

TESTIMONY

OF

PENNSYLVANIA ENVIRONMENTAL COUNCIL

Presented by Brian Hill and Thomas W. Scott

BEFORE THE

HOUSE ENVIRONMENTAL RESOURCES

AND

ENERGY MANAGEMENT COMMITTEE

INDUSTRIAL SITES REMEDIATION AND LIABILITY LEGISLATION

SENATE BILL 1, PN 676

SENATE BILL 11, PN 677

SENATE BILL 12, PN 678

MARCH 16, 1995

TESTIMONY OF THE PENNSYLVANIA ENVIRONMENTAL COUNCIL

MEMBERS OF THE COMMITTEE:

I. INTRODUCTION

I am Tom Scott, PEC Legislative Counsel. With me is Brian Hill, Director of the Western Pennsylvania office of the Pennsylvania Environmental Council (PEC). The Environmental Council is a statewide organization of environmental organizations, business leaders, academics and concerned citizens dedicated to the development and enforcement of sound environmental laws and regulations in the Commonwealth that will protect our environment and enhance our economy. PEC is extremely interested in the issues presented by Senate Bill 1, 11, and 12 and appreciates this opportunity to present testimony before the Committee.

II. THE PROBLEM

Pennsylvania's long history as a heavily industrialized state, coupled with the development in the past decade of far reaching laws imposing liability upon the owners of contaminated property, have combined to burden the Commonwealth with scores of former industrial sites (many of them located in urban areas) that are contaminated, abandoned, and, by present standards, worthless. These sites are responsible for present pollution of surface and ground water and they threaten future pollution of those resources. In many instances, the companies responsible for the pollution are

no longer viable. The sites are unusable, unsalable, and, under the present legal framework, are destined to remain as industrial wastelands that blight the urban areas where they are located.

A related component of the problem is that virtually all new industrial or commercial activity is being located on virgin land, frequently in rural or fringe areas. The result of this industrial and commercial migration is a decrease in available woodland, farm land and open space with a concomitant loss of urban tax base.

III. PEC'S INVOLVEMENT

In 1991 the PEC Board of Directors created a special board-level task force on the reuse of industrial sites. In 1992, when the General Assembly first considered legislation to address the special problems presented by abandoned industrial sites, PEC endorsed the concept and testified in favor of legislation that would foster the clean up and reuse of existing industrial sites, establish realistic risk-based cleanup standards and limit the liability of future owners for historic contamination. Beginning in October of 1993 The Council sponsored a series of roundtable discussions across the state (Philadelphia, Wilkes-Barre, Erie and Pittsburgh) to provide a public forum for knowledgeable individuals from a broad spectrum of interests to discuss the subject. The following recommendations for legislation emerged from these discussions:

1. There is a need for clear, consistent clean-up standards based upon actual risk to human health and the environment;
2. The clean-up process needs to move quickly from assessment to solution;
3. There must be a proactive approach to public involvement, so that the community has some say in the solution;
4. There is a need for finality as to liability when approved cleanups have been completed;
5. There should be funding for site assessments and cleanups which are in the overall community interest but which lack a private owner or potential purchaser.

The Pennsylvania Environmental Council believes there is a significant need for a coordinated program that will foster the clean-up of former industrial sites to the greatest extent economically feasible, promote the reuse of those lands, and, in the process, preserve farm and other open land. Impediments need to be replaced with incentives; risks need to be replaced with rewards.

IV. ASSESSING SENATE BILL 1

A. What we like about SB 1.

The first step in addressing an appropriate clean up for contaminated industrial areas is to acknowledge, difficult as that may be for some, that there are areas that will never be truly "clean" again -- regardless of fault, cause or control -- they are and will remain contaminated. The challenge is to reach an environmentally, socially and economically acceptable compromise that will allow those sites to remain economically viable even

though they are ecologically degraded. Exceptions to complete cleanup based upon both use and pre-existing conditions are appropriate in certain instances. The difficulty lies in establishing the extent of the exception and the instances when the less than perfect cleanup is acceptable.

