

CONDENSED DRAFT

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
SITE REMEDIATION LEGISLATIVE REFORM
STAKEHOLDERS MEETING

DATE: Friday, May 4, 2007

DEP staff present: IRENE KROPP, Assistant Commissioner, ADAM ZELLNER, Deputy Commissioner, KENNETH KLOO, THOMAS COZZI, WAYNE HOWITZ, JUDY SHAW, JANICE BROGLE, JOHN HAZEN, ROSS MCDONALD, ED PUTNAM, KAREN JENTIS, BARRY FRASCO, GEORGE KLEIN, DONNA RENDEIRO, Office of Smart Growth.

JORGE BERKOWITZ, Langan
SHERYL TELFORD, Dupont
BUDDY BEALOR, Shell
DAVID BROGAN, NJBIA
ANDY ROBINS, Giordana, Halleran & Ciesla
JUDY HOROWITZ, OLS
PHIL GENNACE, OLS
THEA SHERIDAN, Assembly Majority House
KEVIL DUHON, Senate Democratic Office
ADAM LIEBTAG, CWA
MICHAEL EGENTON, NJ Chamber of Commerce
ERIC DEGESERO, Fuel Merchants Assoc.
TONY RUSSO, Chemistry Council
MARK SMITH, Smith Pizzutillo LLC
STEW ABRAMS, Shaw Environmental

Please note: The following is not a complete transcript, but a summary of the discussion.

The group discussed the importance of having the environmental community present for their input.

Adam Zellner led a general discussion regarding environmental insurance.

IRENE: I just want to explain my process -- and we can discuss this if people want to change the processes - individual White Papers, not a big, thick report, the individual White Papers laying out the issues, and then potential solutions and where people stand on those so that everybody has an option to say, hate this, love this, this is okay but only with these clarifications, modifications or restrictions, so that those individual papers can be given to folks to work legislation. We weren't going to draft legislation here. It was strictly information for Senator Smith.

Adam Zellner: Environmental Insurance for developers and residential owners of brownfields.

ADAM: Let me start by framing it and then talking about the three pictures of insurance and how I see them coming together, including what the market currently offers; and where we may be going. We're entering into areas as regulation and regulatory picture becomes clearer, the market reacts and usually produces products that are offered up. Right now we're in the middle of this process. The market is changing. Funding is also changing. Pension funds are finding themselves more involved in Brownfield redevelopment. It

started a couple years back with some very large projects and has progressed to the point where we're now seeing 5 percent of large development deals in some way connected to pension funds.

The natural middle ground of insurance pops up in two different ways if you're looking at non-permanent remedies. There is what you would use insurance for on the monitoring side, and then what you would use insurance for on the long-term liability side.

One thing we are seeing as we start out framing these bigger brownfields long-term investments for non-permanent remedies is the idea that monitoring needs to take place, and monitoring over a long period of time in some cases. That could range from simple vapor intrusion all the way up to a cap, and what goes into that monitoring. At the same time, we are seeing that folks developing these sites have a non-permanent remedy that requires interaction, maintenance, monitoring reports with the Department. All of a sudden three years go by, the condo association finds itself on its own, and originally what the developer took care of now falls to the association. You have issues regarding whether condo associations can monitor these things.

Change in ownership and monitoring

ADAM: You also have the second big picture of the flip market. Someone will develop a product, put a cap on it, and the market will change, and they will look to flip that product out to somebody else for some other reason. As title changes, who's responsible for making sure that each time the purchasing party is aware of his or her responsibility to the Department, to the maintenance of a cap or non-permanent remedy. So that's A. How do you monitor?

There's the second part, B, which is protection. We are seeing now, as we look at redevelopment, and again long-term residential especially, folks interested in insuring the long-term health and safety of the residence through an insurance product. And it's an interesting evolution in the market in two ways. First, you know, I think that folks were probably less aware of site remediation than they are today. And that means that residents are asking for the first time what it means. We also have constituency groups, some of which are missing from today's discussion, that raise those issues a lot, and oftentimes residents are left asking us what recourse do they have, do they have insurance, are they safe, is it guaranteed. And so we are now seeing folks come out, AIG, Wells Fargo, a couple of players who have said that they are looking at actually doing insurance of residential structures that are on brownfields so that residents have that peace of mind, if you will, that there is some insurance should something go wrong that there is a recourse to. Usually you just sue the developer. This is sort of a secondary tier. That is interesting to me in two ways. First, go back to where we started. If insurance companies look at things from a risk perspective and an investment perspective, naturally you will assume that the result of a good insurance plan can be that the more you go to a cleanup, the less your premiums are on insurance. A permanent remedy where you're removing, probably is a premium that's extremely cheap versus a remedy where you have a cap, you have vapor monitoring, et cetera, where you have a lot of activity going on. Insurance rates may differ. It is a nice motivator, from my perspective, for the industry to begin to look at a cost benefit analysis of, the more I go to clean up, the less my premiums are, and vice versa. There is a second effect because before everybody looks at the full cost out of this -- because there is a cost that we'll get to in a minute. The second effect is today we have deed restricted properties that are bought. People call and say, it's deed restricted and now are beginning to ask that insurance question. Inevitably, you may have a category of deed restricted without insurance, deed restricted with insurance. I don't know, because we don't have the product yet, whether the market looks at deed restricted with insurance as a more valuable residential product because at least there is a secondary piece of insurance, secondary piece of confidence in marketing this place. I'm not positive yet that that's the result, but that's one of the things that could be out there. There are currently a few companies that are out there right now looking at the monitoring side of things. I wouldn't call it insurance inasmuch as I would call it an annuity where a company comes in and says, "If you give us money up front, we will guarantee that the testing will be done over X number of years because we will annuitize those dollars over so many years to make sure it gets done. It is evolving, though, more towards that insurance role, a traditional insurance

policy that would guarantee actions. On the second part, on the protection, we have already seen AIG come to us with several products. And the recent one was on the NL property that did not go forward, but the initial developer came in offering an insurance product for the residential portion. How I see this coming together is twofold.

