House
Legislative
Analysis
Section

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RESPONSE ACTIVITIES TO CLEANUP CONTAMINATED LAND

House Bill 5418 (Substitute H-1)
First Analysis (2-29-00)

Sponsor: Rep. Larry DeVuyst
Committee: Conservation and Outdoor Recreation

THE APPARENT PROBLEM:

In 1995, the legislature passed Public Act 71 of 1995 to restructure the state's "polluter pay" laws. (See *BACKGROUND INFORMATION*, "Polluter Pay Laws", below.) Generally the act established provisions to eliminate liability for owners and operators who did not cause contamination at a facility, and replaced then current cleanup standards and remediation procedures. Public Act 71, one of three bills in a legislative package, specified the costs of response activities that are recoverable and that can be assessed against a person who is held liable for cleanup of a site. The act also set deadlines to recover cleanup costs from contaminating industries.

Environmental regulators generally call cleanup costs "response activity costs", and section 20140 of the act provides for certain limitation periods for filing actions, depending on the circumstances of the cleanup. In particular, subsection (2) of that section specifies that "for recovery of response activity costs and natural resource damages that accrued prior to July 1, 1991, the limitation period for filing actions under this part is July 1, 1994." According to committee testimony, the intent of the law was to hold parties liable for cleanup costs incurred by the state, including the cost of the damage to natural resources, and the cost of response activities. Further and according to the Department of Environmental Quality and the regulated industry, the intent of the law is that claim accrual begin when response activity costs are incurred (as opposed to when the contamination occurred), however the state has long sought recovery for the cleanup of sites whose history of contamination predates the enactment of Public Act 71.

Recently, following a lawsuit brought in Oakland County (See *BACKGROUND INFORMATION*, "*Shields v. Shell Oil Company*" below), both a trial court and later a panel of the Appeals Court have dismissed one suit that was brought to recover costs. In making the judgment that the alleged polluter was not liable, the courts interpreted the statute to mean that claim accrual begins when contamination occurred, and then applied the limitation period that is specified in subsection (2) as a statute of repose. (Unlike a 'statute of limitations' which states a number of years within which a suit must be brought, a 'statute of repose' sets a date certain by which a suit must be filed.)

The Office of the Attorney General and the Department of Environmental Quality fear that the effect of this ruling is that any party, including the state, would have to act before July 1, 1994, in order to take action to collect response activity costs and natural resource damages that had accrued before July 1, 1991. Spokesmen for the two departments testified before the committee that the court's ruling puts the Department of Environmental Quality at jeopardy of not being able to recover between $10 and $15 million in cleanup costs.

The attorney for Shields filed a delayed application for leave to appeal in the Michigan Supreme Court on February 2, 2000. The Department of Attorney General has filed a notice of intervention and a brief in support of the application for leave to appeal in the Michigan Supreme Court case. The Michigan Supreme Court may not grant this appeal, and the state's cleanup program may be jeopardized.

To counter the effects of this ruling, some have argued that the law should be amended to apply retroactively, and to specify that recovery of response activity costs in subsection (2) applies only to claims that were incurred before July 1, 1991, and/or to claims where remedial action had been approved by the department before that date.

THE CONTENT OF THE BILL:

Currently, under Part 201 of the Natural Resources and Environmental Protection Act (NREPA), concerning environmental remediation, time limits are placed for filing to recover costs for certain response actions. The act specifies that a claim to recover response activity costs and natural resources damages that accrued before July 1, 1991 must be filed by July 1, 1994. House Bill 5418 would amend the act to say that this provision would apply only to one or both of the following:

• A claim to recover response activity costs that were incurred prior to July 1, 1991.

• A claim for natural resources damages where the remedial action for the facility had been selected or approved by the department before July 1, 1991.

The bill would add that this provision is curative, is intended to clarify the original intent of the legislature, and would apply retroactively.

MCL 324.20140

BACKGROUND INFORMATION:

Polluter Pay Laws. In 1995, the Michigan legislature enacted Public Act 71 (House Bill 4596), Public Act 70 (House Bill 4597) and Public Act 37 (House Bill 4598) to restructure the state's polluter pay laws. Historically, environmental contamination has exacerbated the problems associated with redeveloping cities' urban core areas, since few developers or investors will invest in an urban area with a potential contamination problem and attendant cleanup costs.

In 1994, the mayors of the cities of Detroit, Grand Rapids, Ann Arbor, Battle Creek, Bay City, Flint, Jackson, Kalamazoo, Lansing, Muskegon, Pontiac, and Saginaw -- the "Urban Core Mayors" -- formed an "Act 307 Committee" to scrutinize the programs conducted under Michigan's environmental cleanup law (the Michigan Environmental Response Act, Public Act 307 of 1982, [MERA] generally referred to as "Act 307"). Specifically, the mayoral group focused on reducing the restrictions and costs of redeveloping contaminated property sites within urban areas. In December, 1994, the group released its Core City Revitalization Package.

Although not agreed to by all members of the Urban Core Mayors group, the report outlined proposals that would alter MERA's liability provisions; modify current cleanup standards; use tax credits to finance the "orphan" share of cleanup costs; replace the current "list" of environmentally contaminated sites with one that would list, in alphabetical order, only those sites receiving funds for response activities; extend the liability protection currently afforded to commercial lending institutions to those who loan money for the purchase or improvement of property sites; expand current Covenant Not to Sue (CNTS) provisions; replace the present Environmental Protection Bond Fund, and assure that priority is given under a new fund to allocations for urban sites.

Also, in 1994, the House Conservation, Environment and Great Lakes Committee formed a "Public Act 307" subcommittee to study the various complaints being voiced over the "Polluter Pay" provisions of Public Act 307. The subcommittee proposed legislation that would incorporate into the environmental statutes some of the recommendations contained in the Core City Revitalization Package and other provisions that would lessen the costs of redevelopment of urban areas.

