AMENDED IN SENATE JANUARY 22, 2004

AMENDED IN SENATE JANUARY 20, 2004

AMENDED IN SENATE JANUARY 5, 2004

SENATE BILL No. 559

Introduced by ~~Senator Ortiz~~ *Senators Ortiz and Machado*

February 20, 2003

An act to add Chapter 6.86 (commencing with Section 25399.10) to Division 20 of the Health and Safety Code, relating to hazardous materials.

LEGISLATIVE COUNSEL'S DIGEST

SB 559, as amended, Ortiz. Hazardous materials: Brownfield site cleanup and reuse.

The Carpenter-Presley-Tanner Hazardous Substance Account Act imposes liability for hazardous substance removal or remedial actions and requires the Department of Toxic Substances Control (department) to adopt, by regulation, criteria for the selection and priority ranking of hazardous substance release sites for removal or remedial action under the act. The act requires the department or, if appropriate, a California regional water quality control board, to prepare or approve remedial action plans for each listed site.

Under existing law, the Site Designation Committee in the California Environmental Protection Agency is authorized to designate an administering agency for oversight of a remedial action to a hazardous substance release. Existing law requires the administering agency to supervise the site investigation and remedial action conducted by the responsible party and, upon determining that the site investigation and

remedial action has been satisfactorily completed, to issue a certificate of completion to the responsible party.

This bill would establish the Brownfield Site Cleanup and Reuse Program Act, define terms, and authorize the department to ~~establish and implement a site assessment grant program and a program for funding the department's oversight costs for qualifying brownfield site projects, to the extent that funding is provided for these purposes by the Legislature, or from federal grant funds or other sources.~~

~~The bill would authorize the department to~~ adopt guidance documents, policies, and procedures to implement the act and would exempt the adoption of these documents, policies, and procedures from the administrative requirements for the adoption of regulations. The bill would require the department to provide information to the State Water Resources Control Board and the California regional water quality control boards regarding brownfield site projects that are being considered for oversight by the department pursuant to the act. The bill would also require the department to pursue specified agreements with state and federal agencies and would require the department and the water board to enter into an agreement to minimize overlap, and to maximize coordination and consistency in oversight of brownfield site projects under the act.

The bill would authorize the department to enter into an environmental oversight agreement with any person for the department's consultation regarding, or the oversight of, a site assessment or response action, or both, at a brownfield site. The bill would define a person who enters into an environmental oversight agreement with the department as a brownfield project sponsor. The bill would specify eligibility requirements and specified conditions for entering into an agreement.

The bill would require a brownfield project sponsor who enters into an agreement for the oversight of a site assessment to submit a site assessment plan to the department. The bill would require the department to evaluate the adequacy of a site assessment plan and if the department finds that the site assessment plan is adequate, the department would be required to approve the plan and notify appropriate persons.

The bill would require a brownfield project sponsor who enters into an agreement for the oversight of a response action plan to submit a response action plan to the department and would require the department to evaluate the adequacy of the response action plan

submitted in accordance with specified criteria. The department would be required to approve the plan if the department makes certain ~~finding~~ *findings* and would authorize the department, in approving a response action plan, to require, as a condition of approval, additional requirements, including requirements for long-term maintenance and operations, land use controls, and engineering controls.

The bill would allow a response action plan to include land use controls that impose appropriate conditions, restrictions, and obligations on land use or activities when hazardous materials will remain at the site at a level that is not suitable for unrestricted use of the land, as specified. The bill also would require the department to issue a certificate of completion upon the satisfactory completion of a response action by a brownfield project sponsor, in accordance with an approved response action plan.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Chapter 6.86 (commencing with Section 25399.10) is added to Division 20 of the Health and Safety Code, to read:

CHAPTER 6.86. BROWNFIELD SITE CLEANUP AND REUSE PROGRAM ACT

Article 1. Findings and Definitions

25399.10. The Legislature hereby finds and declares all of the following:

(a) (1) There are thousands of brownfield sites in the state where redevelopment has been stymied due to real or perceived hazardous materials contamination. Cleaning up these sites and returning them to productive use will benefit the communities in which they are located and the state as a whole.

(2) Contamination of property in the state has hampered redevelopment, which, in turn has limited job creation, economic revitalization, and the full and productive use of the land.

