

HOUSE BILL REPORT

SSB 5787

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: Senate Committee on Natural Resources, Energy & Water (originally sponsored by Senators Morton, Prentice, Hale, Jacobsen, Kohl-Welles, Hewitt, Doumit and Horn).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 4/1/03, 4/4/03 [DPA].

Brief Summary of Substitute Bill (As Amended by House Committee)

- 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.
- Prohibits the importation of fill material with heavy metal concentrations that exceed the MTCA standards.
- 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: Do pass as amended. Signed by 10 members: Representatives Linville, Chair; Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Orcutt, Quall and Sump.

Minority Report: Do not pass. Signed by 3 members: Representatives Rockefeller, Vice Chair; Hunt and McDermott.

Staff: Caroleen Dineen (786-7156).

Background:

Clean Water Act

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 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 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.

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 and is pending before the Washington Supreme Court.

Summary of Amended 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 cleanup rules adopted according to the Model Toxics Control Act (MTCA rules) 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.

If the department utilizes a leaching test in the MTCA rules for a construction project, neither the project proponent nor any person or entity working on the project proponent's behalf may import fill material that contains heavy metals in concentrations that exceed the standards specified in the MTCA rules. If the MTCA rules specify more than one standard for a heavy metal, the DOE must determine the applicable standard. Provisions regarding fill importation related to water quality certifications do not limit the DOE's authority under the water pollution control statutes.

The DOE must identify the leaching tests, including those identified in the MTCA 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.

Amended Bill Compared to Substitute Bill:

The amendment replaces provisions specifically authorizing the use of the SPLP with provisions: (1) allowing the DOE to require the use of a leaching test included in the MTCA rules; (2) prohibiting importation of fill material containing heavy metals in concentrations exceeding the MTCA rules when the test is used in connection with a construction project and requiring the DOE to determine the applicable standard if the MTCA rules specify more than one standard; and (3) requiring the DOE to identify and assess the effectiveness of leaching tests used for evaluating potential water quality impacts from fill importation. The amendment also adds an emergency clause.

Appropriation: None.

Fiscal Note: Not Requested.

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

Testimony For: An acceptable process is needed for importing fill material for different types of projects. The bill establishes the Synthetic Precipitation Leaching Procedure (SPLP) in statute; this test is accepted by the federal Environmental Protection Agency and is recognized by the state Department of Ecology (DOE). SPLP is one of the few ways to directly measure movement of contaminants in fill material. This test is designed for environmental protection -- it is a safety net.

This bill does not allow importation of contaminated fill material, permit environmental degradation, or reduce environmental standards. The bill can help the economy and allow the state to develop badly needed infrastructure. There is nothing left to reveal regarding the third runway project. This bill is important to environmental quality and to ensure certainty for large projects.

Although the Washington Supreme Court has agreed to hear the appeal of the Pollution Control Hearings Board decision, a decision is not likely until next year.

(Neutral) The Model Toxics Control Act (MTCA) has cleanup standards predicated on protecting water quality and human health. The bill reflects an appropriate use of MTCA standards with respect to testing and surrounding protocols.

Testimony Against: This bill is special interest legislation to allow the Port of Seattle (Port) to build a third runway at Seattle-Tacoma International Airport. The Washington Supreme Court has agreed to expedite review of the appeal of the Pollution Control Hearings Board's decision. The Port is trying to circumvent the existing legal process. This bill interferes with a pending case and attempts to change the ground rules existing in September 2001. The appeal process should be respected. The citizens deserve their day in court.

This bill weakens water quality protection. This site is above an aquifer, which is the most important source of water for the area. This bill will deprive area residents of clean water and severely impact the quality of life. The MTCA is being misused. Dirty fill should not be put on a clean site.

Jobs should not be created for some at the expense of the health and safety of others. The environment needs to be protected to keep Washington a good place to live.

Testified: (In support) Senator Morton, prime sponsor; Gina Marie Lindsey, Port of Seattle; Gil Reavis, Brown, Reavis & Manning; and Roger Boatwright, Washington State Building Trades.

(Neutral) Jim Pendowski, Department of Ecology.

(Opposed) Representative Schual-Berke; Representative Uptegrove; Rose Clark, City of Burien; Dan Caldwell, Retired Highline Water Commissioner; and Stuart Creighton, Airport Communities Coalition.