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Sarah L. Inderbitzin

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CONSERVATION AND NATURAL RESOURCES

Waste Management: Creation of a State Superfund to Help Fund the Cost of Hazardous Waste Site Cleanup in Georgia

CODE SECTIONS: O.C.G.A. §§ 12-8-90 to -97 (new)
BILL NUMBER: HB 1394
ACT NUMBER: 1249
SUMMARY: The Act creates the Hazardous Waste Trust Fund with monies collected from fees on generators and importers of hazardous and solid waste. The fund is to be used for the cleanup of hazardous waste sites. The Act also identifies categories of persons jointly, severally, and strictly liable to the state for costs incurred by the state in the cleanup. Those persons are also liable for civil and punitive damages which will help fund the Trust. The Act also provides certain exceptions to liability. Finally, the Act calls for identification and listing of hazardous waste sites in Georgia.
EFFECTIVE DATE: July 1, 1992

History

In 1980, Congress passed the Comprehensive Environmental Response, Compensation and Liability Act¹ (CERCLA) to address past management practices which resulted in the release or threatened release of hazardous wastes. CERCLA authorized the United States Environmental Protection Agency (EPA) to inventory sites by establishing a National Priorities List (NPL).² Sites on the NPL were to be given priority for cleanup by the EPA using federal money from a trust fund called the "Superfund" which was established by Congress to pay for the cleanup of hazardous waste sites.³

In Georgia, as many as 800 hazardous waste sites have been identified in 116 counties.⁴ Only thirteen of the approximately 800

1. 42 U.S.C. §§ 9601-9675 (1988).

2. 42 U.S.C. § 9605 (1988).

3. 42 U.S.C. § 9611 (1988). The Act created the "Hazardous Substance Superfund."
Id.

4. Charles Seabrook, *The Georgia Legislature Move to Cleanup Toxic-Waste Sites Faces Tough Fight*, ATLANTA J. & CONST., Mar. 3, 1992, at D3; Rhonda Cook & Mark Sherman, *From Light-Hearted to Serious, Bills Pile Up in Hopper*, ATLANTA J. &

sites are on the EPA's NPL.⁵ In addition, it has been estimated that the federal superfund program will only be able to fund cleanup of five percent of the sites in Georgia⁶ leaving the balance of the cleanup cost to the state.⁷ According to EPA officials, "[t]here's not enough money [in the federal superfund program] to clean everything up."⁸

Concern by the state over the inability of the federal program to clean up sites identified in Georgia, and the discovery of two hazardous waste sites in Douglas County, led to the introduction of state superfund legislation.⁹ Prior to 1992, Georgia did not have its own superfund program.¹⁰ It was suggested that the funding for a state superfund could be raised by assessing fees on companies disposing of solid and hazardous waste in the state.¹¹ Such a state superfund program would be similar to the federal program, but would be used for the cleanup of sites that would not be reached by the federal Superfund.¹² Governor Zell Miller, concerned that the state did not "have the resources or regulatory power to clean up the sites,"¹³ introduced HB 1394 as part of an eight bill environmental package.¹⁴

HB 1394

The Act was patterned after the federal Superfund¹⁵ and creates a "Hazardous Waste Trust Fund"¹⁶ (the Fund) generated by surcharges on solid and hazardous waste disposal.¹⁷ Fees are to be collected by

CONST., Feb. 4, 1992, at B3.

5. Interview with Rep. Mary Jeanette Jamieson, House District No. 11 (Aug. 7, 1992) [hereinafter Jamieson Interview]. Rep. Jamieson was a cosponsor of HB 1394. The federal Superfund is only intended to address the most dangerous sites that require immediate attention. *Id.*

6. *Id.*; see Seabrook, *supra* note 4; Charles Seabrook, *Douglas Farm Cleanup Reveals Massive Contamination, 3,200 Drums, 10,000 Tons of Soil Removed So Far*, ATLANTA J. & CONST., Feb. 3, 1992, at C1.

