

HOUSE BILL REPORT

HB 3041

As Reported By House Committee On:
Agriculture & Ecology

Title: An act relating to clarifying state agency responsibility for cleaning up contaminated sediments.

Brief Description: Clarifying agency responsibility for cleaning up contaminated sediments.

Sponsors: Representatives Linville and G. Chandler.

Brief History:

Committee Activity:

Agriculture & Ecology: 2/2/00, 2/4/00 [DPS].

Brief Summary of Substitute Bill

- Clarifies state agency responsibility for cleaning up contaminated sediments.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 14 members: Representatives G. Chandler, Republican Co-Chair; Linville, Democratic Co-Chair; Cooper, Democratic Vice Chair; Koster, Republican Vice Chair; Anderson; B. Chandler; Delvin; Fortunato; Grant; Reardon; Schoesler; Stensen; Sump and Wood.

Staff: Carole Richmond (786-7114).

Background:

The state Model Toxics Control Act (chapter 70.105D RCW) (MTCA) and the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42. U.S.C. Sec. 9601 et seq.) (CERCLA) require sites contaminated with hazardous materials to be cleaned up by liable parties. 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.

Contaminated sites are found on land and under water. The state of Washington owns about 2 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. Many of these lands are leased to ports, businesses, and municipalities for water-dependent uses. Over the years, state-owned aquatic lands have become contaminated in many of these leased areas by hazardous releases and spills. At present, there are over 60 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 smaller and 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.

The Department of Natural Resources has two principal roles in the cleanup of contaminated sediments: (1) it is a "potentially liable party" (PLP) under MTCA and "potentially responsible party" under CERCLA because it owns or manages state-owned aquatic lands; and, (2) it is authorized to make property management decisions under the Aquatic Lands Act (chapter 79.90 RCW).

The Department of Ecology (Ecology) has primary responsibility for hazardous waste cleanup under MTCA. Its duties include: (1) investigating and prioritizing sites; (2) providing technical assistance to PLPs desiring to perform cleanups; (3) setting cleanup standards for hazardous substances; and (4) requiring or undertaking cleanups where appropriate. Ecology is also granted enforcement authority, including the ability to enter property, enter into settlements, file actions or issue orders to compel cleanup, and impose civil penalties and seek recovery of state cleanup costs.

The Bellingham Bay Pilot Project was initiated in 1996 to provide a model for resolving issues related to contaminated sediment remediation in an urban embayment. The project was funded through appropriations under the Local Toxics Control Account. A proposal for resolving disposal and liability issues in Bellingham Bay was recently agreed to.

Summary of Substitute Bill:

The Legislature finds that cleanup of contaminated sediments is beneficial, yet attempts to cleanup contaminated sediments have resulted in debates about whether it is permissible to use state-owned aquatic lands for remediation of sites.

A number of unresolved policy issues exist related to remediation and the state's share of liability and costs. The Legislature believes that it must address these issues. The

Legislature also believes that the current model for addressing liability and allocating costs among state agencies is not an appropriate one for resolving interagency issues.

"Habitat mitigation and restoration" is defined as a water-dependent use, meaning that lease rates are one-third of fair market value.

"Disposal of contaminated sediments" is defined as a non water-dependent use except if the disposal is also used to remediate existing on-site contamination.

"Bay-wide plans" are defined as multi-jurisdictional plans developed for the aquatic lands of the state and include four elements:

- cleanup of contaminated sediments;
- restoration of estuary and salmon migration habitat;
- the highest achievable control of ongoing sources of point and nonpoint sources of pollutants to marine waters; and
- identification of existing and projected aquatic land uses, including development of public access to the waterfront.

Plans must be integrated with comprehensive plans under the Growth Management Act, local master programs under the Shoreline Management Act, and watershed plans.

"Disposal" is defined as one of three methods for remediating contaminated sediments: confined aquatic disposal, nearshore confined disposal, or capping.