Currently, the Department of Banking and Insurance does not regulate those products or create those products because they haven't been put into use effectively in New Jersey. There are some small annuities, but those are not insurance policies; they're just parking dollars to make sure that there's someone there. In looking at any necessary changes to the site remediation program and the laws that govern that program, our role will be to create a picture that the insurance industry is watching and waiting. And frankly, they want to get feedback from us as part of our meetings. And we'll likely as we get further along want to join in, take a look at White Papers.

I see it going in two ways. As the picture becomes clearer, we will require, mandate, in terms of non-permanent remedies, the insurance market will get more ripe in terms of products offered. At some point, we will reach a plateau where we have a product that is fairly good. And at that point, we will probably have to get together and talk about both additional legislation and additional oversight and monitoring by the Department of Banking and Insurance to make sure, like any other product, it is something that can be sold at a reasonable rate, achieve economies of scale to spread risk -- because this is all about spreading risk -- and at the same time, flexible enough to be part of what is ever-increasing flexible brownfields in terms of uses and mixed uses and how they come together.

Summing it all up, I see it going in two ways. Products will probably come online first for non-permanent remedies for monitoring. Again, we are seeing more and more homeowners associations becoming responsible for these things. If you have an insurance policy, it dictates what has to happen, and creates fallback to a large corporation. We know insurance companies; they tend to be deep, long companies; they don't disappear tomorrow. It allows us the confidence to know someone's taking care of it. And most importantly, that as properties get flipped and as the COs get flipped, there is some underlying authority that knows each time somebody buys the property, they must look at that insurance policy that travels with the property to make sure that the due diligence he or she understands. You're not just buying a warehouse, you are buying a cap and the monitoring responsibility and the premiums that go with this insurance policy that will guarantee that that gets done. It gives us certainty over the long haul.

The second piece, more complicated, is as the market begins to evolve and requirements for builders to have a product that gives residents more confidence in what they're moving into, that will be the second product that evolves over time. I say it's slower because today it's really going to depend a little bit on the market and a little bit of what comes out of the this group. Because if the market at the end of the day says that people are willing to take the risk and they're willing to move on without this insurance, that's one thing. If the regulation say it has to happen, that's another. So I'm happy to take questions on where we are, talk about at least AIG and Wells Fargo and a few others and what they've offered up by product today and what you see as the concerns.

SHERYL: Just a clarification. You're speaking a lot about the residential scenario, but that is not the only scenario where engineering and institutional controls are used. Were you thinking about those primarily as a tool for contaminated sites that are converted for residential use, or were you thinking about this more broadly?

ADAM: More broadly. And that's so when you talk about the warehousing. I use residential as the primary because at least in the other, the secondary uses, it tends to be -- the ownership tends to be a little bit more stable. What we're really suffering from is the condo world, it's the third-party owners that all of a sudden -- because if you're building something unrestricted and you're going to have a deed restriction, we don't want

single family homes, we don't want tomatoes in the ground, that kind of stuff, you're always going to have some sort of association. That association at some point evolves from a corporate structure into individual structures. But, no, it would be broad to help us look at property flips for things like commercial warehousing.

SHERYL: Again, clarification for the flips. Suppose, for example, I have an operating industrial site that has a deed restriction on it, no intention of flipping the property. Are you talking about adding insurance on the deed restriction?

ADAM: Could very well be, to make sure that you have guarantees of the monitoring going on. And that's part of the conversation, there is a cost associated with it.

TONY: What would be the purpose of that insurance?

ADAM: The purpose of the insurance is to, one, to guarantee that what needs to happen in terms of the non-permanent remedy continues to happen over time. Because we're finding that even folks who understand -- and they're good folks and bad folks, but it is a constant oversight. And you know Irene's got a caseload that is huge, so handling the inflow is difficult, handling the follow-up and the monitoring of these sites is very difficult. And oftentimes we find ourselves reacting to reports that are overdue or things that people didn't know. So for me, it does two things. It takes a third-party risk assessment and it allows the third party to be out there to say, okay, you have to carry this product. This product goes with your site. No different than if you're going to have a car or a house and you're going to add any kind of extra anything, you get that supplemental insurance. You buy the diamond ring, first thing you do is make sure it's insured under your homeowner's insurance as well. So it does two things. It creates permanency. It's required. Everybody has to have it. The insurance company will call you and say, Hey, Tony, you didn't file your report, and you know that I can't certify you unless you do it. And it allows it to follow the owner forever provided, you know, in case you decide at some point you're going to flip it. We have run into stories, it's been flipped many times and somewhere between the second and third purchase of the warehouse somebody forgot to tell them about the cap.

SHERYL: From my perspective, I think that certainly I share concerns about the long-term effectiveness and the long-term stewardship of any institutional controls. I wonder if there's some alternative approaches to the insurance approach, perhaps a license that is granted per property that's transferable to subsequent property owners, a permitting type of program. And management of that program can certainly be privatized to the extent that there's an issue of workload for the Department. That permit could carry a time frame or license or registration, whatever you want to call it, a couple years or five years. I think it gets to making sure that there's a transparency and folks are aware, not just the first transaction but the second transaction, the third transaction, the fourth transaction. Speaking for myself, I'm not a huge fan of insurance because you find that your term limited. There's no guarantee that you'll get a renewal at the end of that term. I think there may be other sources that might be more rigorous.

