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BILL ANALYSIS

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Senate Bill 383 **PUBLIC ACT 12 of 1995**
Senate Bill 386 **PUBLIC ACT 22 of 1995**
Senate Bill 387 **PUBLIC ACT 15 of 1995**
Sponsor: Senator Loren Bennett
Senate Committee: Natural Resources and Environmental Affairs
House Committee: Conservation, Environment, and Great Lakes

Date Completed: 5-3-95

SUMMARY OF SENATE BILLS 383, 386, and 387 as enrolled

The bills amended the Natural Resources and Environmental Protection Act to revise procedures for the reporting and cleanup of releases from underground storage tanks; require the Department of Natural Resources (DNR) to evaluate and report to the Legislature on the solvency of the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund; require the DNR to recommend cost containment measures to assure the MUSTFA Fund's viability; extend for one year the maximum funding amounts for certain claims against the MUSTFA Fund; and specify that corrective actions concerning underground storage tanks would satisfy certain remedial obligations concerning water resources.

Following are more detailed descriptions of the bills.

Senate Bill 386

Overview

The bill does the following:

-- Requires the DNR to establish cleanup criteria for corrective action activities using the process outlined in the American Society for Testing and Materials document, "Emergency Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA).
-- Deletes the definition of "clean up standards", which provided for the degree of cleanup as required under administrative rules.
-- Establishes cleanup criteria for a regulated substance that poses a carcinogenic risk to humans, and specifies that the risk must be the 95% upper bound on the calculated risk of one additional cancer above the cancer rate per 100,000 individuals using exposures assumptions established by the Department and RBCA.
-- Deletes requirements that an initial abatement report be submitted to the DNR, and requires instead that a site closure report be submitted after corrective actions to address contamination has been undertaken at the site.
-- Requires the preparation of a corrective action plan, as outlined in the bill, if initial response actions have not resulted in completion of corrective actions.
-- Requires the implementation of institutional controls, according to whether corrective action activities rely on a "tier I", "tier II", or "tier III" evaluation (as defined in the RBCA).
-- Requires the recording of a notice of corrective action or a restrictive covenant with the register of deeds for the county in which the site is located.
-- Requires within one year after a release has been discovered that a final assessment report, which includes a corrective action plan, be submitted to the DNR.
-- Requires that a closure report be submitted to the DNR within 30 days following completion of the corrective action plan.
-- Repeals and recodifies penalties for failure to meet reporting requirements.
-- Permits the DNR to establish a classification system for sites, considering impacts on

public health, safety, and welfare, and the environment.

-- Prohibits a person from knowingly delivering a regulated substance to an underground storage tank system located at a facility not in compliance with the Act.
-- Establishes misdemeanor penalties for persons who knowingly deliver regulated substances to underground storage tank systems or who remove or tamper with a placard placed at a noncomplying facility prohibiting the delivery of a regulated substance.
-- Permits the DNR to issue an administrative order requiring an owner to take action to abate the danger of a release or threatened release at a facility, and establishes penalties for not complying with an administrative order.

Retroactivity

The bill specifies that this part of the Act (Part 213) "is intended to provide remedies for sites posing a threat to the public health, safety, or welfare, or to the environment, regardless of whether the release or threat of release of a regulated substance occurred before or after January 19, 1989, the effective date of the former Leaking Underground Storage Tank Act, ...and for this purpose, this part shall be given retroactive application". Criminal penalties provided in the bill, however, apply only to violations of Part 213 that occur after the bill's effective date (March 31, 1995).

Corrective Actions

Corrective action activities undertaken pursuant to the bill must be conducted in accordance with the process outline in the RBCA in a manner protective of public health, safety, and welfare, and the environment.

Subject to the following provisions concerning a carcinogenic risk and groundwater, the Department must establish cleanup criteria for corrective action activities using the process outlined in the RBCA. The DNR is to use only reasonable and relevant assumptions and pathways in determining the cleanup criteria.