7. Seabrook, *supra* note 6.

8. Ernie Freda, *Washington in Brief, Democrats Win House Rejection of Bush Budget*, ATLANTA J. & CONST., Mar. 5, 1992, at A4 (quoting Don Claw, Assistant Administrator of the Office of Solid Waste and Emergency Response of EPA).

9. *From Hunting Fees to Ostrich Farming: A Look Back at the 1992 Session Budget*, ATLANTA J. & CONST., April 5, 1992, at G9; Seabrook, *supra* note 4; Seabrook, *supra* note 6; see also Jamieson Interview, *supra* note 5.

10. Seabrook, *supra* note 6.

11. Jamieson Interview, *supra* note 5.

12. *Id.*

13. Seabrook, *supra* note 4.

14. Cook & Sherman, *supra* note 4.

15. Jamieson Interview, *supra* note 5. However, HB 1394 is not exactly the same as the federal law. *Id.*; see also *infra* notes 72, 81, 83 and accompanying text.

16. O.C.G.A. § 12-8-95(a) (1992). The trust is funded by fees collected in accordance with Code sections 12-2-2(e), 12-8-39(e), 12-8-68(d), and 12-8-95.1. *Id.* §§ 12-2-2(e), -8-39(e), -8-68(d), -8-95.1 (1992).

17. No surcharges are to be imposed after July 1, 2003, unless reimposed by the

the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources (DNR) and deposited into the Fund.¹⁸

Fees are collected until the Fund principal equals or exceeds \$25 million.¹⁹ If the fund exceeds \$25 million, transfers from the principal of the fund are to be made to the Georgia Hazardous Waste Management Authority (the Authority) which is created by the Act.²⁰ When the Fund principal equals or is less than \$12.5 million, the EPD is to resume collection of fees.²¹ The director of the DNR must provide written notice to solid waste facilities when the Fund reaches either of these two figures.²²

Civil penalties collected by the EPD pursuant to an order issued by the director of the DNR are to be deposited into the general fund of the state treasury.²³ These funds are available for appropriation by the General Assembly and may be transferred to the Fund.²⁴

Money for the Fund comes primarily from three sources. First, funds are generated by imposition of a surcharge of fifty cents per ton of solid waste collected from each disposal source.²⁵ The bill, as originally drafted, set a fee of one dollar per ton,²⁶ but this fee was reduced to fifty cents per ton by a substitute bill from the House Committee on Natural Resources and the Environment²⁷ when members of the solid waste industry protested the higher amount.²⁸

The Act also provides a second source of funding.²⁹ Hazardous waste facilities must submit evidence of "adequate financial responsibility, by bonding or other methods approved by the director" to

General Assembly. *Id.* § 12-8-39(g) (1992).

18. *Id.* § 12-8-95(a) (1992).

19. *Id.*

20. *Id.* § 12-8-94(6) (1992). The Authority is to receive ten percent of each previous year's payment of "fees and penalties collected pursuant to [Code sections 12-2-2(e), 12-8-39(e) and 12-8-95.1]." *Id.* When the principal of the Fund exceeds \$25 million, the amount transferred to the Authority is to be equal to the average transfer for the three preceding years. *Id.* The Authority is to use the funds for "source reduction and project activities set out in Article 4 of this chapter." *Id.*; see *infra* note 91 and accompanying text.

21. O.C.G.A. § 12-8-39(f) (1992).

22. *Id.*

23. *Id.* § 12-2-2(e) (1992).

24. *Id.*

25. *Id.* § 12-8-39(e) (1992).

26. HB 1394, as introduced, 1992 Ga. Gen. Assem.

27. HB 1394 (HCS), 1992 Ga. Gen. Assem; O.C.G.A. § 12-8-39(e) (1992).

28. Jamieson Interview, *supra* note 5. Rep. Jamieson stated that some of the fee schedule charges were "instrumental in garnering the support we needed for the bill." *Id.*; see also Seabrook, *supra* note 4; Seabrook, *supra* note 6; Matt Kemper, *Accord Near to Clean Up Waste Sites*, ATLANTA J. & CONST., Feb. 27, 1992, at B1.

