

GOVERNMENT AFFAIRS TEAM

Melanie Willoughby  
Senior Vice President

September 24, 2007

Sara Bluhm  
Assistant Vice President  
Energy & Federal Affairs

**VIA REGULAR MAIL / E-MAIL**

David Brogan  
Vice President  
Environmental Policy &  
Small Business Issues

Ms. Irene Kropp, Assistant Commissioner-  
Site Remediation  
New Jersey Department of Environmental Protection  
P.O. Box 028  
401 East State Street, 6<sup>th</sup> Floor  
Trenton, New Jersey 08625-0028

Christopher Emigholz  
Director  
Education Policy

Arthur Maurice  
First Vice President  
Economic Development &  
Taxation

**Re: NJBIA Comments on the "White Papers"  
Stakeholder Process on Legislative Reform  
Site Remediation Program**

Frank Robinson  
Vice President  
Grassroots &  
Transportation

Dear Irene:

John Rogers, Esq.  
Vice President  
Human Resource Issues

On behalf of the members of the New Jersey Business and Industry Association (NJBIA), I want to thank you for the opportunity to submit these comments pertaining to the Site Remediation Stakeholder Process White Papers, referenced above.

Christine Stearns, Esq.  
Vice President  
Health & Legal Affairs

NJBIA represents over 23,500 businesses in the State of New Jersey, and is the largest state-level employer association in the nation. Many of our members have an interest in New Jersey's Site Remediation Program (SRP), and any future changes pertaining thereto. Furthermore, NJBIA is a member of the Site Remediation Industry Network (SRIN), which is a coalition of more than 30 companies and associations that address contemporary issues pertaining to the SRP of New Jersey. SRIN and NJBIA share the same comments and concerns on the proposed White Papers and we urge the Department to consider these concerns as you make suggestions for legislative changes.

NJBIA would like to thank the New Jersey Department of Environmental Protection (NJDEP) for inviting us to be part of the Stakeholder process, and for listening to our input and feedback on the issues. The issues discussed were complex, highly emotional, and at times, polarizing. The NJDEP should be lauded for its efforts toward maintaining order, capturing the essence of the issues and listening to the wide range of views and positions. Ultimately, we are confident that the process helped to clarify concerns, and identify potential improvements to the site remediation process.

After reviewing the eleven (11) White Papers, our comments are primarily focused on the intent and spirit of each paper, as well as possible next steps/recommendations related to changes in the Site Remediation Program.

### **Prescriptive -vs- Performance**

As the White Paper acknowledges, the regulated community highlighted reasons why the NJDEP should restructure its program to focus on performance and risk reduction, rather than process. Delays and backlogs occur as a result of NJDEP's prescriptive, cumbersome, "process-oriented" approach which is detailed in the 140-page Technical Requirements for Site Remediation ("Tech Reg's"). The current process is extraordinarily lengthy and requires the NJDEP to review and approve every submittal before commencing to the next step. Contrary to what is stated in the White Paper, New Jersey's current site remediation process is anything but flexible. All sites are treated the same assuming a worst-case scenario rather than evaluating actual risks and/or end use or vision of a property (i.e., schools, homes, operating industrial sites). A majority of the cases are bottlenecked in the delineation phase, even when there is enough information to allow for further action or closure.

The regulated community gave a presentation describing why a "cookie cutter" (a one size fits all) approach to site remediation uses public and private sector resources inefficiently, without commensurate benefits to human health and the environment. We also demonstrated that this type of approach results in sites languishing in the process and not being put back into beneficial use.

We strongly urge the NJDEP to revise its oversight program to allow: a) site specific flexibility; b) case managers to consider a site's potential/current use(s) and risks when making a decision; and, c) the use of the Tech Reg's as guidance rather than mandates. We recommend that the Legislature require NJDEP to establish goals for program performance, develop metrics to measure success toward achieving those goals, and regularly report on any progress in a public and transparent manner.

