

SENATE BILL REPORT

SB 6078

AS REPORTED BY COMMITTEE ON ECOLOGY & PARKS, FEBRUARY 2, 1994

Brief Description: Modifying toxic cleanup settlement authority.

SPONSORS: Senators Talmadge, Deccio and Fraser

SENATE COMMITTEE ON ECOLOGY & PARKS

Majority Report: That Substitute Senate Bill No. 6078 be substituted therefor, and the substitute bill do pass.

Signed by Senators Fraser, Chairman; Deccio, Moore, Morton, Sutherland and Talmadge.

Staff: Gary Wilburn (786-7453)

Hearing Dates: January 24, 1994; February 2, 1994

BACKGROUND:

The Model Toxics Control Act (MTCA) provides for a comprehensive program for the cleanup of hazardous waste sites. Under the act the following are jointly and severally liable for all of the costs of cleanup of a contaminated site: (1) current owner; (2) owner at the time of waste disposal; (3) those generating the waste; (4) certain transporters of the waste to the site; (5) certain manufacturers of hazardous substances released at the site. Under "joint and several" liability, any liable person may be liable for 100 percent of the cleanup costs.

Where the liable persons refuse to clean up the site, the state Department of Ecology may conduct the cleanup and recover up to treble its costs. Liable persons may conduct a cleanup under the terms of a settlement agreement with the state, which must be approved by the Attorney General. Such a settlement may contain a covenant not to sue, subject to a "reopener" provision where factors not known at the time of the settlement are discovered. Such a settlement agreement provides the settling person with protection against contribution claims by other liable parties for matters addressed in the settlement.

The federal Superfund law provides limited circumstances in which a settlement agreement may restrict the reopener provisions, or exclude them altogether. For example, settlements with "de minimus" contributors to the site contamination do not contain reopener provisions. Thus a settlement with such parties contains no provision in which those parties would be further liable for any costs in the future to address a "failed" cleanup at the site. For this

reason the U.S. Environmental Protection Agency typically requires a "premium" monetary payment by such settling parties.

National studies of federal and state hazardous waste cleanup programs have concluded that the uncertainty regarding the costs of complete cleanup at major sites with several liable parties, and the manner in which the costs should be divided among parties that are "jointly and severally" liable, increase the transactional costs of cleanup and cause significant delay. It is also suggested that determining the total financial liability of a party with greater certainty will facilitate earlier settlement of such parties with their liability insurer.

SUMMARY:

In addition to the settlement procedures under existing law, the Attorney General may enter a settlement agreement without a "reopener clause" under certain conditions: (1) it meets the requirements under existing law for settlement agreements; (2) the Ecology director concurs that it is in the public interest; and (3) the settling person agrees to make payment into a site cleanup reserve account.

The factors in making the public interest determination are specified, such as the effectiveness and reliability of the cleanup, the remaining risks at the facility, the completeness of the cleanup, and others.

The Attorney General with the assistance of the Ecology director shall determine the amount of the monetary payment, which shall be sufficient to cover the costs of future site monitoring and the risks of future cleanup that may be necessary. Factors to consider in setting the amount are specified. A payment schedule shall be developed by rule to guide the determination of the payments, to ensure consistency and fairness among all settlements. Payments may be waived for site monitoring costs, or reduced or waived in limited circumstances for cleanups with demonstrated effectiveness.

The covenant not to sue in such settlements are conditioned on carrying out the settlement completely, and shall not bar the state from actions to protect against a health hazard.

The site cleanup reserve account is created in the state treasury. Payments made under the settlements addressed in the act are to be deposited to the account, and moneys in the account are to be used solely for future costs at sites previously cleaned up under such settlements, and periodic monitoring.

EFFECT OF PROPOSED SUBSTITUTE:

The Pollution Liability Insurance Agency is required to prepare a report on insurance coverage for environmental cleanup liability, including policy availability, policy limitations, premium costs, and other subjects.

Appropriation: none

Revenue: yes

Fiscal Note: requested January 12, 1994

TESTIMONY FOR:

Will be an additional method to expedite cleanup by providing certainty and finality regarding a person's cleanup liability.

TESTIMONY AGAINST:

The risks regarding effectiveness of site cleanup may be transferred to the state.

TESTIFIED: Kathy Gerla, Attorney General's Office; Carol Fleskes, Dept. of Ecology; Bruce Wishart, Sierra Club; Randy Ray, Marine Environmental Coalition