

**STATE OF MICHIGAN
95TH LEGISLATURE
REGULAR SESSION OF 2010**

Introduced by Senators Sanborn, Gilbert and Van Woerkom

ENROLLED SENATE BILL No. 1346

AN ACT to amend 1994 PA 451, entitled “An act to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, assessments, and donations; to provide certain appropriations; to prescribe penalties and provide remedies; and to repeal acts and parts of acts,” by amending sections 20101, 20104, and 20104a (MCL 324.20101, 324.20104, and 324.20104a), section 20101 as amended and section 20104a as added by 1996 PA 383 and section 20104 as amended by 1995 PA 71.

The People of the State of Michigan enact:

Sec. 20101. (1) As used in this part:

(a) “Act of God” means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(b) “Agricultural property” means real property used for farming in any of its branches, including cultivating of soil; growing and harvesting of any agricultural, horticultural, or floricultural commodity; dairying; raising of livestock, bees, fish, fur-bearing animals, or poultry; turf and tree farming; and performing any practices on a farm as an incident to, or in conjunction with, these farming operations. Agricultural property does not include property used for commercial storage, processing, distribution, marketing, or shipping operations.

(c) “All appropriate inquiry” means an evaluation of environmental conditions at a property at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the property in conformance with 40 CFR 312.

(d) “Attorney general” means the department of the attorney general.

(e) “Background concentration” means the concentration or level of a hazardous substance that exists in the environment at or regionally proximate to a facility that is not attributable to any release at or regionally proximate to the facility.

(f) “Baseline environmental assessment” means a written document that describes the results of an all appropriate inquiry and the sampling and analysis that confirm that the property is a facility. However, for purposes of a baseline environmental assessment, the all appropriate inquiry under 40 CFR 312.20(a) may be conducted within 45 days after the date of acquisition of a property and the components of an all appropriate inquiry under 40 CFR 312.20(b) and 40 CFR 312.20(c)(3) may be conducted or updated within 45 days after the date of acquisition of a property.

(g) “Board” means the brownfield redevelopment board created in section 20104a.

(h) “Cleanup criteria for unrestricted residential use” means either of the following:

(i) Cleanup criteria that satisfy the requirements for the residential category in section 20120a(1)(a) or (16).

(ii) Cleanup criteria for unrestricted residential use under part 213.

(i) “Department” means the director of the department of natural resources and environment or his or her designee to whom the director delegates a power or duty by written instrument.

(j) “Director” means the director of the department of natural resources and environment.

(k) “Directors” means the directors or their designees of the departments of natural resources and environment, community health, agriculture, and state police.

(l) “Disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous substance into or on any land or water so that the hazardous substance or any constituent of the hazardous substance may enter the environment or be emitted into the air or discharged into any groundwater or surface water.

(m) “Enforcement costs” means court expenses, reasonable attorney fees of the attorney general, and other reasonable expenses of an executive department that are incurred in relation to enforcement under this part.

(n) “Environment” or “natural resources” means land, surface water, groundwater, subsurface, strata, air, fish, wildlife, or biota within the state.

(o) “Environmental contamination” means the release of a hazardous substance, or the potential release of a discarded hazardous substance, in a quantity which is or may become injurious to the environment or to the public health, safety, or welfare.

(p) “Evaluation” means those activities including, but not limited to, investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are needed to determine the nature, extent, and impact of a release or threat of release and necessary response activities.

(q) “Exacerbation” means the occurrence of either of the following caused by an activity undertaken by the person who owns or operates the property, with respect to contamination for which the person is not liable:

(i) Contamination that has migrated beyond the boundaries of the property which is the source of the release at levels above cleanup criteria for unrestricted residential use unless a criterion is not relevant because exposure is reliably restricted as otherwise provided in this part.

(ii) A change in facility conditions that increases response activity costs.

(r) “Facility” means any area, place, or property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property where any of the following conditions are satisfied:

(i) Response activities have been completed under this part that satisfy the cleanup criteria for unrestricted residential use.

(ii) Corrective action has been completed under part 213 that satisfies the cleanup criteria for unrestricted residential use.

(iii) Site-specific criteria that have been approved by the department for application at the area, place, or property are met or satisfied and both of the following conditions are met:

(A) The site-specific criteria do not depend on any land use or resource use restriction to ensure protection of the public health, safety, or welfare or the environment.

(B) Hazardous substances at the area, place, or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.

(s) “Feasibility study” means a process for developing, evaluating, and selecting appropriate response activities.

(t) “Financial assurance” means a performance bond, escrow, cash, certificate of deposit, irrevocable letter of credit, corporate guarantee, or other equivalent security, or any combination thereof.

(u) “Foreclosure” means possession of a property by a lender on which it has foreclosed on a security interest or the expiration of a lawful redemption period, whichever occurs first.

(v) “Free product” means a hazardous substance in a liquid phase equal to or greater than 1/8 inch of measurable thickness that is not dissolved in water and that has been released into the environment.

(w) “Fund” means the cleanup and redevelopment fund established in section 20108.