ADAM: We're finding companies that are no longer able to keep up with their financial responsibilities, in some cases Chapter 11. And so not only are they not doing the maintenance and monitoring, but it's overdue, they're Chapter 11 or can't do it. The insurance product would allow us also to know that the backstop of the Chapter 11 risk is covered under insurance different from or some sort of annuity up front in which if it's a 20-year responsibility to monitor vapor intrusion, you annuitize a certain portion of dollars and then you draw down. The only problem with annuities is you're spending liquid M1 capital today in this current year that has to be drawn down over time. It's a very big expense, where insurance tries to load over time. So I hear you.

JORGE: I think Sheryl raises a good point. I think that many of us at the State have either work for or against insurance companies and we know how much they like to pay and we know what they say when they're selling the premium versus when you say on a claim that you really owe me money. Well, guess what? And there's lots of horror stories in the environmental insurance world, even though you have a lot of people out there telling you how great environmental insurance is. Most of the insurance companies are reluctant to write long-term policies because risk becomes less finite and less predictable. Second of all, and therefore if your term is for 10 years and then you can't get the insurance after that 10 years, you're back in the same position that you were before. Or the premiums go sky high that they're impracticable. It's obviously going to be on a claims-made basis so if you've got insurance for 10 years, and 10 years plus 1 day and that's when the problem is discovered, they're going to say -- even though it occurred during the first 10 years, they're going to say, Nope, it's a claims-made basis.

JORGE: They'll renew it. You'll be subject renewal, but as I get older, guess what happens to my insurance rates?

ADAM: Right. They're going up. First they go down, then they go up.

JORGE: That's what's going to happen to these babies, too. I think insurance should be explored. I hate to see it as a sole option and only a sole option.

ANDY: I have four points. A lot of what you're talking about affects who I'm here representing, the Builders Association. I think that most people in the room might have a lot of disagreements with insurance products and transactions and residential construction. First, the big concern I have overall is that we not look at this as a cookie cutter approach, one size fits all. There's a vast difference. Starting point is the 15-story high rise on Hudson River covered by a parking lot, sidewalk, small landscape area; that's the cap. The maintenance and inspection obligations associated with that are far different than a building, for example, on top of a landfill. Putting the buildings in the same -- the same situation should apply for both of them I think is creating a difficult program.

ADAM: I would agree. And I just would add the comment that hopefully in part the industry -- that was what I meant by the industry taking a look at risk and analysis of what that risk means. You'd almost think that if you had a cap that is parking lot, that is this, that is that, that your premiums would be based on 31 a much lower risk.

ANDY: The second point, I think Jorge picked up on some, and that is the insurance product relies on level of predictability. Life insurance, granted there are changes. For the most part, the actuary is able to predict where you are. Auto insurance is different, and I think one of the important points that Jorge rose about renewal, you have to be renewed except for certain situations. And unless we consider legislation mandating the renewal of a product, I think relying on the product -- Third, as far as the risk is concerned and how it can be dealt with. In most instances -- and there are exceptions. There are complicated engineering institution controls. But for the most part, they're not that complicated. In my mind, they're not dealt differently, whether it's a homeowners association or a single owner leasing the property, for example. That from -- if they operate a sewage plant, if they operate other equipment necessary for the facility, higher maintenance. For example, those are the bigger risk in maintenance and management, not a parking lot and landscaping or even a vapor mitigation system. It's a relatively simplistic engineering function. And that is passed on in condo association, homeowner association. The associations, they hire management companies. The big issue they have is in long run, collecting money from all the members, not how to manage a relatively small portion of their budget to handle these issues. I'm not sure insurance is the thing they want to look at for that type of product. Both for the type of issues we talked, renewal and lack of predictability the insurance company to rely on, and also just gross efficiency. Because at the end of the day, the cost gets passed on. It gets passed onto the homeowner, it get passed on to the retail owner, it passed on to the

warehouse. And passing the cost through an insurance product isn't the most efficient way to do it. There's the ability to work it into your budget and deal with it directly -- having the insurance company back there is not necessarily the most economic. You're just driving up the cost. And the ideas that we've discussed in prior sessions about permitting and those type of programs where it passes with the property and has specific requirements which can be adapted over time as we learn more about the process, it is worthwhile. I'm not sure insurance is that product, A, is what you want. And four, as to market developing, it's always an issue because most of our clients' first question -- if not the first, it certainly comes up sooner or later, sometimes at the closing table, but it comes up. And that is, how am I protected for myself and how am I protected from people I'm selling to. Because the last thing you want to do after going through a myriad of approvals that you need to hopefully try to get something built on this thing -- that's a whole other day -- is to protect their ability to build, get people to buy, and then move on without having to come back. They don't want to get calls. They don't want to get lawsuits. They don't want to get complaints. And for the larger institutional ones, which are pretty much the only ones, they don't want publicity. They want to build something that they know is safe and that they know that they can sell to people and that they don't have to worry about coming back. And the market is not necessarily how I can insure myself. In 95 percent of the transactions I'm involved in, insurance is considered and rejected for a myriad of reasons, but for the most part the term isn't long enough, the product is too narrow, or the risk associated with it doesn't bear the cost. You're paying for protection you already have. The parking lot is going to be maintained.

