

**SUBJECT:** State superfund alternatives and liability

**COMMITTEE:** Environmental Regulation — committee substitute recommended

**VOTE:** 8 ayes — Chisum, Dukes, Hirschi, Howard, Kuempel, Puente, Talton  
0 nays  
1 absent — Allen

**WITNESSES:** For — Jon Fisher, Texas Chemical Council; Mary Miksa, Texas Association of Business and Chambers of Commerce; Karen Neeley, Independent Bankers Association of Texas  
Against — None

**BACKGROUND :** The state superfund program was created in 1985 to address abandoned or inactive polluted sites that do not qualify under the federal superfund program. There are 45 sites on the state superfund registry, and 600 additional sites need further investigation. The state attempts to compel those parties responsible for the contamination at the sites to finance cleanups before expending state funds. After a site is identified, it is investigated, a remedy selected, and a final engineering plan drafted. Only then is actual cleanup, the most expensive part of the process, initiated. The majority of state superfund sites are still under investigation, but actual remediation is expected to start soon at many sites. Superfund cleanup is funded through the Hazardous and Solid Waste Remediation Fee Fund (Fund 550) and overseen by the Texas Natural Resource Conservation Commission (TNRCC).

The 74th Legislature authorized TNRCC to create a voluntary cleanup program, which provides technical, and legal and administrative incentives to encourage cleanup of contaminated sites and gives future lenders and landowners protection from liability for prior contamination on program sites.

**DIGEST:** CSHB 2776 would expand funding options for state cleanup of contaminated sites, provide new protection from liability for certain lenders

or fiduciaries acquiring contaminated superfund sites through foreclosure, and extend immunity from liability for certain landowners for off-site contamination.

TNRCC would be allowed under certain conditions to use Fund 550 monies to remove hazards from a site if the removal was substantially likely to prevent its being listed as a state superfund site. Such planned removal could only be accomplished if it would protect human health or the environment, be completed without extensive planning, and would reduce cleanup costs. Fund 550 could not be used for waste tire and municipal solid waste recycling facilities, petroleum storage tanks, or used oil collection sites. Hazardous solid waste remediation fees would not be charged for the storage, processing or disposal of hazardous waste generated from a removal or remedial action by the Environmental Protection Agency.

CSHB 2776 also would establish that the voluntary cleanup program could be used an alternative to listing a site in the state superfund registry.

The TNRCC executive director would have authority to remove a facility from the state superfund registry rather than waiting for a request from the landowner. The commission could hold public meetings rather than hearings to review requests for removing sites from the registry. A facility removed from the state superfund registry into the voluntary cleanup program would automatically be reinstated to the registry if the executive director determined that the cleanup was not being adequately addressed.

The executive director would have to hold a public meeting concerning a site subject to a remedial investigation if the responsible party proposed using the land for a purpose other than residential. The land could not be zoned for residential use only. CSHB 2776 would establish notice and meeting requirements and specify that a hearing on the matter would not be a contested case hearing. After the meeting, the TNRCC executive director would select an appropriate land use for the purposes of determining remedial action.

Under CSHB 2776, the executive director would no longer have to file a lien on all state superfund sites. However, the TNRCC would have to file

for cost recovery against all responsible parties when conducting various actions, including planned removals and implementation of a voluntary cleanup program. The bill would expand TNRCC's current de minimis settlement program to include de minimis settlements, covenants not to sue, mixed funding, and partial settlements. A settlement with the state would release the settling party from all liability to the state for the site and would reduce the potential liability to the state of the nonsettling persons by the amount of the settlement. When apportioning costs of a site, TNRCC would give credit for previous expenditures connected to a TNRCC-approved cleanup at the site.

The bill would limit the liability of fiduciaries, including trustees, executors and others acting for the benefit of another person, for contamination of superfund sites, unless their negligence caused the release. A fiduciary could begin cleanup of the site, or perform fiduciary duties connected to the site and still be shielded from liability.

Lenders who acquired contaminated solid waste superfund sites through foreclosure and did not participate in the management or operation of the sites would not be liable for cleanup costs or environmental penalties in certain situations, as long as they sought to divest themselves of the property within twelve months of foreclosure.

“Innocent” owners and operators would not be liable for cleanup, investigation, monitoring or other corrective action in response to the release or migration of a contaminant from a source not located on or at the property. Persons claiming this liability would have provide reasonable access to their site so it could be remediated. Innocent owners and operators could apply to TNRCC for a certificate evidencing their immunity from liability. The commission would be required to deny or issue a certificate, and could require that the use of property be restricted, as a condition of issuing it.

The bill would release TNRCC from certain Government Code provisions relating to purchasing, construction, acquisition and public work contract requirements on activities undertaken in connection with Superfund sites.

The bill would take effect September 1, 1997.

SUPPORTERS  
SAY:

CSHB 2776 would make the state superfund process simpler and more flexible and the use of superfund monies more efficient and cost effective. Many of the changes it proposes are recommendations of a work group brought together by TNRCC to review the program's funding requirements and processes.

The statutory change to allow early consideration of future land use would, for the first time, allow public input on land use before a remedy was selected for the site. Under current law, land use is only considered after a feasibility study is completed. This can necessitate redoing a portion of the study, a costly and time-consuming procedure. CSHB 2776 would avoid this problem by having TNRCC elicit public input early in the investigation process if the planned future use is other than residential. Requiring a contested case hearing on the matter would be unnecessary and would further delay cleanup of contaminated sites.

Principles of fairness dictate that innocent owners and operators be released from liability if their sites were contaminated by off-site sources. Limiting the liability of lenders and fiduciaries who were not involved in the management or operation of superfund sites would encourage marketing of these sites and would restore many sites to economically productive use. Currently, lenders are often afraid to lend to those who want to clean up and develop sites, for fear of becoming liable for cleanup costs and penalties. CSHB 2776 would alleviate these fears.

The bill would encourage people to use the highly successful voluntary cleanup program by allowing them to shifting sites from the state superfund registry. This move would save the state time and money and cause sites to be remediated more promptly.

CSHB 2776 would introduce a new concept of planned removal in order to provide for quick remediation without the time-consuming process of listing a site on the state superfund registry. This would give TNRCC greater discretion in dealing with smaller sites. In many cases, the risk posed by a site can be eliminated by removing a few barrels of hazardous waste and contaminated surface soils. In these cases, there is no need for the extensive

and elaborate investigations and preplanning required under the superfund program.

OPPONENTS  
SAY:

Contested case hearings rather than public meetings should be held concerning potential land-use changes at a contaminated sites. The owner of a contaminated site, for example, might seek to have the land use changed from residential to light industrial because the standards for cleaning up such a site would not be as stringent and remediation therefore would be less expensive. Neighbors of the site, however, might not want their children growing up next to a partially remediated site. They should be able to present their views in a serious forum such as a contested case hearing, rather than a public meeting, which has no legally binding consequences.

OTHER  
OPPONENTS  
SAY:

The fiscal note to CSHB 2776 shows that requiring TNRCC to certify that certain owners and operators are immune from liability would cost \$417,197 in 1998 and \$376,697 annually from that time forward. This would be an unnecessary added expense, especially when TNRCC figures show the superfund program will run out of money in this biennium.

NOTES:

The committee substitute added provisions releasing innocent owners or operators of land next to contaminated property from liability and exempting TNRCC from state purchasing, building, construction and public works requirements.

The companion bill, SB 1226 by Brown, is pending in the Senate Natural Resources Committee.