

**Joint Hearing of Senate Environment and  
Assembly Environment and Solid Waste Committees**

**Commissioner Lisa P. Jackson  
Assistant Commissioner Irene S. Kropp**

**April 15, 2008**

Good morning Chairman Smith and Chairman McKeon and members of the Senate and Assembly Environment committees. I would like to thank you for the opportunity to appear before you today and discuss what I consider a major priority for the State of New Jersey -- reform of the Site Remediation Program.

In October 2006, I testified before the Senate Environment Committee that, although New Jersey has one of the premier site remediation programs in the nation, Assistant Commissioner Kropp and I identified where improvements could be made. At that time I highlighted the fact that there were in excess of 16,000 contaminated sites that required our attention. Today, we have reached a milestone. There are more than 20,000 cases currently in the queue at DEP -- far too many cases for the program to address in any reasonable timeframe. And under the program's current structure, sites will remain unremediated for perhaps years to come.

The obvious problem with this is that it equates to contamination remaining unaddressed, potentially spreading and potentially impacting the health of our residents. Many of these sites are in urban communities where residents are already struggling with a multitude of other quality of life challenges. Another drawback to these sites remaining unremediated is that properties that could be developed and placed back on the tax rolls or converted to open spaces, remain blighted, unused lots, compromising the economic vitality of our state. Accepting the status quo is unacceptable. It is critical to the health of our citizenry and environment, as well as to the health of our economy, to remediate contaminated sites in New Jersey as quickly as possible while maintaining the strict clean up standards we have always applied.

Subsequent to my October 2006 testimony, the Department decided that key to the development of meaningful legislative reform was receiving input from our stakeholders. We convened a series of stakeholder sessions and posted 11 white papers in August 2007 outlining what we believe to be the major issues. After receiving meaningful input from stakeholders on the white papers, we expanded and refined those papers and re-posted them as “final” last week. This process provided the Department with additional insights that have shaped our recommendations for reform, which we are discussing today. Due to stakeholder input and our analysis of the program, the reforms outlined today while reflecting the overall concepts discussed in my recommendations of 2006, offer a slightly different approach.

Let me now ask Assistant Commissioner Kropp to present our recommendations for major legislative reforms, which are presented in order of priority, and the reasons they are needed.

1. Licensing Environmental Consultants. As the Commissioner noted earlier, we now have more than 20,000 active cases in the Department. As you can see from this chart, the number of new cases coming into Site Remediation has dramatically increased over the past few years without a commensurate change in program resources. While the number of cases closed has also increased and is reflective of the dedication of our staff, we are not able to keep up with an ever-increasing work. As a result the gap between new and closed cases continues to grow. The majority of the new cases we receive are transactional cases. Cases that are in need of a No Further Action letter (or NFA) or Remedial Action Work Plan (RAWP) approval from the Department because of financial reasons and not necessarily because they are highly contaminated sites threatening human health or the environment. Examples of these cases include: homeowners in need of a mortgage, developers in need of Department approvals as a requirement of their financial institution or insurance company, or industrial sites selling their properties or ceasing operations. It is important to note, not all of these cases are in the Site Remediation program because current legislation

requires us to regulate them. The transactional deadlines associated with these cases often dictate our priorities and where we focus our limited resources. We are often asked to expedite these sites for economic reason by mayors, developers, community leaders, legislators, and others – for good cause because they are the key to economic revitalization. But we cannot prioritize every redevelopment site in this way, especially with budget constraints and strained resources. So, two problems result from our large caseloads, we cannot focus on the most important environmental sites, and redevelopment projects that would have positive economic impacts are seriously delayed.

We are recommending a 2-pronged approach that will fix this problem over time. The first, which we are already implementing, is an examination of the Site Remediation program's business practices. We are currently implementing policy changes to streamline our review of cases and expedite cleanups while maintaining our strict environmental standards. To date our focus has been on smaller, lower risk cases. The second is to license environmental consultants in the State in New Jersey who perform site investigations and conduct remedial actions in order hold them more accountable for the quality of the work products they produce. These two actions, together, will reduce the number of backlogged cases we have in house. They will offer a more streamlined process for the majority of new cases, provide us with the ability to take enforcement action against consultants who do not comply with our regulations and ensure that cases do not linger unattended for years.

