



Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

DEFINE HAZARDOUS SUBSTANCE

House Bill 4670 as introduced
First Analysis (6-17-93)

Sponsor: Rep. Tom Alley
Committee: Conservation, Environment
and Great Lakes Affairs

THE APPARENT PROBLEM:

In response to concerns that those responsible for contaminating some 2,700 sites were not taking responsibility for their actions, Public Acts 233 and 234 of 1990 (the Polluters Pay acts) compelled compliance with the Environmental Response Act and provided penalties and incentives to encourage polluters to pay for cleanup of these sites. Since then, the definition of "hazardous substance," as contained in the act, has come under fire from the owners of facilities where hazardous substances have been located. Currently, "hazardous substance" is defined as either a chemical or other material which is, or which could become, injurious to the public health, safety, or welfare or to the environment; or as "hazardous waste," "petroleum," or a "hazardous substance," as the term is defined under the Hazardous Waste Management Act; under the Leaking Underground Storage Tank Act; or under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), respectively. Critics of the act agree that there is some justification for the definition of "hazardous substance" contained in the latter three federal and state acts. These definitions refer to substances that have been specifically determined to be hazardous. The definition that refers to a material "injurious to the public health," however, is so broad that it is often impossible to have a facility removed from the Department of Natural Resource (DNR) list of contaminated sites once any hazardous substance has been found there. A substance, it is argued, can be hazardous to the public health or to the environment in some locations, but not in others. What actually determines the level of toxicity is related to factors that are unique to each site, such as the particular sensitivity of the ecosystem, and the density of the substance in proportion to surrounding materials at a particular location. Therefore, critics argue, the act should be amended to require that each site be considered on its own merits and that the DNR be

required to demonstrate whether a substance is hazardous or not at that site.

THE CONTENT OF THE BILL:

House Bill 4670 would amend the Environmental Response Act to define the term "hazardous substance" on a site-specific basis, and to exclude commercial lending institutions from liability for cleanup of an environmentally contaminated site when acting in a representative capacity for a disabled person.

Hazardous Waste. Under the act, environmental contamination is defined as the release of a "hazardous substance" which causes harm, or potential harm, to the public health, safety, or welfare, or to the environment. A "hazardous substance" is defined as a chemical or other material that may become injurious to the public health, safety or welfare or to the environment. House Bill 4670 would amend the act to redefine a "hazardous substance" as any substance that the Department of Natural Resources had demonstrated, on a case by case basis, to pose an unacceptable risk to public health, safety, welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources.

Liability for Cleanup. Under the act, a commercial lending institution or person who acts as a fiduciary is not held personally liable as an "owner" or "operator" of a property, provided that the lender has not managed the property prior to assuming ownership or control of it. The bill would amend the act to include under this provision a commercial lending institution or other person who assumed ownership or control of a property in a representative capacity for a disabled person.

MCL 299.603 and 299.612a

House Bill 4670 (6-17-93)

FISCAL IMPLICATIONS:

According to the Department of Natural Resources, the bill would have a fiscal impact on state government. Each potential site of contamination would have to be tested by the department to determine whether it contained hazardous substances or not, and whether cleanup procedures would fall under the provisions of Michigan's Environmental Response Act (MERA, or "Public Act 307"); the Hazardous Waste Management Act ("Public Act 64"), or the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Costs of testing would vary from site to site, depending on the amount of damage at each site from environmental contamination. (6-15-93)

ARGUMENTS:**For:**

Once placed on the Department of Natural Resources (DNR) "Environmental Response List" of contaminated sites, a site cannot be removed until the appropriate cleanup activities have been completed. This may cause financial hardship, since few buyers can be found for a contaminated site. At present, the DNR can classify a site as "contaminated" if a substance in the soil or groundwater is found in a level above a certain concentration, as determined by the application of a risk analysis formula that relies upon preset assumptions regarding acceptable risk, exposure, duration, and amount of ingestion. The rules deem the substance injurious to the public health, safety, welfare or environment when it is present at a certain level; there is no requirement under the act that the department prove that the presence of this particular substance at a specific level of concentration actually creates harm to the public health or to the environment. The bill, on the other hand, would require that the DNR prove that actual injury would be caused to the public health or to the environment at each site where a hazardous substance was located.

For:

The bill would exclude persons acting in a representative capacity for a disabled person for liability for cleanup activities. Currently, the act excludes commercial lending institutions and state and local units of government that have not participated in the management of a property prior to assuming ownership or control as a fiduciary

from liability as owners or operators of a contaminated site. It is fair that those acting on behalf of a disabled person should receive the same immunity from liability since they, too, are acting in a fiduciary capacity.

POSITIONS:

The Department of Natural Resources supports the bill. (6-15-93)

The Michigan United Conservation Clubs supports the bill. (6-16-93)

The Michigan Recreation and Park Association supports the bill. (6-16-93)

The Michigan Manufacturers Association supports the bill. (6-16-93)

A representative of the Michigan Chemical Council testified before the committee in support of the bill. (6-15-93)

The Michigan Municipal League has no position on the bill. (6-16-93)

The Michigan Association of Counties has no position on the bill. (6-16-93)

The Michigan Bankers Association has no position on the bill. (6-15-93)

The Michigan Association of Home Builders has no position on the bill. (6-16-93)