

**Site Remediation Program Reform
Stakeholders Meeting
April 18, 2008**

Stewart Abrams	Langan Engineering
Buddy Bealer	American Petroleum Council - NJ Chapter
Jorge Berkowitz	Langan Engineering
David Brogan	NJ Business & Industry Assn.
Eric DeGesero	Fuel Merchants Association of NJ
Michael Egenton	NJ Chamber of Commerce
Adam Liebttag	Communication Workers of America
Kate McDonnell	Assembly Democratic Office
Jane Nogaki	NJ Environmental Federation (NJEF)
Olga Pomar	Camden Regional Legal Services, Inc.
Andrew Robins	NJ Builders Association
Tony Russo	NJ Chemistry Council
Steven Senior	Riker, Danzig
Thea Sheridan	Assembly Republican Office
Mark Smith	Smith Pizzutillo LLC
Tom McKee	Interfaith Community Organization
Dave Pringle	North Jersey Environmental Justice Alliance

DEP Attendees: Irene Kropp, Assistant Commissioner, Site Remediation
Staff: Kerry Kirk Pflugh, Office of Communication Planning and Outreach
SRP: Janice Brogle, Glynis Hill, Barry Frasco, Wayne Howitz, George Klein, Ken Kloo,
Karen Kloo and Mark Herzberg

Irene Kropp provided opening remarks:

The final versions of eleven whitepapers which summarized the topics that were discussed were made available on SRP's website on Friday, April 11, 2008.

On April 15, 2008 Commissioner Jackson and I provided testimony before the Assembly Environment and Solid Waste Committee and the Senate Environment Committee concerning the proposed reforms to the Department of Environmental Protection's Site Remediation Program.

At this time, I would like to continue our reform discussions.

Licensed Site Professional Program (LSP)

NJDEP is proposing an LSP program to certify environmental professionals and to establish a code of ethics to be adhered to by consultants. The introduction of an LSP program does not represent privatization or relinquishment of control of site remediation in NJ. NJDEP is not adopting the Massachusetts (Mass.) model of an LSP program. The result of the LSP program will be the submission of higher quality documents and will enable NJDEP to vary the amount of oversight that we provide based on such factors as case complexity and impact to the environment. An LSP program will allow NJDEP to determine categories of cases for varying amounts of oversight. Some cases, such as sites with recalcitrant responsible parties (RPs) and those with long and complex histories will receive more extensive oversight than NJDEP currently provides. The least complex cases can proceed like the existing cases in the Cleanup Star and Unregulated Heating Oil Tank Programs (UHOT).

As part of an LSP program, NJDEP will institute an auditing program. In Mass., screening audits are performed on a percentage of the cases, with a more intensive audit performed on a smaller number of sites. Submittals for some cases are provided from the LSP to the remediating party and the Mass. DEP simultaneously. It is envisioned that process will be similar in the NJ program.

Remedy Selection

The NJDEP may propose legislative reforms to allow for NJDEP to have greater input in remedy selection when the end use will be schools, child care centers and residential development. The NJDEP may propose to offer presumptive remedies and “enhanced” engineering controls for these categories of cases. The NJDEP may establish a set of remedies and make them available to RPs and developers prior to remediation in order for the remediating party to consider the available options before work begins. The NJDEP may also propose to restrict single-family residential development on certain categories of landfills.

The NJDEP may propose to incentivize permanent remedies by using the Remediation Guarantee Fund. If the remediating party implements a permanent remedy, they will not have to pay an additional surcharge into the fund. The Remediation Guarantee Fund was established in the Brownfield’s Act and \$5 million was allocated to the fund. A 1% annual surcharge is paid on certain remediation funding sources and the money is deposited in the HDSRF.

There is approximately \$1.4 billion in remediation funding sources and old financial assurances, of which almost \$1 billion is in the form of self guarantees. Currently, the surcharge cannot be applied to self guarantees and the older financial assurance mechanisms. Therefore, approximately \$2 million is generated each year from the surcharges. SRP proposes to eliminate or restrict the use of self guarantees, apply the surcharge to all forms of remediation funding sources, require remediation funding sources for all cases (with the exception of homeowner UST, childcare and education

facilities) and deposit the proceeds into the Remediation Guarantee Fund. (RGF) This could generate approximately \$14 million to the RGF. The use of the fund would be expanded. It could be used to address future order of magnitude changes for any remedial action that met unrestricted standards. It could also be used by future property owners, who were not responsible for the original remediation activities, in the event of remedy failure.

