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SENATE BILL 362

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

ROMAN M MAES III

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR VOLUNTARY REMEDIATION OF CONTAMINATED REAL PROPERTY AND VOLUNTARY AGREEMENTS; AUTHORIZING COVENANTS NOT TO SUE; PROVIDING AUTHORIZATION FOR A FEE FOR ADMINISTRATION OF AGREEMENTS; APPROPRIATING FEES FOR OPERATION OF A VOLUNTARY REMEDIATION PROGRAM; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. --This act may be cited as the "Voluntary Remediation Act".

Section 2. PURPOSE. --The purpose of the Voluntary Remediation Act is to provide incentives for the voluntary assessment and remediation of contaminated property, with state oversight, and to remove future liability of lenders and landowners.

Underscored material = new  
[bracketed material] = delete

1           Section 3. DEFINITIONS. --As used in the Voluntary

2 Remediation Act:

3           A. "applicable standards" means federal or state  
4 standards, requirements, criteria or limitations that are  
5 legally applicable to the facility;

6           B. "applicant" means a person that elects to submit  
7 an application to participate and enter into an agreement under  
8 the Voluntary Remediation Act;

9           C. "contaminant" means:

10                   (1) solid waste;

11                   (2) hazardous waste as defined by Section 1004  
12 (5) of the federal Solid Waste Disposal Act and 40 C.F.R. Part  
13 261.3;

14                   (3) an RCRA hazardous waste constituent listed  
15 in 40 C.F.R. Part 261, Appendix VIII;

16                   (4) any substance that could alter, if  
17 discharged or spilled, the physical, chemical, biological or  
18 radiological qualities of water;

19                   (5) a hazardous substance, as defined by  
20 Section 101(14) of the federal Comprehensive Environmental  
21 Response, Compensation and Liability Act and 40 C.F.R. Part 302,  
22 Table 302.4; or

23                   (6) petroleum substances within the  
24 jurisdiction of the department;

25           D. "department" means the department of environment;

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E. "enforcement action" means:

(1) a written notice from the department or other state agency which requires abatement of contamination under 20 NMAC 6.2;

(2) a written order from the department or other state agency that requires or involves the removal or remediation of contaminants; or

(3) a judicial action by the department or other state agency seeking the abatement of contamination or the remediation of contaminants; or

(4) a notice, order or judicial action similar to those enumerated in Paragraphs (1) through (3) of this subsection, but initiated by the federal government;

F. "fraud" means the knowingly false representation, whether by words or conduct, and whether by inaccurate or misleading allegations, or by concealment of that which should have been disclosed, that is intended to deceive or circumvent the intent of this statute;

G. "participant" means an applicant that has been approved by the department as eligible for and who signs and performs an agreement pursuant to the provisions of the Voluntary Remediation Act;

H. "person" means a legal entity;

I. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping,

1 leaching, dumping or disposing into the environment, including  
2 abandonment or discarding, of any contaminant;

3 J. "remediation" means:

4 (1) actions necessary to investigate, prevent,  
5 minimize or mitigate damages to the public health or to the  
6 environment, which may otherwise result from a release or threat  
7 of release; and

8 (2) the cleanup or removal of released  
9 contaminants to applicable standards;

10 K. "site" means a parcel of real property for which  
11 an application has been submitted under Section 5 of the  
12 Voluntary Remediation Act; and

13 L. "voluntary remediation" means a response action  
14 taken under and in compliance with the Voluntary Remediation  
15 Act.

16 Section 4. REGULATIONS. --The department shall adopt and  
17 promulgate rules and regulations necessary to implement the  
18 provisions of the Voluntary Remediation Act. The rules and  
19 regulations shall provide for, among other things, the amount of  
20 the nonrefundable application fee and a schedule for the cost of  
21 the department's oversight of the voluntary remediation.

22 Section 5. APPLICATION AND FEE. --

23 A. To be eligible for a voluntary remediation  
24 agreement an applicant must:

25 (1) own the site;

- 1 (2) operate a facility located on the site;  
2 (3) be a prospective owner of the site; or  
3 (4) be a prospective operator of a facility at  
4 the site.