Under this plan, cases will be addressed more rapidly and properties will be developed to desired uses. We will be cleaning up sites and stimulating economic vitality. We will not compromise on our standards or protection of the environment and public health. Nor will we delegate the inherently governmental functions of site remediation to private entities. The Department will maintain the functions associated with the issuance all NFA's, review all cases with receptor and off-site contaminant migration impacts, audit cases based on potential risks and expand our oversight for the "worse" cases and for those with recalcitrant responsible parties.

We recommend that legislative reforms authorize us to: 1. impose strict requirements on licensed consultants, 2. develop a tiered approach for the review of cases where lower risk cases receive a lesser degree of oversight, 3. adopt a new enforcement program that will enable us to revoke or suspend the license of any consultant that does not adhere to a strict code of ethics, and, 3. issue penalties to consultants who do not perform in accordance with our regulations. Our goal is to loosen the reins between consultants and those who pay them and for the first time hold individuals truly accountable for the quality of the remediations they conduct.

One last comment on this subject. Originally we considered adopting the Massachusetts Licensed Site Professional (LSP) program. That is not where we ended up. Although, we have chosen not to adopt that program as is, it is an extremely effective program. Today, you will most likely hear concerns about the Massachusetts program. Let me take one minute to provide you with statistics from the Assistant Commissioner of the Massachusetts DEP. Since its inception in 1993, greater than 30,000 cases have moved through the Massachusetts LSP program. The Massachusetts DEP closes approximately 2000 – 2500 cases each year and the average time to close a case is one year. Prior to enacting the LSP program, the Massachusetts DEP closed out between 100-200 cases each year. Last year, they performed screening audits on approximately 2600 case – that is essentially everything that came into the program. They performed field audits on 325 cases and comprehensive audits on 160 cases; these audits were conducted based on concerns noted during the earlier screenings. Additional site samples and documentation are occasionally required as a part of the comprehensive audit process. That happened last year for about 60% of the cases that receive the comprehensive audits; this equates to less than 5% of the overall cases processed. And more importantly only 10 final decisions rendered by LSP's were revoked through this audit process. So less than 1% of the cases that are closed were reopened because of environmental concerns.

2. Remedy Selection. When the Industrial Site Recovery Act was amended previously, parties successfully argued that the Department's requirement to evaluate different alternatives slowed the remedial process. As a result, the Department's role in the remedy selection process was reduced for all site cleanups to the point where we could overrule a remedy only if we could "prove" that a remedy was unprotective. While some will argue that the statutory change resulted in more cases actually getting cleaned up, many cases still languish in the system for greater than 10 years. As you can see on this chart, over 4000 sites currently in the system have been there for greater than 10 years. Many of these are the larger, more complex industrial sites. We believe the extended timeframes between site identification and final cleanup are more directly related to a repetitive back and forth between consultants and staff, recalcitrant behavior on the part of some responsible parties and the prescriptive nature of our current business processes; not remedy selection. We are recommending changes to all of the problems, I noted. But as a priority, the selection of remedies for certain categories of cases needs to be placed back into the hands of the Department. Specifically, we believe the Department should have the ability to select remedies for residential end uses, especially single-family homes on contaminated sites and residential developments on landfills. Additionally, remedy selection for educational and childcare facilities should be subject to greater Department input. It is critical to ensure these facilities are properly located. Local governments officials and school boards are key to making these informed decisions. But by the time some of these cases come into the Site Remediation Program, key financial decisions have already been made and it is next to impossible to reverse the course of action. Another situation that would warrant expanded Department involvement would include a case where a responsible party is recalcitrant or proposing a remedial solution that prolongs a cleanup. The Department should have the authority to say when a timeframe associated with a proposed cleanup is unduly protracted. Lastly, we believe that, if a proposed remedy would leave an otherwise valuable piece of property "unusable" for eternity, and a municipality has no choice but to leave that property off its tax rolls, the Department, in consultation with the municipality, should be able to overrule the remedy.