The NJDEP may also propose to expand innocent purchaser protection. Other incentives may include faster reviews and protection from having to revisit cleanups when there is a remediation standard change.

The NJDEP may propose to establish a permit system for post-NFA monitoring of engineering/institution controls (EC/IC) to replace the current biennial certification program, creating a program that is linked to the property rather than the current owner. NJDEP is also working with the Board of Public Utilities to include EC/ICs as a condition to be identified in the one-call underground utility mark-out system.

NJDEP may propose legislation to require all unregulated underground storage tanks (USTs) to include secondary containment in order to be consistent with federal statutes. NJDEP may also amend other site remediation statutes to be consistent with the Environmental Enforcement Enhancement Act. NJDEP may amend the Brownfield Act to allow funding for Technical Assistance Grants (TAGs). A TAG provides money to community groups so they can pay for technical advisors to interpret and explain technical reports, site conditions, and proposed cleanup plans at contaminated sites. NJDEP may also amend HDSRF legislation to increase funding to child care facility owners and operators for required environmental investigations of child care facilities.

SRP may amend the Petroleum Underground Storage Tank Remediation, Upgrade & Closure Fund (UST Fund) legislation to allow funding for homeowners to pay for NJDEP costs associated with emergency response actions, which are necessary when discharges from home heating oil USTs result in an immediate threat to the health of the public and environment. NJDEP may also amend HDSRF to make clear that the HDSRF can be used to reimburse fund applicants for NJDEP oversight costs, to allow for matching grants for remedial actions if the end use will be green energy production or agriculture, and to allow municipalities to access the funds without passing a resolution to acquire the subject property.

NJDEP may establish a dry cleaner remediation fund allowing for a stable funding source for remediation of discharges from dry cleaners. Discharges from dry cleaners are an environmental problem in NJ, particularly when ground water is impacted in areas of bedrock. Also, many dry cleaners in urban areas co-locate with other types of businesses resulting in the potential for vapor intrusion issues at these other businesses. NJDEP may also establish a grant/loan program for dry cleaners to investigate and/or remediate their facilities. Funding may provided by the UST Fund and/or the Corporate Business Tax (CBT). If NJDEP proposes to change the CBT, the NJDEP may also propose to expand flexibility in transferring money from one funding source to another, to make funding

available as needed. NJDEP will explore the possibility of expanded notification requirements to municipalities when a remediating party proposes a change of use to residential (similar to the Madden Bill for daycare centers.) The NJDEP may explore removing the innocent purchaser liability for off-site contamination to spur brownfield redevelopment, and at the same time, expanding enforcement against the discharger.

Senator Smith recommended that the NJDEP focus initially on the following three issues:

1. LSP
2. Remediation Guarantee Fund
3. Remedy Selection

At this time, SRP will not pursue the issues of cumulative risk because the Environmental Justice Task Force has prepared a report for the Commissioner's review. SRP will evaluate the success of the current rule proposal for public notification and outreach before considering other possible changes. SRP will not promulgate acute soil remediation standards at this time, as we have not yet developed a scientifically defensible position to enable us to do so.

The discussion was then opened up to all stakeholders.

LSP Program Development and Implementation

Irene - The LSP program proposal needs to be fleshed out and will be the topic of future discussions including a full day retreat on April 22, 2008 for SRP Managers. Mass. officials will be asked to participate in an upcoming legislative session in order to provide information about the Mass. LSP program at Senate and Assembly hearings.

Qualifications

Irene - In the interest of setting up the LSP program quickly, SRP will propose a temporary license based on such factors as an LSP applicant's years of experience in complete project management in NJ, education, and previous certifications. (Professional Engineers will not automatically receive licenses.) In the future, LSP applicants may be required to pass a test to qualify to be licensed.

