LEGISLATIVE BILL 1349

Approved by the Governor April 20, 1994

Introduced by Avery, 3; Fisher, 35; Schellpeper, 18; Wehrbein, 2

AN ACT relating to the environment; to amend sections 66-1518, 66-1525, and 81-15,113.01, Revised Statutes Supplement, 1993; to adopt the Remedial Action Plan Monitoring Act; to provide for indemnification; to change the last year for the remittance of funds from the Central Interstate Low-Level Radioactive Waste Compact; to provide operative dates; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 8 of this act shall be known and may be cited as the Remedial Action Plan Monitoring Act.

Sec. 2. For purposes of the Remedial Action Plan Monitoring Act, the following definitions shall apply:

(1) Land pollution shall mean the presence upon or within the land resources of the state of one or more contaminants or combinations of contaminants, including, but not limited to, refuse, garbage, rubbish, or junk, in such quantities and of such quality as will or are likely to (a) create a nuisance, (b) be harmful, detrimental, or injurious to public health, safety, or welfare, (c) be injurious to plant and animal life and property, or (d) be detrimental to the economic and social development, the scenic beauty, or the enjoyment of the natural attractions of the state; and

(2) Water pollution shall mean the manmade or man-induced alteration of the chemical, physical, biological, or radiological integrity of water.

Sec. 3. There is hereby created the Remedial Action Plan Monitoring Fund which shall be administered by the Department of Environmental Quality. The fund shall be used by the department to:

(1) Receive funds voluntarily paid by public and private entities to finance department administration and oversight of remedial action plans for land pollution or water pollution;

(2) Provide funds for the department to offset expenses incurred in monitoring remedial action plans for land pollution or water pollution as voluntarily submitted by public and private entities; and

(3) Receive a one-time General Fund appropriation in an amount not to exceed one hundred thousand dollars for costs associated with the implementation of the Remedial Action Plan Monitoring Act.

Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276.

Sec. 4. Any entity which voluntarily chooses to make application for monitoring of remedial action plans for land pollution or water pollution shall:

(1) Submit a remedial action plan on a form approved by the Department of Environmental Quality which conforms with procedures approved by the department;

(2) Provide the department with documentation regarding the land pollution or water pollution site, including, when appropriate, information indicating that the applicant holds or can acquire title to all lands or has the necessary easements and rights-of-way for the project and related lands;

(3) Provide a plan for the proposed project, including project monitoring reports, appropriate engineering, scientific, and financial feasibility data, and other data and information as may be required by the department;

(4) Provide a payment plan and schedule for the reimbursement of all department expenses related to monitoring the progress of the remedial action plan, including expenses to review and evaluate the proposed plan;

(5) Demonstrate that the remedial action plan conforms with federal Environmental Protection Agency standards. However, nothing in this subdivision shall be construed to require that the department make any determination that such plan conforms with such standards; and

(6) Provide the department with an application fee of five thousand dollars and a participation fee of five thousand dollars. The application fee shall be used by the department to offset the expenses referred to in subdivision (4) of this section. The participation fee shall be used by the department to reimburse the General Fund as such fund is impacted by activities conducted pursuant to the Remedial Action Plan Monitoring Act.

Sec. 5. Upon the receipt of a voluntary application for the monitoring of a remedial action plan for land pollution or water pollution

pursuant to section 4 of this act, the Department of Environmental Quality shall evaluate and investigate all aspects of the proposed project, the proposed schedule for completion, and the proposed reimbursement schedule and shall determine if the remedial action plan is eligible for department monitoring. If the department determines that an application is unsatisfactory or does not contain adequate information, the department shall return the application to the applicant and may make recommendations to the applicant which the department considers necessary to make the plan, the reimbursement schedule, or the application satisfactory. If the department approves the application, the department shall execute an agreement with the applicant for department monitoring and payments by the applicant.

Sec. 6. If the provisions set forth in the Remedial Action Plan Monitoring Act are met and the applicant has remitted all applicable fees, the Department of Environmental Quality may issue to the applicant a letter stating that no further action need be taken at the site related to any contamination for which remedial action has been taken in accordance with the approved remedial action plan. Such letter shall provide that the department may require the person to conduct additional remedial action in the event that any monitoring conducted at or near the real property or other circumstances indicate that (1) contamination is reoccurring, (2) additional contamination is present which was not identified pursuant to section 4 or 5 of this act, or (3) additional contamination is present for which remedial action was not taken according to the remedial action plan.