5 B. An applicant shall pay at the time of submitting  
6 the application a reasonable, nonrefundable application fee  
7 determined by the department in advance, which will pay for the  
8 costs to the department of processing the application.

9 C. The participant shall pay all costs of the  
10 department's oversight of the voluntary remediation.

11 D. The department shall reject an application for a  
12 voluntary remediation agreement if the department determines:

13 (1) the contaminants at the site constitute an  
14 unreasonable threat to human health or the environment;

15 (2) an administrative or judicial state or  
16 federal enforcement action is pending that concerns the  
17 remediation of a contaminant described in the application;

18 (3) a federal grant requires an enforcement  
19 action at the site;

20 (4) the application is incomplete or  
21 inaccurate; or

22 (5) the facility is operating under a state or  
23 federal permit which addresses a contaminant described in the  
24 application, or a permit is pending; or

25 (6) the applicant has, within ten years

1 immediately preceding the date of submission of the permit  
2 application:

3 (a) knowingly misrepresented a material  
4 fact in an application for a permit;

5 (b) refused or failed to disclose any  
6 information required under this act;

7 (c) been convicted of a felony or crime  
8 involving moral turpitude;

9 (d) been convicted of a felony in any  
10 court for any crime defined by state or federal law as being a  
11 restraint of trade, price-fixing, bribery or fraud;

12 (e) exhibited a history of willful  
13 disregard for environmental laws of any state of the United  
14 States; or

15 (f) had an environmental permit revoked  
16 or permanently suspended for cause under any environmental laws  
17 of any state of the United States.

18 E. The department shall determine, on a first come  
19 first served basis and within a reasonable period defined by  
20 regulation, if the applicant is eligible to participate in a  
21 voluntary remediation agreement under the Voluntary Remediation  
22 Act.

23 F. If an agreement is not reached between an  
24 applicant and the department on or before the thirtieth day  
25 after the department determines an applicant to be eligible

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1 pursuant to Section 5 of the Voluntary Remediation Act, the  
2 applicant or the department may withdraw from the negotiations.

3 Section 6. AGREEMENT. --

4 A. After the department determines that an applicant  
5 is eligible, the secretary of environment may enter into a  
6 voluntary remediation agreement that sets forth the terms and  
7 conditions of the department's evaluation and implementation of  
8 the oversight to be performed.

9 B. The department shall not initiate an enforcement  
10 action, including an administrative or judicial action, against  
11 a participant for the contamination or release thereof, or for  
12 the activity that resulted in the contamination or release  
13 thereof, if the contamination is the subject of an agreement  
14 pursuant to the provisions of the Voluntary Remediation Act, but  
15 this section shall not be a bar to enforcement if the  
16 participant does not successfully implement this agreement.

17 C. The department or the participant, in the sole  
18 discretion of either, may terminate a voluntary remediation  
19 agreement on sixty days' written notice. The department's costs  
20 incurred or obligated before the date the notice of termination  
21 is received are recoverable under the agreement if the agreement  
22 is terminated.

23 D. In the event that the participant is unable to  
24 resolve a dispute concerning the actions required under a  
25 voluntary remediation agreement, the participant may submit a

1 written request for a final decision to the secretary of  
2 environment. The secretary shall issue a binding final  
3 decision, including a written statement of the reason for the  
4 decision.

5 E. After a voluntary remediation agreement becomes  
6 effective, the participant may submit a proposed voluntary  
7 remediation work plan for the required cleanup or that  
8 demonstrates that a cleanup is not required in order to comply  
9 with applicable standards.

10 Section 7. CERTIFICATE OF COMPLETION. --If the department  
11 determines that a participant has successfully complied with the  
12 voluntary remediation agreement and the site conditions meet  
13 applicable standards, the department shall issue the participant  
14 a certificate of completion.

15 Section 8. COVENANT NOT TO SUE. --

16 A. After the department issues a certificate of  
17 completion for a site, the secretary of environment shall  
18 provide a covenant not to sue to a purchaser of the site that  
19 did not contribute to the site contamination for any direct  
20 liability, including future liability for claims based upon the  
21 contamination covered by the agreement and over which the  
22 department has authority. No person provided a covenant not to  
23 sue pursuant to this section shall be liable for claims for  
24 contribution for cleanup of a contaminant that is the subject of  
25 the voluntary remediation agreement. Except as may be provided



1 under federal law or as may be agreed to by a federal government  
2 entity, the covenant not to sue shall not release a participant  
3 from liability to the federal government for claims based on  
4 federal law. Except as may be agreed to by third parties, the  
5 covenant not to sue shall not release a person from liability to  
6 third parties.