TONY: A legal angle to this in the sense that -- and I think it was brought up at the last meeting -- where if I'm supposed to monitor in accordance with the directives of the DEP and I fail to do that, I'm in violation technically so you're going to buy an insurance program to cover what is tantamount to illegal activity. So from a legal perspective, does that trigger an issue? I also -- I go back to the basics. How many sites out of the 18,000 do we really see this as being an issue where homeowners associations have to take over and what exactly are they monitoring? If they're doing CEA, I understand if you're just sending them biannual certification, that's one thing. Our members passed the CBT portion of the program. There's a lot of funds out there to protect against those companies that do go bankrupt, you can't identify, and you need to continue to monitor them. You would just go to those public funds and take care of the situation. So the concern that we have is that by introducing this whole insurance scheme, it just adds to the cost of remediation in New Jersey. Again, I just don't know if that's really --

TOM: One of the concerns we have is the LLC, you know, X Company and X, LLC. They develop housing under the LLC and then they fold the LLC. And I think our concern is where does that leave the homeowner, the homeowners association. That LLC is obviously not an entity we can go after anymore for these long-term monitoring issues. And if insurance isn't the answer for that, I mean, I hate to see my family put into one of these situations where now if something happens five, six years down the road -- let's face it, we're building a lot of housing on contaminated properties. What are their options, if it's not insurance and the LLC is no longer there? --

TONY: Public monies. Funds.

IRENE: But how is that fair that a developer gets to walk away and our public funds are being used to monitor homes? And it's not just condo associations, there's single family home development.

ANDY: Developers didn't put it there. They're developing the property, making it better than when they got it. The State didn't come up and clean the property; they did. If you want disclosures and those issues, a lot of that is what you're talking about. What is the risk? What is the concern that we're talking about? Where is the down side to the homeowner who may or may not have had enough of disclosure? Whether they paid attention to what they were doing or not. They can also be told of a insurance policy to follow-up on or they got a policy that isn't adequate enough. I don't know who has the expertise in insurance policies. It usually

takes two or three attorneys going back and forth as to the insurance policy that's written and what needs to be covered. But in that instance, if there was a failure to disclose, they're individuals involved in some level.

TOM: Is there something on a homeowner's deed that says there's a cap or they're on contaminated property? I think that's an issue that's come up. And folks have told us there should be. I don't know. Is your experience that that's in every one? If I was buying one of the 15 or 20-unit condo on a site -- it's my understanding from some of the attorneys we spoke to that you are actually part owner of whatever property. So if it's a hundred acres, whatever acres it is, I get whatever percent that is. Well, does that -- somehow are we protecting them by saying in the deed somewhere when you buy that condo that you're on contaminated property? I would bet we're not.

ANDY: An important point that needs -- for this additional discussion is level disclosure and what's involved. If you're talking about something that required a registration by DCA under PREDFDA, you're required to do a public offering statement. That public offering statement is supposed to accurately reflect everything that you put into the site. If it's going to building remediation, as of now DCA's policy is that you have to have an approval, and that's been dealt with on their end as to how to tighten up that aspect of how to complete it. The disclosure is in there. If the property is being transferred before the deed's recorded, there's a statement in there saying, this is what the notice is going to look like; these are the requirements.

ADAM: Monitoring is inexpensive and procedural, you know, go down, do what you have to do. The problem is, it's expensive when it's not done.... A lot of it depends on the tolerance for that risk in the first place. Lots of folks know that they're moving into sites that are whatever they are and they're aware and they're okay with that.

The group discussed the problems with insurance: terms being limited, reluctance to write long-term policies and no guarantee for renewal. Andy stressed the vast difference in inspecting caps based on the project such as a building with a parking lot versus a landfill. He also mentioned the issue of predictability with insurance, managing risk, and liability.

Liability and LLCs

ANDY: The sites where we've followed the recommendations and done the remediation, sometimes I've had attorneys call up and say, "My client's interested in buying this piece of property... How can you guarantee that there's absolutely no risk?" I've read the documents. It's right there in bold letters. DCA required it in bold letters. And my answer was, "I can't. You're buying in an urban area. This is the type of property that's impacted. At least it's been reviewed. It's gone through DEP being capped, it's being managed and has a management plan. If your client isn't comfortable with that, then don't buy the property." And by and large, even in this market, they buy the property. Sometimes they don't. Most times they do.

TOM: Do you think the average person is aware of these issues? I think we need to assure the folks in this state that if you're going buy property or something like that, that there's some assurance that two years from now you're not sitting there alone on a landfill.

STEW: Talking about major brownfields, they all have insurance. We buy or our clients buy about a hundred million dollars every year of purely environmental insurance. We're buying blended, finite, cost caps, 10-year term, 15-year term. Even in the situation you described, I've had clients who say, "That's too rich for me." They go buy the product and they put it into their proforma. Part of this insurance discussion I look at as a private decision.

JORGE: I think the ideas of having a permit or license is really a good idea because I think that institutionalizes it, give you a better opportunity to capture when it starts failing and you can figure out how frequently you want to have the permit renewed and so forth and so on. Regarding how you fix an

engineering control that fails in the absence of a responsible party, yeah, we have this bill fund. If we use the motor vehicle insurance pool as a paradigm, I mean, you've got insurance for uninsured people. It's called the New Jersey uninsured vehicle form. What would be a problem with imposing a transfer tax on real estate property, a very nominal one? I mean, there are, new units sold in the state every year. I don't know how many properties are transferred. But if it's a hundred dollars a property, pretty soon you'd be mounting up some significant money. Now, if you melded that with a short-term insurance product and until you've got enough critical mass in terms of your insurance pool, you could do away with your short-term insurance product at some point if you had that insurance pool backing it up.

DONNA: One thought was to create a pool by either developer fee or transfer tax or something that had the minimum bare bones insurance policy or a cost overrun for the cleanup process itself. And then if the developer feels or if the project is very complicated, layer more complication and more expensive insurance based on what the developers feels that they need. If you can do that through a pool, it's cheaper for the developer through the pool instead of going out and getting it by themselves, have the State being an additional insurer to protect the State in the event the developer walks and then create a insurance product that starts in the beginning during the cleanup. I like the idea of the permit process for maintaining the cap. But I think what you need to do is create some kind of an insurance product to help the developers get insurance at a cheaper rate so they get it from the beginning. Have two different pools, one for the smaller sites and one for the larger sites. The larger sites are going to take up all the resources and there aren't going to be anything for the smaller sites. Maybe have two different pools, one for the smaller developer that's cleaning up the corner gas station and one for the bigger sites that need the more complicated product.