### **Addressing Backlogs**

The White Paper focused on the licensing of site professionals, use of outside contractors, and the "carve out" (shifting of responsibility) of homeowner cases as a means of reducing backlogs/caseload. As we have pointed out previously, the regulated community strongly urges the NJDEP to change its prescriptive oversight approach to a performance-based program as a method of reducing backlogs. We are confident that by changing the process, more sites will be cleaned up which will "free up" more resources which can be devoted to cases that pose the greatest risk to the environment and public. We appreciate the fact that the NJDEP is resource limited and that the amount of work continues to increase. However, we caution that simply hiring contractors and additional

staff without changing the overall program, will ultimately do nothing to address the issue of backlogs.

Furthermore, regarding the Massachusetts (MA) based Licensed Site Professional (LSP) program that NJ is considering, we urge the NJDEP to adopt the entire MA program which incorporates a flexible risk-based approach to site remediation. As described in the “Performance vs. Prescriptive” White Paper, a key element of the MA program is that it allows the entity undertaking the remediation to select the option that *makes sense for an individual site*, considering current and future site uses. Three cleanup options (“tiers”) include: the use of generic remediation standards that take into account exposure controls (e.g., groundwater that is not classified as drinking water, vapor controls, etc.); modified standards that incorporate site-specific information (e.g., size and flow of a nearby river); and, site-specific risk assessment for more complex sites. Another critical factor is that the MADEP’s prioritization of sites is based on risk. MADEP oversees the highest priority sites, and LSP’s, who adhere to strict professional standards, oversee all elements of site remediation at all other sites. MADEP audits a portion of LSP controlled sites including those utilizing institutional or engineering controls.

In short, implementing an LSP program and increasing staff must be done in concert with a systemic change toward a performance-based approach with risk-based prioritization, instead of applying the same NJ prescriptive requirements to every site.

### **Remedy Selection**

No one disputes the fact that responsible party remedy selection should be based on whether or not a remedy is protective of the human health and the environment. The regulated community asserts that existing statutes and regulations already provide the NJDEP with authority to deny a remedy, should it fail to be protective of health and/or the environment.

The regulated community cautions against the concept of limiting or banning the use of non-permanent remedies, because the consequences of such actions could be devastating to New Jersey’s SRP. This could result in more costly remediations, divestments of Brownfield sites, and the potential languishing of sites due to projected cost increases. Furthermore, from a practical perspective, it is technologically infeasible to permanently remediate many sites in our State due to a variety of factors. (i.e. historic fill)

Permanent remedies also have ancillary impacts such as more truck traffic, increased levels of carbon dioxide and particulate emissions, more energy consumption, and an increased burden on our stressed landfills. At a time when the New Jersey is looking to curb greenhouse gasses and vehicle emissions, it seems counterintuitive to impose new requirements that would dramatically

increase the aforementioned air pollutants and health hazards. Furthermore, so long as the remedy is protective and continues to be protective in the future, a dormant contaminated site brought back to productive use has numerous benefits including: tax revenues; elimination of exposure pathways; as well as aesthetic values.

Regardless of the unsubstantiated comments by some of the participants in the Stakeholder Process, engineering/institutional controls (e.g., “caps”) are effective. They eliminate exposure pathways, and benefit society by taking a contaminated site that would otherwise lie fallow, and bring it back to productive use. In short, when implemented and monitored properly, non-permanent remedies can be effective solution for a contaminated site. Rather than imposing additional requirements for remedy selection, the regulated community strongly urges NJDEP and the Legislature to focus their efforts on the long-term stewardship of engineering and institutional controls.

### **Environmental Insurance**

The regulated community is opposed to any environmental insurance program that is implemented purely to act as a disincentive toward utilizing non-permanent remedies. As stated above, the use of non-permanent remedies is both effective and protective of the public and the environment. Furthermore, we believe that such insurance would be prohibitively expensive and as outlined in the meeting, would not serve the purpose intended by the NJDEP.

If the goal of the NJDEP is to balance the desire to cleanup as many sites as possible, with the ability to ensure that non-permanent remedies have a regulatory mechanism for continued proper maintenance, the environmental insurance proposal outlined in this white paper is not the answer. Instead, we would suggest a program that ties a permit to the site, as outlined in the “Engineering and Institutional Controls” comment below.