Sec. 7. The Remedial Action Plan Monitoring Act shall not be construed as an acceptance of liability by the State of Nebraska for activities conducted pursuant to such sections. Entities proceeding under such sections shall indemnify and hold harmless the State of Nebraska for any further action required by the federal Environmental Protection Agency relating to land pollution or water pollution by an entity.

Sec. 8. The powers conferred by the Remedial Action Plan Monitoring Act shall be independent of and in addition and supplemental to any other provisions of the laws of the State of Nebraska with reference to the matters covered hereby, and the act shall be considered as a complete and independent act and not as amendatory of or limited by any other provision of the laws of the State of Nebraska.

Sec. 9. That section 66-1518, Revised Statutes Supplement, 1993, be amended to read as follows:

66-1518. (1) The Environmental Quality Council shall adopt and promulgate rules and regulations regarding the form and procedure for applications for payment or reimbursement from the fund, procedures for investigation of claims for payment or reimbursement, procedures for determining the amount and type of costs that are eligible for payment or reimbursement from the fund, procedures for auditing persons who have received payments from the fund, and other provisions necessary to carry out the Petroleum Release Remedial Action Act.

(2) The department shall make available to the public a current schedule of reasonable rates for equipment, services, material, and personnel commonly used for remedial action. The department shall consider the schedule of reasonable rates in reviewing all costs for the remedial action which are submitted in a plan. The rates shall be used to determine the amount of reimbursement for the eligible and reasonable costs of the remedial action, except that (a) the reimbursement for the costs of the remedial action shall not exceed the actual eligible and reasonable costs incurred by the responsible person or his or her designated representative and (b) reimbursement may be made for costs which exceed or are not included on the schedule of reasonable rates if the application for such reimbursement is accompanied by sufficient evidence for the department to determine and the department does determine that such costs are reasonable.

(3) The department, in consultation with interested parties, shall report to the Legislature at the beginning of every third year during which the fund is in existence on the availability of private insurance to insure the damages for which payment may be made from the fund.

Sec. 10. That section 66-1525, Revised Statutes Supplement, 1993, be amended to read as follows:

66-1525. (1) Any responsible person or his or her designated representative who has taken remedial action in response to a release first reported after July 17, 1983, and on or before December 31, 1998, or against whom there is a third-party claim may apply to the department under the rules and regulations adopted and promulgated pursuant to section 66-1518 for reimbursement for the costs of the remedial action or third-party claim. Partial payment of such reimbursement to the responsible person may be authorized by the department at the approved stages prior to the completion of

remedial action when a remedial action plan has been approved. Such partial payment may include the eligible and reasonable costs of such plan or pilot projects conducted during the remedial action.

(2) No reimbursement may be made unless the department makes the following eligibility determinations:

(a) The tank was in substantial compliance with any rules and regulations of the United States Environmental Protection Agency, the State Fire Marshal, and the department which were applicable to the tank. Substantial compliance shall be determined by the department taking into consideration the purposes of the Petroleum Release Remedial Action Act and the adverse effect that any violation of the rules and regulations may have had on the tank thereby causing or contributing to the release and the extent of the remedial action thereby required;

(b) Either the State Fire Marshal or the department was given notice of the release in substantial compliance with the rules and regulations adopted and promulgated pursuant to the Environmental Protection Act and the Petroleum Products and Hazardous Substances Storage and Handling Act. Substantial compliance shall be determined by the department taking into consideration the purposes of the Petroleum Release Remedial Action Act and the adverse effect that any violation of the notice provisions of the rules and regulations may have had on the remedial action being taken in a prompt, effective, and efficient manner;

(c) The responsible person reasonably cooperated with the department and the State Fire Marshal in responding to the release;

(d) The department has approved the plan submitted by the responsible person for the remedial action in accordance with rules and regulations adopted and promulgated by the department pursuant to the Environmental Protection Act or the Petroleum Products and Hazardous Substances Storage and Handling Act or that portion of the plan for which payment or reimbursement is requested;

(e) The costs for the remedial action were actually incurred by the responsible person or his or her designated representative after May 27, 1989, and were eligible and reasonable;

(f) If reimbursement for a third-party claim is involved, the cause of action for the third-party claim accrued after April 26, 1991, and the Attorney General was notified by any person of the service of summons for the action within ten days of such service; and

(g) The responsible person or his or her designated representative has paid the amount specified in subsection (1) or (2) of section 66-1523.

