

H639 puts groundwater and neighbors at risk

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H639, Risk-based Remediation Amendments, significantly expands a state program that currently allows incomplete cleanup of soil and groundwater contamination at several dozen pre-2011 industrial sites. As expanded by H639, the program will cover virtually all sources of contamination, past, present and future, and will sharply reduce final protections for neighbors, communities, and the environment at most of those sites. In addition, with no additional fee or appropriated resources, H639 sets up the risk-based program to fail to meet even the weakened protections it claims to apply. We recommend that the General Assembly not expand the program now, but instead examine barriers to the cleanup of the sites already eligible.

Expanding risk-based remediation threatens groundwater and neighbors:

- H639 undermines the business case for spill prevention. A spill can cost hundreds of thousands or millions of dollars to fully clean up. Preventing a spill costs less. But, a risk-based cleanup costs even less than that – DENR estimates \$20K to \$80K per plan. Allowing parties to count on risk based cleanup for future spills will increase the frequency of groundwater contamination.
- H639 hurts neighbors of existing *and* future contaminated sites. Under current law, responsible parties must keep contamination on site and, ultimately, clean it up. Under H639, many responsible parties will instead insist that neighbors accept low-ball payments and allow their properties to be capped and have land use restrictions put in place. A neighbor could in theory resist, but most will lack the resources to sue for the full cleanup that is theirs by right.
- H639 undermines future economic development. Not only does the bill forfeit groundwater resources; it also explicitly allows responsible parties to satisfy their obligations using only land use restrictions – with no cleanup at all. In some communities, those restrictions on development could impose significant economic constraints on future growth.
- H639 privatizes cleanups without funding adequate DENR oversight. Where DENR lacks resources to properly oversee cleanups, H639 pushes the agency to rely on Registered Environmental Consultants – private third parties paid by the responsible parties – to conduct the cleanups with minimal state agency oversight. That is a recipe for abuse and disaster. If the program is expanded to non-industrial sites, or post-2011 site, DENR will desperately need additional fees and appropriations – neither of which H639 provides.

Risk based cleanup in context:

- Under North Carolina law, groundwater is a ‘water of the state’, which the state has the authority and responsibility to protect under Article XIV, Section 5 of the North Carolina constitution. Surface landowners can use groundwater, but it is a common resource held in trust by the state. As groundwater in other states runs out or is polluted, clean and abundant groundwater is increasingly important to North Carolina’s economic future.

- North Carolina's default rule, 15A NCAC 2L .0106, requires those responsible for soil and groundwater contamination to clean it up to 'unrestricted use' – to meet groundwater standards for pollutants that have them, and to meet pre-existing levels for pollutants that lack standards.
- The legislature has made a number of exceptions to the strong default rule, mostly for categories of pollution where the responsible parties are small and poorly capitalized (dry cleaners, gas stations with underground storage tanks) or where the responsible parties are long gone, and someone else is willing to partially clean the site and redevelop it (the so-called 'brownfields' program).
- In 2011, the legislature established a program for risk-based cleanups by responsible parties for industrial sites reported to DENR by March 1, 2011. To date, only a handful of sites have made significant progress under the program. The \$4,500/acre permit fee does not cover DENR's costs, so the agency loses money on each site in the program.

How a risk based cleanup works:

- Under the current risk based approach, a responsible party hires a consultant to draft a plan that does not remove all the contamination on site, but instead relies on a combination of some cleanup, capping, and land use restrictions to reduce (but not eliminate) predicted public exposure. Under GS 130A-310.68(b)(9), the allowable risk can range from 1 in a million lifetime risk of cancer from a single pollutant, to 1 in 10,000 cumulative risk from multiple pollutants. The standard for non-cancer results (immune system problems, birth defects, other illnesses) is 'no adverse health effect', GS130A-310.68(b)(10).
- If another plume later shows up, or the risk turns out to be greater, DENR could in theory reopen the agreement. But in practice, DENR is understaffed, and the chance that anyone will realize what has happened in time to prevent public exposures is low.
- In economic terms, the risk based approach transfers much of the cost of pollution – harms to public health, the lost future use of groundwater, and the risk that additional cleanup turns out to be needed – from the responsible party to neighbors, future generations, and the state.

H639 will not address North Carolina's backlog of contaminated sites:

- Over 1700 contaminated sites across the state are not under any cleanup plan, in part because it is cheaper for responsible parties to do nothing than to clean them up. That problem needs attention, but lowering cleanup standards will not reduce the backlog, as inaction will still be cheaper for most responsible parties than risk based cleanups.
- During a two meeting stakeholder process in October 2014, DENR staff floated the idea of imposing a fee on responsible parties that let sites languish with no remediation. Industry stakeholders promptly rejected that idea, and DENR dropped it. Without it, most responsible parties have little incentive to enroll their sites, and the backlog will not shrink.

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