If a regulated substance poses a carcinogenic risk to humans, the cleanup criteria derived for cancer risk must be the 95% upper bound on the calculated risk of one additional cancer above the background cancer rate per 100,000 individuals using the exposure assumptions and pathways established by the Department and the algorithms in the RBCA. If a regulated substance poses a risk of both cancer and an adverse health effect other than cancer, cleanup criteria must be derived for cancer and each adverse health effect.

If a cleanup criterion for groundwater differs from either the State drinking water standard established pursuant to the Safe Drinking Water Act, or criteria for adverse aesthetic characteristics derived pursuant to R 299.5709 of the Michigan Administrative Code, the cleanup criterion must comply with either standard unless a consultant retained by the owner or operator determines that compliance with this requirement is not necessary because the use of the groundwater is reliably restricted pursuant to the bill.

If corrective action is required at a site where there are releases regulated and releases not regulated under the Act, the DNR must determine the applicable laws and regulations to define the cleanup requirements.

De Minimis Spill

Under the Act, if a de minimis spill occurs, the owner or operator or a consultant retained by the owner or operator may remove and properly dispose of contaminated soils. The bill deleted requirements that a consultant test soils in the vicinity of the spill. If the sampling and testing showed contamination, the spill had to be reported as a release and corrective action had to be implemented. If the tests showed no contamination, the results had to be submitted to the Department along with other information required on a de minimis spill not more than 45 days after the spill was discovered.

The bill requires, instead, that a consultant provide the DNR with a closure report. If it is determined that the release exceeds specified amounts, then corrective action must be implemented as otherwise provided in the Act.

Assessment Report

The bill deleted provisions that required a consultant, within 20 days after a release had been reported, to submit to the Department an initial abatement report, as described in the Act. Under the bill, following initiation of initial response actions, a consultant retained by the owner or operator must complete the requirements of this part and submit related reports or executive

summaries detailed in this part to address the contamination at the site. At any time that sufficient corrective action to address contamination has been undertaken, a consultant must complete and submit a site closure report and omit the remaining interim steps.

In addition to the specified reporting requirements, a consultant must provide 48-hour notification to the DNR prior to initiating any of the following activities: soil excavation; well drilling, including monitoring well installation; sampling of soil or groundwater; or, construction of treatment systems.

Within 90 days after a release has been discovered, a consultant must complete an initial assessment report. The report, or an executive summary of it, must be submitted to the DNR on a form created pursuant to the Act. The report must include certain information on site conditions previously required in an abatement report, as well as results of initial response actions, and site information and characterization results. The bill adds the following to required information on site conditions: an estimate of the horizontal and vertical extent of on-site and off-site soil contamination; the depth to groundwater; an identification of potential migration and exposure pathways and receptors; and, an estimate of the amount of soil in the vadose zone that is contaminated. If the on-site assessment indicates that off-site soil or groundwater may be affected, the steps that have been or will be taken, including an implementation schedule to secure expeditiously access to off-site properties to complete the delineation of the extent of the release, must be reported. Information on site conditions also is to include groundwater flow rate and direction, laboratory analytical data collected, and the vertical distribution of contaminants.

The assessment report also must include a site classification, as established in the bill; tier I or tier II evaluation according to the RBCA process; and, a work plan including an implementation schedule for conducting a final assessment report under the bill to determine the vertical and horizontal extent of the contamination as needed for preparing the corrective action plan.

Corrective Action Plan

Under the bill, if initial response actions have not resulted in completion of corrective action, a consultant retained by an owner or operator must prepare a corrective action plan to address corrective action at the site. For corrective action plans submitted as part of a final assessment report after October 1, 1995, the plan must use the process described in the RBCA.

A corrective action plan must include a description of the corrective action to be implemented, including an explanation of how that action will meet the RBCA process requirements. The plan also is to include an analysis of the selection of indicator parameters to be used in evaluating the plan's implementation, if indicator parameters are to be used. The plan must describe ambient air quality monitoring activities to be undertaken during the corrective action if these activities are appropriate.