3. Permanent Remedies. You will undoubtedly hear today that the Department should only approve “permanent” remedies for many cleanups; including those that involve residential properties, educational and childcare facilities or those in overburdened communities. Although we agree that, in these cases, the Department should play a greater role to ensure that remedies are protective – not just on the day we approve them but over time – we do not agree that “permanent” remedies – those that meet our strictest cleanup standards - are feasible in all these situations. As an alternative, we are recommending the following solutions to address these concerns. 1. Establish “enhanced protection” remedies for certain sensitive uses, such as new schools and childcare facilities, 2. Provide financial incentives for permanent remedies, (I will discuss this further shortly), 3. Strengthen the effectiveness of institutional and engineering controls by establishing a new permit program and incorporating their existence into the “One Call” system, and, 4. Establish mandatory timeframes for completion of remedial investigations and remedial actions.
  
4. Finality and Protection Against Remedy Failure. One issue raised by the business community during the stakeholder sessions was their desire for the Department to provide for “finality” as part of the cleanup process. We believe the ability to do this exists through the use of the previously established, but never used, Remediation Guarantee Fund coupled with the expansion of our existing financial assurance requirements. The Remediation Guarantee Fund was set up to provide funding for the Department to use to remediate properties when a person, who was required to set up a remediation funding source, failed to conduct that remediation. Even though we already possess the ability to access a remediation funding source for the same purpose. The fund was seeded with \$5M that still exists and it was suppose to grow through cost recovery and investment of the original \$5M. Under current law, there is a 1% annual surcharge on certain financial assurance, which equates to approximately \$2.0 M annually, that is deposited into the HDSRF fund. We are recommending a legislative amendment to take this 1% annual surcharge and divert it to the Remediation Guarantee fund. We would also expand the surcharge requirement to all

financial assurance mechanisms; it currently does not apply to self-guarantees, which is the mechanism of choice for most of the larger corporate responsible parties. This action coupled with a limit or elimination of the use of self-guarantees would generate approximately \$14M annually, which could be deposited into the Remediation Guarantee Fund. The fund could then be used by anyone who implements a permanent remedy to cover: 1. Order of magnitude changes in our soil standards or, 2. Subsequent changes in use of the property. This would provide incentives for permanent remedies that do not exist today.

The fund could also be used to provide grants to innocent third parties who purchased a site with an NFA to cover costs associated with: 1. Remedy failure, or 2. Order of magnitude changes in our soil standards. This would provide new protections to homeowner associations and others who end up responsible for institutional or engineering controls when an LLC dissolves, a company goes bankrupt or for some other reason there is no longer a viable entity to finance additional remediation.

5. Incentivizing Brownfields Redevelopment. As clearly noted in Governor Corzine's Economic Growth Strategy, the redevelopment of contaminated sites is critical to economic revitalization of New Jersey. We strongly believe that the public-private partnership associated with Brownfields Redevelopment is key to helping our urban communities flourish. One deterrent to redevelopment is the Spill Act liability that one inherits when they knowingly purchase a contaminated site. The legislature has, in the past, amended the Brownfields and Contaminated Sites Act to limit this liability in certain circumstances, but additional liability limitations need to be enacted to further encourage economic growth. We should limit the liabilities associated with purchasing a contaminated site by an innocent third party to the cleanup of the site itself and the prevention of future contamination leaving the site. Liability for off-site contamination caused by the original Spill Act responsible party should remain with that party and the Department should aggressively pursue the original discharger. In the event that a viable entity does not exist, we should use public funds for those cleanups. The Department would still, however, require the

developer to perform an up-front receptor evaluation so that immediate environmental concerns can be identified quickly and addressed.

