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BILL ANALYSIS

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Senate Bill 1328 (as enacted) **PUBLIC ACT 446 of 2012**
Sponsor: Senator Tom Casperson
Senate Committee: Natural Resources, Environment and Great Lakes
House Committee: Natural Resources, Tourism, and Outdoor Recreation

Date Completed: 8-11-15

CONTENT

The bill amended several parts of the Natural Resources and Environmental Protection Act to do the following:

-- Exclude soil that is removed from sugar beets and meets other criteria from the definition of "solid waste".
-- Revise the allocation of money from the Clean Michigan Initiative (CMI) Bond Fund to be used for grants and loans.
-- Eliminate a requirement that a loan agreement between a CMI loan recipient and the applicable State department include a commitment that the loan is secured by a full faith and credit pledge.
-- Include the provision of an alternate water supply in the definition of "response activity".
-- Eliminate a requirement for permanent markers under a postclosure plan if a hazardous substance is present at a concentration of more than 10 times a particular cleanup criterion, if the land or resource use restrictions meet other requirements.
-- Allow a person to request a certificate of completion of a response activity from the Department of Environmental Quality (DEQ), confirming that an approved response activity has been completed.
-- Allow a person to submit to the DEQ documentation of due care compliance with requirements that apply to an owner or operator who knows his or her property is a facility contaminated by a hazardous substance.
-- Require the DEQ to make a decision on a request for a certificate of completion or approve documentation of due care compliance within a prescribed period, and provide that the request is approved if the Department does not make its decision by the deadline.
-- Allow a person to appeal to a review panel the DEQ's decision on a certificate of completion or document of due care compliance.
-- Require the DEQ's evaluation and revision of environmental cleanup criteria to take into account best practices from other states, reasonable and realistic conditions, and sound science.
-- Prescribe the conditions a person must meet to demonstrate compliance with indoor air inhalation criteria for a hazardous substance.
-- Revise provisions pertaining to the relocation of contaminated soil, and provide that relocated soil is not "solid waste".
-- Exempt from liability for contamination a person who owns or occupies a residential condominium unit, under certain circumstances.
-- Allow a person who is not liable for a release from an underground storage tank (UST) system under Part 213 (Leaking Underground Storage Tanks) to conduct corrective actions under that part in the same manner as a person who is liable.

-- Allow the owner or operator of a UST system to address venting groundwater pursuant to Part 201 (Environmental Remediation) in lieu of corrective actions to do so under Part 213.
-- Delete from the Part 213 definitions of "owner" and "operator" references to liability, and instead specify that certain provisions of Part 213 apply to an owner or operator who is liable.

The bill also repealed provisions of the Act pertaining to the regulation of polychlorinated biphenyls (PCBs), and rescinded related administrative rules. In addition, the bill rescinded a number of rules pertaining to environmental contamination response activity.

The bill took effect on December 27, 2012.

Clean Michigan Initiative Bond Fund

Part 196 (Clean Michigan Initiative Implementation) provides for the allocation of money from the Clean Michigan Initiative Bond Fund, including up to $335.0 million for use by the DEQ for response activities at facilities. Of that amount, $75.0 million must be used to provide grants and loans to local units of government and brownfield redevelopment authorities for response activities at known or suspected facilities with redevelopment potential. Previously, of the $75.0 million, a maximum of $37.5 million had to be used to provide grants and a maximum of $37.5 million had to be used to provide loans. Under the bill, up to $50.0 million must be used for grants and up to $25.0 million must be used for loans.

The bill eliminated a requirement that up to $12.0 million be used for grants to the municipal landfill grant program. (The section establishing the program was repealed in 2010.)

Part 196 requires a loan recipient to enter into a loan agreement with the administering State department. The bill deleted a requirement that, at a minimum, the agreement contain a commitment that the loan is secured by a full faith and credit pledge of the applicant, or, if the applicant is a brownfield redevelopment authority, from the municipality that created the authority.

Environmental Remediation

Postclosure Plan. Under Part 201, upon completion of remedial actions at a facility for a category of cleanup that does not satisfy cleanup criteria for unrestricted residential use, the person conducting the remedial actions must prepare and implement a postclosure plan for the facility. The plan must include land or resource use restrictions, as well as permanent markers to describe restricted areas of the facility and the nature of those restrictions.