Further, a corrective action plan must include an operation and maintenance plan if any element of the corrective action requires operation and maintenance. The operation and maintenance plan is to include all of the following: the name, telephone number, and address of the person responsible for operation and maintenance; an operation and maintenance schedule; a written and pictorial plan of operation and maintenance; design and construction plans; equipment diagrams, specifications, and manufacturers' guidelines; a safety plan; an emergency plan, including emergency contact telephone numbers; and, a list of spare parts available for emergency repairs. The plan also must include other information required by the DNR to determine the adequacy of the operation and maintenance plan. Department requests for information are to be limited to factors not adequately assessed by information already required in the bill and must be accompanied by an explanation of need for the additional information.

In addition, a corrective action plan must include a monitoring plan if monitoring and/or environmental media or site activities are required to confirm the remedy's effectiveness and integrity. The monitoring plan is to include all of the following: location of monitoring points; environmental media to be monitored, including, but not limited to, soil, air, water, or "biota"; a monitoring schedule; monitoring methodology, including sample collection procedures; and, substances to be monitored, including an explanation of the selection of any indicator parameters to be used. The plan also must include laboratory methodology, including the name of the laboratory responsible for analysis of monitoring samples, method detection limits, and practical quantification levels. Raw data used to determine

method detection limits must be made available to the Department on request. Other information required in the plan includes a quality control/quality assurance plan; a data presentation and evaluation plan, a contingency plan to address ineffective monitoring; an operation and maintenance plan for monitoring; an explanation of how the monitoring data will be used to demonstrate effectiveness of corrective action activities; and, other elements required by the DNR to determine the adequacy of the monitoring plan. Department requests for information are to be limited to factors not adequately address by information already required and must be accompanied by an explanation of the need for the additional information. ("Biota" means the plant and animal life in an area affected by a corrective action plan.)

A corrective action plan also must include an explanation of any land use or resource use restrictions, if these restrictions are required by the bill; a schedule for implementing the corrective action; and a financial assurance mechanism, as provided for in R 29.2161 to R 29.2169 of the Administrative Code, in an amount approved by the Department, to pay for monitoring, operation and maintenance, oversight, and other costs if required by the DNR as necessary to assure the corrective action's effectiveness and integrity.

The bill specifies that if provisions for operation and maintenance, monitoring, or financial assurance are included in the corrective action plan, and those provisions are not complied with, the plan is void from the time of lapse or violation unless the lapse or violation is corrected to the Department's satisfaction.

The bill also specifies that if a corrective action plan does not result in an unrestricted use of the property for any purpose, the owner or operator or a consultant retained by the owner or operator must provide notice to the public by means designed to reach those members of the public directly affected by the release and the proposed corrective action. The notice is to include the name, address, and telephone number of a contact person. A copy of the notice and proof of providing the notice must be submitted to the DNR. The DNR is required to ensure that site release information and corrective action plans that do not result in an unrestricted use of property are made available to the public for inspection upon request.

Institutional Controls

Notice of Corrective Action. If the corrective action activities at a site, based on a tier I evaluation, will result in anything other than an unrestricted use of the site, institutional controls must be implemented as provided in the bill. A notice of corrective action must be recorded with the register of deeds for the county in which the site is located before a closure report is submitted under the bill. A notice is to be filed only by the property owner or with the express written permission of the property owner. The notice's form and content are subject to the Department's approval. A notice of corrective action must state the land use that was the basis of the corrective action selected by a consultant retained by the owner or operator. Further, the notice must state that if there is a proposed change in the land use at any time in the future, the change may necessitate further evaluation of potential risks to the public health, safety, and welfare and to the environment and that the DNR is to be contacted regarding any proposed change in the land use. Additional requirements for financial assurance, monitoring, or operation and maintenance do not apply if contamination levels do not exceed the levels established in the tier I evaluation.