(3) Because of the reluctance of private developers, local governments, and schools to redevelop these properties, the

location of new development tends to be at the edges of urban areas, because those areas are generally perceived to entail lesser potential for contamination and liability for cleanup costs.

(4) This has resulted in a multitude of problems, including urban sprawl, decaying inner-city neighborhoods and schools, public health and environmental risks stemming from contaminated properties, reduced inner-city tax bases, and an increased need for major infrastructure improvements, such as streets, highways, and sewer systems to service the urban fringe areas while the inner-city infrastructure deteriorates.

(5) One of the primary reasons these properties are not redeveloped for beneficial use is that potential redevelopers are hesitant to expend funds to determine whether a property is contaminated, and if so, how much it would cost to remediate the site.

(6) Cleanup of contaminated land can and should be coordinated with plans for redevelopment and sustainable reuse of land whenever possible, including coordination of the public participation activities of the state with those of local agencies.

(b) It is therefore the intent of the Legislature in enacting this article to do all of the following:

(1) Clearly establish that the cleanup and reuse of brownfield sites is a priority of the state, and specifically, of the California Environmental Protection Agency.

(2) Minimize procedural burdens and establish an efficient, flexible, consistent, and expeditious process while ensuring that cleanups are fully protective of public health~~, safety~~ *and safety,* and the environment.

(c) This chapter shall be known, and may be cited as, the ‘‘Brownfield Site Cleanup and Reuse Program Act.’’

25399.11. The definitions in this section govern the interpretation of this chapter. Unless the context requires otherwise, and except as provided in this section, the definitions contained in Article 2 (commencing with Section 25310) of Chapter 6.8 apply to the terms used in this chapter.

(a) ‘‘Agency’’ means the California Environmental Protection Agency.

(b) ‘‘Agreement’’ means an environmental oversight agreement entered into pursuant to Section 25399.14.

(c) ‘‘Board’’ means the State Water Resources Control Board.

(d) ‘‘Brownfield project sponsor’’ means a person who enters into an environmental oversight agreement with the department pursuant to this chapter.

(e) (1) ‘‘Brownfield site’’ or ‘‘site’’ means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or perceived presence of hazardous materials.

(2) ‘‘Brownfield site’’ does not include any of the following:

(A) A facility that is listed or proposed for listing on the National Priorities List established under Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sec. 9605).

(B) A site that is subject to an existing cleanup or abatement order issued by a regional board pursuant to Section 13304 of the Water Code or an enforcement action by the department pursuant to Chapter 6.5 (commencing with Section 25100) or Chapter 6.8 (commencing with Section 25300).

(C) A property that is or was owned or operated by a department, agency, or instrumentality of the United States.

(D) A site on the list maintained by the department pursuant to Section 25356.

(f) ‘‘Department’’ means the Department of Toxic Substances Control.

(g) ‘‘Hazardous material’’ has the same meaning as defined in subdivision (d) of Section 25260.

(h) ‘‘Land use control’’ means a recorded instrument executed pursuant to Section 25399.19 that restricts or imposes obligations on the present and future uses or activities on a brownfield site, including, but not limited to, recorded easements, covenants, restrictions or servitudes, or any combination thereof, as appropriate.

(i) ‘‘Local public entity’’ means a city, county, or redevelopment agency as defined in Section 33003.

(j) ‘‘Presumptive cleanup approach’’ means a standard remedy for a brownfield site that that has similar chemical contaminants or similar characteristics with other sites, based on historical patterns of remedy selection and scientific and engineering evaluation of cleanup technology performance.

(k) ‘‘Regional board’’ means a California regional water quality control board.

(*l*) ‘‘Response,’’ ‘‘respond,’’ or ‘‘response action’’ have the same meaning as defined in Section 25323.3, except that ‘‘response,’’ ‘‘respond,’’ and ‘‘response action’’ under this chapter apply to hazardous material as defined in subdivision (g).

(m) ‘‘Response action plan’’ or ‘‘plan’’ means a response action plan submitted to the department pursuant to Section 25399.16.