TOM: Unfortunately, sometimes the smaller site, quote/unquote, ends up being the mega cleanup site because we've had sites where if they contaminated bedrock groundwater. It could cost a fortune to clean it up. It could be a very small site that's actually caused that.

SHERYL: I think that we need to be focused on looking at the site-specific issues and making the right cleanup decisions for specific sites so that the cleanup is protective. If there are issues with exposure due to breach of a cap, let's address that.

Stew stated that environmental insurance is more expensive in New Jersey because of the cultural attachment to process in New Jersey; uncertainty around NRD costs and difficulty having conversations "without prejudice" with the agency at closing.

STEW: I see government's role is finding out who's responsible, making sure people are informed, making sure if there's a bankruptcy, and follow-up with the responsible parties. Just like my PE license, I get a letter every year to renew it. Why wouldn't these caps get those kinds of letters, too?

TOM: Developers aren't liable by NRD if you're developing a property and moving forward. I imagine the insurance you're talking about is – if you're taking on the liability for NRD from a responsible party, which that's a contractual issue; that's not a – or if you cause it during the cleanup. And as far as NRD predictability, I know they are drafting rules anticipating being out within a year. Those are the two comments I have on NRD, is that we changed the law on developers so that wouldn't be an issue.

ADAM: In listening to some of the stories, it almost seems like there is a need to step up at least the Department of Banking and Insurance oversight of what's going on because the world is in flex free fall. And depending on which day you catch – that is alarming. I think whatever comes out of this, at least is worthwhile taking a review of today on the ground to see if there's any way of making that process more normalized.

Irene mentioned the difficulties of staff shortages to focus on all the issues that the advocacy groups to lending institutions to insurers to everybody.

IRENE: Everybody wants our signature on the dotted line that something's okay or approved. And it's just becoming more of a burden. [The number of cases is 18,000 and growing.] This does not include the day care facilities that will start coming in June. In addition, we don't know the impact of the Madden legislation with schools and how that might increase. It's not a shrinking universe; it's a growing universe.

What we have been talking about is looking at a myriad of options for providing relief; higher fees for people, developers and whoever want to come in, get special case workers or whatever, move through an expedited process: CEHA delegation; expansion of cleanup star and taking the homeowners cases off our plates. We are having contractors working on a contract to bring geology support into the Department. That's one of the areas that we have really big backlogs. And we wanted to start the concept of using in-house contractors on a somewhat small pilot type of arena, provide a lot of relief to the geologists who are overburdened, overworked. We'll probably focus a lot of that geologic support on brownfields, maybe even underground storage tanks, things like that. We're hoping to get a contract out within six months.

IRENE: We have a bunch of sites and beaches where munitions cleanups have to occur. And we don't really have the expertise in that area. One of the things that we had talked about with regard to permits for institutional controls was looking at NJPDES permits for the long-term monitoring of groundwater plumes and CEAs. I was hoping that with existing regulations that was something that we were going to be able to implement relatively quickly in the internal meeting with the NJPDES program we found out that low and behold in the late '90s they took all of the ability to issue discharge permits to pre-1997 discharges out of the NJPDES rules. So in order for me to effectively use the NJPDES permit as a monitoring tool for groundwater plumes, we'd have to do a major rule revision. So that right now is sort of off the table for a short-term fix. It's something that I'm still going to look at. They are going to be NJPDES rule revisions in the very near future. If we can squeeze something in there, we will.

I'm not quite sure if I want to go that route or if I want something else in the legislation that is an SRP permit to monitor as opposed to a permit to discharge, something along that line. We're continuing to talk about and evaluate.

Certification program for non-regulated underground storage tanks

WAYNE: We're going to mirror a certification program identical to what you see for the regulated tanks. A situation such as an entire system installation, there will some extra monitoring, closure tank testing with our protection specialist, testing and some sort of evaluation will all be folded into that. If you're certified for the regulated tanks, you're automatically certified for the non-regulated tanks. If you're not certified, you can also seek individual certification for the non-regulated tanks alone.

We're going to try to marry the Cleanup Star Program with the Homeowner Underground Storage Tank Program and try to have subsurface evaluators that are certified for regulated tanks and non-regulated tanks the ability to certify, do the RAW, submit the certification to the Department, including groundwater on site, and the Department will issue an NFA within a certain period of time, similar to the way we'd operate Cleanup Start Program today. The difference is, if you're doing a homeowner tank and you're certified for subsurface evaluation, you can do everything, groundwater included, provided it doesn't go off site from the homeowner's site. There's another four categories where we would require those cases to come back for the Department, and that would be for an IEC (immediate environmental concern). We talked about what an IEC was in the previous meetings as well as any kind of off-site impacts from the property that you're dealing with, impacts to receptors, such as wetlands, and surface water problems. So on-site groundwater is something that will be for subsurface evaluation, certified for regulated tanks and non-regulated tanks for the homeowner universe only. As we develop this program, we may look to expand that beyond that.

There was continued discussion of the Cleanup Star program and how it might evolve in the future. It's hoped that the rule on certification will be out in the fall.

Irene discussed presenting issues in a White Paper including how to move things more expeditiously, staffing culture, and process.

Barry Frasco discussed the difficulties of balancing consistency with flexibility in the program.

BARRY: The problem has always been that if you're focusing towards absolute consistency, you become inflexible. As opposed to putting some flexibility into the system and then people are saying, "Well, you're inconsistent." And it's somewhat frustrating from the Department's perspective because, you know, I'll go out, I'll give presentations, and someone will say, "DEP, you're not flexible." And then someone will stand up and say, "Well, this case manager says you can do this, but this one says you can't." And it's like they put you in a bind sometimes.

