamination at the site, (ii) off-site migration potential, (iii) exposure and vapor intrusion potential, (iv) health effects information on those contaminants, and (v) the status of the cleanup of the site.

The Department shall provide written notice to all facilities that rely on on-site wells for drinking water supply that are located within 400 feet of a known contaminated groundwater site or a “Classification Exception Area” (CEA). The notification shall describe (i) the presence and extent of the groundwater contamination, (ii) pollutant migration and exposure potential, (iii) health effects and risks of groundwater pollutants, and (iv) provide information regarding alternative water supply options or on-site point of use treatment systems.

The Department shall not issue a well drilling permit or water allocation permit to any new well or proposed new groundwater withdrawal located in or within 400 feet of known groundwater contamination or a Classification Exception Area (CEA).”

8. Strengthen Enforcement - Rescind the site remediation program aspects of the “Grace Period” law – DEP adopted regulations on September 18, 2006 - see http://www.nj.gov/dep/rules/adoptions/2006_0815grace.pdf

*NJSA 13:1D-125 is amended as follows:

The subchapter shall not apply to the Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C (Oversight Rules) to set forth penalties for violations of the Underground Storage Tank Rules, N.J.A.C. 7:14B (UST Rules), the Industrial Site Recovery Act Rules, N.J.A.C. 7:26B (ISRA Rules), the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules.), N.J.A.C. 7:26E, for the purpose of providing grace periods.”

9. Enforcement – restore stipulated penalties to the DEP oversight documents

The Department shall adopt regulations that incorporate stipulated penalties for failure to comply with terms and conditions of oversight documents entered into pursuant to Oversight of the Remediation of Contaminated Sites Rules, N.J.A.C. 7:26C (Oversight Rules) regarding penalties for violations of the Underground Storage Tank Rules, N.J.A.C. 7:14B (UST Rules), the Industrial Site Recovery Act

Rules, N.J.A.C. 7:26B (ISRA Rules), the Oversight Rules, N.J.A.C. 7:26C, and the Technical Requirements for Site Remediation Rules (Technical Rules.), N.J.A.C. 7:26E

10. Relax the burden on DEP to require additional cleanup when DEP suspects a cap has failed or may fail

*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 **upon a reasonable basis that the engineering controls may no longer be** protective of public health, safety, or the environment."

11. Under current law, DEP is prohibited from establishing environmental or ecological based standards until the Environmental Advisory Task Force makes recommendations. This Task Force was ever established.

*NJSA 58:13B-12 a.

"The department shall [not] propose [or] **and** adopt remediation standards protective of the environment **and ecological and natural resources within one year of the effective date of ()** [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"]

12. Under current law, DEP is prohibited from considering current science on multiple pollutants or synergistic or cumulative effects:

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

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

13. Under current law, site specific variances allowed to avoid strict compliance with standards

Delete this subsection

“[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]:

13. Under current law, polluters are given option to evade protective standards by use of site specific alternate remedial standards

Delete this subsection

[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.]

14. Under current law, DEP may not require additional cleanup when there is change in standards needed to protect public health or environment if site is capped

Delete 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).]

15. On scene presence, enact a new law, to read:

“The Department shall monitor activities conducted on site during the active phases of site investigation (sampling episodes) and remedial action (soil excavation, construction, or demolition).”