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Senate Environment Committee

Dear Chairman Smith and Committee Members:

On behalf of New Jersey Environmental Lobby, NJ Chapter of Sierra Club and the New Jersey Environmental Federation please accept our initial objections and thoughts on SCR for S. 1897. We look forward to working with the committee and DEP on reforming the site remediation program.

It is commonly accepted that the site remediation is broke. Neither the environmental community, the regulated community, the Dept nor the general public is happy with how contaminated sites are getting remediated. Everyone is in agreement there must be some changes, but there is disagreement on what those changes should entail.

The LSP portion of the bill is modeled after the Massachusetts version. A brief view of the Massachusetts experience shows that NJ should not adopted the LSP program as proposed. In a Mass. DEP review of RAOs, Mass DEP found that 50% RAOs required more work. Further, a review of Mass DEP's website shows the results of their Level 2 and Level 3 audits.

		<b>Mass. 2007 Level 2 and Level 3 Audit Results</b>			
		<b><u>Jan - March</u></b>	<b><u>April - June</u></b>	<b><u>July - Sept</u></b>	<b><u>Oct - Dec</u></b>
Audit	#	74	89	94	78
L2	Violations	17	24	24	18
	% in violation	22.97%	26.97%	25.53%	23.08%
L3	#	40	30	42	68
	Violations	26	21	30	56
	% in violation	65.00%	70.00%	71.43%	82.35%

If 50% of the ROA issued in Massachusetts have to be reopened and 75% of all Level 3 audits reveal violations of the Standards, reason would encourage NJ not to adopt the program. We have already seen, in recent years, multiple instances where responsible parties and their consultants claimed sites or materials were clean which were in fact not. One must only look at Kiddie Kollege, W.R. Grace, Martin Luther Middle School in Trenton, Ford's Edison Plant, Ringwood and others. In the instance of

Kiddie Kollege, children were exposed to Mercury at 27 times the legal limit. What where the costs to the families whose children were exposed?

In NJ the quality of submissions, by responsible parties and others, to the Department is not acceptable. A large portion of documents submitted to the Department are inaccurate, incomplete or otherwise not in accordance with the applicable standards. There is nothing in the bill that directly addresses this situation. LSP should be responsible for the costs, to the department, of resubmissions arising out of the LSP's failure to submit documents that meet regulatory and technical requirements.

We believe that all professional involved in the remediation of sites should be licensed and subject to strict requirements. We believe that having properly trained LSP taking part in the remediation of contaminated sites will improve the quality of submissions to the DEP; thus resulting in less resources being dedicated by DEP to fixing mistakes and more resources to managing the cleanup of sites. Licensing site professionals does not mean that DEP can then turn over the clean up NJ to private entities.

According to the Department there are approximately 18,000 cases within DEP of which Underground Storage tanks make up a significant portion of the case load. The Dept should allow the removal and remediation of low level, modestly contaminated

UST sites to be cleanup under the LSP program. This would free DEP resources to concentrate on the more significant case.

The move to LSPs handling cleanups is also problematic in that Government has a constitutional duty to ensure the public's safety and health. The NJ Constitution provides that it is the responsibility of Government to protect, secure and benefit the people. A move to the LSP program is an abrogation of this duty.

We offer the following changes to SCS for S1897:

§3. While the board is comprised of 11 members, it is our concern that the responsible parties are all practical matters have a majority when it comes to the oversight and discipline of its professionals. The public should have a greater say in how those responsible for protecting their health and safety are doing.

§7(d)(6) and 13(b)(5). This section deals with the qualifications of the LSP. This section prevents an applicant who has a conviction for an environmental crime as unqualified. We propose that this section add any crime of dishonesty to the list, including but not limited to: fraud, theft by deception, and forgery.

§14(a). This section requires a LSP to "manage, supervise or perform" the work. There is no definition of "manage" or "supervise." This opens up the process to abuse as these words are open to a broad range of interpretations from merely reading the

reports of others to being present while all samples are taken, reviewing the underlying data to all reports, etc.

§16(e) & (g). This section requires a LSP to correct a deficiency that is caught by the department. We propose that any time a deficiency is uncovered the LSP has a duty to correct it. There can be circumstances when a LSP notices that they made an honest mistake in a past submission, a correction wasn't made from a draft to the final version, a property owner or responsible party notes an issue. Further environmental organizations or community members may not an issue and bring it to the attention of the LSP and/or the department. In short a mistake is a mistake which should be corrected. The LSP should be able to wait to see if DEP catches the error.