Stewart: Testing would simplify the licensing process.

Jorge: The testing should be fair and performed by an outside firm.

Adam: SRP needs to take steps to prevent "bad apples" from being grandfathered into the LSP program.

Categories of cases that will fall under LSP Program

Irene - *All environmental professionals will need one of the following licenses: Subsurface Evaluator Certification for unregulated UST and some regulated UST remedial activities, or an LSP license for all other sites.* The amount of oversight that

SRP will provide will vary. There will be a sliding scale of NJDEP oversight depending on a number of factors including the complexity of the case and the recalcitrance of the RP. SRP anticipates that approximately 1,000 sites will receive expanded NJDEP oversight, and the balance will have varying degrees of oversight. NJDEP will perform a complete review of certain required submittals for all sites, such as the Sensitive Population and Resource Checklist. For all sites, there will always be some level of NJDEP oversight.

The Remedial Priority Scoring System (RPS), a GIS tool under development will allow SRP to determine “how sick a site is” by using contaminated site data and overlaying it with environmental factors surrounding the site. This will allow SRP to identify the sites presenting the highest environmental and/or public health risk. SRP will use the RPS to prioritize sites in order to determine which sites warrant the use of public funds for cleanup.

Enforcement –

Irene - The consequences for poor performance by an LSP will have to be severe for the LSP program to be effective. There has been little support from the Governor’s Office for an outside Board to contend with LSPs who are poorly performing; however, SRP can revisit establishing a Board, which includes individuals from outside SRP.

Andrew: An outside Board should be established to make decisions about LSP licenses. If the NJDEP acts as judge, jury, and executioner public confidence in the program will suffer.

Jorge: If the LSP’s profession is at jeopardy, an outside Board of Review is necessary.

Andrew: There will be economic drivers for consultants to do good work because there will be more liability for the consultant than currently exists.

Stewart: Mass. has a strong enforcement mechanism. Mass. DEP regularly reviews the opinions each LSP renders. It is “professional suicide” for the LSP if the state overturns the LSP’s opinions. A list of each LSP’s overturned opinions is posted on the Mass. DEP’s website.

Adam: The number of sites undergoing remediation in the Mass. LSP program is small compared to the number of sites currently in the NJ Site Remediation Program.

Implementation -

Stewart: In Mass. the LSP works closely with the DEP, and prior to the LSP rendering an opinion, the LSP will meet with the Mass. DEP officials.

Andrew: There is concern among the NJ Builders Association members that cleanups will cost more under an LSP program than under the current program.

Stewart: Cleanup plan approvals under a LSP program, because they are self-approvals, actually result in cost savings.

Andrew: Procedures must be established to ensure that the remediating party will be notified if their LSP is not conducting remedial activities in accordance with applicable regulations. There have been disagreements in the past between consultants and NJDEP

staff and the remediating party will need to be informed if there is a disagreement between their LSP and the NJDEP.

Flexibility –

Irene: For an LSP program to be effective, it has been suggested that there may need to be a culture change in the NJDEP to allow case managers to be more flexible when applying the Technical Requirements.

Tony: Many cases currently are “stuck” in the delineation phase of the remediation because consultants interpret the requirements differently from the NJDEP staff overseeing the case. Can an LSP accomplish delineation within the framework of the current requirements?

Jorge: For an LSP program to be effective, the LSP must be allowed the flexibility in interpreting the regulations, using professional judgment. The LSP needs to have better communication with the NJDEP than currently exists for the program to work.

Tony: The regulated community needs certainty.

Irene: The regulated community wants flexibility and predictability. It is difficult to accomplish both.

Andrew: The goal needs to be predictable but how we accomplish the goal needs to be flexible. There needs to be a culture change in NJDEP to allow the case managers to exercise flexibility when overseeing remedial activities.

Stewart: Consultants do not want to be second guessed as is frequently done by NJDEP staff.

Jorge: The LSP program should not be linked to the current prescriptive Tech. Regs. The Tech. Regs. should be revised to become more guidance oriented.

Linda: SRP Managers are developing guidance on where flexibility is appropriate on meeting goals. Case managers are encouraged to contact consultants regarding deficiencies.