29. O.C.G.A. § 12-8-68 (1992).

ensure that facilities can carry out any corrective action which might be required.³⁰ If a facility has been abandoned, or if its owner or operator has become insolvent or is unable or unwilling to carry out corrective action, the proceeds of the bond are to be deposited into the Fund.³¹

The final source of funding is fees imposed on hazardous waste activities.³² The fee scales encourage recycling and reuse of hazardous wastes, as well as on site treatment, by decreasing fees charged based on the method of disposal.³³ Every large quantity and small quantity generator of waste³⁴ must pay either \$100 a year or the total of fees imposed by the Act, whichever is greater.³⁵ If hazardous waste generators meet the statutory definition of a small quantity generator, they are exempted from the per ton charges and are subject only to the \$100 annual fee.³⁶

Large quantity generators of waste that ship waste offsite must pay \$20 per ton for waste shipped for disposal or incineration, \$16 per ton for waste shipped for treatment or storage, and \$2 per ton for waste shipped for recycling or reuse.³⁷ Fees paid may not exceed \$25,000 per year, and fees may not be imposed on waste for which a fee has previously been paid.³⁸

30. *Id.* § 12-8-68(a) (1992).

31. *Id.* § 12-8-68(d) (1992).

32. *Id.* § 12-8-95.1 (1992). Hazardous wastes generated by the following methods are exempted from the fee schedule: (1) corrective action taken pursuant to an order, permit, or closure plan; (2) voluntary corrective action; and (3) response actions required by CERCLA. O.C.G.A. §§ 12-8-95.1(e)(1),(2),(3) (1992).

33. *Id.* § 12-8-95.1 (1992). Rep. Jamieson stated that fees were structured to encourage the most favored activities by charging the lowest fees for those activities while charging the highest fees for the least favored activities. Jamieson Interview, *supra* note 5. However, she noted that although the interest was to encourage recycling, the preference was to eliminate the generation of hazardous waste altogether. *Id.*

34. The definition of a "small quantity generator" was added by a substitute presented by the House Committee on Natural Resources and the Environment, and small quantity generators were exempted from the fee schedule imposed on "large quantity generators." HB 1394 (HCS), 1992 Ga. Gen. Assem. A "small quantity generator" is defined as one who "generates greater than 220 pounds but less than 2200 pounds of hazardous waste in one month." O.C.G.A. § 12-8-92(13) (1992).

35. O.C.G.A. § 12-8-95.1(a) (1992). Fees are due annually on July 1 of each calendar year. *Id.* § 12-8-95.1(d) (1992). Fees paid later than thirty days after the due date are subject to a penalty of fifteen percent of the balance due and interest on the unpaid balance at the same rate as that imposed for delinquent taxes. *Id.* § 12-8-95.1(c) (1992). No fees are to be levied after July 1, 2003, unless reimposed by the General Assembly. *Id.* § 12-8-95.1(f) (1992).

36. *Id.* § 12-8-95.1(a) (1992); *see id.* § 12-8-92(13) (1992); *see also supra* note 34.

37. *Id.* § 12-8-95.1(a)(1) (1992).

38. *Id.* For example, if a fee is paid on imported waste, an additional fee could not be imposed on the same waste if the recipient sought to dispose of the imported waste elsewhere. *See id.*

Large quantity generators of waste that dispose of waste on site are to pay a fee of \$10 per ton for waste disposed of or incinerated on site, \$4 per ton for waste treated or stored on site, and \$1 per ton for waste which is reused or recycled on site.³⁹ The fees may not exceed \$25,000 in 1993 and 1994,⁴⁰ \$50,000 in 1995 and 1996,⁴¹ and \$75,000 for payments due in 1997 and beyond.⁴² No generator that pays fees for on site treatment of hazardous waste water is required to pay fees for the shipment off site of sludge removed by that treatment.⁴³