(3) The State Fire Marshal shall review each application prior to consideration by the department and provide to the department any information the State Fire Marshal deems relevant to subdivisions (2)(a) through (g) of this section.

(4) The department may withhold taking action on an application during the pendency of an enforcement action by the state or federal government related to the tank or a release from the tank.

(5) Reimbursements made for a remedial action may be reduced as much as one hundred percent for failure by the responsible person to comply with applicable statutory or regulatory requirements. In determining the amount of the reimbursement reduction, the department shall consider:

(a) The extent of and reasons for noncompliance;

(b) The likely environmental impact of the noncompliance; and

(c) Whether noncompliance was negligent, knowing, or willful.

(6) Except as provided in subsection (4) of this section, the department shall notify the responsible person of its approval or denial of the remedial action plan within one hundred twenty days after receipt of a remedial action plan which contains all the required information. If after one hundred twenty days the department fails to either deny, approve, or amend the remedial action plan submitted, the proposed plan shall be deemed approved. If the remedial action plan is denied, the department shall provide the reasons for such denial.

Sec. 11. That section 81-15,113.01, Revised Statutes Supplement, 1993, be amended to read as follows:

81-15,113.01. (1) There is hereby created the Community Improvements Cash Fund which shall be under the direction of the department. The Central Interstate Low-Level Radioactive Waste Compact Commission shall annually through ~~1993~~ 1994 remit to the department the funds received from the states belonging to the Central Interstate Low-Level Radioactive Waste Compact as compensation paid to the host state. When the facility begins operation, the developer shall levy, collect, and remit to the department a surcharge on the rates charged to the users of the facility which is sufficient to raise two million dollars per year together with any adjustments made by the

department pursuant to this section. The department shall remit such surcharge to the State Treasurer who shall credit it to the Community Improvements Cash Fund. On October 1, 1990, and each October 1 thereafter, the department shall adjust the amount to be remitted by the developer by an amount equal to the percentage increase in the Consumer Price Index or, if publication of the Consumer Price Index is discontinued, a comparable index selected by the director. There is hereby appropriated three hundred thousand dollars from the Community Improvements Cash Fund for the period July 1, 1988, to June 30, 1989, to carry out the purposes of this section. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276.

(2) The department shall distribute money from the fund as follows:

(a) Prior to final site selection, three hundred thousand dollars per year shall be allocated for public purposes to be divided among the communities that are under active consideration to host the facility as provided in subsection (3) of this section;

(b) After the final site has been selected and until the facility is operational, three hundred thousand dollars per year shall be allocated for public purposes as provided in subsection (3) of this section. Acceptance of the funds distributed pursuant to this subdivision or subdivision (a) of this subsection shall in no way affect the siting process; and

(c) Once the facility is operational and during the operational life of the facility, the total amount in the fund shall be allocated each year for public purposes as provided in subsection (3) of this section.

(3) Money distributed pursuant to subdivisions (2)(a), (b), and (c) of this section shall be allocated as follows:

(a) Fifty percent of such money shall be distributed to incorporated municipalities which lie totally or partially within ten kilometers of the facility or the proposed facility based on the ratio of the population of the particular incorporated municipality to the total population of all such incorporated municipalities as determined by the latest federal census; and

(b) Fifty percent of such money shall be distributed to the county treasurer of the county where the facility is located or proposed to be located to be distributed to each political subdivision which levied property taxes on the property where the facility is located or proposed to be located. The money shall be distributed on the basis of the ratio of the total amount of taxes levied by each political subdivision to the total amount of property taxes levied by all such political subdivisions on such property based on the amounts stated in the most recent certificate of taxes levied submitted by each county to the Tax Commissioner pursuant to section 77-1613.01.

(4) The Natural Resources Committee of the Legislature shall conduct a study to establish a formula for the equitable distribution of the funds specified in subdivision (2)(c) of this section. The committee shall hold public hearings necessary to carry out the purposes of the study.

Sec. 12. Sections 1 to 8 of this act shall become operative on January 1, 1995. Sections 9, 10, and 13 of this act shall become operative three calendar months after adjournment of the legislative session. The other sections of this act shall become operative on their effective date.

Sec. 13. That original sections 66-1518 and 66-1525, Revised Statutes Supplement, 1993, are repealed.

Sec. 14. That original section 81-15,113.01, Revised Statutes Supplement, 1993, is repealed.

Sec. 15. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.