JOHN: ...as a public agency, we're a function of the last crisis. Kiddie College had a life of its own, new legislation, new things on the Department that, quote, procedurally on the regulated community and a new regulated community we never even interacted with before. I always kind of joke that we have a way of looking for people who don't hate us and then we figure out a way to get them to hate us. (Laughter). I think in the site remediation program, because it's so prone to having these types of press events and then add on the new procedures nature, we don't get other press events. I think we have to figure out a way to get past that.

IRENE: That's exactly why Senator Smith was kind enough to let us put together these White Papers because... if we just got legislation that added more responsibility to the Department for permitted remedies, feasibility studies and remedies selection, et cetera, we would just be bogging down. And that's why this discussion is all about what can I take off my plate or what can I do differently to take on some of these other issues so I can still get cases through the Department in some sort of a reasonable fashion.

Wayne discussed the evolution of guidance documents and technical requirements noting they are getting longer.

WAYNE: Now we have so many more things added on to our plate, and our clients have become very sophisticated -- we're writing technical legal documents to respond to our clientele. And I think we're getting away from what I think is our basic mandate. Let's get sites cleaned up.

Jorge discussed delineation and stressed the importance of expediting remediation.

STEW: Even with the current rules, you have certain things you're required to do. You're required to delineate, you're required to do this, you're required to do that. And I've had clients who say, "I want to remediate X." And the DEP's reaction is, "Well, that's out of order. You haven't delineated." Yet the client's sitting there going, "I'm ready to spend a million dollars right there. And, yes, I know you may not be satisfied when I'm done, but we all agree it will be an improvement. "That process is really almost one of the key things I find frustrating, is that you have a willing, responsible party willing to invest dollars on the cleanup. They're just not the place the DEP wants the dollars invested in so they start arguing about the direction of the project, rather than saying, "You want to help clean up that source area, go have a good time, but we, the DEP, are not relieving you of your other responsibilities."

The group discussed the applicability of technical regs in varying circumstances and if variances could set a precedent. A concern was expressed that variances could take more time.

SHERYL: I agree there are components of the tech regs that do not make sense in certain circumstances. They might be applicable and work well in certain circumstances but the other thing we could improve is thinking about the remediation from an end vision point of view. I mean, not just in the context of redevelopment, but if you have an industrial site, a potential warehouse site, a future park, residential, let's design programs that fit what the site is as opposed to following the same process for a quarter acre gas station that's going to stay a station that you follow for a 1500-acre industrial site that's going to remain industrial versus a 50-acre site former industrial site that's going to be residential. I think there's a potential to miss the forest for the trees, missing the real issues. So it's thinking about these sites from the vision as opposed to let's start at the postage stamp and work our way out.

IRENE: Good point.

MARK: It's that within the context of those regs, it seems to me that if you deviate from one or another or three, are you setting a new precedent that's going to require you to treat the next person exactly the same as you just said? Probably not.

IRENE: Should we be looking at changing the program?

JORGE: EPA's done a lot of cleanups without the tech regs. Pennsylvania may be doing some thing without the tech regs. Tech regs are minimum standards and that's in many cases how they're read, minimum standards. So they're even more onerous than they may initially appear because people say, "These are minimum standards." And I think the point here I'm trying to make simply is that maybe it's time to establish guidance and maybe the tech regs should be in the form of guidance and maybe our standards should be cleanup standards and performance based and those established by risk based standards. And how we get there is almost irrelevant except we have a context and we have a frame of reference and maybe that's the guidance that you put forth in the form of technical regulations.

IRENE: It sounds like you're saying – and I'm not opposed to this concept – is maybe the tech regs have those major things that are required that some of the things like Stew said, you have to delineate, you have to get the stuff out of there or treat it, you have to check for receptors. But the guidance piece is all the "and here's how we recommend we do that," not "here is how we mandate you do that."

STEW: When I've been in meetings with DEP and we're arguing about minimum standards, we usually think we are meeting the minimum standards and the Department thinks we're not. But the reality is, it's a result-oriented argument. You go and do the work and get the post-ex samples or pump the groundwater or whatever, it's results oriented. Three years later or if you're digging it up six months later, we have the data, we can all see whether we met the standards. So why do we argue about whether we've met the standards or not before we've done the work? The people from the Department say, "Oh, no, that's not the standards." We think so. Why can't we spend the money and prove it to you? And that may be -- it's not a variance. It's more like -- I don't know. Sometimes I think the Department is my mother, you know. It's the sense of -- it's almost like it's our destiny, it's our butt, it's our consultant's butt, my engineering license's butt, my client's money, my relationship with my client. All of that gives you the assurance that you're going to get good results. What you guys need to do is recognize when you think you have somebody who has no intention of fulfilling their responsibilities. Then you've got a great set of regs to bang them over the head with.

IRENE: If we devote less resources to the people who are actively remediating and moving forward, would that free up resources for the publicly funded program so we could be spending more money, getting more things done? And for the enforcement program, two areas that we want to grow where we can be taken more

aggressive enforcement against the people who have been sitting around with ACOs for years and still haven't delineated the place.

The group discussed the Department's responsibility for the cleanups and the need to assure the public that the remedies for remediation will work. Delineation of the contamination was also discussed and the problem with vapor intrusion when buildings are on top of the contamination. The issue of tech regs requiring data may not be necessary. Any changes will require legislation.

TOM: When working with developers, if they can move the building away from the product, that would be good to tell them because I can't tell you how many meetings we've been where there's a site and the building they want to build is right over the worst part of the site. I never get it. Why can't you move the building over here?