Article 2. ~~Grants, Funding, and~~ Administration

~~25399.12. (a) To the extent that funding is provided for these purposes by the Legislature, or from federal grant funds or other sources, the department may establish and implement one or both of the following:~~

~~(1) A site assessment grant program.~~

~~(2) A program for funding the department's oversight costs for qualifying brownfield site cleanup projects, as determined by the department and by the terms of the funding provided for this purpose.~~

~~(b)~~

25399.12. (a) The department may adopt guidance documents, policies, and procedures to implement the brownfield site cleanup and reuse program established by this chapter, including facilitating the use of rational presumptive approaches and other methods for site investigation and cleanup. The adoption of guidance documents, policies, and procedures is not the adoption of regulations for purposes of, and is not subject to, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

~~(c)~~

(b) (1) Except as otherwise expressly provided in this chapter, this chapter does not affect the authority of the department to issue any order or take any other action under any other provision of law to protect public health and safety or the environment.

(2) Except as otherwise expressly provided in this chapter, this chapter does not affect the authority of the department, a regional board, or any other public agency to pursue any existing legal, equitable, or administrative remedies pursuant to state or federal law.

(3) Except as otherwise expressly provided in this chapter, Chapter 6.8 (commencing with Section 25300) does not apply to the implementation of this chapter.

25399.13. (a) Pursuant to procedures developed by the department and the board, the department shall provide information to the board and the regional boards at least once every three months regarding brownfield site projects that are being considered for oversight by the department pursuant to this chapter.

(b) The department shall maintain information on brownfield sites that are subject to oversight under this chapter and shall make this information available through its Internet Web page.

(c) The department shall pursue agreements with appropriate state and federal agencies to provide assurances that the interests and concerns of those agencies are met when a certificate of completion is issued under this chapter. The state and federal agencies that the department may enter into an agreement with, include, but are not limited to, the board, the regional boards, and Region IX of the federal Environmental Protection Agency.

(d) The department and the board shall enter into an agreement to minimize overlap, and to maximize coordination and consistency, in the oversight of brownfield site cleanup and reuse projects that are subject to this chapter. The agreement shall do both of the following:

(1) Maximize the efficient and effective use of the state resources that are available to facilitate brownfield site cleanup and reuse.

(2) Describe a framework to ensure that the appropriate state agency provides environmental oversight at a brownfield site.

(e) The Secretary for Environmental Protection shall assist in coordinating the oversight conducted by the department and the board, if the brownfield project sponsor is a local public entity.

Article 3. Environmental Oversight Agreements: Site Assessment and Response Action Plans

25399.14. (a) (1) A person may voluntarily seek the oversight of the department for consultation services and for review and approval of a site assessment plan or a response action plan, or both, for an eligible brownfield site that may be

contaminated by the release of hazardous materials, by entering into an agreement pursuant to this section.

(2) Except as provided in subdivision ~~(i)~~ *(h)*, the department may enter into an environmental oversight agreement with any person for the department's consultation regarding, or oversight of, a site assessment or a response action, or both, at a brownfield site pursuant to Sections 25399.15 and 25399.16. This consultation may include, but is not limited to, participating in meetings or site visits, review of documents or other information, and providing technical advice.

(b) (1) A person who elects to become a brownfield project sponsor shall submit to the department sufficient information for the department to determine whether the site is a brownfield site and for the department to prepare an agreement pursuant to this section.

(2) The person who elects to become a brownfield project sponsor shall demonstrate to the department that the brownfield project sponsor owns or otherwise has sufficient control over the brownfield site to conduct a site assessment or response action pursuant to this chapter and to provide access to the brownfield site for the purposes of the department's oversight activities.

(c) Either the department or a brownfield project sponsor may withdraw from an agreement by providing adequate written notice to the other party prior to withdrawing. Before withdrawing from an agreement, the brownfield project sponsor shall do both of the following:

(1) Reimburse the department for its incurred costs.

(2) Demonstrate, to the satisfaction of the department, that conditions at each brownfield site to which the agreement applies do not endanger public health and safety or the environment.

(d) A brownfield project sponsor who enters into an agreement with the department is responsible for all costs the department incurs for consultation regarding, and oversight of, a site assessment or response action subject to the agreement.

(e) For the purposes of recovering the department's costs pursuant to this chapter, the department shall provide a brownfield project sponsor who enters into an agreement with an estimate that includes all of the following information:

(1) A description of the work to be performed or services to be provided.

(2) The estimated billing rates for all classes of employees expected to perform work under the agreement.

