



Legislative Fiscal Bureau

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Joint Committee on Finance

Paper #304

PECFA -- High-Cost Sites (Commerce -- Building and Environmental Regulation)

[LFB 2001-03 Budget Summary: Page 190, #3]

CURRENT LAW

DNR administers remedial actions and completion of cleanup at high-risk petroleum storage tank discharge sites and at medium- and low-risk petroleum storage tank discharge sites that also have contamination from non-petroleum hazardous substances. Commerce administers remedial actions and completion of cleanup at low- and medium-risk petroleum storage tank discharge sites.

GOVERNOR

Create a definition of "high-cost site" to mean the site of a discharge of a petroleum product from a petroleum storage tank at which more than \$200,000 in eligible PECFA costs have been incurred. Create a definition of "category one high-cost site" to mean a site of a discharge that is a high-cost site on November 30, 2001, for which written approval of the completion of remedial action activities has not been issued on or before that date by DNR or Commerce, whichever agency has jurisdiction. The two Departments would be required to oversee the remedial action activities at these sites in a manner that remedial action activities are completed for at least 15% of those sites in each 12-month period and that remedial action activities are completed at all category one high-cost sites no later than December 1, 2006, or 10 years after the site investigation is completed, whichever is later.

Create a definition of "category 2 high-cost site" to mean a site of a discharge that becomes a high-cost site after November 30, 2001, if either more than \$400,000 in eligible PECFA costs have been incurred or remedial action activities have not been completed within seven years after the site investigation is completed. Commerce would be required to oversee the remedial action activities for category 2 high-cost sites. This means that sites classified as

category 2 high-cost sites under the bill that are currently high-risk sites under the jurisdiction of DNR would be transferred to Commerce. Under the bill, Commerce would be required to administer the remedial action activities at category 2 high-cost sites so that remedial action activities are completed within three years after the site becomes a category 2 high-cost site.

The requirement that DNR and Commerce administer the remedial action activities at PECFA sites so that remediation is completed within a certain period of time would not apply to a PECFA claimant that: (a) is a local government, if federal or state financial assistance other than from PECFA, has been provided for that expansion or redevelopment; or (b) is engaged in the expansion or redevelopment of brownfields, if federal or state assistance other than PECFA, has been provided for that expansion or redevelopment.

DISCUSSION POINTS

1. DOA officials indicate that the intent of the provision is to place more emphasis on directly managing the cleanup of high-cost PECFA sites within a reasonable time frame and thus reducing overall costs to the program.

2. As the PECFA program matures, most of the site owners or operators who are able or willing to complete a site cleanup will have done so. The remaining sites are more likely to have owners who are unwilling or unable to complete the cleanup, or owners who are not credit worthy and can not obtain financing to complete the cleanup, or may have complex cleanups that may take a long time to complete. Commerce and DNR administration of cleanup at these sites might involve increased enforcement actions, active review of the cost of sites and increased bidding of remediation proposals.

3. Not all sites that incur more than \$200,000 in eligible PECFA costs would be "category one" or "category 2" high-cost sites. High-cost sites would include the following types of sites:

a. Sites that have incurred more than \$200,000 in eligible PECFA costs on or before November 30, 2001, would be category one high-cost sites. This would be a fixed group of sites. Commerce estimates that there are at least 1,000 open sites that fit this definition, based on data submitted by lenders about unreimbursed outstanding loan balances and Commerce data about reimbursed costs. However, this includes data from approximately two-thirds of lenders and does not include data from the two largest lenders, so the number of category one high-cost sites is probably higher. (Commerce estimated that as of December, 2000, there were approximately 500-600 open active sites where one or more claims have been paid totaling more than \$200,000, but this does not include sites where a claim has been paid for less than \$200,000 but total incurred costs are more than \$200,000.) DNR and Commerce would have to oversee the remedial action activities at these sites so that the remedial action activities are completed for at least 15% of the sites in each 12-month period and for all of the sites no later than December 1, 2006, or 10 years after the site investigation is completed, whichever is later.