One of the concerns -- and I'm being kind of funny about it -- the case managers have is once you -- if you're going to do a structure in a year or two and you're doing something like one of your technologies, you're dumping stuff in or whatever, a lot of times they want to build over that. And it ends up being a situation where they may not be able to go back in once that building is there to fix it if it doesn't work. I know we often run into that situation where they want to go forward. It's not like we don't want to go forward, we're not sure of the technology, we're not sure it's going to work, and now there's a building over it.

STEW: Again, when we were talking about insurance. If that remedy fails, my company's liability insurance is going to back it up. Environmental insurance, there's a responsible party

TOM: It's not the insurance that's a concern, it's the fact that how are we going to get it out with the structure over it?

STEW: That's an engineering problem. I don't see that as the Department's concern. You know who is going to pay for it; that's all you need to know.

TOM: The concern is we're then faced with arguments that it's impracticable for us to get in there now and do the cleanup.

IRENE: But I think what Stew is saying is, if you go to a different approach which is, "Stew, remove it. I don't care how the hell you do it," then he removes it and it's not our problem anymore.

TOM: I don't know. We oftentimes are not getting folks -- if you want to remove it, fine, and pump it out and get it out of there, we're often faced not removing it, we're faced with treatment and other things that don't necessarily immediately remove it or technology that we're not sure if it's even going work. I think it depends on the situation.

SHERYL: One thing that we're not talking about is what we're trying to accomplish through these remediation systems. If the concern is a volatilization or vapor intrusion and that's what the future human health concern is, then why part of the remedy could be instillation at the time of the construction of a vapor intrusion system. Instead of worrying -- you know what I mean?

IRENE: But I think part of the problem is source -- we really would love source removed because it impacts the groundwater potential, surface water, that type of thing. Tom's point is if you engineer on top of an existing source to groundwater contamination or potential surface water contamination and then come back under the tech regs and say, technical impracticability, and we can't get to it, then we have a problem. And if

we have the authority to just say, Whoops. Sorry. Take care of it somehow. I don't care how you take care of it --

STEW: That's where I'm coming from. Let's say you have a failed remedy under a building. And you had to evacuate people. I think the Department should say, "They did it their way. We told them that it would be a problem if it failed. And you tell the newspapers it is XYZ Corporation's problem. You are taking too much responsibility. You do not own these cleanups; we do.

JORGE: Well, that's not necessarily true, Stew. I mean, the Department does have a responsibility. The Department has a major responsibility of protecting public health, and they need to be assured. And what we need to do is we need to structure a program that gives them the assurance that they need to make sure that the remedies are going to work. It's just a question of what they're looking for in terms of context with what they're going to approve. Are they approving specific details? Are they approving performance-based criteria? That's where we need to get to, in my opinion.

WAYNE: The biggest arguments that we get into at the meetings are, is this site delineated? Is the contamination waived? If the answer is yes, that remediation flies and you can get what you need. In the cases where it's not delineated, that's where we run into problems. That's where you want to put a box score over top of an area, Well, we're not sure if contamination is there or not. So as a result they move in that area, and that's the worst spot to put a building on. Then vapor intrusion problems. The bottom line is if work is done upfront, everything else falls into place. I can't tell you the number of meetings over the past 30 years that we had over issue of site delineation or contamination delineation. When it is, that site will move through this program like wildfire. When it's not, that's when we get --

ANDY: There's always that, what is delineated? You're supposed to have 15 samples, you only have 14, that's not good. I had discussion with other regulatory bodies. You build a house, you're supposed to put the studs on center every 16, but if you have couple studs at 17 and a couple at 14, the building inspector is going to approve the building as long as there are studs in there categorized. And that's the level of flexibility we don't see. The one thing I want to point out, though, is in the law when it came through, there was no abandoning the concept. We know you're going to develop regs. We know that the regs can get overly proscriptive. You, as the Department, mandated and said in 5810B 2B and C, you have to come up with a program. You have to encourage flexibility, and you have to allow for people to be able to say why the goals of the different steps have been met. A preliminary assessment is not a preliminary assessment because we have rules. A preliminary assessment is because you've categorized the past operations of the site and whether it has the substance reviewed and where they might have discharged. A site investigation is you following the sampling in the tech rules.

BUDDY: I think delineation also is where you have to have the goal of the site. If the site's already in an area with absolutely no sense of receptors, then maybe the requirement of delineation may not be as stringent. But again, every site is treated the same as a site that has no risk and we end up with soil samples ... It comes to the purposefulness. The question is the access of the data that we collect at this point is of any value. Is it going change our assessment of health and safety? Is it going to change the remedial action selection? If it doesn't do any one of those, then the only reason they're collecting that data is collect it because the tech regs says you have to collect it. And that's where sites get stuck ... we know the health and safety risk, we know what we're going to do to remediate the site, but we haven't met stringent tech regs so we continue the delineation phase trying to offset access agreements, trying to get borings, trying to go vertical and every three dimensional direction and applying a parts per billion that added zero value to the site.

TOM: Receptors change. One day you might have a receptor a mile away, and it might be a new receptor who has now concerns for vapor intrusion and other things. And how do we assure it, how do we protect

those things? If you're only looking at a receptor a mile away, and six months from now there's a hundred receptors in that area, who's going to make any assurances on that?

BUDDY: In the middle Newark you've got to meet the drinking water standards.

TOM: There's also vapor intrusion, which is also occurring in the middle of Newark that has nothing to do with drinking water.

IRENE: In the Massachusetts program, the cleanup standards are based on do you have vapor problems, are you going to impact another facility for vapor, are you going to impact a drinking water supply, are you going to impact a sensitive ecological receptor? And if all those things are no, your cleanup standards are different and they're met at the boundary, the property boundary. So there are models out there that other states use that are different than our model. And one of the other things in Massachusetts is they do have groundwater quality standards that are very stringent, but they have different cleanup standards and different points of compliance for the cleanup standards...we probably need to take a look at and see -- if it's still highly protective of the environment, both people and birds and bees and bunnies and everybody, you know, it might be an alternative process.