We support the concept embodied in Senate Bill 1 that the procedure for cleaning up areas of historic and current industrial use should be streamlined, and that the standards for cleanup should be realistic and based upon actual risk to human health and the environment. We also support the provisions of the Bill which limit the liability of those who perform appropriate cleanup measures. Our roundtables made it quite clear that certainty, before, during and after a cleanup is essential if actual cleanup and reuse is to occur.

B. Suggested changes to improve SB 1.

1. Differentiation between developed and undeveloped land.

Our interest is in legislation that will foster and encourage the cleanup and reuse of past and present industrial lands. As you know, although the problem of historically contaminated property provides impetus for this legislation, the legislation itself applies to all property: that which was contaminated in the past, is being contaminated today, and will be developed and contaminated in the future. PEC does not believe that the standards and

procedures that are necessary and appropriate for the remediation of historically contaminated sites are always directly applicable or appropriate for sites that will be developed on today's "greenfields" which may be contaminated in the future.

Broad application legislation needs to discriminate between how we handle cleanup of sites burdened by historic contamination and sites that are currently undeveloped but which will be dedicated to industrial use in the future. Legislation that does not differentiate between these two very different types of properties runs the risk of imposing too high a standard on properties with historic contamination or too low a standard on modern and future facilities. Without differentiation based upon the history of the site, the legislation cannot achieve its objective of fostering cleanup and reuse of contaminated sites. If the standards are too high and the costs too onerous, capital will continue to flow into the development of new facilities in unspoiled areas. However, if standards appropriate for areas of historic contamination are readily available for the cleanup of areas of future contamination, there will be less incentive for development to concentrate in existing industrial areas and we face the probability of more widespread areas of future contamination.

PEC feels that the legislation should be amended to provide that only property developed for industrial use prior to the effective date of the Act may utilize the less stringent, restricted use, site specific cleanup standards authorized by the

legislation. We have prepared an amendment to Section ___ which we believe will accomplish this objective. Our amendment is attached for your consideration.

This amendment will foster the cleanup and reuse of existing industrial areas for new growth, and deter the present pattern of siting virtually all new development on previously undeveloped lands. If site specific, risk based standards are restricted to redevelopment in existing industrial areas it will create incentive to locate new industrial uses in those areas. Doing so will preserve open land and the environmental quality of presently undeveloped areas. There is plenty of justification for some relaxation of cleanup and liability standards in presently developed areas; there is no justification for extending that philosophy into areas that have not yet been developed.

2. Insure that there is reuse of lands cleaned up to a "restricted use" standard.

A common theme at the roundtables PEC conducted last year was the desire for cleanup standards based upon actual risks through real pathways of exposure. There was wide acceptance that the mere presence of a contaminant, without an actual exposure pathway, need not always call forth herculean efforts at great cost, merely to eliminate the blot for the sake of doing so. There is not enough capital in either the public or the private sector to engage in such conduct. Accordingly, we support the provisions of Senate

Bill 1 that provide for special response action requirements at industrial land use properties, based upon a risk assessment utilizing the more conservative occupational exposure assumptions.

A key provision of Senate Bill 1 is the ability of a landowner to choose one of three potential cleanup standards: background, health based, or site specific. This is an important provision when properly utilized because it insures that the cleanup will reflect the real risks at the property based upon its use. However, while there is a potential benefit to landowners utilizing a site specific cleanup, there is also a risk that some otherwise liable landowners may attempt to secure the benefits of limited liability present in the bill without performing much cleanup or providing any reuse by "claiming" to clean up to an industrial standard which is appropriate based upon limited access when in fact there is little or no likelihood that the land will ever be reused for that purpose. The result would be "industrial dead zones" which are polluted and restricted and for which there is no longer a viable entity liable for further cleanup.

The legislation should be amended to provide that, when the applicant for site specific cleanup standards owns the site, and was responsible for the contamination, site specific cleanup standards based upon a restricted use of the property may only be used when the owner establishes a reasonable probability that the property will be committed to that use in the foreseeable future. This change is responsive to a legitimate concern that some owners

of presently contaminated property may take advantage of the legislation by submitting "cleanup plans" that do little cleaning up. When lower cleanup standards for a site are authorized because of the limited access to the site that comes with industrial use, it is appropriate to insure that the proffered use is reasonably likely to actually occur. Owners should not be permitted to promise an industrial use to secure less stringent cleanup standards as a prelude to minimal cleanup, deed restriction, fencing and virtual abandonment of the property without significant cleanup or reuse. We have prepared an amendment which we believe accomplishes this change and it is attached for your consideration.

