



Commissioner Lisa P. Jackson delivered the following statement before the Senate Environment Committee on October 23, 2006.

Reforming the Site Remediation Program

October 23, 2006

Good morning Mr. Chairman and members of the committee. I would like to thank you for the opportunity to appear before you today to present my ideas on ways that together we can reform the site remediation program.

As you well know New Jersey was at the forefront of industrialization as it is uniquely situated proximate to major of population centers. As such contaminated sites have long blighted the New Jersey landscape. They have endangered our health, threatened our natural resources and stifled economic and urban development for decades. In response, this legislature was one of the first in the country to enact comprehensive site remediation and cleanup laws. Additionally, New Jersey has a brownfields redevelopment program that is emulated by other states. For example, Connecticut Public Act 06-184 requires analysis of New Jersey brownfield remediation and liability provisions before they move forward with developing a new program. We have committed significant amounts of public dollars to this effort. In fact, we have twice amended the State constitution to dedicate CBT monies to public site cleanups and to brownfields redevelopment.

Despite the substantial State investment, it has become obvious that protecting the public from exposure to hazardous substances cannot be solely a State function. As I indicated in my testimony before the Assembly Environment and Solid Waste Committee hearing last week on the issue of protecting children in child care centers, we need to make sure that the multiple parties involved in the cleanup of sites – state and local governments, private citizens, developers, the regulated community – work together and communicate effectively in order to successfully perform their respective roles in this process. Senator Madden's bill S2261, which you are discussing today, is an important measure in ensuring that the appropriate checks and balances are in place to keep a Kiddie Kollege situation from occurring ever again. I commend the Senator and his legislative district colleagues Assemblymen Mayer and Moriarty for introducing this legislation and for working with all the involved parties to make it a workable and effective piece of legislation.

However, I firmly believe that additional changes in how the DEP manages and cleans up contaminated sites are definitely needed. A number of these changes can be accomplished through regulatory and management improvements. And I am committed to seeing those changes through. There are others fixes that will require legislative solutions.

The DEP is taking steps internally to help prevent residents of the State of New Jersey from exposure to contamination from regulated sites. The most important thing we are doing is developing a new ranking system to prioritize sites so that we focus our resources on the worst cases; those that present the greatest risks to public health and the environment. We are also expanding the use of our case tracking systems to better track our sites. The State has in excess of 16,000 contaminated sites. These range from minor leaks at residential heating oil tanks to Superfund sites. It is crucial that we be able to track the progress of remediation efforts at all of these sites. And it is equally crucial that the general public, our partners in

local government, the development community and lending institutions have real time access to this information. Not simply a list that is published every few years. That is why we are expanding access to our site remediation data over the Internet.

Secondly, the DEP recently adopted a new grace period rule that covers violations associated with our Site Remediation Program regulations. There is a misunderstanding among some in the stakeholders that this rule in fact lessens our enforcement authority. It does not. It most definitely strengthens how Site Remediation will go forward in pursuing cleanups that are protective of public health, meet environment standards and more importantly move more quickly through our agency. Why will they move more expeditiously? Implementation of this new rule will limit the number of times a person conducting a remediation can come back to the DEP with yet another version of how they want to get it right. That is not done today. Today, a responsible party or their consultant may submit a document to the DEP numerous times before there is agreement on how a site will be investigated or cleaned up. Under the power of these new rules, the regulated community will be afforded two bites of the apple in order to submit documents that are in compliance with our regulations, after that the DEP will either proceed with enforcement action or terminate an MOA [Memorandum of Agreement]. Our Site Remediation Program will now have stronger enforcement tools available to them.

Later this year we will be proposing new rules requiring expanded public notification requirements for all parties, except homeowners, conducting an investigation or remediation. These rules follow The Municipal Notification Law, Public Law 2006, Chapter 65. They will require posting of signs and written notification to property owners located within 200 feet of the site informing them of the activities at the site. There are also provisions for local officials or residents to request public information sharing meetings to be set up. Recent events have taught us all a lesson about the important of partnering with local official and residents.

While these changes will most definitely improve how we prioritize work at sites, increase our enforcement presence, better inform communities and will more effectively focus our limited resources, there are a number of legislative changes that are needed to improve site remediation in New Jersey. Let me briefly articulate a number of our recommended legislative changes.

First, we need to provide the DEP with a greater role in the selection of remedies at sites. Prior to 1993, the DEP was charged with the responsibility for selecting remedies. At that time, there was a widespread perception that the department review of extensive feasibility studies and over analysis of remedial alternatives would dramatically slow the progress of remediations and adversely impact our economic growth. In the end, few whole site cleanups would be approved and contaminated sites would linger for years. It was not worth the risk for a developer to assume the liability of a contaminated site only to get lost in the DEP labyrinth for years. And in fact, if one evaluates the length of time it takes a site to get to closure in the CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act] process versus that of a brownfields program, the differences are dramatic.

With the changes in ISRA enacted at that time, the remedy selection process was put in the hands of those charged with the actual cleanup, whether they are third party developers or responsible parties. The DEP was precluded from denying approval for the remedy selection unless we could demonstrate that the remedial action was not protective of the environment or public health. It is very hard to prove that capping contaminated sites which eliminates the risk of exposure is “not protective” even if the contaminants below the cap are at high levels.

The positive result of these legislative amendments are that more sites are being cleaned up and redeveloped than were previously. And many of these cleanups are being done by redevelopers who take properties with no viable responsible party and turn them into productive uses in urban communities.