The environmental insurance program outlined by the NJDEP is ill defined at this point, and without further consideration, the NJDEP should withdraw its position on the matter.

### **Engineering and Institutional Controls**

NJBIA members share the concerns of the NJDEP and the public regarding the long-term stewardship of remediated sites and maintenance of engineering and institutional controls. As the White Paper notes, current NJDEP regulations already contain extensive requirements to ensure the effective maintenance and long-term monitoring of engineering and institutional controls (deed notices, CEAs, biennial certification, etc.). At the vast majority of sites, these requirements are working successfully to ensure the protection of human health

and the environment. However, we understand the public's desire for additional assurances that these important controls remain effective.

The regulated community supports the development and utilization of a permitting program to track responsible parties who are required to ensure the proper maintenance of an engineering and/or institutional control. It should be required that the permit holder is solely responsible for compliance with the permit, and any associated monitoring and reporting to NJDEP. Ideally, the permit would be transferred to the new property owner when sites are sold (similar to other permits). A permit program such as this would provide the State with a mechanism to promote the proper maintenance of capped sites without mandating the aforementioned environmental insurance initiative. In addition, a permit program would allow the State to track the number of engineering and institutional controls and their success rates.

New Jersey must be realistic in its efforts to remediate over 18,000 known contaminated sites. The funding is not available to remediate all of these sites to residential standards. Furthermore, in many cases, residential standards are not appropriate for sites due to their location and use (i.e., industrial).

The NJDEP must be pragmatic in their approach toward the use of engineering and institutional controls. As we have stated previously, the continued use of engineering and institutional controls (where appropriate) is vital to a successful Site Remediation & Brownfield Redevelopment Program. The NJDEP should take every step possible to ensure that this option remains available for those who own contaminated sites as well as those who would consider investing in contaminated sites located in NJ.

### **Acute Exposure/Hot Spot Removal**

Above, the regulated community has proposed solutions that the NJDEP and the Legislature can implement to address concerns regarding the long-term maintenance of engineering and institutional controls. We feel that a robust and transparent permit program will make significant steps toward ensuring that engineering controls are properly maintained. Despite these efforts, there may be instances in which an engineering control "fails".

The regulated community agrees that acute (short-term) risks should be addressed by a remedy **if** an acute risk to human health or the environment *truly* exists. It should be acknowledged that many chemicals do not pose an acute health risk at levels typically found in the environment. As stated in the White Paper, there is toxicological information available for some contaminants with known acute health effects for certain exposure pathways. If NJDEP feels there are acutely hazardous materials or site conditions that require an alternative approach, the NJDEP currently has the authority to use site-specific risk assessment to demonstrate that removal is warranted.

The development of a definition of a “hot spot” and requirement for “hot spot” treatment/removal is not an appropriate way to address acute risks. Therefore, the regulated community does not support this approach. The use of an arbitrary multiplier is based on neither science nor the actual risk to human health and the environment. The fact that a chemical concentration is “high” (a large number) relative to the surrounding area does not necessarily constitute acute risk or a “hot spot.” Neither would a remediation standard that fails to consider the toxicity of the chemical or the amount/nature of exposure.<sup>1</sup>

The White Paper discusses USEPA’s “principal threat” waste concept as lacking a strong scientific basis because it is based on protection of chronic (long-term) exposures. We respectfully disagree. The principal threat waste concept significantly reduces overall site risks by focusing cleanup efforts on areas of contamination that pose significant threats to humans or the environment, and could readily include consideration of acute health risks.

The rationale behind “hot spot” treatment/removal is to address the materials at the site that pose the greatest risk to human health or the environment. The regulated community recommends that NJDEP consider USEPA’s principle threat waste concept to be protective and we urge the DEP to actively endorse the option of performing site-specific risk assessments, as currently allowed under N.J.S.A. 58:10B-12f.

### **Public Notification and Participation**

NJBIA and SRIN members firmly support and believe in meaningful communication and notification where the risks are real and where potential impact exists. It should be noted that this communication and notification process already exists, and continues to occur on a regular basis.

