

SUBJECT: Release of third party liability for voluntary cleanup of waste

COMMITTEE: Environmental Regulation — committee substitute recommended

VOTE: 9 ayes — Chisum, Jackson, Dukes, Howard, Kuempel, Saunders, Stiles, Talton, Yost

0 nays

WITNESSES: For — Steve Perry, Texaco and Star Enterprises; Jim E. Kennedy, Texas Chemical Council

Against — None

On — David Duncan and Charles Epperson, Texas Natural Resource Conservation Commission

DIGEST: CSHB 2296 would establish a voluntary cleanup program for sites contaminated with solid waste, hazardous waste, hazardous waste constituents, pollutants, and hazardous substances.

A person who entered into a voluntary cleanup agreement with Texas Natural Resource Conservation Commission (TNRCC) would be released from liability for the site if that person were not a responsible party for the contamination. A certificate of completion proving the successful cleanup of the site would release future site owners and lenders from liability at the site.

The TNRCC could adopt rules relating to public participation in cleanup decisions.

Cleanup program application. A person who wished to participate in the voluntary cleanup program would submit an application to the TNRCC along with a \$1,000 application fee. An application would have to contain an environmental assessment of the actual or threatened release of the hazardous substance or contaminant at the site.

Application fees would be deposited to the credit of the hazardous and solid waste remediation fee fund. Any site would be eligible for the program except the portion of the site subject to a TNRCC order or permit. The executive director of TNRCC could reject an application if the site were subject to a pending enforcement order or if the application were incomplete or inaccurate. If the application were rejected because it was inaccurate or incomplete, no later than 45 days after receipt of the application TNRCC would be required to inform the applicant what would be needed to make the application complete. An application could be resubmitted without an additional fee.

If the executive director rejected the application, the director would be required to notify the applicant, explain the reasons for the rejection and inform the applicant that TNRCC will refund half the application fee.

Voluntary cleanup agreement. The TNRCC would enter into a voluntary cleanup agreement with a person for remediation of the site. A state or local permit would not be required for removal or remedial action taken as part of the voluntary cleanup, but the TNRCC would, by rule, require the person cleaning up the site to comply with state and federal requirements.

A voluntary cleanup agreement would have to provide for TNRCC recovery of all reasonable costs associated with implementing the program, and work plans or reports. A final report would be required to verify that all work provided for in the agreement had been done.

If an agreement could not be reached between a program applicant and the executive director within 30 days after good faith negotiations had begun, the applicant or director could withdraw from negotiations and TNRCC would retain the applicant's fee.

TNRCC could not initiate enforcement action against someone for an activity that resulted in contamination or release if it were the subject of a voluntary agreement. TNRCC could terminate the agreement by giving 15 days written advance notice.

Certificate of completion. If the executive director determined that the cleanup had been successfully completed, the person would be issued a

certificate of completion. The certificate would include acknowledgement of liability protection, and proposed future land use.

Release from liability. After a certificate of completion was issued for a site, whoever who bought the land or made a loan secured by that property would be released from all liability for cleanup of contamination released before the date of the certificate, unless the owner or lender was a responsible party for the contamination.

The release of liability would not apply to a person who changed the land use from the use specified in the certificate of completion if the new use would result in increased risks to human health and the environment.

Program costs. The TNRCC would publish in the Texas Register, the recoverable costs under the program.

The bill would take effect September 1, 1995.

**SUPPORTERS
SAY:**

CSHB 2296 would provide an incentive to clean up polluted sites by removing the liability of lenders and future landowners for sites that have been cleaned up to the satisfaction of TNRCC. Instead of mandating expensive remediation, CSHB 2296 would encourage voluntary cleanup of contaminated sites. A large number of sites that would never have been cleaned up otherwise would be remediated at no cost to taxpayers.

CSHB 2296 would not release a party directly responsible for the contamination from liability. Even if a responsible party participated in the voluntary cleanup program, and received a certificate of completion from TNRCC, that person would still be liable to the state for any future cleanup of the site. The only person released from liability would be a future owner or lender.

In Texas, most remediation of contaminated sites is done through state and federal enforcement orders, the federal or state superfund program or the federal Resource Conservation and Recovery Act. TNRCC oversees all of these methods using existing risk reduction rules to ensure that the sites are properly remediated. A remediation performed under the auspices of the

voluntary cleanup program would be subject to the same stringent TNRCC risk reduction rules.

Contaminated sites that are too small for TNRCC enforcement attention, or that the agency simply does not have the resources to investigate, would be cleaned up under CSHB 2296. Since no enforcement action would be pursued against those participating in a voluntary cleanup, and a certificate of completion would make a site much easier to sell or lease, many owners of small sites would wish to participate in this program.

The voluntary cleanup program would be a godsend for small businesses and property owners who operate on a tight margin and could not afford a cleanup without the possibility of selling the land afterwards. Sites of dry cleaners, auto repair shops and other similar sites could be remediated under this program. The program would encourage property owners to come forward with small contamination problems rather than hiding problems because of fear of potential liability.

Lending institutions would welcome release from third party liability, which would encourage development and cleanup of blighted areas, allow them to liquidate land holdings that have been tied up due to potential liability problems and free them to lend money to people who wish to clean up a contaminated site.

Requiring permits for voluntary cleanup sites would discourage cleanups from being performed. Currently, remediation of sites performed under TNRCC enforcement or consent orders does not require a permit. Site remediation is strictly regulated under risk reduction rules by TNRCC.

A requirement to provide to TNRCC information concerning the potential for human exposure to contamination at the site would put the applicant in the position of speculating about complicated scientific issues. Such information, though possibly incorrect, would be a red flag to toxic tort lawyers. The TNRCC has total discretion over whether or not to accept a site for voluntary cleanup. If remediation of a site posed a risk to human health, the TNRCC would not allow it to proceed.

OPPONENTS
SAY:

Any remediation of a hazardous waste site that is being cleaned up needs to be under rigorous state and federal supervision to protect the public health and safety. A permit should be required for voluntary cleanup sites.

The bill should require applicants to provide information to TNRCC concerning the potential for human exposure to contamination on the site. This would provide valuable information to TNRCC about the risks the site might pose to the people who live near the site.

The state might be stuck with costs associated with voluntary cleanups because attorney general's office might not be able to get to the cases for many months.

TNRCC should be required (rather than permitted) to adopt rules pertaining to public participation in cleanup decisions. In fact, mandatory public hearings in the area should be required so the public would have some say over the clean-up of hazardous waste sites in their communities. The TNRCC should also have more authority to decide which sites could be eligible for the program.

NOTES:

The committee substitute added a provision prohibiting TNRCC from initiating an enforcement action against someone in the program for contamination that is the subject of the cleanup agreement. The substitute deleted provisions requiring TNRCC to adopt rules on site eligibility requirements, and requiring applicants to provide information concerning potential for human exposure to contamination.