Persons who receive out-of-state hazardous waste must pay \$20 per ton received for disposal or incineration, \$16 per ton received for treatment or storage, and \$2 per ton received for recycling or reuse.⁴⁴ The fee is not to exceed \$75,000 per year per out-of-state generator.⁴⁵ Waste for which importation fees have been paid are not subject to the off site treatment fees.⁴⁶

The director must expend Fund monies for EPD activities in administering the Act⁴⁷ and for pollution prevention activities.⁴⁸ Funds are also to be used for investigation, detoxification, removal, and disposal activities where corrective action is necessary at a hazardous waste site.⁴⁹ The director may also expend funds if emergency actions are necessary to protect human health and the environment when there has been a release of hazardous waste.⁵⁰ Funds are also to be provided to help finance the state and local costs of sites placed on the CERCLA NPL or state hazardous site inventory.⁵¹

Municipalities and counties in Georgia supported the bill because of the financial support it provides for cleanup of sites which they might otherwise have been unable to reach.⁵² However, if a county or municipality is the owner or operator of a site, no more than \$500,000 will be paid to the county or municipality by the Fund for cleanup of that site.⁵³

39. *Id.* § 12-8-95.1(a)(2) (1992).

40. *Id.* § 12-8-95.1(a)(2)(A) (1992).

41. *Id.* § 12-8-95.1(a)(2)(B) (1992).

42. *Id.* § 12-8-95.1(a)(2)(C) (1992).

43. *Id.*

44. *Id.* § 12-8-95.1(a)(3) (1992).

45. *Id.*

46. *Id.*

47. *Id.* § 12-8-95(b)(3) (1992).

48. *Id.* § 12-8-95(b)(5) (1992).

49. *Id.* § 12-8-95(b)(1) (1992).

50. *Id.* § 12-8-95(b)(2) (1992).

51. *Id.* § 12-8-95(b)(4) (1992); Jamieson Interview, *supra* note 5.

52. Jamieson Interview, *supra* note 5.

53. O.C.G.A. § 12-8-95(b)(4) (1992). Since many sites are old municipal dumps, municipal support made sense even though state support was limited to \$500,000. Jamieson Interview, *supra* note 5.

The Act also identifies categories of parties which are liable for cleanup costs where Fund monies have been expended. Every person who contributes to a release of hazardous waste is jointly, severally, and strictly liable to the state for the cost of the cleanup.⁵⁴ Chemical industries opposed the imposition of strict liability because it makes them liable for the total cost of the cleanup even if they only contributed to a portion of the wastes at the site.⁵⁵ Individuals who contribute to a release of wastes are also liable for punitive damages up to three times the cleanup cost incurred by the state.⁵⁶

The director is responsible for identifying parties who have contributed or are contributing to the release of hazardous wastes at a site.⁵⁷ Identified parties are then liable for costs incurred by the state at the site.⁵⁸ Identified parties are to be given notice of the opportunity to perform voluntary corrective action which can then be taken by entering into an administrative consent order with the director.⁵⁹ The director may issue an order requiring corrective action if the person fails or refuses to enter into an administrative consent order.⁶⁰ If the person also fails to comply with the order, or if all necessary corrective action cannot be achieved through the responsible party or parties, the director may use Fund monies to undertake corrective action.⁶¹

Parties are exempted from liability if the release was solely the result of an act of God, an act of war, an act or omission of a third party,⁶² or any combination of the above.⁶³ In the case of a release caused by the act or omission of a third party, the party must prove by a preponderance of the evidence both that (1) the third party was not his agent or employee and had no contractual relationship with him whatsoever; and (2) that he took precautions against foreseeable acts by any such third parties.⁶⁴

54. *Id.* § 12-8-96.1(a) (1992).

55. Seabrook, *supra* note 4. In addition, the state does not need to determine *all* responsible parties since one responsible party could be held liable for the total cleanup. Jamieson Interview, *supra* note 5.

