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BILL ANALYSIS

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Senate Bill 386
Sponsor: Senator Loren Bennett
Committee: Natural Resources and Environmental Affairs

Date Completed: 3-16-95

SUMMARY OF SENATE BILL 386 as introduced 3-14-95:

The bill would amend the Natural Resources and Environmental Protection Act to revise procedures for the reporting and cleanup of releases from underground storage tanks by doing the following:

- **Requiring the Department of Natural Resources (DNR) to establish cleanup criteria for corrective action activities using procedures outlined in the American Society for Testing and Materials document, "Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA).**
- **Deleting the definition of "clean up standards", which provides for the degree of cleanup as required under administrative rules.**
- **Establishing cleanup criteria for a regulated substance that posed a carcinogenic risk to humans, and specifying that the risk would have to 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.**
- **Deleting requirements that an initial abatement report be submitted to the DNR, and requiring instead that a site closure report be submitted after corrective actions to address contamination had been undertaken at the site.**
- **Requiring the preparation of a corrective action plan, as outlined in the bill, if initial response actions had not resulted in completion of corrective actions.**
- **Requiring the implementation of institutional controls, as defined by RBCA.**
- **Requiring the recording of a notice of corrective action and a restrictive covenant with the register of deeds for the county in which the site was located.**
- **Requiring within one year after a release had been discovered that a final assessment report, which included a corrective action plan, be submitted to the DNR.**
- **Requiring within 30 days following completion of the corrective action plan that a closure report be submitted to the DNR.**
- **Repealing and recodifying penalties for failure to meet reporting requirements.**
- **Permitting the DNR to establish a classification system for sites, considering impacts on public health, safety, and welfare, and the environment.**
- **Prohibiting a person from knowingly delivering a regulated substance to an underground storage tank system located at a facility not in compliance with the Act.**
- **Establishing misdemeanor penalties for persons who removed or tampered with notification placed at a noncomplying facility prohibiting the delivery of a regulated substance.**
- **Permitting 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 establish penalties for not complying with an administrative order**.

The bill would delete current provisions concerning definitions (MCL 324.21301); rules promulgation (MCL 324.21305); initial assessment of release conducted by a consultant (MCL 324.21308); conditions requiring report 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 is found unconstitutional (MCL 324.21331).

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, the Natural Resources and Environmental Protection Act would be given retroactive application. Criminal penalties provided in the bill would apply only to violations of Part 213 that occurred after the bill's effective date.

Corrective Actions

Corrective action activities undertaken pursuant to the bill would have to be conducted in accordance with procedures outline in the RBCA (the American Society for Testing and Materials document entitled Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites, final draft, dated December 27, 1994) in a manner protective of public health, safety, and welfare, and the environment.

Subject to the bill, the Department would be required to establish cleanup criteria for corrective action activities using procedures outlined in RBCA. The DNR would have to establish all exposure assumptions and pathways to be used in determining the cleanup criteria.

If a regulated substance posed a carcinogenic risk to humans, the cleanup criteria derived for cancer risk would have to 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 RBCA. If a regulated substance posed a risk of both cancer and an adverse health effect other than cancer, cleanup criteria would have to be derived for cancer and each adverse health effect.

If a cleanup criterion for groundwater differed 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 could be the more stringent of either standard unless a consultant retained by the owner or operator determined that compliance with this requirement was not necessary because the use of the groundwater was reliably restricted pursuant to the bill.

If corrective action were required at a site where there were releases regulated or not regulated under the Act, the DNR would have to determine the applicable laws and regulations to define the cleanup requirements.

De Minimis Spill

Currently, 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, and must test soils in the vicinity of the spill. If the sampling and testing show contamination, the spill must be reported as a release and corrective action must be implemented. If the tests show no contamination, the results must be submitted to the Department along with other required information required on a de minimis spill not more than 45 days after the spill was discovered.

The bill would delete provisions on sampling and tests, and require, instead, a consultant to provide the DNR with a closure report. If it were determined that the release exceeded specified amounts, then corrective action would have to be implemented as otherwise provided in the Act.

Assessment Report

The bill would delete current provisions that require a consultant, within 20 days after a release has 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 would have to complete the actions and submit related reports to address the contamination at the site. At any time that sufficient corrective action to address contamination had been undertaken, a consultant would have to complete and submit a site closure report and omit the remaining interim steps.

In addition to the specified reporting requirements, a consultant would have to 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.