b. Sites that incurred \$200,000 or less in eligible PECFA costs on or before November

30, 2001, would not be category one high-cost sites. If the eligible costs at such a site exceed \$200,000 after November 30, 2001, it would not become a category 2 high-cost site until it incurs more than \$400,000 in eligible PECFA costs or if more than seven years elapse after the investigation with no completion of remedial action activities. Thus, some sites would eventually incur over \$200,000 in eligible PECFA costs but would not be a category one or category 2 high-cost site and Commerce and DNR would not be required to oversee the remedial action activities at these sites to reach completion within a specific amount of time.

c. Sites that incurred \$200,000 or less in eligible PECFA costs on or before November 30, 2001, would become category 2 high-cost sites if eligible costs incurred exceed \$400,000 after November 30, 2001, or if the costs incurred at the site exceed \$200,000 after November 30, 2001, and remedial action activities have not been completed within seven years after the investigation is completed. Any of these sites currently under the jurisdiction of DNR would be transferred to Commerce when they become a category 2 high-cost site. This would include high-risk petroleum tank sites and any site under the jurisdiction of DNR (including medium- or low-risk sites) because of contamination from a hazardous substance other than petroleum in addition to contamination from a petroleum product discharge. Commerce would be required to administer the remedial action activities at the portion of the site contaminated by petroleum so that the remedial action activities are completed within the three years after the site becomes a category 2 high-cost site. Under the bill, DNR would retain jurisdiction for the non-petroleum portion of the contamination at a category 2 high-cost site.

4. The requirement in the bill that DNR and Commerce oversee the remedial action activities at certain high-cost sites so that the remedial action activities are completed within a specified period of time is in potential conflict with the compliance requirements under the hazardous substance spills law. The bill could be amended to specify that the requirement that DNR and Commerce oversee completion of remedial action activities within certain periods of time does not exempt Commerce and DNR from complying with the hazardous substances spills law.

5. The proposed inclusion within the definition of category 2 high-cost sites under Commerce jurisdiction of some sites that have contamination from a hazardous substance other than petroleum in addition to the petroleum product discharge, represents a change in current policy that retains jurisdiction for all non-petroleum sites under DNR. The statutes specify that DNR has jurisdiction for sites with contamination from non-petroleum sources in addition to petroleum sources. If the Committee wishes to maintain the current policy, the bill could be amended to exempt sites with contamination from a hazardous substance other than petroleum from the definition of category 2 high-cost sites.

6. Commerce is currently authorized to administer remedial actions at sites with discharges of a petroleum product from a petroleum product storage tank and is not authorized to respond to discharges of non-petroleum product. While the bill would transfer some category 2 high-cost sites from DNR to Commerce that have contamination from a non-petroleum hazardous substance, the bill does not authorize Commerce to administer remedial action activities at such sites. Under the bill, some category 2 high-cost sites transferred from DNR to Commerce have petroleum and non-petroleum contamination, so Commerce would administer the petroleum

cleanup but DNR would retain responsibility for administering the cleanup of the non-petroleum contamination at the site. DNR has been given jurisdiction for these sites to avoid having two agencies responsible for one site. If the Committee wishes to provide Commerce with the authority to administer cleanup of hazardous substances other than petroleum product discharges at category 2 high-cost sites, the bill could be amended to do so.

7. The bill does not contain any penalties for DNR, Commerce or site owners if cleanup at less than 15% of category one high-costs is completed each year. For example, if one or both of the agencies oversee remedial action activities so as to complete 14.9% of cleanups at category one high-cost sites in a year, the agencies would not be in compliance with the law but there would be no penalties for the agencies or the owners of open active category one high-cost sites. DOA officials indicate that the 15% requirement could be viewed as a goal. However, the bill includes it as a requirement. DOA indicates that if DNR and Commerce do not close 15% of sites in each of the next two years, DOA would offer alternative solutions in the 2003-05 biennial budget.