56. O.C.G.A. § 12-8-96.1(a) (1992).

57. *Id.* § 12-8-96(a) (1992).

58. *Id.* § 12-8-96.1(a) (1992).

59. *Id.*

60. *Id.*

61. *Id.* § 12-8-96(b) (1992). Costs and damages incurred by the state are recoverable in civil actions brought by the director and must be commenced within six years from when the costs were incurred. *Id.*

62. The third party cannot be an agent or employee of the liable party and the relationship cannot be the result of a contractual relationship between the third party and a liable party. *Id.* § 12-8-96.1(c)(3) (1992).

63. *Id.* § 12-8-96.1(c)(1), (2), (3), (4) (1992).

64. Jamieson Interview, *supra* note 5; *see also* O.C.G.A. § 12-8-96.1(c)(3)(A), (B)

Some limited protection is given to parties who acquire property after there has been a release of hazardous waste. If the property was acquired after the release, the owner or operator is not liable if he establishes by a preponderance of the evidence at least one of the following: (1) that when he acquired the site, he did not know and had no reason to know that hazardous wastes had been released or disposed of at the site;⁶⁵ (2) that a government entity acquired the site by involuntary transfer, acquisition, or eminent domain;⁶⁶ or (3) that the site was acquired by inheritance or bequest.⁶⁷

In order to establish that the person who acquired the site did not know or had no reason to know that hazardous wastes had been disposed of or released at the site prior to acquisition, that person must have made inquiries into the previous owners and uses of the property "in accordance with good commercial or customary practices."⁶⁸ Factors to be considered in this determination are: (1) whether the person had any specialized knowledge or experience; (2) the relationship of the purchase price to the value of the property if it had been uncontaminated; (3) information which is commonly known or "reasonably ascertainable" about the property; and (4) the ability to detect contamination by inspection.⁶⁹

Previous owners who are found liable remain liable even if they subsequently transfer the property.⁷⁰ In addition, an owner who knows property is contaminated and transfers the property without disclosing the contamination is liable, and none of the defenses available under the Act are available to such a person.⁷¹

A person who elects to undertake voluntary corrective action may seek contribution pursuant to state law from other persons who have contributed or are contributing to hazardous wastes found at the site.⁷² Furthermore, persons who take voluntary corrective action pursuant to an administrative consent order are not liable for claims of

(1992). "[A] contractual relationship may be conclusively established by, but not limited to, land contracts, deeds, or other instruments transferring title or possession" unless the property is acquired after the release. *Id.* § 12-8-96.1(d)(1) (1992).

65. O.C.G.A. § 12-8-96.1(d)(1)(A) (1992).

66. *Id.* § 12-8-96.1(d)(1)(B) (1992).

67. *Id.* § 12-8-96.1(d)(1)(C) (1992).

68. *Id.* § 12-8-96.1(d)(2) (1992).

69. *Id.*

70. *Id.* § 12-8-96.1(d)(3) (1992).

71. *Id.*

72. *Id.* § 12-8-96.1(e) (1992). This provision is not contained in the federal superfund legislation and a party can only seek contribution if the cleanup is voluntary. Jamieson Interview, *supra* note 5. This provision was included to encourage voluntary cleanups. *Id.*

contribution for matters addressed in the order.⁷³ However, other liable parties remain liable unless the order provides otherwise.⁷⁴

Sites where releases have occurred are to be identified by the EPD and published in the Hazardous Site Inventory (the Inventory).⁷⁵ The Inventory is to include: (1) the name or description of the property; (2) its location; (3) the name of the current owner; (4) a description of the hazardous wastes at the site; (5) known or potential threats to human health or the environment; (6) the status of the cleanup; (7) the priority for the cleanup; (8) a summary of needed actions or a designation that no further action is required; and (9) the status of any contested listing.⁷⁶