Shields v Shell Oil Company. On October 1, 1999, the Michigan Court of Appeals published a ruling in a case called *Edward J. Shields v Shell Oil Company*, a lawsuit brought by Edward Shields on behalf of his son Daniel Shields, who had purchased an allegedly contaminated site from Shell Oil Company in October 1987. Subsequently Daniel Shields sold that site on a land contract in March 1992, and was then sued by the new owner, Singh, who sought damages for breach of contract, and to force Shields to remediate the contamination in accord with the land contract. In December 1994 a consent judgement awarded $38,500 to Singh, and then in September 1996, Edward Shields sought to recover the $38,500 credit from Shell Oil on the basis that the Natural Resources and Environmental Protection Act (NREPA) holds property owners at the time of contamination responsible for remediation costs. Shell moved for summary disposition after Shields admitted that the contamination was present at the time his son purchased the property in 1987. Accordingly, Shell argued that the limitation period set forth in the NREPA for action seeking recovery of response activity costs that accrued before July 1, 1991,

barred this action. Shields responded by arguing that incurring response activity costs triggered a six-year limitation period (citing another provision of NREPA), and that he did not incur response costs until the December 1994 consent judgement.

Having been presented with these facts, the appeals court concluded that Shields' cause of action accrued before July 1, 1991, and therefore, he had to file his action before July 1, 1994, under subsection 2, interpreting that subsection as a statute of repose. Because Shields waited until September 20, 1996 to file his complaint, it was time-barred as a matter of law. Therefore, the appeals court held that the circuit court did not err in granting summary disposition to Shell, and affirmed the trial court's ruling.

The attorney for Shields filed a delayed application for leave to appeal in the Michigan Supreme Court on February 2, 2000. The Department of Attorney General has filed a notice of intervention and a brief in support of the application for leave to appeal in the Michigan Supreme Court case. The Michigan Supreme Court may not grant this appeal, and the state's cleanup program may be jeopardized.

According to the Department of Environmental Quality, the implications of *Shields* for the state's efforts at environmental cleanup are significant. Documents offered by the Department of Environmental Quality point out that in the case of *Shields v Shell Oil*, contamination was discovered on October 17 of 1991, and response activities were incurred in December of 1994. Then, the court opined that, since contamination existed prior to July 1, 1991, the claim accrued prior to July 1, 1991 and was, therefore, barred pursuant to Section 20140(2) on July 1, 1994. According to the department, the court concluded that the claim accrues under this section when contamination is present (or occurs), not when response activity costs are incurred. The Department of Environmental Quality and the Office of the Attorney General argue that under this interpretation, the state's ability to recover costs under Part 201 is severely restricted.

FISCAL IMPLICATIONS:

In testimony before the committee, the Department of Environmental Quality reported that since the *Shields* ruling, liable parties have listed the *Shields* case as a defense against reimbursing the state approximately $10 million to $15 million in state response activity costs. (2-24-00)

ARGUMENTS:

For:

This legislation is needed in order to ensure that the Department of Environmental Quality can file and collect cleanup recovery claims against polluting industries when damage accrued before July 1, 1991. Because the statute of repose seems to have been interpreted by the courts to preclude the filing of any claims after July 1, 1994, millions of dollars could be barred from recovery.

According to the Department of Environmental Quality (DEQ), the legislative intent of Part 201 is to hold parties liable for state response activity cost and natural resource damages. Parties do not become liable for the state's response activity costs until the state incurs (that is, becomes legally obligated to pay) the costs. Nonetheless, the state has spent, and continues to spend, millions of dollars responding to contamination that existed prior to July 1, 1991. However, since the *Shields* ruling, liable parties have listed the *Shields* case as a defense against reimbursing the state approximately $10 million to $15 million in state response activity costs. Between the historic funding sources for cleanup and the recent passage of the Clean Michigan Initiative, close to $500 million has been appropriated to the DEQ for cleanup. If Part 201 is not amended, the state could forego the recovery of these funds. Further, the liability policy that is outlined in Part 201 will likely be further scrutinized, removing any incentive that a liable party may have for responding to historical environmental contamination.

Against:

This bill is intended to address concerns raised by the Michigan Court of Appeals decision in *Shields V. Shell Oil Co*. However, the bill goes further than is necessary to address those legitimate concerns, and further, it is contrary to well established principles regarding the accrual of claims and the application of statutory time limits on the assertion of such claims. As originally introduced, House Bill 5418 would have amended Section 20140 of the Natural Resources and Environmental Protection Act by adding language to clarify that, for purposes of subsection (2) of that section, "a claim does not accrue until the time in which the plaintiff has incurred response activity costs." This language represented a more reasonable

approach to dealing with the possibility that, under *Shields*, the statutory time limit could run against a party with no knowledge of its potential claims. Under the initial language, it appears that such a party would not be barred from bringing an action after the July 1, 1994 cutoff date, while a party that was aware of its potential claims would be required to diligently pursue them.

However, by measuring the running of the statutory time period not by accrual of the claim, but rather by when particular costs are incurred, the bill creates a sort of rolling statutory time limit that will be difficult to enforce, and that is ill-suited to serve the policies such time limits are intended to advance: encouraging timely assertion of claims; providing defendants protection against stale claims; and protecting potential defendants from protracted fear of litigation.

POSITIONS:

The Department of Environmental Quality supports the bill. (2-28-00)

The Department of the Attorney General supports the bill. (2-28-00)

ANR Pipeline supports the concept of the bill. (2-29-00)

Attorneys for Genesco submitted testimony in opposition to the bill. (2-23-00)

Analyst: J. Hunault

■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.