(3) An estimate of the charges to be billed under the agreement, to the extent the department can project its time and costs in advance. The department may adjust this estimate based on an analysis of new information that supports the adjustment, including, but not limited to, those circumstances as a change in the scope of the original work, additional work that is needed to ensure protection of human health or safety or of the environment, or other circumstances that arise that require substantially more time and effort than was originally anticipated to complete the work. Before adjusting the estimate, the department shall provide written notice to the brownfield project sponsor.

(f) An agreement is exempt from any requirement of the Public Contract Code that requires the oversight, review, or approval by the Department of General Services.

(g) The Attorney General may, upon the request of the department, commence an action to recover any response costs incurred by the department for work performed or services provided in connection with a brownfield site under this chapter, including consultation and oversight of site assessment or response actions, against the person responsible for the department's incurred costs.

~~(h) To facilitate informal discussion and information sharing, and, to the extent that funding to reimburse the department's costs is available for this purpose, the department may provide initial consultation services for one or more brownfield sites before entering into an agreement.~~

~~(i)~~

(h) (1) All of the following persons are not eligible to enter into an agreement:

(A) A person who has been convicted of a felony or misdemeanor involving the regulation of hazardous materials, including, but not limited to, a conviction of a felony or misdemeanor under Section 25395.13.

(B) A person who is in violation of an administrative order or agreement issued by or entered into with any federal, state, or local agency that requires site assessment or response action at a site, or a judicial order or consent decree that requires site assessment or response action at a site.

(C) A person who has engaged in gross negligence with respect to site assessment or response action at a site that causes endangerment of public health and safety or the environment.

(D) A person who obtains or seeks to obtain an approval or other determination from the department by fraud, negligent or intentional nondisclosure, or misrepresentation.

(2) If the department determines that any of the conditions specified in paragraph (1) apply to a person that has entered into an agreement, the department shall terminate the agreement.

25399.15. (a) A brownfield project sponsor who enters into an agreement pursuant to Section 25399.14 with the department for oversight of a site assessment shall submit a site assessment plan to the department to conduct a site assessment of the brownfield site in accordance with the requirements of this section.

(b) (1) The site assessment proposed in the site assessment plan shall provide for the assessment, monitoring, and evaluation of a release or threatened release of hazardous materials at the brownfield site to determine or evaluate any one or more of the following:

(A) If a release of hazardous materials has occurred at the brownfield site.

(B) If a release or threatened release at the brownfield site poses a risk to public health and safety or the environment, including risk to water quality.

(C) The potential for redevelopment of the brownfield site.

(2) The site assessment plan shall also include all of the following:

(A) An opportunity for the public to participate meaningfully in decisions regarding the site assessment.

(B) Adequate characterization of the hazardous materials released or threatened to be released and documentation of the findings.

(c) Reasonably available information about the brownfield site, including sampling and analysis if appropriate, a preliminary evaluation of the risks posed by the hazardous materials released or threatened to be released, and any other information that the department determines is necessary.

(d) A brownfield project sponsor shall submit the site assessment plan to department for review and approval.

(e) The department shall evaluate the adequacy of a site assessment plan submitted pursuant to subdivision (c) to ensure the site assessment plan contains all necessary elements.

(f) After evaluating the site assessment plan pursuant to subdivision (d), if the department finds that the site assessment plan is adequate, the department shall approve the plan and provide notification to appropriate persons.

25399.16. (a) A brownfield project sponsor who enters into an agreement with the department pursuant to Section 25399.14 for oversight of a response action shall submit a response action plan to the department to conduct a response action at the brownfield site. The response action plan shall require the response action at the brownfield site to do both of the following:

(1) Provide an opportunity for the public to participate meaningfully in decisions regarding the response action.

(2) Adequately characterize the hazardous materials released or threatened to be released and document the findings.

(b) A response action plan submitted by the brownfield project sponsor for the department's review and approval shall contain all of the following:

(1) A summary of activities that have been conducted to determine the extent of contamination at the brownfield site and an assessment of potential health risks from exposure to hazardous materials and environmental impacts.

(2) An identification of reasonably anticipated future land uses of the brownfield site.

(3) A description of the techniques and methods to be used in excavating, storing, handling, transporting, treating, and disposing of any hazardous materials or environmental media contaminated with hazardous materials.

(4) A description of the methods that will be employed during the response action to ensure the health and safety of workers and protection to the public and the environment.

