

HOUSE BILL REPORT

HB 1876

As Reported by House Committee On:
Agriculture & Natural Resources

Title: An act relating to the use of a leaching test in state water quality certifications.

Brief Description: Protecting water quality.

Sponsors: Representatives Linville, Jarrett, Murray, Schoesler, Conway, Anderson, Kenney, Cairnes, Sommers, McIntire, Dunshee, Haigh, Chase and Tom.

Brief History:

Committee Activity:

Agriculture & Natural Resources: 2/21/03, 2/26/03, 3/5/03 [DPS].

Brief Summary of Substitute Bill

- Allows the Department of Ecology (DOE) to require the use of leaching tests included in the Model Toxics Control Act (MTCA) soil clean-up rules for water quality certifications to assess the potential impact to water quality from the importation of fill material.
- Ratifies and approves any requirement for use of a leaching test included in the MTCA rules in a water quality certification for work not completed by June 1, 2003.
- Requires the DOE to identify and assess the effectiveness of the leaching tests used for evaluating potential water quality impacts from fill material importation.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Linville, Chair; Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Hunt, Orcutt, Quall and Sump.

Minority Report: Do not pass. Signed by 2 members: Representatives Rockefeller, Vice Chair; and McDermott.

Staff: Caroleen Dineen (786-7156).

Background:

General Framework

The federal Clean Water Act (CWA) sets a national goal to restore and maintain the chemical, physical, and biological integrity of the nation's waters and to eliminate pollutant discharges into navigable waters. The CWA defines "pollutant" to include a variety of materials that may be discharged through human activities, construction or industrial processes, or other methods.

The CWA sets technology-based effluent limitations for discharges to navigable waters. The CWA also requires states to adopt water quality standards, which are rules specifying the desired water quality to be achieved or maintained and protecting existing water quality from degradation. Finally, the CWA establishes the National Pollutant Discharge Elimination System (NPDES) permit system to regulate wastewater discharges from point sources to surface waters.

The United States Environmental Protection Agency (EPA) implements the CWA and may delegate its authority to states. The Washington Department of Ecology (DOE) has been delegated CWA authority by the EPA.

Water Quality Certifications

As part of its delegated authority under the federal CWA, the DOE reviews requests for water quality certifications. Applicants for a federal license or permit must provide the federal licensing or permitting agency a DOE certification that any discharge to navigable waters associated with the licensed or permitted activity will comply with federal CWA requirements. Federal law requires the DOE to establish procedures for public notice of all certification applications and, to the extent the DOE deems appropriate, for public hearings related to the applications. The DOE has adopted regulations regarding notice and public hearing on applications for water quality certifications.

Pollution Control Hearings Board

The Pollution Control Hearings Board (PCHB) is a quasi-judicial state agency with three members appointed by the Governor for six-year terms. The PCHB is authorized to hear and decide appeals of certain orders and decisions of the DOE, local and regional air and pollution control authorities, local conservation districts, and local health departments. The DOE's decisions on water quality certifications may be appealed to the PCHB.

Any person who has received notice of a denial of a petition, a notice of determination, or an order of the DOE may appeal to the PCHB. The statutes governing the PCHB and

the implementing administrative regulations specify the procedures for the filing of appeals with the PCHB and the conduct of proceedings at the PCHB.

PCHB decisions may be appealed to superior court within 30 days after the final decision has been communicated to the parties. The Director of the DOE has the same right of review of a PCHB decision as does any other person.

Recent PCHB Water Quality Certification Decision

As part of the permitting process for its proposal to construct a new runway at Seattle-Tacoma International Airport, the Port of Seattle needs a permit from the U.S. Army Corps of Engineers to fill all or portions of 50 wetlands. This project will involve more than 20 million cubic yards of fill material. After several years of permit issues and processes and an appeal of an earlier certification, the DOE issued a final water quality certification for the fill project on September 21, 2001.

The Airport Communities Coalition and others pursued an appeal of the September 2001 certification to the PCHB. *Airport Communities Coalition v. Department of Ecology*, PCHB No. 01-160 (Findings of Fact, Conclusions of Law, and Order issued August 12, 2002). The PCHB affirmed the DOE's water quality certification but imposed numerous conditions on it.

As part of the appeal, the PCHB considered whether the Synthetic Precipitation Leaching Procedure (SPLP) should be used to assess the potential impact to water quality from placement of imported fill material. The SPLP is one of a variety of procedures and methods referenced in soil cleanup regulations adopted by the DOE according to authority in the Model Toxics Control Act (MTCA). *See* WAC 173-340-747(7). SPLP is used in a process to determine the concentration of particular soil constituents. The PCHB noted concerns about the SPLP procedure's ability to detect contaminants of concern at regulated levels and expressed concern about the intended use of the SPLP process. The PCHB modified the DOE's water quality certification to specify SPLP should not be used to allow importation of fill above numeric fill criteria. The PCHB's decision has been appealed.

Summary of Substitute Bill:

The DOE may require in any water quality certification involving the importation of fill material that the suitability of potential fill material be evaluated using a leaching test included in the soil clean-up rules adopted according to the MTCA if some or all of the fill material will be placed in waters of the state. The Legislature ratifies and approves as a valid and reliable method for determining soil constituent concentrations any requirement to use any of these tests imposed by the DOE in a water quality certification or administrative order issued prior to the effective date of these provisions. This

ratification and approval applies to work not completed by June 1, 2003.

The DOE is required to identify the leaching tests, including those identified in the MTCA soil clean-up rules, that are used for evaluating water quality impacts when fill material is imported. Within existing resources, the DOE must assess whether the list of identified leaching tests provides appropriate methods for analyzing water quality impacts for all types of projects and in all circumstances involving fill material importation. The DOE also must identify any gaps in testing methodology. The DOE must report both the leaching test list and the list of any methodology gaps to the Legislature by December 31, 2003.