For site cleanups initiated after these provisions become effective until June 30, 2002, the Department of Natural Resources is required to allow the use of state-owned aquatic lands for the cleanup of contaminated sediments when:

- a bay-wide plan has been completed and the plan identifies in-water disposal as the preferred option among a range of options, including treatment and upland disposal;
- the area to be used for remediation is itself a site needing remediation, or a multi-user disposal site;
- an account has been established to receive funds to address in perpetuity any and all risks to the state from contingencies identified in the bay-wide plan;
- the state is indemnified from any and all future liability for contaminants that it is not liable for as established in a consent decree under state or federal cleanup authorities; and
- constitutionally protected uses of harbor areas for commerce and navigation are not impaired.

Bay-wide planning groups must include certain representation, including state and local government. Affected tribes and appropriate federal agencies are each invited to provide a representative. The group is to operate by consensus, and if consensus is

not achievable, the issues must be resolved using existing provisions in state law for dispute resolution. The planning process is to be managed by the Department of Ecology, the Department of Natural Resources, and the affected local port district. Funding for the planning processes is from the Local Toxics Control Account.

A joint select committee on contaminated sediment management and liability is established. The committee consists of two representatives from each of the two major caucuses in the Senate and in the House of Representatives, or eight members. The membership also includes a representative from Ecology, Natural Resources, Transportation, Fish and Wildlife, the Puget Sound Action Team, the Governor's office, and the Attorney General's office.

The purpose of the committee is to address:

- the appropriateness of using state-owned aquatic lands for the remediation of contaminated sediments;
- the availability and feasibility of treatment for contaminated sediments;
- the financial risk to the state from contaminated sediment disposal, and the need for financial assurance to offset this risk;
- how contaminated sediment sites should be managed;
- how the state's share should be determined;
- the fair market return to the state for the use of state-owned aquatic lands for remediation of contaminated sediments; and
- the sources of funding and financial mechanisms available to the state to fund the state's share of cleanup, management of sites, and contingency funding.

Staff support for the committee is to be provided by the House of Representatives and Senate. The committee shall provide a final report to the standing environment committees of the House and Senate by December 1, 2001. An interim progress report must be provided by December 1, 2000.

Substitute Bill Compared to Original Bill: The term "disposal" is changed to "remediation." Habitat restoration is added to mitigation as a water-dependent use. "Capping" is recognized as a third method of remediating contaminated sediments. A public involvement process is authorized for bay-wide planning. A termination clause is added to bay-wide planning. Two additional tasks are provided to the task force: addressing the appropriateness of using state-owned aquatic lands for remediation, and the feasibility of using treatment.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: (Original bill) We do not have an agreement on Bellingham Bay. Regardless of Bellingham Bay, we still need policy on these issues. This whole issue is a question of judgment: what is in the public interest? Aquatic Lands Act policies do not prevent us from cleaning up contaminated sediments. EPA and Battelle found that treatment is not a viable option.

(Concerns) Bay-wide planning is too cumbersome.

Testimony Against: (Original bill) A bill is not needed. There is clear direction in statute about how to proceed. The Aquatic Lands Act set policy direction for the management of state-owned aquatic lands. All sites are different, but all have degraded estuaries. Public participation is needed in bay-wide planning. MTCA favors permanent solutions. Containment approaches fail over time. This bill would allow the Hylebos site to be used in Commencement Bay. A single decision point is needed. There should be involvement of all parties.

Testified: (In support) Kim Maree Johannessen and Cliff Webster, Johannessen and Associates, Maritime Environmental Coalition; Tom Fitzsimmons, Department of Ecology; and Eric Johnson, Washington Public Ports Association.

(Concerns) Kari Lynn Frank, Puyallup Tribe; Sharon Kanareff, Alcoa Inc.; and Scott Hazlegrove, Association of Washington Businesses.

(Opposed) Leslie Ryan, Citizens for a Healthy Bay; Bruce Wishart, People for Puget Sound; Carl Wiemer; Rebecca Cochran, Sierra Club; Rochelle Giddings; Pam Johnson; Erika Schrader, Washington Toxics Coalition; Josh Baldi, Washington Environmental Council; Eddy Cotes; Jennifer Belcher, Commissioner of Public Lands; and Ron Schultz, National Audubon Society.