BARRY: Buddy brought up a good point. You can have a discussion whether tech regs make any sense versus what you're cleaning up to. Those are two different issues. If the argument is, what am I cleaning up to, that's an argument as how you do the cleanup. I think you have to keep them separate. One's establishing your cleanup number versus one's how you do your investigation.

BUDDY: The cases are not close to being caught in delineation. We know what the remediation will be on most of our sites. We're just held up to get -- well, most of our sites, you know, UST sites, most of them are natural attenuation. A lot of times we get trapped in the delineation phase and it adds to the caseload. I mean, I think Massachusetts works because you have the MTP, not because they have LSPs; because they have off ramps. If the site is not a worst case scenario, you get off. All of our sites, they're on the highway and there's no end in sight.

IRENE: Can you talk a little about the off ramp concept?

STEW: I work mostly on bigger sites than Massachusetts. A little more complex. But there are places where you show that there's receptors are all taken care of and you've got some issues related to site restriction and all that. You can go to a higher standard but get it done and you're done. And your monitor program addresses it.

STEW: The one other state I've worked in that I like is Illinois, which has almost a three-tier program. In the urban areas, groundwater standards are actually low. They recognize in urban areas people aren't going to potentially get exposed. But the soil standards are very high because they recognize that -- or are real strict because they recognize there may be playgrounds and open areas and things like that. Suburbs, they recognize that there are non-public wells. So in the suburbs in certain areas of the state, groundwater standards are really strict because they don't know if somebody's going to put a well in for a sprinkler system and things like that. And in the rural areas, it changes back again. They know they can get large natural attenuation zones. You have an underground storage tank in an industrial farm. Every square foot of the attenuation zone is on that farmer's property. So they recognize that they're going to be able to control that, and then the soil standards. So they have this three-tier program that recognizes where you're working. And then even then it goes through a RBCA process. It's a nice program. It's complicated. But the way it's done is the consultant prepares what is his interpretation and the agency concurs.

BUDDY: It's a system looking where you are and where you can go and you take those factors into consideration instead of saying it's always worst case.

JORGE: Who makes the decision as to the cases done in Massachusetts? Is the license –

STEW: I have an extremely high profile case, TCE and chromium. It migrated off site. And we are quite honestly, we're moving at the speed of light. It's probably moving -- three to four times faster on the same site would be in New Jersey. We've gone from basically barely delineated two years ago to discussing whether we can get the entire remedy done before New England freeze occurs now. And this is a big site with really complicated issues and a citizen's committee watching us. The LSP sometimes aren't free agents. What they'll do is they'll call their contact at the DEP and go visit them. And they'll lay the plans on the table. They'll say, "This is what I'm inclined to approve, but let me run through it with you because really I don't want my license audited because there's something here you don't like." And rather than making the case manager think it all through, he goes, "This is my plan." And I've had the LSP on my jobs. Sometimes they'll call up and they'll say, "The DEP guy wants another off-site well," or "The DEP guy thinks this area you would want write off, he's not so sure he can write it off." And when we internalize that discussion and decide should we collect more data and do it that way, but at least the LSP is not left hanging out there. It's eventually his professional reputation. It's not likely to be sole regard. That still allows for the speed of light. Because I've been on with the attorneys, with us, with the client, you're on a conference call and the LSP says, "You know what? Let me go down to the DEP tomorrow, run through it." There will be another conference call. He reports back. It sounds good. And what we've done is in what takes three days, we have now done what takes sometimes a year here to do.

IRENE: Let me just say also for Massachusetts, one of the reason that the case managers have the time to devote to these cases is because the cases move so quickly through the system that you don't have this 5,000, 10,000, 18,000 and growing list. Most the cases move through in one year to two years; three years is big.

JORGE: This week, we have an opportunity to talk to some folks who work in Massachusetts versus Connecticut in the license program. It's night and day. The only reason I'm saying this is that if you go after a license, it's got to be the right site professional program. Because in Connecticut all it's done is add another layer. It so command and control, it's audit intense that it gets them essentially nothing in terms of saving time.

IRENE: I think what we had heard also is Connecticut is voluntarily; whereas Massachusetts, it's the only game in town except for some Tier type cases. And the other thing ...about Connecticut is they don't have that strong of an enforcement program. I don't think anyone there has ever lost their license. Whereas Massachusetts, people have lost their license and people have had their licenses suspended.

JANICE: I think in the past month they had two that lost five years.

IRENE: People take it very seriously.

BUDDY: I think the LSP in Massachusetts works because it has the MCP behind it, though. Their job is to look against MCP and say, "I have to follow these rules to get a site off because I can't deviate. If I deviate, I get whacked." So they have to follow the rules.

IRENE: How is that different, then, MCP or tech regs?

BUDDY: MCP essentially is tech regs. They have risk built into it. Not everybody goes the same way; it's some sites go this way, some sites go that way.

STEW: They have different imports. They have Remedial Action Orders, RAO. They have different tiers, so RAO-A is permanent completely cleaned. B means you left something. C means you've got long-term OMM. At any rate, my site, we're actually bouncing around. We had a C because we had a pump and treat system and now we're trying to turn off the C. We're setting a precedent because we're actually going -- after they thought they were done with us, we're coming back through the system. Once they understood what we were doing, when the LSP explained that, we're on our way. Did a lot of cleanup.

Irene mentioned inviting staff from Massachusetts DEP to discuss their process. Irene expressed an expectation of getting feedback from the White Papers.

Irene mentioned the May 7th soil standards proposed in the Register, and public participation for July 2nd.