Restrictive Covenant. If corrective action activities at a site rely on a tier II or tier III evaluation, institutional controls must be implemented as follows. A restrictive covenant must be recorded with the register of deeds for the county in which the property is located within 30 days from submittal of the final assessment report, unless otherwise agreed to by the Department. The restrictive covenant is to be filed only by the property owner or with the property's owner written permission. The restrictions must run with the land and be binding on the owner's successors, assigns, and lessees. The restrictions must apply until the DNR determines that regulated substances no longer present an unacceptable risk to the public health, safety, or welfare or to the environment.

The restrictive covenant must include a survey and property description that defines the areas addressed by the corrective action plan and the scope of any land use or resource use limitations. The form and content of the restrictive covenant are subject to approval by the DNR and must include provisions to accomplish all of the following:

-- Restrict activities at the site that may interfere with corrective action, operation and maintenance, monitoring, or other measures necessary to assure the corrective action's effectiveness and integrity.
-- Restrict activities that may result in exposure to regulated substances above levels established in the corrective action plan.
-- Prevent a conveyance of title, easement, or other interest in the property from being consummated bythe property owner without adequate and complete provision for compliance with the corrective action plan and prevention of exposures.
-- Grant to the DNR and its designated representatives the right to enter the property at reasonable times to determine and monitor compliance with the corrective action plan, including, but not limited to, the right to take samples, inspect the operation of the corrective action measures, and inspect records.
-- Allow the State to enforce restrictions set forth in the covenant by legal action in a court of appropriate jurisdiction.
-- Describe generally the uses of the property that are consistent with the corrective action plan.

If an owner's or operator's consultant determines that exposure to regulated substances may be reliably restricted by a means other than a restrictive covenant and that imposition of land use or resource use restrictions through restrictive covenants is impractical, the consultant may select a corrective action plan that relies on alternative mechanisms. These mechanisms may include, but are not be limited to, an ordinance that prohibits groundwater use in a manner and to a degree that protects against unacceptable exposure to a regulated substance as defined by the cleanup criteria identified in the corrective action plan. An ordinance that serves as an exposure control must include a requirement that the local government notify the Department 30 days before adopting a modification to the ordinance or to the lapsing or revocation of the ordinance, and a requirement that the ordinance be filed with the register of deeds as an ordinance affecting multiple properties.

If a mechanism other than a notice of corrective action, an ordinance, or restrictive covenant is requested by a consultant, and the DNR determines that the alternative mechanism is appropriate, the DNR may approve of the alternate mechanism.

A person who implements corrective action activities must provide notice of land use restrictions that are part of the corrective action plan to the local government in which the site is located within 30 days of submitting the corrective action plan, unless otherwise approved by the Department.

Final Assessment Report

Within 365 days after a release has been discovered, a consultant retained by an owner or operator must complete a final assessment report that includes a corrective action plan and must submit the report or an executive summary of it to the Department on a form created pursuant to the bill. The report must include, but is not limited to the following: the extent of contamination, tier II and tier III evaluation, as appropriate, under the RBCA process; and a feasibility analysis, which is to include the following, as appropriate and given the site conditions: on-site and off-site corrective action alternatives to remediate contaminated soil and groundwater for each cleanup type, including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances; the costs associated with each corrective action alternative including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances; the effectiveness and feasibility of each corrective action alternative in meeting cleanup criteria; the time necessary to implement and complete each corrective action alternative; and, the preferred corrective action alternative based on the above criteria and an implementation schedule for completion of the corrective action. The report also must include a corrective action plan and a schedule for the plan's implementation. If the preferred corrective action alternative is based on the use of institutional controls regarding off-site migration of regulated substances, the corrective action plan may not be implemented until it is reviewed and determined by the DNR to be in compliance with this part of the Act.

Closure Report

Within 30 days following completion of the corrective action, a consultant retained by the owner or operator must complete a closure report and submit it or an executive summary to the DNR on a prescribed form. The report must include, but

is not limited to, the following information: a summary of corrective action activities, closure verification sampling results, and a closure certification prepared by the consultant. Within 60 days after receiving a closure report, the DNR must give the consultant a confirmation of the Department's receiving it.