Buddy: The administrative culture that exists at the NJDEP is the problem.

Senior: Some case managers are flexible in their oversight of cleanups. This flexibility needs to be institutionalized.

Adam: Incomplete and deficient deliverables and submittals result in delays in cleanups.

Stewart: If the quality of the documents is the problem, there should be an administrative completeness review process to reject deficient submittals.

Andrew: Completeness reviews must be objective, not subjective.

Public Process –

Irene: There will be a public notice requirement process as part of the LSP. Documents will continue to be subject to OPRA. Major submissions will continue to be required to be submitted to the NJDEP.

Stewart: Mass. Program has very strong public process.

Opposition –

Olga: For the record, there is strong opposition from community and environmental groups to turn over remedial oversight to consultants. It would be the “worst of both worlds” to do this and provide more flexibility and greater discretion to the remediating parties.

Miscellaneous –

Tom: There is a basic question as to whether NJ should adopt an LSP program.

Irene: We are past the point of discussion about whether to establish an LSP program. Legislators have instructed SRP to draft LSP legislation.

Steven: If there is a requirement for the LSP to submit documents to the RP and the NJDEP simultaneously, there is a concern that the RP will not want to give up the right of approval before the submittal goes to the NJDEP (especially for the RAWP).

Adam: There are political differences in Mass. and NJ. There are public trust issues in NJ (significant pay to play concerns).

Adam: There is a threshold question that has never been answered. Why are we not evaluating restructuring fees in order to provide NJDEP with the necessary staff to address turn around time issues, especially if LSP program is going to result in higher cost to RPs?

Jorge: For the record, Jorge stated that Bill Wolfe misspoke during testimony on April 15, 2008 before the Senate and Assembly Environment Committees. Bill Wolfe stated that NJ allows a risk range of 10^{-4} to 10^{-6} . The Brownfield Act actually requires NJDEP to establish a risk factor of 10^{-6} . Jorge will ensure that the legislators understand the correct risk factor currently required in NJ. Jorge further commented that we need legislative reform so NJ can change the requirement for a risk factor of 10^{-6} to a range.

Dave Pringle: In response, Dave stated that some stakeholders want standards revised which will decrease protection from risk.

Remedy Selection

Irene - SRP plans to introduce presumptive remedies that may be required for sites when the end use will be residences, child care centers or schools. It is critical for a remediating party to know “up front” that a remedy will be acceptable. The NJDEP will need to establish legislative authority to make it clear that NJDEP has more than “a preference” for a permanent remedy.

In certain cases, permanent remedies are not feasible. For example, in certain cases it is not possible to remediate the residual low level ground water contamination. Permanent remedies are usually more easily implemented prior to new construction. Permanent remedies may be more appropriate for single family homes; however, condominiums with yards may also need a permanent remedy or enhanced engineering control to be protective of human health.

Olga: Specific site conditions should be evaluated prior to remedy selection approval. There should not be a presumption that one can implement non-permanent remedies,

such as 3-5 feet of cover. Toxicity of the contaminant must be considered when evaluating the protectiveness of a non-permanent remedy. Although implementing a permanent remedy is difficult under certain site conditions, it often is not impossible. For example, deep excavations (to a depth of 25 feet) have been performed at some coal gas sites.

Andrew: Each capping element has to be protective for each use at the site.

Tom: When excavation with off-site disposal of contaminated material is not practical, in situ remedial techniques can sometimes be used to achieve permanence.

Olga: Many sites with ground water contamination are not being fully remediated in the City of Camden. Sites always receive a Classification Exception Area in Camden.

Jane: Years can elapse before a problem may show up from the use of a non-permanent remedy. For example, an apartment complex scenario can have a vapor problem.

Jorge: The case managers already have a great deal of say in remedy selection.

Dave: For the record, there should be a "poison pill" provision in the Remediation Guarantee Fund legislation.

The next meeting will be at the EIT on May 6, 2008 in the morning. Discussions about the LSP program and remedy selection will continue, and the discussion about the Remediation Guarantee Fund can begin. An outline of possible strategies will be provided at the meeting.