

ANALYSIS OF HB 1448

House Agriculture & Ecology Committee

January 25, 1999

Clarifies state agency responsibility for cleaning up contaminated sediments on state-owned aquatic land.

BACKGROUND:

The state Model Toxics Control Act (chapter 70.105D RCW) (MTCA) and the federal Comprehensive Environmental Response, Compensation, and Liability Act (42. U.S.C. Sec. 9601 et seq.)(CERCLA) of 1980 require sites contaminated with hazardous and deleterious materials to be cleaned up by liable parties. Those parties are referred to as either potentially responsible parties– (PRP) or potentially liable parties– (PLP) until they can sort out the limit of their individual liabilities through negotiations or legal proceedings. The original approach used by EPA was to hire contractors to perform the cleanup, and to send the bill to the PLPs, who would then sort out their liability. EPA’s current approach is to issue an order directly to the PLP’s.

The Model Toxics Control Act is carried out by the Washington Department of Ecology and CERCLA is carried out by the U.S. Environmental Protection Agency. The Model Toxics Control Act was designed to supplement CERCLA by addressing sites that are somewhat less hazardous than CERCLA sites. The combined effect of CERCLA and MTCA is to ensure that the vast majority of sites at which hazardous substances have been released are cleaned up. The Model Toxics Control Act also creates liability rules similar to those under CERCLA, imposing strict, joint, and several liability on generators and transporters of hazardous substances, and on owners and operators of sites where the substances are or may be released.

Funds called Superfund– under CERCLA, and the Local Toxics Account under the Model Toxics Control Act, are used to pay for the portion of cleanup that cannot be assigned to a PLP or PRP. The accounts are funded through a tax on certain chemicals.

Contaminated sites are found on land and under water. The State of Washington owns about

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two million acres of aquatic lands; that is, the bedlands, shorelands, and tidelands of navigable water. These lands are managed for the public by the Department of Natural Resources (DNR). Many of these lands are leased to ports and to others for water-dependent commerce. Over the years, state-owned aquatic lands have become contaminated in many of these areas by hazardous releases and spills. As of 1996, there were 49 CERCLA and MTCA sites on state-owned aquatic lands. Most of the CERCLA sites are found in the large urban embayments of Puget Sound and adjacent to military facilities. The MTCA sites are more dispersed. The cleanup method used most frequently for contaminated sediments is capping— in the nearshore areas where the contaminants are most often found, or burial in deeper underwater excavations.

DNR plays multiple roles in the cleanup of contaminated sediments: it is a potentially responsible party— because it is the owner of the lands, it is a natural resource trustee— in that it also represents the resources that have been injured as a result of years of contamination, and it can also be the provider of aquatic land for cleanup of contaminated sediments.

SUMMARY:

The Department of Ecology is provided with primary responsibility, on behalf of the state, for working with local communities in cleaning up contaminated sediments in urban harbors on state owned aquatic lands. Ecology's decisions on cleanup of state-owned aquatic lands are binding on all other state agencies.

The use of existing statutes (i.e., MTCA, The Water Pollution Control Act, and the State Environmental Policy Act) is reaffirmed as the basis for cleaning up urban harbors. For cleanups under CERCLA, Ecology is provided with primary responsibility for coordinating and making decisions on behalf of the state. Shoreline master programs and port district comprehensive plans are also declared to be the primary land use planning processes for urban harbors.

The use of state-owned aquatic land for the disposal of contaminated sediments or for mitigation projects conducted by third parties is authorized. In examining whether to use state-owned aquatic land for disposal or for mitigation. Ecology is directed to evaluate a range of disposal alternatives that balance habitat, impacts to navigation and water-borne commerce, the liability of the state or other parties under MTCA, cost-effectiveness, and the benefits of prompt cleanup.

An agreed order or consent decree issued under MTCA constitutes a use authorization for state-owned aquatic land. In developing such a use authorization, Ecology is authorized to obligate the state on: (1) matters relating to cleanup of contaminated sediments on state-owned aquatic lands, and (2) disposal of contaminated sediments on state-owned aquatic land.

An agreed order or consent decree is directed to contain measures Ecology deems are necessary to indemnify or hold the state harmless under the liability provisions of MTCA. Where DNR is not a PLP. Ecology is directed to consult with DNR regarding the content of indemnity measures.

The Aquatic Lands Act is amended to include "habitat mitigation" in the definition of "water dependent use."

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