The bill specifies that the DNR retains the right to review any closure report in which an executive summary was submitted in lieu of the report. Further, upon the request of any person who lives in close proximity to the site where the corrective action is occurring, the DNR must require that a report rather than an executive summary be submitted and must make the report available to the person who requested it.

Penalties for Not Reporting

The bill recodified existing penalties for failure to submit a report on time. Under the bill, these penalties apply if a report is not completed or a required submittal under the bill's provisions on initial assessment, final assessment, and closure reports is not provided during the time required.

Classification Systems

The bill permits the DNR to establish and implement a classification system for sites considering impacts on public health, safety, and welfare, and the environment. Notwithstanding any other provision in Part 213, at sites posing an imminent risk to the public health, safety, or welfare, or the environment, corrective action must be implemented immediately. If the DNR determines that no imminent risk exists at a site, it may allow corrective action at these sites to be conducted on a schedule approved by the Department. The DNR may not use this provision to limit the ability of an owner or operator or a consultant to submit a claim to the MUSTFA Fund or delay payment on a valid claim to an owner, operator, or consultant.

Audit

Under the Act, the DNR is required to design and implement a program selectively to audit or oversee all aspects of corrective actions to assure compliance. The bill adds that the Department may audit a site at any time prior to the receipt of a closure report and within six months after receiving it.

Penalties

Under the bill, a person is prohibited from knowingly delivering a regulated substance to an underground storage tank system at any facility that is not in compliance with all provisions of Part 213 and Part 211 (regulating underground storage tanks) and rules promulgated under these parts. Upon discovering a violation of either part or rules at a facility having an underground storage tank system, the Department must provide notification prohibiting delivery of regulated substances to the facility by affixing a placard providing notice of the violation in plain view to the underground storage tank system.

The bill also prohibits a person from removing, defacing, or altering, or otherwise tampering with a placard affixed to an underground storage tank system. A person who knowingly removes, defaces, alters, or tampers with a placard so that the notification is not discernible, who knowingly delivers a regulated substance to an underground storage tank system is guilty of a misdemeanor punishable by imprisonment for up to 90 days and/or a fine of up to $500.

The Attorney General or, upon request by the Department, the county prosecuting attorney may commence criminal actions for these violations in the circuit court for the county where a violation occurred.

These provisions took effect 30 days after enactment of the bill.

Imminent Danger

Under the bill, if the DNR determines that there may be an imminent and substantial endangerment to the public health, safety, or welfare, or the environment, because of a release or threatened release, the Department may require an owner or operator to take necessary action to abate the danger or threat.

The DNR may issue an administrative order to an owner or operator requiring that person to perform corrective actions relating to a facility, or to take any other action required by Part 213. An order issued under these provisions must state with reasonable specificity the basis for its issuance and specify a reasonable time for compliance.

Within 30 days after an administrative order was issued, a person to whom it was issued must indicate in writing whether he or she intends to comply with the order. A person who, without sufficient cause, violates or fails to comply properly with an administrative order issued under the bill is liable for either or both of the following:

-- A civil fine of up to $25,000 for each day during which the violation occurs or the failure to comply continues. A fine must be based upon the seriousness of the violation and any good faith efforts by the violator to comply with the administrative order.
-- Exemplary damages in an amount at least equal to the amount of any costs or response activity incurred by the State as a result of a failure to comply with an administrative order but not more than three times the amount of these costs.

A person who complied with an administrative order but believes that the order was arbitrary and capricious or unlawful may petition the Department, within 60 days after completing the required action, for reimbursement for the reasonable costs of the action plus interest and other necessary costs incurred in seeking reimbursement. If the DNR refuses to grant all or part of the petition, the petitioner may, within 30 days of receiving the refusal, file an action against the Department in the Court of Claims seeking this relief. A failure by the DNR either to grant or to deny all or any part of a petition within 120 days of receiving it constitutes a denial of that part of the petition, which is reviewable as final agency action in the Court of Claims. To obtain reimbursement, the petitioner must establish by a preponderance of the evidence that the petitioner is not an owner or operator or that the action ordered was arbitrary and capricious or unlawful, and in either instance that costs for which the petitioner seeks reimbursement are reasonable in light of the action required by and undertaken under the relevant order.