6. Expanded notification to the locals – Public Law 2007, c.1 (the Kiddie Kollege Bill) went a long way in ensuring that changes in use from an industrial type to a child care facility or school would not occur unnoticed but would in fact be caught during the issuance of a construction permit or certificate of occupancy. It also expanded notification to local officials. We are recommending that this statute be expanded to include changes in use from any industrial/commercial use to residential. We are also recommending that, any time a property regulated by the Site Remediation Program is being developed to an end use that includes a child care facility, a school or residential housing, it be required to undergo a preliminary assessment and site investigation consistent with our Technical Regulations. This requirement should apply regardless of the fact that the site may have received an NFA from the Department previously. The reason being that many people in the general public are unaware of the differences between an unconditional NFA which has no limitations and conditional NFA which has on-going commitments.
  
7. Underground Storage Tanks USTs - The Department processes approximately 4000 - 5000 new Homeowner Underground Storage Tanks cases each year. The only way to ensure that our children and grandchildren do not inherit the problem of leaky USTs is to ban the installation of new homeowner USTs and to only allow for underground storage tanks with secondary containment when there is no option to use an above ground tank. Currently EDA administers a program for non-leaky underground tanks and provides grants to homeowners of \$3000 to help cover the cost of replacement. If this grant amount is raised to \$4000, we believe that the cost differential to install secondary containment would be covered for situations where above ground tanks are not an option.

Additionally, for New Jersey to be in compliance with the Federal Policy Act of 2005, and to ensure against future releases from regulated underground storage tanks,



we are recommending that all new or replaced underground storage tanks and piping be secondarily contained. For regulated underground storage tanks, secondary containment has become a quasi-industry standard and since 2005, 587 out of 595 regulated USTs that have been installed in New Jersey were secondarily contained. The changes will ensure a New Jersey standard that continues the trend of better protection for our drinking water supplies.

Lastly, to ensure that remediation funding source requirements in the regulated UST program are similar to those in other SRP programs, we are recommend amending the UST act to require an owner/operator confirm that their financial assurance mechanism will cover all remedial costs for discharges found at the site. We further recommend allowing the DEP to draw on this funding source if the operator/owner does not comply with remediation requirements.

8. Drycleaners - Since it was first introduced in 1934, perchloroethylene (Perc) has been used as a cleaning solvent by the dry cleaning industry. Perc is considered a potential carcinogen and is regulated as a hazardous substance. It is often found as a contaminant in our aquifers and has impacted drinking water supplies along with creating vapor hazards in residential dwellings. Currently, there are about 2000 dry cleaning facilities operating in the state and an unknown number of closed facilities. The Site Remediation program has only about 300 dry cleaner sites within its universe of known contaminated sites. The State Coalition for the Remediation of Dry Cleaners (SCRD) estimates that about 75% of dry cleaners have some level of contamination associated with them. This contamination is predominantly caused by past operations. Often the current owner is not the original discharger and many facilities are co-located in strip malls or mixed use buildings with residential housing. In most cases, the current owner does not have the financial ability to pay for remediation. And as Perc is very soluble and travels far, it often impacts wells and structures miles away.

Other states have successfully addressed the ongoing remediation concerns associated with dry cleaners through the development of a state-funded dry cleaner remediation program where user fees are assessed on dry cleaning services and are dedicated to funding Perc remediations. We are recommending that New Jersey consider such a program. One option is to fund the program with money from the constitutionally dedicated UST grant fund, which currently has approximately \$108M and uses only \$7-8M each year. Grants could be limited to those facilities where the owner is not the original discharger, where the business is defined as a “small business” and where the facility is co-located with residential or commercial uses.

Lastly, there are additional smaller legislative reforms that we are proposing that will clarify and clean up existing statutes, strengthen our enforcement program and expand the use of the HDSRF funding. The complete list of DEP recommended legislative reforms will be available on the DEP website today for public viewing.

In closing, reform of the Site Remediation program is needed. There is no doubt. The option of maintaining the status quo does not exist as the environmental, health and economic consequences are too great. We believe the package of reforms outlined today provide something for all stakeholder groups. It will strengthen the Site Remediation program, by expanding enforcement, providing incentives for Brownfields redevelopment and permanent remedies, ensuring our remedies are protective at the time of approval and over time, and addressing the ever growing backlog of cases in the Department.