§16(q)(1). This section should read, “*knowingly or recklessly* make a false statement of material fact”

§19(a). The provision provides that the Dept. *may* require periodic monitoring, inspections or maintenance of engineering or institutional controls. This should not be optional. Most institutional controls fail. This failure is the result of many factors including: people forget about or do not appreciate the significance of institutional controls; the owners cannot locate the deed and thus cannot reference the institutional controls, the deed restrictions were not filed, etc.<sup>1</sup> Further, engineering controls are not effective over the long run. They are especially ineffective without monitoring and

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<sup>1</sup> 2001 Superfund Review, Environmental Law Institute (2001).

upkeep. The cause of failure are many. In some instances the failure is the result of improper installation, damage during installation, or the installation was not complete. In other instances the engineering controls fail because of interactions with the hazardous substances the controls are meant to cover. We must insure that these sites are monitored and that corrective action is taken upon the discovery of an institutional or engineering control has failed or is about to fail.

§19(c). Given that engineering and institutional controls are destined to fail over time, there should not a provision allowing child care facilities, educational facilities or residential projects to occur on property that has not been or is not going to be remediated to an unrestricted standard. This risks to our health and safety is too great. It must also be remembered that all of our safe exposure levels to hazardous or toxic substances where set using a healthy adult male as the standard. All of these uses subject growing children to these chemicals. Children have growth rates and metabolisms that are greater than that of the healthy adult male. Neurological and other bodily systems are growing and developing. All of this makes our children even more susceptible to the effects of hazardous substances are levels that may be healthy for you and me.

§20(a). This section provides that the LSP only has to keep records for five years. This is too short, especially in light of the fact that LSP will be submitting their documentation to the Dept. in electronic format. Currently the statute of limitations is 6 years fro breaches of contract and 10 years under the statute of repose. If the five years

requirement where to stay then a former client may be hampered in their pursuit of claims under either a breach of contract or negligence theory. Therefore, LSP should be required to maintain their documents for a minimum of 10 years.

§21(b). It is helpful that DEP will be required to do reviews of LSPs under certain circumstances. First, the scope of the Dept's review is not explained and the number of triggers for a review is not broad enough. Those triggers found in §21(c)(2), (3), (4), (5), (7), (9), (10), and (11) should be found in the mandatory triggers and not the permissive triggers.

§22. This section provides that a non-presumptive remedy can be implemented and the Dept. has to prove that it is not protective enough. The burden of proof is misallocated. If a LSP wishes to undertake a remediation using an alternative remedy than it should be the LSP's burden to show by clear and convincing evidence, that the chosen remedy is at least as protective as the presumptive remedy.

§24. The Department should be required to audit at least 20% of submissions annually and that 20% cannot be comprised of any audits performed under the mandatory or permissive triggers found in §21.

§28. This section provides when the Department shall take direct oversight or when the Department may take direct oversight of the remediation of a site. Currently, it is merely permissive for the dept of oversee remediation of a site that is ranked by the

Dept. as requiring the highest priority. §28(b)(4). These sites should require Dept. oversight and should be moved to §28(a)(4).

§31(b). As noted above we do not believe that anything but an unrestricted clean up on childcare facilities, schools and residence should be permitted. Therefore, this section should be amended accordingly.

§33. The definition of “Natural Resources” is not broad enough to encompass plants, and other non-wildlife. Therefore, this section should be revised to encompass all life in the State.

§34. This section is very troubling. Currently, the State must provide notice to the public that it intends to issue a No Further Action letter to a site. This proposal removes this notification for NFAs and does not provide any notification of remedial action plan filed by a LSP or that the LSP intends to issue a ROA. We propose that when a LSP files a remedial action plan that notice of the filing is in the NJ register and in a publication of general circulation in the municipality of the cleanup in addition with complying with P.L. 2006 c. 65 by providing notice to the municipality, local and county health departments.. Further copies of the information should be available at the municipality for public review. Also, once a LSP proposal to issue a ROA for a site, that proposed ROA must be published in the NJ Register and a publication of general circulation in

the municipality for a 30 day comment period before the ROA can become final.

Additional notice should go to the municipality, local and county health departments.

§45(g). Again, for residential, childcare and school purposes there should not be a cleanup to anything less than unrestricted use.

Additionally, there is nothing in the Bill that would require the LSP to maintain insurance. What level of insurance is a LSP required to maintain. These should be addressed in the bill. Additionally, to avoid the situation of LSPs avoiding liability by forming companies to do individual remediation, the legislation should provide that the LSP is personally liable for violating the requirements of the law.

For the above reasons, we ask that this bill in its current form not be passed out of this committee.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael L. Pisauo, Jr.", written in dark ink.

Michael L. Pisauo, Jr.