Currently, within 20 days after a release has been reported, a consultant must submit to the Department an initial abatement report, as described in the Act. The bill would require, instead, that within 90 days after a release had been discovered, a consultant complete an initial assessment report. The report, or an executive summary of it, would have to be submitted to the DNR on a form created pursuant to the Act. The report would have to include certain information on site conditions currently required in an abatement report, as well as results of initial response actions, and site information and characterization results. The bill would add 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 was contaminated. If the on-site assessment indicated that off-site soil or groundwater could be affected, the steps that had been or would be taken, including an implementation schedule to secure expeditiously access to off-site properties to complete the delineation of the extent of the release, would have to be reported. Information on site conditions also would have to include groundwater flow rate and direction, laboratory analytical data collected, and the vertical distribution of contaminants.

The assessment report also would have to 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

If initial response actions had not resulted in completion of corrective action, a consultant retained by an owner or operator would have to 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 would have to use the process described in RBCA.

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

Further, a corrective action plan would have to include an operation and maintenance plan if any element of the corrective action required the operation and maintenance. The operation and maintenance plan would have 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 would have to include other information required by the DNR to determine the adequacy of the operation and maintenance plan. Department requests for information would be limited to factors not adequately assessed by information already required in the bill and would have to be accompanied by an explanation of need for the additional information.

In addition, a corrective action plan would have to include a monitoring plan if monitoring and/or

environmental media or site activities were required to confirm the remedy's effectiveness and integrity. The monitoring plan would have 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 chemicals to be used. The plan also would have to 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 would have to be made available to the Department on request. Other information in the plan would include 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 would 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 would have to be limited to factors not adequately address by information already required and would have to be accompanied by an explanation of the need for the additional information. ("Biota" would mean the plant and animal life in an area affected by a corrective action plan.)

A corrective action plan also would have to include an explanation of any land use or resource use restrictions, if these restrictions were 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 the DNR determined to be necessary to assure the corrective action's effectiveness and integrity.

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

Notice of Corrective Action

If the corrective action activities at a site, based on a tier I evaluation, assumed institutional controls, as defined in RBCA, the controls would have to be implemented as provided in the bill. A notice of corrective action would have to be recorded with the register of deeds for the county in which the site was located prior to submittal of a closure report under the bill. A notice could be filed only by the property owner or with the express written permission of the property owner. The notice's form and content would be subject to the Department's approval. Any restrictions contained in the notice would be binding on the owner's successors, assigns, and lessees, and would have to run with the land. A notice of corrective action would have to state the land use that was the basis of the corrective action selected by a consultant retained by the owner or operator. A change from the land use could necessitate further evaluation of potential risks to the public health, safety, and welfare and to the environment. Notice of the corrective action would have to include a survey and property description that defined the areas addressed by the plan and the scope of any land use or resource use limitations. Additional requirements for financial assurance, monitoring, or operation and maintenance would not apply if contamination levels did not exceed the levels established in the tier I evaluation.

Restrictive Covenant

If corrective action activities at a site relied on a tier II or tier III evaluation, institutional control would have to be implemented as provided in the bill. The restrictive covenant would have to be recorded with the register of deeds for the county in which the property was located within 30 days from submittal of the final assessment report, unless otherwise agreed to by the Department. The restrictive covenant could be filed only by the property owner or with the property's owner written permission. The restrictions would run with the land and would be binding on the owner's successors, assigns, and lessees. The restrictions would apply until the DNR determined that regulated substances no longer presented an unacceptable risk to the public health, safety, or welfare or to the environment.

The restrictive covenant would have to include a survey and property description that defined 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 would be subject to approval by the DNR and would have to include provisions to accomplish all of the following:

-- Restrict activities at the site that could interfere with corrective action, operation and maintenance, monitoring, or other measures necessary to assure the corrective action's effectiveness and integrity.
-- Restrict activities that could result in exposures above levels established in the corrective action plan.
-- Prevent a conveyance of title, easement, or other interest in the property from being consummated by the 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 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 were consistent with the corrective action plan.

If an owner's or operator's consultant determined that exposure to regulated substances could be reliably restricted by a means other than a restrictive covenant and that imposition of land use or resource use restrictions through restrictive covenants would be impractical, the consultant could select a corrective action plan that relied on alternative mechanisms. These mechanisms would include, but not be limited to, an ordinance that prohibited groundwater use in a manner and to a degree that protected against unacceptable exposures as defined by the cleanup criteria identified in the corrective action plan. An ordinance that served as an exposure control would have to 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 an ordinance or restrictive covenant were necessary, then the mechanism would have to be approved by the DNR prior to implementation.