These provisions took effect 30 days after enactment of the bill.

Repeals

The bill deleted provisions concerning definitions (MCL 324.21301); rules promulgation (MCL 324.21305); initial assessment of release conducted by a consultant (MCL 324.21308); conditions requiring the reporting of corrective actions and removal of contaminated soil (MCL 324.21309); preparation of soil feasibility analysis, soil remediation corrective action plan, and corrective action alternatives for various types of cleanup (MCL 324.21310); groundwater contamination (MCL 324.21311); delay of corrective action by owners or operators of petroleum underground storage tank systems (MCL 324.21312); Type A or B cleanup (MCL 324.21313); retaining a consultant (MCL 324.21314); Type C cleanup (MCL 324.21317); Type C corrective action plan (MCL 324.21318); corrective action order (MCL 324.21319); reports not submitted during the required time (MCL 324.21321); liability (MCL 324.21322); rewards (MCL 324.21325); and, the invalidation of Part 213 if any provision was found unconstitutional (MCL 324.21331).

Senate Bill 383

The bill amended the Natural Resources and Environmental Protection Act to:

-- Extend for one year the maximum funding amounts for certain claims against the MUSTFA Fund.
-- Require the DNR annually to evaluate and report to the Legislature the impact on the solvency of the MUSTFA Fund of the December 22, 1998, submittal deadline for a claim or request for indemnification. The Legislature must examine the report and take action necessary to assure the solvency of the Fund.
-- Require the DNR, by May 1, 1995, to complete a study of the MUSTFA Fund's fiscal soundness. The study is to project costs and revenues over the Fund's remaining life as well as consider and outline appropriate cost containment measures to assure the Fund's long-term viability.

The MUSTFA Act was repealed on March 30, 1995, and the Natural Resources and Environmental Protection Act took effect on the same date. The bill also took effect on March 30, 1995.

Senate Bill 387

The bill amended the Natural Resources and Environmental Protection Act to specify that corrective action measures conducted pursuant to Part 213 of the Act satisfy remedial obligations under Part 31 of the Act, which deals with water resources protection.

MCL 324.21510 & 324.21512 (S.B. 383)
324.21302 et al. (S.B. 386)
Proposed MCL 324.3106a (S.B. 387)

Legislative Analyst: L. Burghardt

FISCAL IMPACT

Senate Bills 383, 386 and 387 will have an indeterminate fiscal impact on State and local governments.

The Department of Natural Resources has estimated that the change in standards to 1 additional cancer per 100,000 individuals (compared with the former 1 per 1,000,000) and the utilization of "Risk-Based Corrective Action" (RBCA) could stop further actions at as many as 30% of the listed active sites. The amount of cost savings to underground storage tank owners will depend on the cleanup cost per site and the actions taken to date.

Direct cost savings to State and local government will depend on the number and type of cleanup sites owned by governmental entities. Assuming the MUSTFA Fund remained solvent, there would also be an estimated reduction in cleanup reimbursement claims of between $100 million and $150 million. Cost savings to the Fund would primarily affect the way money is allocated and have no impact on overall State expenditures, since the MUSTFA Act requires payment of claims only up to available revenues.

Cost savings will be limited, however, due to the recent announcement of MUSTFA Fund insolvency. In March, Public Sector Consultants released a report estimating that the value of MUSTFA claims exceeded revenues by $235.34 million. Cost containment measures were estimated to reduce the MUSTFA Fund deficit to $84.95 million. On April 3, the Department of Natural Resources notified all registered owners of underground storage tanks that the MUSTFA Fund is insolvent. Only those invoices received by March 31, 1995, will be paid, with other invoices paid as funds become available.

The bill does not change the amount of revenues available for MUSTFA purposes. A new misdemeanor with penalties is established, which could generate additional enforcement costs and revenues for the State.

Fiscal Analyst: G. Cutler

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