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H.B. 168*
133rd General Assembly

Bill Analysis

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Version: As Re-Reported by Senate Agriculture & Natural Resources

Primary Sponsor: Rep. Arndt

Helena Volzer, Attorney

SUMMARY

BFPP immunity

- Establishes an affirmative defense that allows a bona fide prospective purchaser (BFPP), if certain factors are met, to claim immunity from liability for the costs associated with the state's performance of investigational and remedial activities to address a release or threatened release of a hazardous substance from the BFPP's facility.
- Specifies that a BFPP is a purchaser of a facility where hazardous substances were disposed before the purchaser acquired it who can demonstrate specific factors relating to that facility.
- Makes conforming changes to the law governing the Voluntary Action Program (VAP) consistent with the affirmative defense established by the bill.
- Specifies that the affirmative defense is available to a BFPP in any pending civil action as of the bill's effective date or any new civil action initiated thereafter.

Covenant not to sue

- Eliminates a provision of law that automatically voids a covenant not to sue under the VAP Program when a property subject to institutional controls or activity and use limitations is not in compliance with those controls or limitations.
- Instead, authorizes, but does not require, the Director of Environmental Protection to issue an order voiding the covenant in that circumstance.
- Specifies that the order voiding the covenant not to sue is an appealable action.

* This analysis was prepared before the report of the Senate Agriculture & Natural Resources Committee appeared in the Senate Journal. Note that the legislative history may be incomplete.

DETAILED ANALYSIS

BFPP immunity

Overview

Generally, when there is a release or threatened release of a hazardous substance at a facility, the state can investigate and conduct remedial activities to remedy the release or threatened release. The state can then impose response costs for the response action, and may recover those costs in a civil action against a responsible party.

The bill specifies that a bona fide prospective purchaser (BFPP) of a facility (previously contaminated by a hazardous substance) who can demonstrate certain factors relating to that facility, is immune from liability to the state in a civil action. A BFPP must have acquired ownership of the facility after January 11, 2002. This immunity is limited in scope to the costs incurred by the state for the state's performance of investigational and remedial activities to address the release or threatened release of a hazardous substance from the facility. The bill specifies that the affirmative defense is available to a BFPP in any pending civil action as of the bill's effective date or any new civil action initiated thereafter (see COMMENT). This type of immunity is not available under current Ohio law.¹

Immunity for BFPPs is available at the federal level under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and is somewhat broader than the bill in its scope. The federal immunity extends to all response costs in a federal civil action, regardless of whether the party bringing the action is the federal government or a private citizen.²

BFPP immunity: federal

Under CERCLA, a "BFPP" is a person who acquires ownership of a facility (any property where a hazardous substance was disposed) after January 11, 2002, and that establishes several factors relating to that facility. These factors include all of the following:

1. All disposal of hazardous substances at the facility occurred before the person acquired it;
2. The person made all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with federal law;
3. The person provides all legally required notices for the discovery or release of any hazardous substances at the facility;

¹ R.C. 3746.122(B).

² See, e.g., *Saline River Props., LLC v. Johnson Controls, Inc.*, 823 F. Supp.2d 670 (2011) (in which a facility owner claiming BFPP immunity sued a previous facility owner).

4. The person exercises appropriate care with respect to any hazardous substances at the facility by taking reasonable steps to:
 - Stop any continuing release;
 - Prevent any threatened future release; and
 - Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
5. The person provides full cooperation, assistance, and access to those authorized to conduct response actions or natural resource restorations;
6. The person is in compliance with any land use restrictions established or relied on in connection with the response action at the facility;
7. The person does not impede any institutional control employed at the facility in connection with the response action;
8. The person complies with any request for information or administrative subpoena issued by the President; and
9. The person is not either of the following:
 - Potentially liable, or affiliated with any other person that is potentially liable, for response costs at the facility through any direct or indirect familial relationship, or, any contractual, corporate, or financial relationship (other than the relationship created for conveyance of title for the facility); or
 - The result of a reorganization of a business entity that was potentially liable for the facility.³