A permanent marker is not required if the applicable land or resource use restrictions relate to protection of the integrity of exposure controls that prevent contact with soil, and those controls are composed solely of asphalt, concrete, or landscaping materials.

The bill deleted language stating that this exception did not apply if any of the hazardous substances addressed by the exposure control were present at a concentration of more than 10 times an applicable soil direct contact cleanup criterion.

("Remedial action" includes 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.)

No Further Action Report. Upon completion of remedial actions that satisfy the requirements of Part 201, a person may submit a no further action report to the DEQ. The report must document the basis for concluding that the remedial actions have been completed, and may include a request

that, upon approval, the release or conditions addressed by the report be designated as a residential closure.

Under the bill, a person may submit a no further action report for remedial actions addressing contamination for which the person is or is not liable. Remedial actions included in a report may address all or a portion of a facility's contamination consisting of one or more releases, one or more hazardous substances, and/or contamination in environmental media.

Certificate of Completion. Under the bill, upon completion of a response activity under Part 201, a person may request a certificate of completion from the DEQ. The bill defines "certificate of completion" as a written response provided by the DEQ confirming that a response activity has been completed in accordance with the applicable requirements of Part 201 and is approved by the Department.

To obtain a certificate of completion, a person must submit to the DEQ a request form, as well as documentation of the completed response activity. The Department must specify the required content of the form and make it available on the DEQ website.

Upon receiving a request, the DEQ must issue a certificate or deny the request. Alternatively, the DEQ must notify the submitter that there is not sufficient information for the Department to make a decision, and identify the required information. If the request is denied, the denial must state with specificity all of the reasons for it, to the extent practical.

The DEQ must make a decision and give the person a certificate, as appropriate, within one of the following time frames, as applicable:

-- 150 days after the DEQ receives the request, if the response activity was undertaken without the Department's prior approval and the DEQ determines that the activity complies with the applicable requirements of Part 201.
-- 90 days after the request is received, if the response activity was undertaken pursuant to a Department-approved response activity plan, and the DEQ determines that the activity was completed in accordance with the plan.

If the DEQ fails to provide a written response within the required time frame, the response activity will be considered approved.

Any required time frame may be extended by mutual written agreement of the DEQ and a person submitting a request for a certificate of completion or a person who has received a certificate.

A person requesting a certificate of completion may appeal the DEQ's decision in accordance with the review panel process prescribed in Part 201. Under that process, a person who submitted a response activity plan or a no further action report under Part 201 may appeal a DEQ decision regarding a technical or scientific dispute concerning the plan or report by submitting a petition to the DEQ Director and paying a fee of $3,500. Part 201 prescribes procedures for resolution of the dispute, including a negotiation period and, if necessary, a convening of the Response Activity Review Panel (which is established to advise the DEQ Director on technical or scientific disputes). Under the bill, these provisions also apply to a person who submitted a request for a certificate of completion or documentation of due care compliance (as described below).

Documentation of Due Care Compliance. The bill allows a person to submit to the DEQ documentation of due care compliance regarding a facility. The documentation must be submitted on a form provided by the DEQ and must contain documentation of compliance with Section 20107a (which requires an owner or operator who knows that property is a facility to take certain actions with regard to hazardous substances at the facility) and other information required by the Department.

Within 45 business days after receiving the documentation of due care compliance containing sufficient information for the DEQ to make a decision, the Department must approve it, approve it

with conditions, or deny it. If the DEQ does not approve the documentation of due care compliance, it must provide the reasons why to the person who submitted it.

A person who disagrees with the DEQ's decision may submit a petition for review of scientific or technical disputes to the Response Activity Review Panel.

Air Inhalation Criteria. Part 201 prescribes categorical cleanup criteria for different types of facilities.

Under the bill, a person may demonstrate compliance with indoor air inhalation criteria for a hazardous substance at a facility under Part 201 if all of the following conditions are met:

-- The facility is an establishment covered by the classifications provided by Section 31-33 – Manufacturing, of the North American Industry Classification System, United States, 2012, published by the Office of Management and Budget.
-- The person complies with the Michigan Occupational Safety and Health Act (MIOSHA) and the rules promulgated under it applicable to the exposure to the hazardous substance, including the occupational health standards for air contaminants, R. 325.51101 to R 325.51108 of the Michigan Administrative Code.
-- The hazardous substance was included in the facility's hazard communication program under Section 14a of MIOSHA and the hazard communication rules, R 325.77001 to R 325.77003 of the Michigan Administrative Code.