Many would argue that the downside of those amendments is that quality of the remediations is poor – contaminated materials left under a cap that could erode and that developers pursue the cheapest solutions in order to quickly get a profit from the property they remediate. Although these types of remedial action require institutional and engineering controls, which is most often a cap and a deed notice, long term maintenance and monitoring of the effectiveness and integrity of these controls as the property is transferred is problematic. The use of these caps by developers and the subsequent transfer of responsibility for their upkeep have become so prevalent that a slang term of art has been developed and they are known as “pave and waves.”

There are some who would argue that every cleanup should be a permanent remedy where every bit of contamination is carted away from a site before it can be redeveloped. While philosophically as an environmental professional I agree that anyone responsible for contaminating a site should remove the problem he or she has caused, I also know that realistically this can not happen in every case. In many applications, a well maintained cap or other controls can effectively protect the public and the environment. I also do not see us returning to the day where the DEP was the sole party responsible for making the decision on a remedial solution.

Rather, what I propose is that we selectively reinsert the DEP back into the remedy selection process in those cases where there is greater probability for future exposure of the public to contamination. I would therefore recommend that we have greater ability to evaluate and select the remedy when the end use is going to be residential or education facilities.

I would also recommend that the statutes specifically authorize the DEP to develop acute soil standards. Under existing law, high levels of contamination in soils are left on site that may meet chronic health based standards but may have acute health impacts. We would recommend that, where toxicological information is available, the statutes require the Department to promulgate short term/acute exposure soil remediation standards. Then, based on these standards, any soil with contamination in excess of short term/acute exposure standards must either be excavated or removed from the site or treated to the standard. These amendments would continue to allow the use of engineering and institutional controls but would prohibit high concentration contamination that could pose a short term/acute exposure health risk.

As I mentioned, one of the recurrent concerns with the use of institutional and engineering controls is the long term maintenance and monitoring of the effectiveness of these controls. In many cases, a property is remediated by a developer who is not the party responsible for the contamination. Furthermore, many developers do not maintain ownership or control of the property but rather sell it to subsequent owners. Over the years, it could get transferred multiple times or the use of the property could change. It would be very easy for the maintenance and monitoring responsibility to get lost over time under these circumstances. We would therefore make the following recommendations.

The law should require special new Environmental Insurance for protection against remedy failure for all cases where the cleanup does not meet unrestricted standards and where a deed notice is required. We have been in discussion with the Department of Banking and Insurance (DOBI) to discuss this proposal and will work with DOBI and the companies who provide environmental insurance coverage to develop a product that provides an incentive for making more permanent environmental decisions. I also believe we should require that the remediation funding source requirements currently in the law be expanded to include not only cases that are subject to an ACO but also those that enter into a voluntary agreement with the Department. Furthermore, the remediation funding source should include the cost of inspection and maintenance of engineering and institutional controls.

While New Jersey still has amongst the strongest laws in the country to compel responsible parties to act responsibly, there is more we can and should do. We should require Spill Act responsible parties to retain responsibility to inspect and maintain engineering and institutional controls. There should be no ability to

transfer responsibility to new owners. We should provide DEP with the ability to recover all of its all direct and indirect costs, including legal fees, from responsible parties. We should increase ISRA penalties and provide DEP with civil administrative penalty authority. We should allow for first priority liens for cases where the State expends any funds, not just Spill fund monies. We should also have clear authority to remove Spill Act responsible parties from the voluntary cleanup program.

The remediation of contaminated sites is a very complex program. It not only impacts our natural resources, water supplies, and the health of our residents but plays a key role in enhancing our economic vitality. The presence of contaminants in our drinking water supplies, on a property near our homes, in a facility where our children attend school is frightening. And when these contaminants are above levels that can cause harm, it is completely unacceptable. It is equally unacceptable to exploit tragedies and misconceptions to promote personal agendas. I truly believe there are weaknesses in the Site Remediation Program that exist for a variety of reasons; but I also believe there is no reason to dramatically change a program that has been a model for many other state for many years.

Lastly, there have been quite a few statements made in the press lately about the staffing levels in the Site Remediation Program. New Jersey is a heavily populated, industrial state that continues to grow. We regulate more types of contaminated sites than almost every other State and that universe will be growing with the new forwarding thinking child care center legislation introduced by Senator Madden. It is not possible for the DEP to review every document submitted for the 16,000+ sites currently in the system. Every day we issue No Further Action letters for sites that have been remediated to standards. And everyday more sites come in the door. The State can not afford to increase the number of case managers and technical support staff by 2 or 3 times in order to make sure we are 100% up to date with all the reviews pending. But we can institute a Professional Site Licensing Program similar to that successfully implemented in Massachusetts. This program has mandatory review times for case managers, annual fees which are meant to incentivize responsible parties to move quickly through the system, an independent licensing board which includes all stakeholders including the environmental community and strong auditing program which to oversee consultants and remove their license when necessary. This program has been a success and is a model for other States. The unionized staff in the Massachusetts DEP were either retained to handle the highest priority cases, assigned audit functions or moved to other priority programs, so there was impact to the union. I strongly recommend that as we move forward in evaluating changes to New Jersey's Site Remediation Program, we use the Massachusetts program as a model, at least for the lower priority cases in the system.

There will be multiple interest groups who will weigh in with recommendations for changing the program. I realize that there will be no quick fixes as we search for balance. I look forward to working with this committee and with all the stakeholders over the coming months to improve the effectiveness of the site remediation program. And I commit that I will continue to make changes internally with the statutory and regulatory authority I currently have to protect the health and well being of the residents of New Jersey.

I am available to answer any questions you may have.