

CHAPTER 302

H.B. No. 1621

AN ACT

relating to the liability of certain persons who clean up hazardous or solid wastes and to the indemnification of those persons.

*Be it enacted by the Legislature of the State of Texas:*

SECTION 1. Subchapter H, Chapter 26, Water Code, is amended by adding Section 26.308 to read as follows:

*Sec. 26.308. ENGINEERS OR CONTRACTORS. (a) In this section, "engineer or contractor" means a person, including the employee or subcontractor of the person, who performs a contract for evaluation, planning, designing, engineering, construction, equipment, or auxiliary services in connection with the identification of a site containing a hazardous substance, the development of a plan of response to the site, or the supervision or performance of the response to the site.*

*(b) Notwithstanding any other law or rule, the commission may agree in a contract retaining an engineer or contractor to perform a program of removal, remedial action, or cleanup of a hazardous substance in connection with a contract or cooperative agreement under Section 26.303 of this code to indemnify the engineer or contractor against any claim or liability arising from an actual or threatened release of a hazardous substance that occurs during the performance of any work, including:*

- (1) damages arising from economic loss, personal injury, property damages, or death;*
- (2) costs and expenses, including the cost of defense of a lawsuit brought against the engineer or contractor; and*

(3) *claims by third parties for indemnification, contribution, or damages for economic loss, personal injury, property damages, or death.*

(c) *In determining whether to contract to indemnify an engineer or contractor under this section, the commission shall consider the availability of insurance to the engineer or contractor for the claims and liabilities against which the commission may indemnify the engineer or contractor under this section on the date the engineer or contractor enters into a contract to perform services covered by this section. The commission may not contract to indemnify an engineer or contractor under this section if the engineer or contractor cannot demonstrate that insurance is unavailable at a reasonable cost or if another engineer or contractor submitting a comparable proposal demonstrates that insurance is available at a reasonable cost.*

(d) *The commission is not obligated to award a contract if it determines adequate liability insurance is not available to an engineer or contractor and that the award of the contract is not in the public interest.*

(e) *The commission may not contract to indemnify an engineer or contractor under this section unless the federal government agrees in a contract or cooperative agreement to in turn indemnify the commission under Section 119 of the federal Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. Section 9619). The commission's decision to contract or not to contract to indemnify an engineer or contractor may be made as an executive act without an adjudicative public hearing and is not subject to judicial review.*

(f) *An engineer or contractor performing a program of removal, remedial action, or cleanup of a hazardous substance under a contract entered into in connection with a contract or cooperative agreement under Section 26.303 of this code that results in an actual or threatened release of a hazardous substance is not liable under Section 8(a), 8(b), or 8b, Solid Waste Disposal Act (Article 4477-7, Vernon's Texas Civil Statutes), for an act or failure to act during the performance of the contract. Nothing in this subsection shall in any way limit or otherwise affect the liability of an engineer or contractor in any other action.*

(g) *Subsections (b) and (f) of this section do not apply to a grossly negligent act or omission or to wilful misconduct of an engineer or contractor during the performance of a contract.*

(h) *Notwithstanding any other law, an engineer or contractor performing a program of removal, remedial action, or cleanup of a hazardous substance under a contract entered into in connection with a contract or cooperative agreement under Section 26.303 of this code is liable for a grossly negligent act or omission or for wilful misconduct that results in an actual or threatened release of a hazardous substance in violation of Section 8(a), 8(b), or 8b, Solid Waste Disposal Act (Article 4477-7, Vernon's Texas Civil Statutes), only to the extent that the act, omission, or misconduct caused the violation.*

SECTION 2. Section 8, Solid Waste Disposal Act (Article 4477-7, Vernon's Texas Civil Statutes), is amended by adding Subsection (i) to read as follows:

(i)(1) *In this subsection, "engineer or contractor" means a person, including the employee or subcontractor of the person, who performs a contract for evaluation, planning, designing, engineering, construction, equipment, or auxiliary services in connection with the identification of a hazardous or solid waste site, the development of a plan to clean up the site, or the supervision or performance of the plan to clean up the site.*

(2) *Notwithstanding any other provision of this section, an engineer or contractor performing a program of remedial action or cleanup of hazardous waste or solid waste under a contract with a state agency or political subdivision of the state is liable for any negligent act or omission or for wilful misconduct that results in an actual or threatened release of hazardous waste or solid waste after the abandonment or conclusion of the program only to the extent that the endangerment to public health and safety of the environment is aggravated as a result of such act, omission, or misconduct.*

SECTION 3. This Act takes effect September 1, 1987, and applies only to a contract entered into on or after that date. A contract entered into before the effective date of this Act is governed by the law in effect at the time the contract was entered into, and that law is continued in effect for this purpose.

SECTION 4. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed by the House on April 30, 1987, by a non-record vote; and that the House concurred in Senate amendments to H.B. No. 1621 on May 25, 1987, by a non-record vote. Passed by the Senate, with amendments, on May 22, 1987, by a viva-voce vote.

Approved June 11, 1987.

Effective Sept. 1, 1987.