(x) “Hazardous substance” means 1 or more of the following, but does not include fruit, vegetable, or field crop residuals or processing by-products, or aquatic plants, that are applied to the land for an agricultural use or for use as an animal feed, if the use is consistent with generally accepted agricultural management practices developed pursuant to the Michigan right to farm act, 1981 PA 93, MCL 286.471 to 286.474:

(i) Any substance that the department demonstrates, on a case by case basis, poses an unacceptable risk to the public health, safety, or welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources.

(ii) Hazardous substance as defined in the comprehensive environmental response, compensation, and liability act, 42 USC 9601 to 9675.

(iii) Hazardous waste as defined in part 111.

(iv) Petroleum as described in part 213.

(y) “Interim response activity” means the cleanup or removal of a released hazardous substance or the taking of other actions, prior to the implementation of a remedial action, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment. Interim response activity also includes, but is not limited to, measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by the department. In addition, interim response activity means the taking of other actions as may be necessary to prevent, minimize, or mitigate a threatened release.

(z) “Lender” means any of the following:

(i) A state or nationally chartered bank.

(ii) A state or federally chartered savings and loan association or savings bank.

(iii) A state or federally chartered credit union.

(iv) Any other state or federally chartered lending institution or regulated affiliate or regulated subsidiary of any entity listed in this subparagraph or subparagraphs (i) to (iii).

(v) An insurance company authorized to do business in this state pursuant to the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302.

(vi) A motor vehicle finance company subject to the motor vehicle finance act, 1950 (Ex Sess) PA 27, MCL 492.101 to 492.141, with net assets in excess of \$50,000,000.00.

(vii) A foreign bank.

(viii) A retirement fund regulated pursuant to state law or a pension fund regulated pursuant to federal law with net assets in excess of \$50,000,000.00.

(ix) A state or federal agency authorized by law to hold a security interest in real property or a local unit of government holding a reversionary interest in real property.

(x) A nonprofit tax exempt organization created to promote economic development in which a majority of the organization’s assets are held by a local unit of government.

(xi) Any other person who loans money for the purchase of or improvement of real property.

(xii) Any person who retains or receives a security interest to service a debt or to secure a performance obligation.

(aa) “Local health department” means that term as defined in section 1105 of the public health code, 1978 PA 368, MCL 333.1105.

(bb) “Local unit of government” means a county, city, township, or village, an agency of a local unit of government, an authority or any other public body or entity created by or pursuant to state law. Local unit of government does not include the state or federal government or a state or federal agency.

(cc) “Method detection limit” means the minimum concentration of a hazardous substance which can be measured and reported with 99% confidence that the analyte concentration is greater than zero and is determined from analysis of a sample in a given matrix that contains the analyte.

(dd) “No further action letter” means a written response provided by the department under section 20114d confirming that a no further action report has been approved after review by the department.

(ee) “No further action report” means a report under section 20114d detailing the completion of remedial actions and including a postclosure plan and a postclosure agreement, if appropriate.

(ff) “Operator” means a person who is in control of or responsible for the operation of a facility. Operator does not include either of the following:

(i) A person who holds indicia of ownership primarily to protect the person’s security interest in the facility, unless that person participates in the management of the facility as described in section 20101a.

(ii) A person who is acting as a fiduciary in compliance with section 20101b.

(gg) “Owner” means a person who owns a facility. Owner does not include either of the following:

(i) A person who holds indicia of ownership primarily to protect the person’s security interest in the facility, including, but not limited to, a vendor’s interest under a recorded land contract, unless that person participates in the management of the facility as described in section 20101a.

(ii) A person who is acting as a fiduciary in compliance with section 20101b.

(hh) “Panel” means the response activity review panel created in section 20114e.

(ii) “Permitted release” means 1 or more of the following:

(i) A release in compliance with an applicable, legally enforceable permit issued under state law.

(ii) A lawful and authorized discharge into a permitted waste treatment facility.

(iii) A federally permitted release as defined in the comprehensive environmental response, compensation, and liability act, 42 USC 9601 to 9675.

(jj) “Postclosure agreement” means an agreement between the department and a person who has submitted a no further action report that prescribes, as appropriate, activities required to be undertaken upon completion of remedial actions as provided for in section 20114d.

(kk) “Postclosure plan” means a plan for land use or resource use restrictions or permanent markers at a facility upon completion of remedial actions as required under section 20114c.

(ll) “Release” includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance. Release does not include any of the following:

(i) A release that results in exposure to persons solely within a workplace, with respect to a claim that these persons may assert against their employers.

(ii) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel.

(iii) A release of source, by-product, or special nuclear material from a nuclear incident, as those terms are defined in the atomic energy act of 1954, 42 USC 2011 to 2297h-13, if the release is subject to requirements with respect to financial protection established by the nuclear regulatory commission under 42 USC 2210, or any release of source by-product or special nuclear material from any processing site designated under 42 USC 7912(a)(1) or 42 USC 7942(a).