7 B. The secretary of environment's covenant not to  
8 sue under this section shall be transferable with title to the  
9 site.

10 Section 9. RECISION. -- Nothing in the Voluntary Remediation  
11 Act shall prohibit the secretary of environment from rescinding  
12 a certificate of completion or a covenant not to sue if the  
13 department determines that:

14 A. a contaminant addressed in the agreement is an  
15 unreasonable threat to human health or the environment;

16 B. the agreement was performed in a manner which  
17 fails to comply substantially with the terms and conditions of  
18 the agreement or voluntary remediation work plan;

19 C. the voluntary remediation agreement is a result  
20 of fraud; or

21 D. contamination was present at the site at the time  
22 the voluntary remediation agreement was signed but the  
23 department did not know of the type, extent or magnitude of the  
24 contaminants.

25 Section 10. LENDER LIABILITY. -- An applicant who maintains

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1       indicia of ownership primarily to protect a security interest in  
2       a site that is the subject of a voluntary remediation agreement  
3       and that does not participate in the management of the site, and  
4       is not in control of or does not have responsibility for daily  
5       operation of the site shall not be considered an owner or  
6       operator of that site and shall not be liable under any  
7       contaminant control or other environmental protection law or  
8       regulation administered by the department or otherwise  
9       responsible to the department for any environmental  
10       contamination or response action costs associated with the site.  
11       This section shall apply to all indicia of ownership existing on  
12       and after the effective date of the Voluntary Remediation Act.

13               Section 11. VOLUNTARY REMEDIATION FUND. -- The "voluntary  
14       remediation fund" is created in the state treasury. The fund  
15       shall be administered by the department. All fees and cost  
16       reimbursements collected pursuant to the regulations adopted by  
17       the secretary of environment pursuant to the provisions of the  
18       Voluntary Remediation Act shall be deposited in the fund. Money  
19       in the fund is appropriated to the department for the purpose of  
20       administering the Voluntary Remediation Act. Disbursements from  
21       the fund shall be made upon warrants drawn by the secretary of  
22       finance and administration pursuant to vouchers signed by the  
23       secretary of environment.

24               Section 12. SEVERABILITY. -- If any part or application of  
25       the Voluntary Remediation Act is held invalid, the remainder or

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1 its application to other situations or applicants shall not be  
2 affected.

3 Section 13. EMERGENCY.--It is necessary for the public  
4 peace, health and safety that this act take effect immediately.

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**State of New Mexico**  
**House of Representatives**

**FORTY-THIRD LEGISLATURE**  
**FIRST SESSION, 1997**

**March 11, 1997**

**Mr. Speaker:**

**Your APPROPRIATIONS AND FINANCE COMMITTEE, to  
whom has been referred**

**SENATE FINANCE COMMITTEE SUBSTITUTE FOR SENATE  
CONSERVATION COMMITTEE SUBSTITUTE FOR  
SENATE BILLS 446 & 362**

**has had it under consideration and reports same with  
recommendation that it DO PASS, amended as follows:**

**1. On page 12, line 7, after the period, strike the  
remainder of the line and insert in lieu thereof "The money in the  
fund shall be".**

**2. On page 12, line 8, after "appropriated" insert "by law".**

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**FORTY-THIRD LEGISLATURE  
FIRST SESSION, 1997**

**HAF C/SFC/SCONC/SB 446 & 362**

**Page 13**

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Respectfully submitted,

\_\_\_\_\_  
Max Coll, Chairman

Adopted \_\_\_\_\_ Not Adopted \_\_\_\_\_

(Chief Clerk)

(Chief Clerk)

Date \_\_\_\_\_

The roll call vote was 11 For 0 Against

Yes: 11

Excused: Bird, Buffett, Marquardt, Pearce, Salazar, Varela

Absent: None

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