House
Legislative
Analysis
Section

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LIABILITY FOR TOXIC SUBSTANCES

House Bill 4718
Sponsor: Rep. James M. Middaugh

House Bill 4719
Sponsor: Rep. Jan Dolan

House Bill 4721
Sponsor: Rep. Tom Alley

Committee: Conservation,
Environment and Great Lakes Affairs

Complete to 5-10-93

A SUMMARY OF HOUSE BILLS 4718, 4719 AND 4721 AS INTRODUCED 5-6-93

The bills would amend various act to clarify the liability of certain entities for environmental contamination.

Under the Environmental Response Act certain entities are, by definition, exempt from liability as an "operator" or "owner" of a facility where a hazardous substance has been stored or released. Among those excluded are state and local governments that have acquired ownership of a facility involuntarily through, for example, bankruptcy proceedings. House Bill 4718 would amend the act (MCL 299.614c) to permit such an entity to transfer its exempt status, under certain circumstances, to a subsequent purchaser or lessee of a facility. Such a transfer could not be made to a person who may have liability for response activity costs at the facility. Further, the state or local unit of government would have to establish that the purchaser or lessee proposed to develop the facility according to an approved economic development plan, and that sufficient funds would be generated to pay for response activities consistent with the proposed use of the facility, that, at a minimum, assured protection of human health. Otherwise, the local unit of government would be required to record deed restrictions on future uses of the facility, requiring "institutional controls" to assure protection of human health. In addition, the local unit of government would be required to submit a written transfer proposal to the Department of Natural Resources (DNR) to document compliance, and to publish a notice of the proposal. The DNR would hold a public meeting on the proposal, if requested, and would decide, within 45 days following the publication or the meeting, whether the transfer were consistent with the requirements of the bill. Following the transfer of an exemption from liability under the bill, the exemption could be transferred to a subsequent purchaser if: the initial transferee complied with the provisions of the act, response activities had been completed, and any deed restrictions of future uses of the property were recorded. The bill would state that a transfer of an exemption from liability would not protect a transferee from liability for a subsequent release of a contaminant.

The Uniform Condemnation Procedures Act outlines the procedures whereby public and private agencies may acquire property under the power of eminent domain when they have been given that power under another statute. Under the act, a property owner may file a motion to ask for a review. If a motion is not filed, or is denied, then the court is required to order the escrowee to pay the amount that has been established as just compensation for the property. House Bill 4719 would amend the act (MCL 213.58 and 213.63) to clarify that a transfer of property under these circumstances would not diminish an owner's liability for cleanup expenses or damages. The bill would permit a court to retain a portion of the compensation amount in escrow until the escrowee were ordered to pay it. However, neither the title transfer, the verdict, nor an owner's liability for any expenses, fees, or damages for environmental contamination of the property would be considered concluded under this provision. Nor would the parties be required to waive any rights they may have under statute or common law.

The Environmental Response Act attributes liability for the cleanup of contaminated sites. Under the act, a commercial lending institution that has not participated in the management of a facility, prior to assuming ownership or control as a fiduciary under state or federal banking codes, is not held liable as an owner or operator of the property unless the institution exercised sufficient involvement to control the handling of a hazardous substance, or unless the institution, its agent, employee, or a person retained by the institution, caused or contributed to the release of a hazardous substance. House Bill 4721 would amend the act (MCL 299.603 and 612a) to include under the act's definition of "commercial lending institution" an insurance company, a motor vehicle finance company, a foreign bank, a retirement fund, and a state or federal agency authorized to hold a security interest in real property. The provisions of the bill would apply to an insurance company that is regulated under the Insurance Code; to a motor vehicle finance company with net assets in excess of $50 million that is regulated under the Motor Vehicle Finance Act; and to a retirement fund that is regulated by state law or by a pension fund regulated under federal law with net assets in excess of $50 million.

House Bill 4721 would also define actions, which, under the act, would constitute "participation in the management or operational affairs of a facility." Generally, an institution that has not participated in the management of a facility prior to assuming ownership is not held liable for cleanup costs as an owner or operator of the property unless the institution has been involved to the extent that it controlled the handling of, or contributed to the release of, a hazardous substance. The bill would specify that an institution or person holding a security interest in a facility would be considered to have participated in its management if they actually participated in the management or operational affairs of a facility in acts "that exceed the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations." In addition, an institution or person holding a security interest in a facility would be considered to have participated in its management if, while the borrower was still in possession of the facility, the institution or person exercised decision making control over the borrower's environmental compliance; undertook responsibility for the borrower's hazardous substance handling or disposal practices; or exercised control at a level comparable to that of a manager in a manner that encompassed the enterprise's day-to-day decisions regarding either its environmental compliance, or "all, or substantially all" of its other operational

aspects. However, the following would not constitute participation in the management of a facility:

**The mere capacity to influence, or ability to influence, or the unexercised right to control facility operations.

**An act or omission prior to the time when ownership was held primarily to protect a security interest.

**Undertaking or requiring an environmental inspection of the facility in which ownership was to be held, or requiring a prospective borrower to undertake response activities at a facility, or to comply with any applicable law -- either before or after the time that ownership was held -- primarily to protect a security interest.

**Actions consistent with holding ownership primarily to protect a security interest, whether such authority is contained in a contract or other document.

**Engaging in policing activities prior to foreclosure, unless such actions involve "participation in the management of the facility," as defined under the bill. Permissible actions would include requiring the borrower to undertake response activities at the facility during the term of the security interest; requiring the borrower to comply or come into compliance with federal, state, and local and environmental laws; or securing or exercising authority to monitor or inspect a facility or the borrower's finances. ("Workout" activities [defined under the bill to refer to actions by which an institution or person with a security interest sought to prevent a borrower from defaulting or diminishing the value of the security] conducted prior to foreclosure and its equivalents would remain within the exemption provided that such action did not involve "participation in the management of the facility.")

The bill would also clarify the conditions under which an institution could transfer to the state property on which there had been a release. Under the bill, a commercial lending institution could immediately transfer property on which there had been a release, or threat of release, to the state after all of the following had occurred:

**The facility was listed or advertised as being for sale within 9 months following foreclosure and for a period of at least 120 days.

**The institution did not remove permanent fixtures or allow them to be removed legally or illegally by others.

**The institution provided the DNR with a complete copy of the foreclosure environmental assessment, and all other available environmental information relating to the facility.

**The institution complied with an order issued by the DNR to undertake response activities because of a release of a contaminant.

**The institution undertook appropriate response activities to abate any threat of fire, explosion, or exposure to hazardous substances.