A person who implemented corrective action activities would have to provide notice of land use restrictions that were part of the corrective action plan to the local government in which the site was 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 had been discovered, a consultant retained by an owner or operator would have to complete a final assessment report that included a corrective action plan and would have to submit the report or an executive summary of it to the Department on a form created pursuant to the bill. The report would have to include, but would not be 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 would have 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 reduced the volume, toxicity, and mobility of the regulated substances; the costs associated with each corrective action alternative including alternatives that permanently and significantly reduced 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 correct 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 would have to include a corrective action plan and a schedule for the plan's implementation.

Closure Report

Within 30 days following completion of the corrective action, a consultant retained by the owner or operator would have to complete a closure report and submit it or an executive

summary to the DNR on a prescribed form. The report would have to include, but would not be limited to, the following information: a summary of corrective action activities,
closure verification sampling results, and a closure certification prepared by the consultant retained by the owner or operator.

Within 60 days after receiving a closure report, the DNR would have to provide the consultant who submitted the report with a confirmation of the Department's receiving it.

The bill specifies that the DNR would retain the right to review any closure report in which an executive summary was submitted in lieu of the report.

Penalties for Not Reporting

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

Classification Systems

The DNR could 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 would have to be implemented immediately. If the DNR determined that no imminent risk existed at a site, it could allow corrective action at these sites to be conducted on a schedule approved by the Department.

Audit

Currently, 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 would add that the Department could audit a site at any time up to and including within six months after receiving a closure report.

Penalties

A person would be prohibited from knowingly delivering a regulated substance to an underground storage tank system at any facility that was 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 these parts or rules at a facility having an underground storage tank system, the Department would be required to provide notification prohibiting delivery of regulated substances to a facility by affixing a placard providing notice of the violation in plain view to the underground storage tank system.

A person would be prohibited from removing, defacing, or altering, or otherwise tampering with a notification affixed to an underground storage tank system. A person who knowingly removed, defaced, altered, or tampered with a placard so that the notification were not discernible would be guilty of a misdemeanor. A person who knowingly delivered a regulated substance to an underground storage tank system that had been placarded would be 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, prosecuting attorney could commence criminal actions for these violations in the circuit court for the county where the violation occurred.

Imminent Danger

If the DNR determined that there could 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 could require an owner or operator to take necessary action to abate the danger or threat.

The DNR could 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 would have to 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 would have to indicate in writing whether he or she intended to comply with the order. A person who, without sufficient cause, violated or failed to comply properly with an administrative order

issued under the bill would be liable for either or both of the following:

-- A civil fine of up to $25,000 for each day during which the violation occurred or the failure to comply continued. A fine would have to 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 believed that the order was arbitrary and capricious or unlawful could 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 refused to grant all or part of the petition, the petitioner could, 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 would constitute a denial of that part of the petition, which would be reviewable as final agency action in the Court of Claims. To obtain reimbursement, the petitioner would have to establish by a preponderance of the evidence that the petitioner was 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 sought reimbursement were reasonable in light of the action required by and undertaken under the relevant order.

MCL 324.21302 et al.

Legislative Analyst: L. Arasim

FISCAL IMPACT

The bill would have an indeterminate fiscal impact, depending on the number and type of sites affected by proposed changes in cleanup standards. The cost savings to the State would be in reduced Michigan Underground Storage Tank Financial Assurance Act (MUSTFA) claims reimbursements, which would be dependent on the MUSTFA Fund solvency at the time the claims were filed.

The Department of Natural Resources has estimated that the change in standards to 1 additional cancer per 100,000 individuals (compared with the current 1 per 1,000,000), and the utilization of "Risk-Based Corrective Action" (RBCA) could stop further cleanup actions at as many as 30% of the listed active sites. The amount of cost savings would depend on the cleanup cost per site and the actions taken to date. Assuming an average $95,000 claim per site, with half the costs already incurred to date, this bill could save up to $100 million in MUSTFA reimbursement payments.

Pursuant to a contract with the DNR, on March 20 Public Sector Consultants will be releasing a report that will include more detailed cost figures on savings based on changes in standards, as well as the overall solvency of the MUSTFA Fund.

The bill would maintain revenues to the State from reporting penalties. The bill would establish a new misdemeanor with penalties that could generate additional enforcement costs and revenues for the State.

Fiscal Analyst: G. Cutler

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.