House
Legislative
Analysis
Section

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ENV'L. CLEANUP EXEMPTION

Senate Bill 550 as passed by the Senate
First Analysis (12-7-99)

Sponsor: Sen. Ken Sikkema
House Committee: Conservation and Outdoor Recreation
Senate Committee: Natural Resources and Environmental Affairs

THE APPARENT PROBLEM:

Public Act 71 of 1995 restructured the "polluter pay" provisions of the Natural Resources and Environmental Protection Act (NREPA) to allow companies to clean contaminated property to a lower standard than was previously used, as long as the property is going to be used for industrial purposes or some other activity that will not affect the public. Previously, property had to be cleaned to a level that would be safe for any use. The provisions of Public Act 71 generally eliminate liability for companies that don't cause contamination at a site. However, the provisions do not alter a company's liability regarding a subsequent release of a pollutant (or threat of release) at a facility if the company is responsible for that activity. Also, a person who became an owner or operator of contaminated property after June 5, 1995 -- the effective date of Public Act 71 -- is still responsible unless he or she conducted a Baseline Environmental Assessment (BEA), and disclosed the results to the Department of Environmental Quality (DEQ) if the BEA confirmed that the site was contaminated.

It was intended, at the time, that the provisions of Public Act 71 would lead to more environmental cleanups and the reuse of inner city "brownfields." It was also supposed that the legislation would give companies the incentive to recycle products such as scrap metal, scrap tires, paper, glass and other "secondary" materials. Under the act, salvage companies that recycle trash (defined under the act as "companies that arranged the sale or transport of a 'secondary' material, such as scrap metal, paper, plastic, glass, textiles, or rubber, for use in producing a new product, provided that the material has been separated or removed from the solid waste stream for reuse or recycling, and substantial amounts of the material were consistently used in the manufacture of products that might otherwise be produced from a raw or virgin material") are excluded from liability. Also excluded are companies that arrange the "lawful transport or disposal of any product or container commonly used in a residential household."

According to the DEQ, however, some companies have misinterpreted this exclusion. For example, between 1987 and 1992 both the DEQ and the U.S. Environmental Protection Agency (EPA) conducted inspections at the Fivenson Iron and Metal Company in Alpena to verify that the company was complying with environmental regulations. Among the problems found at the site was ash containing hazardous substances, which was deposited on the ground when wire was burned to remove its coating. The DEQ spent almost $2.5 million cleaning up the site, but has had to initiate a court action to recover its costs. The Fivenson Iron and Metal Company has gone out of business. Some of the other companies involved -- those that produced the materials -- have settled, and approximately $300,000 to $400,000 has been collected. However, the largest companies -- GTE and U.S. Steel, for example -- have not. These companies claim that they are exempt from liability under the provisions of Public Act 71, since it was intended that the wire be recycled once the coating was removed. The DEQ maintains that, although the wire is recyclable, the discarded coating is not, and, in any case, the site was contaminated before June 5, 1995, so the companies are liable for cleanup costs. It is intended that the act be restructured in the near future to restate the intent of Public Act 71. Meanwhile, the deadline by which the state may recover its cleanup costs for this site is fast approaching, and legislation is needed to clarify who should, and who should not, be excluded from liability.

THE CONTENT OF THE BILL:

Currently, under Part 201 of the Natural Resources and Environmental Protection Act (NREPA), which deals with environmental remediation, any company who arranges the sale or transport of a secondary material,

such as scrap metal, paper, plastic, glass, textiles, or rubber, for use in producing a new product, is excluded from liability from cleanup costs provided that the material has been separated or removed from the solid waste stream for reuse or recycling, and substantial amounts of the material are consistently used in the manufacture of products that may otherwise be produced from a raw or virgin material. Senate Bill 550 would restrict the liability exemption to activities performed on or after June 5, 1995. However, the exemption would not apply if the state had incurred response activity costs associated with these secondary materials prior to the bill's effective date.

MCL 324.20126

FISCAL IMPLICATIONS:

The Senate Fiscal Agency (SFA) reports that the bill would have no fiscal impact on the state. (11-15-99)

A representative of the Department of Environmental Quality (DEQ) testified before the House Conservation and Outdoor Recreation Committee that $2.4 million in cleanup costs have been incurred to remove contamination at the site of the Fivenson Iron and Metal Company in Alpena. The state has initiated legal action to recover these costs. (12-2-99)

ARGUMENTS:

For:

According to testimony presented to the House Conservation and Outdoor Recreation Committee, the Fivenson Company, a salvage company in Alpena, was involved in the collection and stockpiling of scrap materials, including used lead batteries and coated wire. The company claims that the batteries were to be recycled. After its coating was removed, the scrap wire was also to be recycled. However, according to the DEQ, this was never done. Instead, dioxin and furans were released into the air, and ash containing these hazardous substances was deposited on the ground when the wire coating was removed -- by illegal, open, burning. In addition, the company reportedly used a front end loader to move the batteries and other materials around at the facility, thereby breaking open the batteries, releasing their contents -- lead acid -- on the ground, and contaminating the site.

The DEQ incurred almost two and one-half million dollars in response activity costs to clean up the contaminated soil and groundwater at the site, and has only recovered a fraction of this amount. It would appear that the companies involved in the production of these materials *should* be liable for cleanup costs for the environmental contamination at the Fivenson facility: After all, a company that handles "secondary" materials is only exempt from liability if those materials are recycled and used in producing a new product. However, some of the products collected at the site were never recycled and resulted in environmental contamination. Furthermore, the contamination occurred before June 5, 1995, the date on which the exemption became effective. The bill would clarify that the exemption from liability only applies after June 5, 1995. In addition, the bill would specify that "secondary" materials would not be excluded from liability if the state had incurred cleanup costs associated with them prior to the bill's effective date.

Against:

While it is intended that the provisions of the bill would temporarily close a loophole by which certain companies have claimed exemption from liability for environmental contamination, some people have expressed concerns that the language of the bill is too restrictive, and could be interpreted to allow other companies to claim exemption for liability. The bill specifies that the exemption would apply to "a person who, prior to June 5, 1995, arranges for the sale or transport of a secondary material for use in producing a new product *unless the state has incurred response activity costs associated with these secondary materials prior to the effective date of the 1999 amendments to this section.*" (Emphasis added) Does this mean that a person who, prior to June 5, 1995, arranged to sell or transport secondary materials for recycling purposes would not be liable if these materials caused environmental contamination, but the state had *not* incurred response activity costs prior to the bill's effective date? Other inequities exist: sites at which the state has incurred millions of dollars in cleanup costs would be treated in the same manner as those where it has spent only a few dollars; whereas sites where response activities had been conducted by private companies would not qualify for the exemption. The legislative intent of this section of the act was to encourage recycling. The bill, as introduced, would simply have clarified the legislative intent, and would have contained a statement to this effect.

POSITIONS:

The Department of Environmental Quality (DEQ) supports the bill. (12-2-99)

The Michigan United Conservation Clubs (MUCC) has no position on the bill. (12-2-99)

The Michigan Environmental Council (MEC) has no position on the bill. (12-3-99)

Analyst: R. Young

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.