If a person can establish all of these factors in court by a preponderance of the evidence, the person is considered a BFPP and is immune from liability for response costs for a release or threatened release of hazardous substances based solely on the person's status as owner or operator of the facility.⁴ As mentioned above, response costs generally include any costs incurred to remedy a release or threatened release of a hazardous substance to insure that the substance does not migrate and cause danger to public health, welfare, or the environment. To maintain BFPP immunity under CERCLA, the BFPP has an ongoing obligation not to impede the performance of a response action or natural resource restoration.⁵

BFPP immunity: the bill

The bill establishes an affirmative defense that allows a person to claim immunity from liability in a civil action **brought by the state** (but not by a private citizen) for performance of

³ 42 U.S.C. § 9601(40).

⁴ 42 U.S.C. § 9607(r).

⁵ 42 U.S.C. § 9607(r).

the state's investigational and remedial activities to address a release or threatened release of hazardous substances from the person's facility if all of the following apply:

1. The person demonstrates that the person is a BFPP of the facility;
2. The state's cause of action rests upon the person's status as an owner or operator of the facility; and
3. The person does not impede a response action or a natural resource restoration at the facility.⁶

The bill adopts the same definition of BFPP and facility as in CERCLA.⁷ Thus, the person must also demonstrate all of the factors necessary to be considered a BFPP under that definition by a preponderance of the evidence.

Additionally, the bill makes conforming changes to the law governing the Voluntary Action Program (VAP) consistent with the establishment of the affirmative defense.⁸ In general, the VAP is a program under which a person assumes responsibility for cleaning a property contaminated by hazardous substances in exchange for a release from liability from the state.⁹

Covenant not to sue

Background

Under the VAP, the cleanup of a contaminated property must meet specific standards and requirements developed by the Ohio Environmental Protection Agency (OEPA). When those standards and requirements are met, the Director of OEPA may issue a covenant not to sue. This covenant protects the property owner or operator and future owners from being legally responsible to the state for further investigation and cleanup. In order for the property to qualify for the covenant, OEPA may establish institutional controls or activity and use limitations that apply to the property.¹⁰ For example, OEPA may limit the property to commercial uses only.

Voiding the covenant

Current law declares a covenant not to sue automatically void when an institutional control or activity and use limitation is violated, beginning on the date of the noncomplying use. The bill instead authorizes, but does not require, the Director to issue an order voiding a covenant not to sue in that circumstance. It further specifies that the order is a final action that may be appealed.¹¹

⁶ R.C. 3746.122(B).

⁷ R.C. 3746.122(A).

⁸ R.C. 3746.122(C) and R.C. 3746.02(A)(5).

⁹ See R.C. Chapter 3746.

¹⁰ See R.C. Chapter 3746.

¹¹ R.C. 3746.05(B).

COMMENT

The bill specifies that it is the General Assembly's intent to extend the affirmative defense established by the bill to civil actions pending on the bill's effective date that were initiated prior to that date. The bill also specifies that the General Assembly finds that the BFPP immunity established by the bill is remedial in nature.¹²

In general, the General Assembly is prohibited from establishing retroactive laws by both the Ohio Constitution and U.S. Constitution. However, such laws are constitutional when necessary to remedy an omission, defect, or error in instruments or proceedings.¹³ The Ohio Supreme Court has held that retroactive laws are constitutional where the purpose of that law is remedial. In particular:

Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of rules of practice, courses of procedure, or methods of review.¹⁴

Because the bill allows a BFPP defense to be asserted in a civil action initiated prior to the bill's effective date, the bill has a retroactive effect. As such, it would be for a court to determine whether the bill's retroactive extension of the affirmative defense is constitutional as a remedial measure.

HISTORY

| Action | Date |
|---|----------|
| Introduced | 03-26-19 |
| Reported, H. Civil Justice | 05-08-19 |
| Passed House (90-0) | 05-30-19 |
| Reported, S. Agriculture & Natural Resources | 12-04-19 |
| Re-Reported, S. Agriculture & Natural Resources | --- |

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¹² R.C. 3746.122(D) and (E).

¹³ Ohio Constitution, Article II, Section 28 and United States Constitution, Article I, Sections 9 and 10.

¹⁴ *State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St.3d 258 (2001).