C. A Challenge to DER and a Caution.

Many have noted that timely consideration and response to cleanup plans at the DER level is necessary if private enterprise is going to have significant involvement with site recycling. SB 1 contains a mechanism, deemed approval after 60 or 90 days following submission, which will prompt prompt DER review and consideration of the plans submitted pursuant to the bill. The purpose of this provision is to insure prompt action. It may impose some significant burdens upon the Department. We anticipate that the Department will receive and devote the necessary staff and effort to this task. In the event the reviews are inadequate to protect health or the environment, or "deemed approval" becomes reality, and plans are allowed to go forward without proper review,

we will be back, insisting that protection of the environment remain paramount.

IV. A CLOSING CAVEAT

The Declaration of Policy prelude to Senate Bill 1 as well as much of the testimony in favor of the Bill (including ours) extols the potential this legislation has to restore Pennsylvania's historic industrial base at historic sites for the benefit of our cities and towns and the preservation of our farmland and open space. Reusing "brownfields" while preserving "greenfields" has such an appealing ring that no one can oppose the concept.

For the past four years the Pennsylvania Environmental Council has been involved in the study of the factors leading to loss of open space and farmland and the deterioration of existing neighborhoods. The quality of our lives and the health of our communities is as much at stake as the quality of the environment. Regardless of the final structure of this legislation, it can never be more than one relatively small building block in what must be a comprehensive structure of institutional, land use, transportation policy and infrastructure decisions, all geared toward urban renewal and revitalization and regulated rural development. Nothing this Bill, or any other like it, can do to foster reuse of existing industrial areas will have much impact in the face of the unfettered expansion of the transportation network and related

developmental infrastructure into the unzoned, unregulated and presently unspoiled countryside. If that continues to happen the incentives for industry to follow will be too great for this legislation to reverse. This is an important piece of legislation; but it is only a beginning if the goal is truly the revitalization of historically vibrant, diverse, productive and healthy urban neighborhoods.

Thank you for allowing PEC to provide you with our position on this matter. WE will be happy to respond to your questions and look forward to working with you in the coming weeks as this issue is taken up by the full House of Representatives.

**The Pennsylvania Environmental Council Amendment
Limiting the Restricted Use, Site Specific Cleanup Option to
Presently Developed Land**

Amend Section 106 "Scope" of the bill by inserting the following proviso at the end thereof:

PROVIDED, that the provisions of this act, including the Remediation Standards and Review Procedures set forth in Chapter 3 and the Clean Up Liability Protection provisions of Chapter 5 shall only be applicable to a property on which industrial activities were conducted prior to the effective date of this act, or which is in an area of pervasive groundwater contamination or which contains historic groundwater or soil contamination. In any dispute regarding the eligibility of a site for the provisions of this act, the person seeking to utilize the provisions of this act shall have the burden of establishing that the provisions of this section have been met.

Our suggested amendment would need to be bolstered by the inclusion of two additional defined terms: area of pervasive groundwater contamination and historic groundwater or soil contamination. We believe that the definitions of pervasive groundwater contamination and historic groundwater or soil contamination originally contained in H.B. 2700 of 1994, and reflected in P.N. 2480 of S.B. 972 of 1994 are appropriate to be incorporated into a final version of S.B. 1.

**The Pennsylvania Environmental Council Amendment
Limiting the Restricted Use, Site Specific Cleanup Option**

Amend Section 304 "Site-specific standard," sub paragraph (a) "General" by inserting the following proviso at the end thereof:

Provided that when a site-specific standard based upon restrictions on the use of the property is sought by a property owner responsible for the contamination of concern, the owner must demonstrate that the projected use has a reasonable likelihood of occurring. In the event site-specific cleanups utilizing restrictions on use of the property are approved for property owners responsible for the contamination of concern, and the use which is projected has not commenced within three years of the completion of the cleanup, the Cleanup Liability Protection of Chapter 5 shall no longer be applicable to the property.