

Suggested Improvements to Pending Toxic Clean-up Legislation (S2261)

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Public Employees for Environmental Responsibility (PEER)

1. Section 1 – mandates adoption of regulations governing procedures and standards to establish indoor “maximum contaminant levels” (MCLs)– The nine month timeframe is aggressive - however, there needs to be additional legislative guidance on—
 - a) How to set these levels (e.g. on a health basis: 1 in a million cancer risk level; non-cancer risk levels; and children’s health protection);
 - b) Who should set them (e.g. DHSS or DEP);
 - c) Cases where:
 - i) DEP regulated “vapor intrusion” issues from contamination on-site may impact current or future indoor air exposures; or
 - ii) Where DEP regulates indoor air under other statutory authority, such as radon or ISRA industrial building cleanups; or
 - iii) Where DEP soil or air risk assessments look at indoor soil/dust and air exposures.
 - d) What are the consequences of exceeding the MCL (*i.e.*, who has to do what); and
 - e) How these standards impact existing versus new facilities.

2. Section 1 & 2 include day care centers, residential and educational purposes as land uses that need special attention with respect to contamination and site cleanup – but implementation is linked to a requirement “to establish that the site has been remediated consistent with the remediation standards and other remediation requirements established pursuant to section 35 of P.L.1993, c.139 (C.58:10B-12) and a no further action letter has been issued by the Department of Environmental Protection for the entire site.” Unfortunately, there are problems with implementation of DEP remediation standards and issuance of the “No Further Action” letter (NFA).

The bill should instead prohibit these land uses unless the entire site has undergone a “permanent remedy” via full excavation of all soil that exceeds new children’s health based clean-up standards (with no soil blending and no caps, backed by deed restrictions), including groundwater clean-up (with no natural attenuation or passive remedy allowed). In addition, the bill should provide for assessment of all natural resource damages or full restoration or compensation for those damages.

3. The bill seeks better coordination between local land use construction permits, DEP site remediation, and day care and school licensing approvals. It is unclear how the bill will accomplish this goal.

4. The bill seeks to strengthen enforcement but –
 - a) Why is Section 3 limited in scope to ISRA? It should include all the remedial laws DEP operates under, including the Spill Compensation and Control Act and the Brownfields and Site Remediation Act;
 - b) Instead of increasing enforcement sanctions for consultants' providing false information, another approach may be superior, such as direct DEP control of cleanup consultants, or a cleanup consultant pool managed by DEP comprised of DEP licensed cleanup professionals; and
 - c) There needs to be some legislative oversight attention directed to the "voluntary cleanup program" and the "enforcement grace period" program. These are major sources of the enforcement problems which cause problems down the road at the local level when these sites are developed.
5. The bill seeks to improve local government and community notice. However, provision of notice without an ability to seek a remedy is flawed. The bill does not provide a remedy – what good is notice without a remedy? Local governments and the public should be provided an opportunity to influence the cleanup plan. The way to do this legislatively is to restore DEP power to require a feasibility study (with alternatives analysis); restore DEP authority to require that a public hearing be held on the feasibility study; and restore DEP powers to select the remedy (instead of remedy selection being vested solely with Responsible Party or developer who have a stake in cost minimization not public health protection).