(Section 14a of MIOSHA refers to a Federal regulation pertaining to comprehensive hazard communication programs, which must include container labeling and other forms of warning, safety data sheets, and employee training. The regulation states that the purpose of the programs is to ensure that the hazards of all chemicals are classified and that information concerning those hazards is transmitted to employers and employees.)

Site-Specific Criteria. Under Part 201, the DEQ must approve site-specific criteria in a response activity if such criteria, in comparison to generic criteria, better reflect best available information concerning the toxicity or exposure risk posed by the hazardous substance or other factors. The bill refers to numeric or nonnumeric site-specific criteria.

Relocation of Contaminated Soil. The bill allows an owner under Part 201 to relocate contaminated soil off-site, or to allow it to be relocated, if all of the following requirements are met:

-- The person determines that the soil can be lawfully relocated without posing a threat to the public health, safety, or welfare, or the environment.
-- Prior DEQ approval is obtained if the contaminated soil is being relocated off-site from or to either of the following: 1) a facility where a remedial action plan that includes soil as an affected medium has been approved by the Department based on a categorical cleanup criterion or site-specific cleanup criteria, or 2) a facility where a no further action report that includes soil as an affected medium has been approved by the Department.
-- If contaminated soil is being relocated off-site in another manner, the owner or operator of the facility from which the soil is being relocated notifies the DEQ within 14 days after the relocation.

(Under the bill, "contaminated soil" means soil that meets all of the following criteria:

-- The soil is contaminated with one or more hazardous substances at levels that exceed the background concentration for that substance.
-- The soil is contaminated with one or more hazardous substances at levels that exceed any applicable cleanup criteria or site-specific criteria.

"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. The bill specifies the methods by which a person may demonstrate a background concentration for a hazardous substance.)

For purposes of determining whether contaminated soil poses a threat to the public health, safety, or welfare or the environment, it is determined to do so if concentrations of hazardous substances in the soil exceed the cleanup criteria that apply to the facility to which the soil would be relocated. Any land use or resource use restrictions that would be required for the application of a cleanup criterion must be in place at the facility before the soil is relocated. Contaminated soil may not be relocated to a location that is not a facility.

Part 201 contained similar provisions prior to the bill's enactment, but referred to soil rather than to contaminated soil specifically. Also, Part 201 previously provided that soil had to satisfy the appropriate regulatory criteria if it was to be removed from the facility for disposal or treatment, and contaminated soil could not be moved to a location that was not a facility unless it was taken there for treatment or disposal in conformance with applicable laws and regulations. In addition, Part 201 previously allowed soil to be relocated only to another location that was similarly contaminated.

Previously, Part 201 prohibited an owner or operator from relocating soil, or allowing it to be relocated, within a facility where a remedial action plan had been approved unless the person assured that the same degree of control required for application of the cleanup criteria was provided for the contaminated soil.

The bill, instead, allows an owner or operator to relocate contaminated soil, or allow it to be relocated, on-site if all of the following requirements are met:

-- Except as otherwise provided, if either a remedial action plan or no further action report that includes soil as an affected medium has been approved for a facility, the person assures that the same degree of control required for application of the cleanup criteria under the plan or report is provided for the contaminated soil.
-- If at least 500 cubic yards of contaminated soil are being relocated on-site at a facility where either a remedial action plan or no further action report that includes soil as an affected medium has been approved by the DEQ, the owner or operator of the facility at which the soil is being relocated notifies the DEQ within 14 days after the relocation.
-- If the 500-cubic yard threshold does not apply and an owner or operator relocates contaminated soil on-site without approval of or notice to the DEQ, the owner of the facility within which the soil is relocated includes specified information (described below) regarding the relocation as part of disclosing the general nature and extent of the release to a purchaser or other person to which the facility is transferred.

In the case of an approved remedial action plan or no further action report that includes soil as an affected medium, the requirement for assurance of control does not apply to soils that are relocated temporarily for the purpose of implementing response activity or utility construction if the activity or construction is completed in a timely fashion and the short-term hazards are controlled appropriately.