Substitute Bill Compared to Original Bill:

The substitute replaces specific references to the DOE regulations including the SPLP with a more general reference to leaching tests included in the MTCA soil clean-up regulations. The substitute allows (rather than requires) the DOE to require the use of the leaching tests. The substitute also removes provisions limiting application of these provisions to projects involving more than two million cubic yards of fill material. In addition, the substitute ratifies and approves requirements imposed prior to the effective date of the legislation (rather than applying provisions retroactively). Further, the substitute specifies these provisions do not limit the DOE's authority under water pollution control statutes. The substitute also adds requirements for the DOE to identify and assess the effectiveness of leaching tests used for evaluating potential water quality impacts when fill material is imported, and to report the test list and any methodology gaps to the Legislature by December 31, 2003. Finally, the substitute adds an emergency clause.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Testimony For: This bill does not damage the environment. The third runway project has been the most studied and processed airport expansion project in the world. There is nothing left to reveal. The leaching test the PCHB prohibited the DOE from using is not new. The test has been approved in the DOE regulations and endorsed by the EPA.

This bill will allow thousands of jobs to be created on and off the third runway project site. Washington has the highest unemployment rate in the United States. This bill allows the project to begin now. A lengthy appeals process could significantly delay the project and increase costs. If this project does not move forward, another airport will be

constructed somewhere else. This bill will help the economy. We can have good jobs and environmental protection. Proceeding with the third runway project will benefit the state.

The DOE determined the SPLP was the appropriate test. The advisory committee assisting with the development of the new MTCA standards did not object to including the SPLP. The purpose of the SPLP is to determine if anything harmful will leach out of the soil when rain percolates through the soil. The PCHB established new fill dirt criteria in its decision, and the PCHB's analysis is not tested by science.

The third runway opponents first raised the issue regarding the SPLP in a post-PCHB hearing brief; no witnesses testified that SPLP is not an appropriate procedure. Using the SPLP does not allow importation of contaminated fill and will not harm the environment. The SPLP is used on soils that meet MTCA standards but may exceed criteria for one or more metals. The PCHB decision will prevent the Port of Seattle from testing to find out if leaching occurs and may require it to disqualify even natural, clean soil.

(Suggested amendments) The DOE would like the references to MTCA and the quantity limits removed from the bill. The DOE also requests that the bill make the use of the SPLP discretionary and clarify that these provisions do not affect the DOE's authority under the water pollution control statutes.

Testimony Against: This bill raises the issue of trust. The state has built a regulatory system intended to protect water, fish, and people. Our future depends on the integrity of this system. This bill is special interest legislation that undermines the DOE and the PCHB and establishes bad environmental policy for the state. This bill also sets the state back in restoring confidence in government.

This bill does not protect the environment or the workers on the third runway project site. Specifying that one test must be used does not address site-specific issues. The Highline aquifer below this site provides water for Seattle-area residents and must be protected.

The SPLP does not detect contaminants such as arsenic, cadmium, and some other metals. Use of the SPLP has allowed and may continue to allow the Port to import contaminated fill to the project site. There are other tests available to assess water quality impacts. The public's right to appeal should not be impeded when concerns exist about protecting environmental standards.

The PCHB conducted two weeks of hearings and considered more than 50,000 pages of documents. The amount of fill for this project would fill 400 football fields 300 feet deep. The Legislature is not the correct venue to assess the validity of the SPLP. The PCHB members have scientific and environmental expertise. Their decision should not be changed legislatively. This bill diminishes the PCHB's ability to protect citizens and

the environment.

This bill is not about jobs. The unemployment rate has nothing to do with environmental protection. Nothing in the PCHB decision prevents the construction of the third runway. The jobs will still be there whenever the third runway is built.

The unanimous PCHB decision was fair, and the Port of Seattle already is using the existing legal process to challenge the PCHB decision. That legal process will determine if the PCHB made a mistake; it should be allowed to continue. This bill attempts to interfere with pending litigation and to gut all the science behind the PCHB decision.

Testified: (In support) Roger Boatwright, Washington State Building and Construction Trades Council; Larry Archer, International Union of Operating Engineers; Anthony Murrietta, King County Labor Council; Rick Bender, Washington State Labor Council; Eric Johnson, Washington Public Ports Association; Teri Floyd, Snider & McCarthy; Lawrence Molloy and Gina Marie Lindsey, Port of Seattle; Gil Reavis, Brown, Reavis & Manning; and Tom Newlon, Stoel Rives.

(Suggested amendments) Ray Hellwig and Ann Kenny, Department of Ecology.

(Opposed) Representative Schual-Berke; Representative Upthegrove; John Wiltse, City of Normandy Park; Dave Kaplan; Darlene Schanfald, Olympic Environmental Council; Stuart Creighton, Kevin Stock, and Phil Watkins, Airport Communities Coalition (ACC); Susan White, City of Des Moines; Jim Bartlemay, Audrey Richter, and Brett Fish, Communities Against SeaTac Expansion (CASE); Brenda Buchanan, Sally Neary, Becky Stanley, and Craig Engelking, Sierra Club; Wally Meyers; Frank Jovanovich and Len Oebser, RCAA; Dan Caldwell, Highline Water District; Dennis Robertson; Chas Talbot, Seattle Community Council Federation; Ivy Sager-Rosenthal, Washington Public Interest Research Group; Molly Nordhaus; Christopher Cain, King County Chapter of Washington Conservation Voters; and Stuart Weiss.