(5) A description of activities that will be implemented to control any endangerment that occurs during the response action at the brownfield site.

(6) The details of any land use control.

(7) An analysis of the potential for the proposed response action to be effectively implemented.

(8) An analysis and certification of the compliance of the response action with federal, state, and local statutes, regulations and ordinances, including the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(9) A description of how the public has been involved to date and is proposed to be further involved.

(10) Any other information that the department determines is necessary.

(c) The department shall evaluate the adequacy of the response action plan submitted pursuant to subdivision (a). The department shall approve the plan if the department makes all of the following findings:

(1) The plan contains the procedures, details, and analysis required by subdivisions (a) and (b).

(2) When fully implemented, the response action will place the brownfield site in a condition that allows it to be permanently used for its reasonably anticipated future land use without any significant risk to human health or potential risk to the environment.

(3) The response action plan adequately addresses all public comments.

(4) If a presumptive cleanup approach is being proposed as the preferred remedy in a response action plan, the presumptive cleanup approach adequately addresses the conditions at the brownfield site.

(d) In approving a response action plan pursuant to subdivision (c), the department may require, as a condition of approval, the brownfield project sponsor comply with additional requirements when carrying out the response action plan. The department may also specify additional requirements for long-term maintenance and operations, including land use controls and engineering controls, that are to be included in the response action plan.

(e) After the department approves the response action plan pursuant to subdivision (c), the department shall notify all appropriate persons.

Article 4. Land Use Controls and Certificate of Completion

25399.19. (a) A response action plan may include land use controls that impose appropriate conditions, restrictions, and obligations on land use or activities when a hazardous material will remain at the site at a level that is not suitable for the unrestricted use of the site.

(b) If the department approves a response action plan that includes land use controls, the land use controls shall be executed by the land owner and recorded by the land owner in the office of the county recorder in each county in which all, or a portion of, the land is located within 10 days of the date of execution. The department shall not issue a certificate of completion pursuant to Section 25399.20 for an approved response action plan that requires the use of land use controls, until the department receives a copy of the recorded land use control. If the site that requires a land use control does not have an owner, or the department determines the owner is incapable of executing a binding land use control as required by this section, the department may record, in the county records, a ‘‘Notice of Land Use Restriction’’ that has the same binding effect as any other land use control executed pursuant to this section, and that is subject to the variance and termination procedures specified in subdivision (d).

(c) Notwithstanding any other provision of law, a land use control executed pursuant to this section and recorded so as to provide constructive notice, runs with the land from the date of recordation, is binding upon all of the owners of the land, and their heirs, successors and assignees and the agents, employees, or lessees of the owners, heirs, successors and assignees, and is enforceable by the department pursuant to Article 8 (commencing with Section 25180) of Chapter 6.5.

(d) Notwithstanding any other provision of law, a land use control executed pursuant to this section is subject to Section 57012 and to the variance and removal procedures specified in Sections 25233 and 25234.

25399.20. (a) The department shall issue a certificate of completion upon the satisfactory completion of a response action by a brownfield project sponsor in accordance with an approved response action plan, in accordance with the requirements of this section.

(b) The department shall issue a certificate of completion if the department determines that the brownfield project sponsor has satisfactorily completed the response actions necessary to implement the approved response action plan in accordance with this chapter and with all other applicable statutes and regulations.

(c) Notwithstanding subdivision (b), the department shall issue a certificate of completion to a brownfield project sponsor when a response action plan includes long-term obligations that have not been completed, including operation and maintenance requirements or monitoring, only if the department makes all of the following determinations:

(1) All other response actions that are necessary to respond to the release have been satisfactorily completed.

(2) The brownfield project sponsor has developed an adequate long-term operation and maintenance plan and demonstrated initial compliance of the system with the plan.

(3) The brownfield project sponsor provides financial assurance demonstrating that sufficient funds are available to fund the implementation of the operation and maintenance plan and the department's costs to monitor performance of the brownfield project sponsor and the effectiveness of the operation and maintenance plan, for the period of time the operation and maintenance plan will be in effect.

(d) If the department determines that long-term operation and maintenance is required at a brownfield site, the department may, as a condition of issuing a certificate of completion, enter into an operation and maintenance agreement with the brownfield project sponsor that governs the long-term operation and maintenance activities.

O