(iv) If applied according to label directions and according to generally accepted agricultural and management practices, the application of a fertilizer, soil conditioner, agronomically applied manure, or pesticide, or fruit, vegetable, or field crop residuals or processing by-products, aquatic plants, or a combination of these substances. As used in this subparagraph, fertilizer and soil conditioner have the meaning given to these terms in part 85, and pesticide has the meaning given to that term in part 83.

(v) A release does not include fruits, vegetables, field crop processing by-products, or aquatic plants, that are applied to the land for an agricultural use or for use as an animal feed, if the use is consistent with generally accepted agricultural and management practices developed pursuant to the Michigan right to farm act, 1981 PA 93, MCL 286.471 to 286.474.

(mm) “Remedial action” includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.

(nn) “Remedial action plan” means a work plan for performing remedial action under this part.

(oo) “Residential closure” means a facility at which the contamination has been addressed in a no further action report that satisfies the limited residential cleanup criteria under section 20120a(1)(c) or the site-specific residential cleanup criteria under sections 20120a(2) and 20120b, that contains land use or resource use restrictions, and that is approved by the department or is considered approved by the department under section 20120d.

(pp) “Response activity” means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of community health and enforcement actions related to any response activity.

(qq) “Response activity costs” or “costs of response activity” means all costs incurred in taking or conducting a response activity, including enforcement costs.

(rr) “Response activity plan” means a plan for undertaking response activities. A response activity plan may include 1 or more of the following:

(i) A plan to undertake interim response activities.

(ii) A plan for evaluation activities.

(iii) A feasibility study.

(iv) A remedial action plan.

(ss) "Security interest" means any interest, including a reversionary interest, in real property created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, consignments, or any other transaction in which evidence of title is created if the transaction creates or establishes an interest in real property for the purpose of securing a loan or other obligation.

(tt) "Target detection limit" means the detection limit for a hazardous substance in a given environmental medium that is specified by the department on a list that it publishes not more than once a year. The department shall identify 1 or more analytical methods, when a method is available, that are judged to be capable of achieving the target detection limit for a hazardous substance in a given environmental medium. The target detection limit for a given hazardous substance is greater than or equal to the method detection limit for that hazardous substance. In establishing a target detection limit, the department shall consider the following factors:

(i) The low level capabilities of methods published by government agencies.

(ii) Reported method detection limits published by state laboratories.

(iii) Reported method detection limits published by commercial laboratories.

(iv) The need to be able to measure a hazardous substance at concentrations at or below cleanup criteria.

(uu) "Threatened release" or "threat of release" means any circumstance that may reasonably be anticipated to cause a release.

(vv) "Venting groundwater" means groundwater that is entering a surface water of the state from a facility.

(2) As used in this part:

(a) The phrase "a person who is liable" includes a person who is described as being subject to liability in section 20126. The phrase "a person who is liable" does not presume that liability has been adjudicated.

(b) The phrase "this part" includes "rules promulgated under this part".

Sec. 20104. (1) The department shall coordinate all activities required under this part and may promulgate rules necessary to implement this part.

(2) A guideline, bulletin, interpretive statement, or operational memorandum under this part shall not be given the force and effect of law. A guideline, bulletin, interpretive statement, or operational memorandum under this part is not legally binding on any person.

(3) Claims for natural resource damages may be pursued only in accordance with principles of scientific and economic validity and reliability. Contingent nonuse valuation methods or similar nonuse valuation methods shall not be utilized and damages shall not be recovered for nonuse values unless and until rules are promulgated that establish an appropriate means of determining such damages.

(4) A contingent nonuse valuation method or similar nonuse valuation method shall not be utilized for natural resource damage calculations unless a determination is made by the department that such a method satisfies principles of scientific and economic validity and reliability and rules for utilizing a contingent nonuse valuation method or a similar nonuse valuation method are subsequently promulgated.

(5) The provisions in this section related to natural resource damages as added by 1995 PA 71 do not apply to any judicial or administrative action or claim in bankruptcy initiated on or before March 1, 1995.

Sec. 20104a. (1) The brownfield redevelopment board is created within the department.

(2) The board shall consist of the following members:

(a) The director or his or her designee.

(b) The director of the department of technology, management, and budget or his or her designee.

(c) The chief executive officer of the Michigan economic development corporation or his or her designee.

(3) A majority of the members of the board constitute a quorum for the transaction of business at a meeting of the board.

(4) The business which the board may perform shall be conducted at a public meeting of the board held in compliance with the open meetings act, 1976 PA 267, MCL 15.261 to 15.275.

(5) A writing prepared, owned, used, in the possession of, or retained by the board in the performance of an official function is subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(6) The board shall implement the duties and responsibilities as provided in this part and as otherwise provided by law.

Enacting section 1. This amendatory act does not take effect unless all of the following bills of the 95th Legislature are enacted into law:

- (a) Senate Bill No. 1345.
- (b) Senate Bill No. 1348.
- (c) House Bill No. 6359.
- (d) House Bill No. 6360.
- (e) House Bill No. 6363.

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Richard J. Brown

Clerk of the House of Representatives

Approved

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Governor