Site owners are to be provided with thirty days notice of the EPD's intent to list the site on the Inventory.⁷⁷ The owners may contest the listing during the thirty day period by providing the director with information supporting the owners' view that the site does not meet listing criteria.⁷⁸ This information is to be considered by the director, but does not prevent the director from determining that the site be listed.⁷⁹ Once listed, an owner may petition to have the site removed from the list if the owner's petition is submitted within ninety days of the listing.⁸⁰

Any hazardous waste site which is listed in the Inventory as needing no further action must include a notice in any "instrument given or caused to be given by the property owner which creates an interest in or grants a use of the property," such as a deed.⁸¹ The notice alerts those acquiring the property that the property contains hazardous wastes.⁸²

Additionally, after July 1, 1993, any owner of property where hazardous waste has been disposed of or released, or who owns a site listed as having a release but requiring no further action, must prepare an affidavit of public notice and file it with the clerk of the superior court in the county where the property is located.⁸³ The affidavit is to state that the property is known to contain hazardous wastes.⁸⁴ It

73. O.C.G.A. § 12-8-96.1(f) (1992).

74. *Id.*

75. *Id.* § 12-8-97(a) (1992).

76. *Id.* § 12-8-97(a)(1)-(10) (1992).

77. *Id.* § 12-8-97(f) (1992).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* § 12-8-97(b)(2) (1992). The federal superfund legislation contains no such requirement. Jamieson Interview, *supra* note 5.

82. O.C.G.A. § 12-8-97(b)(2) (1992).

83. *Id.* § 12-8-97(c)(1),(2) (1992). This provision is also absent in the federal superfund legislation. Jamieson Interview, *supra* note 5.

84. O.C.G.A. § 12-8-97(c)(1), (2) (1992).

must be filed within thirty days of the owner's learning that waste has been disposed of or released on the site.⁸⁵ If the owner contests being listed in the Inventory, the owner's affidavit need not be filed until the issue of whether to list the owner's property in the Inventory has been resolved against the owner.⁸⁶ An owner must also notify the EPD in writing within thirty days after learning that waste has been disposed of or released on her property.⁸⁷ However, if the EPA has been notified pursuant to the requirements of section 103(c) of CERCLA, notification is satisfied if a copy of the 103(c) notice and quadrangle map are provided to the EPD.⁸⁸

The Georgia Board of Natural Resources is directed by the Act to promulgate rules and regulations to enforce the provisions of the Act.⁸⁹ The Board's rules and regulations shall include, but are not limited to: (1) reporting releases of hazardous wastes; (2) investigation, cleanup, and corrective action at sites where hazardous wastes have been released; (3) placement and removal of sites on the hazardous waste site inventory; and (4) filing of additional affidavits in deed records concerning property on which there has been a release of hazardous wastes.⁹⁰

Finally, the director is authorized to exercise the following powers and duties: (1) ensure that corrective action is taken for releases of hazardous waste; (2) collect fees for hazardous waste management activities; (3) administer the principal and interest of the Fund; and (4) appoint a Hazardous Waste Trust Fund Advisory Committee and consult with that committee in developing the rules and regulations required by the Act to be promulgated by the Board.⁹¹

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85. *Id.*

86. *Id.*

87. *Id.* § 12-8-97(d) (1992). The notification by the owner must contain "the location, type, quantity, and date of such disposal or release, if known, and a summary of actions taken to investigate, cleanup, or remediate the site," and the date on which the affidavit of public notice was filed. In addition, a quadrangle map designating the location of the disposal or release must accompany the notification. *Id.*

88. *Id.*

89. *Id.* § 12-8-93(a) (1992).

90. *Id.* § 12-8-93(b)(1)-(4) (1992).

91. *Id.* § 12-8-94(a)(1)-(4) (1992). This provision was added by a substitute bill offered by the House Committee on Natural Resources and the Environment. See HB 1394 (HCS), 1992 Ga. Gen. Assem. The director, at a minimum, is to appoint four representatives from local government, four from business and industry, and four from other interested parties to the Advisory Committee. *Id.* § 12-8-94(a)(4) (1992).