With regard to an on-site relocation of at least 500 cubic yards, the required notice must include the facility from which the soil was relocated, the facility to which it was taken, the volume of soil relocated, and a summary of information or data assuring that the same degree of control required for application of the cleanup criteria is provided for the contaminated soil. If land or resource use restrictions in a postclosure plan or agreement would apply to the soil when it is relocated, the notice must include documentation that those restrictions are in place.

In the case of an on-site relocation without approval by or notice to the DEQ, the information that must be disclosed to a purchaser or transferee of the facility includes the facility from which the soil was relocated, the facility to which the soil was taken, the volume of soil relocated, and a summary of the basis for the owner's or operator's determination that the relocation did not exacerbate the contamination.

Section 20107a requires a person who owns or operates property that he or she knows is a facility to take certain actions with respect to hazardous substances, including undertaking measures necessary to prevent exacerbation. A person who is not otherwise liable for a release who violates this requirement is liable for response activity costs and natural resource damages attributable to the exacerbation, as well as any fines or penalties resulting from the violation. Under the bill, these provisions apply to the on-site relocation of soil even if an owner or operator is not otherwise subject to Section 20107a.

The determinations regarding the threat posed by an off-site relocation and the degree of control for an on-site relocation under an approved remedial action plan or no further action report must be based on knowledge of the person undertaking or approving of the removal or relocation of soil or on characterization of the soil for compliance with the bill.

The bill's provisions related to soil relocation do not apply to any of the following:

-- Soil that is designated by the DEQ as an inert material.
-- Uncontaminated soil that is mixed with a beneficial use by-product under Part 115 (Solid Waste Management).
-- Soil that is relocated for treatment or disposal in conformance with applicable laws and regulations.
-- The relocation of uncontaminated soil (i.e., soil that is either not contaminated with any hazardous substances due to human activity, or that is contaminated with at least one hazardous substance due to human activity but the levels of the substance at the facility do not exceed any categorical or site-specific cleanup criteria).

The bill also amended the definition of "solid waste" in Part 115 (Solid Waste Management) to exclude soil relocated under the provisions of Part 201; as well as soil that is washed or otherwise removed from sugar beets, has a maximum moisture content of 35%, and is registered as a soil amendment under Part 85 (Fertilizers). The bill specifies that any testing required to become registered under Part 85 is the responsibility of the generator.

Exemption from Liability. Part 201 provides that certain people are not liable with respect to contamination at a facility resulting from a release or threat of release unless the person is responsible for an activity causing that release or threat. The bill includes in the exemption a person who owns or occupies a residential condominium unit for both of the following:

-- Contamination of the unit if hazardous substance use within the unit is consistent with residential use.
-- Contamination of any general common element, limited common element, or common area in which the person has an ownership interest or right of occupation by reason of owning or occupying the residential condominium unit.

Leaking Underground Storage Tanks

Liability. Part 213 (Leaking Underground Storage Tanks) provides remedies using a process and procedures separate and distinct from those under Part 201 for sites posing a threat to the public health, safety, or welfare, or the environment, as a result of releases from underground storage tank systems. The bill provides that, notwithstanding any other provision of Part 213, a person who is not liable under Part 213 may conduct corrective actions under Part 213 in the same manner as a person who is liable. The bill requires the DEQ to provide responses to nonliable parties conducting corrective actions for reports submitted under Part 213 in the same manner that it provides responses to people who are liable.

Corrective action at sites where a release has occurred or a threat of release exists from a UST system is regulated exclusively under Part 213. If a release or threat of release at a site is not solely the result of a release or threat of release from a UST, the owner or operator may choose

to perform response activities under Part 201 in lieu of corrective actions under Part 213. The bill specifies that the liable owner or operator may make the choice in its sole discretion.

(Under Part 213, "corrective action" means the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment from a UST system that is necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare; the environment; or natural resources.)

The bill also allows a liable UST system owner or operator to choose, in its own discretion, to follow the procedures set forth in Part 201 rather than Part 213 in performing corrective action related to venting groundwater, if a release from a UST system involves venting groundwater.