8. Commerce has implemented an Internet-based method for collecting information about costs incurred from lenders and is in the process of implementing an Internet-based method for collecting information from consultants about future costs and the status of site remediations. It is unclear how Commerce and DNR will determine whether the costs incurred exceed \$200,000 on November 30, 2001, to meet the definition of a category one high-cost site. It is also unclear how the agencies will determine the point in time after November 30, 2001, that the costs incurred at a site exceed \$400,000. The databases of the two agencies should have sufficient information to determine the point in time that seven years has elapsed since the investigation was completed.

9. Administrative rule Comm 47.338 has a process, effective January 1, 1999, that allows Commerce to require a redetermination of costs for any existing site to establish a total cost, excluding interest but including all closure costs, to achieve the status of a closed remedial action. After reviewing the total cost, Commerce may approve and establish a cap on total costs, excluding interest; deny approval of costs; approve system enhancements; bundle the site with another remediation; or direct the site through a public bid process to establish a lower site cost. Commerce and DNR are beginning to implement this provision. Commerce and DNR are also beginning to receive annual reports from sites about the status of cleanup and, during 2001, to develop the process of an annual review of sites as required under 1999 Act 9. Under both of these provisions, the maximum reimbursement for a specific site can be limited.

10. The proposed exemption of certain local governments or persons engaged in brownfields redevelopment with other state or federal financial assistance from the requirement that DNR and Commerce administer the cleanup within specified periods of time could be viewed as a recognition that these projects sometimes take a longer period than projects managed by the responsible party. The exemption would recognize that local governments or persons engaged in brownfields projects often get involved only after a property has been abandoned or has sat idle with contamination identified but no remediation work being accomplished for a long period of time. However, since the requirement is placed on DNR and Commerce to oversee cleanups within specified times rather than for an individual site to complete a cleanup within a specified time, it is

unclear what effect the exemption would have on specific sites.

11. It could be argued that the current statutes and administrative rules contain sufficient provisions to establish a maximum reimbursable site cost, excluding interest, and that the proposed definitions of high-cost sites do not enhance that authority. Further, the proposed directive for Commerce and DNR to oversee cleanups of certain sites within a specified time may be difficult to administer for specific sites, may be largely unenforceable and is in potential conflict with the hazardous substance spills law.

ALTERNATIVES TO BASE

1. Approve the Governor's recommendation to: (a) create the definitions of high-cost sites; (b) direct Commerce and DNR to oversee cleanup at category one high-cost sites so that cleanup is completed for at least 15% of those sites is completed in each 12-month period and is completed at all category one high-cost sites no later than December 1, 2006, or 10 years after the site investigation is completed, whichever is later; (c) direct Commerce to oversee cleanup at category 2 high-cost sites; (d) direct Commerce to oversee cleanup at category 2 high-cost sites so that cleanup is completed within three years after the site becomes a category 2 high-cost site; and (e) specify that the requirement that DNR and Commerce administer cleanup activities so that they are completed within a specified period of time would not apply to certain local governments and persons engaged in the expansion or redevelopment of brownfields.

2. Approve the Governor's recommendation and modify authority over sites contaminated by hazardous substances other than petroleum in one of the following ways:

a. Specify that category 2 high-cost sites would not include sites contaminated by a hazardous substance other than the petroleum product that was discharged from the petroleum product storage tank. (These sites would remain under DNR jurisdiction as they are under current law.)

b. Specify that if a category 2 high-cost site is transferred from DNR to Commerce under the bill and has contamination from a hazardous substance other than the petroleum product that was discharged from a petroleum product storage tank, Commerce would be authorized to administer the cleanup of both the petroleum and non-petroleum hazardous substances.

3. Approve the Governor's recommendation as modified to specify that as DNR and Commerce oversee the remedial action activities at category one high-cost sites, or as Commerce oversees the remedial action activities at category 2 high-cost sites, the current requirement to follow the hazardous substances spills law takes precedence over the requirement to oversee remedial action activities so that the remedial action activities are completed within specified periods.

4. Maintain current law.

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