The current “Public Notification” rule proposal is going through the administrative procedure process and the NJDEP is requesting public comments, which are due October 5, 2007. Our comments will focus on the potential negative impacts to the remediation process, and the need for legislative amendments to P.L. 2006 c.65, which mandated that the NJDEP develop regulations pertaining to public notification.

We are very concerned that this law and proposed regulation will adversely impact the site remediation program as a whole. The proposed regulation is far too specific to be flexible enough to meet the needs of New Jersey’s communities. The rule should be revised to focus on the goals, principles, and

---

<sup>1</sup> A survey of thirteen state regulatory agencies conducted by the Interstate Technology and Regulatory Council (ITRC) Risk Assessment Resources Team, of which NJDEP is a member, found that only three states (FL, MI, TN) had definitions of “hot spots”. Those definitions that existed were arbitrary and vague.

key elements of providing simple and meaningful information to affected parties. We believe that there will be numerous negative impacts that include the following:

- 1) the notification will unnecessarily alarm the public;
- 2) the potential for influence by environmental groups or others who are not actually impacted by contamination or remediation activities at a site;
- 3) media coverage that will impact the public's view of the remediation process;
- 4) increased distrust from the public of both the Responsible Parties and the NJDEP;
- 5) increased costs to both the responsible party and the NJDEP without resulting benefits to the community. The costly and unnecessary redundancies will draw resources away from the cleanup in order to address public fear and uncertainty;
- 6) possible increased costs to municipalities. It is clear that the first person many citizens will contact will be their mayor or other local officials. This will happen regardless of the signs and letters that are required to be posted and sent to the public. The NJDEP should consider this extra cost and impact on local resources;
- 7) finally, potential litigation. It should be clear that the potential litigation will impact not only Responsible Parties but also municipalities and the NJDEP.

We urge the NJDEP to recommend legislative changes that would provide for a pilot program to accurately assess public sentiment as well as NJDEP staff resources necessary to address concerns. Another alternative would be to set up a tiered approach to notification, similar to the chemical plant security initiative the NJDEP instituted a few years ago. This tiered approach would assess the risk(s) for each site and set up an appropriate communications plan based on those risks. The NJDEP should also support legislative changes which would alter the notification requirements from a 200 foot radius from the site boundary, to a 200 radius from an area of concern, excluding up-gradient property owners and tenants. This change would ensure that notification is made to those with the greatest likelihood of being impacted, rather than a blanket notification that disregards the location of the contamination or other associated site conditions.

### **Municipal Issues**

It seems as though the concerns raised by municipal officials during the Stakeholder process focused on two areas: 1) notification to municipal officials regarding impacted sites in their municipality; and, 2) restoring these sites to a beneficial use as soon as possible (i.e., taxes and jobs). We agree that municipalities need to be aware of ongoing investigations and cleanups in their communities. We also support restoring these sites as soon as possible for the

good of the public and the environment. As we have mentioned previously, if the process is revised in a manner that allows the NJDEP to quickly approve appropriate remedies, we are confident that sites will be remediated and put back into good use.

### **Cumulative Exposure**

The White Paper did not provide much detail on this issue. Nor did it indicate what positions or actions the NJDEP will take. Therefore, we respectfully reserve comment until more information is available.

### **Historic Pesticides and Pesticide Application**

This issue was not identified early in the stakeholder process and was only discussed once newspaper articles were written about the Paramus school incident. Because this is a specific area of concern, the NJDEP should separate this issue from the other issues discussed in the Stakeholder process, and handle it accordingly.

### **Dry Cleaner Remediation Program**

This is a specific area of concern which was discussed late in the stakeholder process. It should be separated from the Site Remediation Stakeholder process and dealt with under another initiative..

NJBIA urges the department to grant the stakeholders another opportunity to comment once the legislative recommendations are developed. Once again, NJBIA would like to thank the DEP for the opportunity to participate in the Site Remediation Stakeholder Process, and to comment on the White Papers. We look forward to working with you and other participants toward improving New Jersey's Site Remediation Program.

If you have any questions or if you need additional information, please contact me at (609) 393-7707, extension 236.

Sincerely,

David H. Brogan  
Vice President, Environmental Policy  
New Jersey Business and Industry Association