The bill deleted from the definitions of "owner" and "operator" references to a person who is liable under Part 213. Additionally, under the bill, certain provisions pertaining to the following apply to an owner or operator who is liable under Part 213:

-- An owner or operator who is or who employs a qualified UST consultant.
-- Requirements that an owner or operator report a release from a UST to the DEQ within 24 hours after discovery and take certain actions to address the contamination.
-- Completion and submission of various reports to the DEQ.
-- Preparation of a corrective action plan.
-- Notice to the DEQ for certain activities and notice to the public, under certain circumstances.
-- Penalties for failing to comply with Part 213 reporting requirements.
-- Auditing of final assessment reports and closure reports by the DEQ.
-- Affixing a placard prohibiting delivery of regulated substances to a UST system found to be in violation of Part 213.
-- Department requirements that an owner or operator take action necessary to abate a danger or threat to public health, safety, or welfare, or the environment, from a release or threatened release.
-- Administrative orders issued by the DEQ requiring an owner or operator to perform corrective actions.
-- Contested case hearings.
-- Procedures by which an owner or operator may appeal a final DEQ decision to affix a placard or issue an administrative order.

Exemption from Liability. Part 213 exempts certain people from liability. Under the bill, an exempt person is not liable for a claim for corrective action costs, fines or penalties, natural resources damages, or equitable relief under Part 17 (Michigan Environmental Protection Act), Part 31 (Water Resources Protection), or common law resulting from the contamination existing on the site or migrating from the site on the earlier of the date of purchase, occupancy, foreclosure or transfer of ownership, or control of the site to the person. This liability protection does not extend to a violation of any permit issued under State law. These provisions do not alter the liability of a person for a violation of the requirements of Part 213 applicable to an owner or operator who knows his or her property is contaminated.

Audits. Under Part 213, the DEQ may audit a required report only once. If the audit identifies certain deficiencies, the Department may audit a revised report to evaluate whether the deficiencies have been corrected. Under the bill, the DEQ also may audit a revised report if the original report does not contain sufficient information for the DEQ to make a decision, and sufficient information is subsequently provided.

Documentation of Due Care Compliance. The bill allows a person to submit to the DEQ documentation of due care compliance regarding a site. The documentation must be submitted on a form provided by the Department and contain documentation of compliance with the requirements of Part 213 applicable to an owner or operator who knows the property is contaminated, as well as other information required by the Department. The documentation must be prepared by a qualified UST consultant.

Within 45 business days after receiving documentation containing sufficient information for the DEQ to make a decision, the Department must approve it, approve it with conditions, or deny it. If the DEQ does not approve the documentation of due care compliance, it must give the person who submitted it the reasons why.

A person who disagrees with the DEQ's decision may submit a petition for review of scientific or technical disputes to the Response Activity Review Panel or to the DEQ's Office of Administrative Hearings for a contested case hearing.

PCBs

The bill repealed Subpart 1 (PCB Compounds) of Part 147 (Chemical Compounds) of the Act, which prohibited a person from disposing of liquid or solid waste resulting from the use of PCBs in his or her business or of an item, product, or material containing a concentration equal to or greater than 100 parts per million of PCBs except in conformity with DEQ rules. A violation was a misdemeanor punishable by a fine of at least $2,500 and not more than $25,000. The DEQ was responsible for the administration and implementation of the subpart to protect the public health, safety, and welfare from the toxic effects and environmental dangers of PCBs.

The bill also rescinded R 299.3301 to R 299.3319, which pertained to PCBs.

Other Rescinded Rules

As of December 27, 2012, the bill rescinded a number of DEQ rules pertaining to environmental contamination response activity. The bill rescinded other rules effective December 31, 2013.

MCL 324.11506 et al. Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill has an indeterminate, but likely negative, fiscal impact on State government, and no fiscal impact on local units of government. The bill shifted $12.5 million in Clean Michigan Initiative brownfield bonding authority from loans to grants, which resulted in $25.0 million in bonding authority for loans and $50.0 million in bonding authority for grants. To the extent that this shift resulted or results in more brownfield projects being funded by CMI grants, additional CMI bonds were or will be issued, resulting in increased debt service costs that appear in the Department of Treasury budget.

The bill also resulted in some new costs for the Department of Environmental Quality associated with the development of forms for, and processing of certificates of completion. An estimate for these costs is not available as the demand for certificates of completion is unknown.

Fiscal Analyst: Josh Sefton