Act No. 310
Public Acts of 1993
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STATE OF MICHIGAN
87TH LEGISLATURE
REGULAR SESSION OF 1993

Introduced by Reps. Alley, Bennane, Middaugh, Freeman, O'Neill, Brown, Shepich, Gnodtke, Dolan, Sikkema, Hood, Wallace, Stallworth, Gire, Varga, DeMars, Points, Pitoniak, Murphy, Saunders, Bryant, Llewellyn, Bodem, Rhead, Hill, Goschka, Nye, Bobier, Wetters and Randall
Rep. Yokich named co-sponsor

ENROLLED HOUSE BILL No. 4721

AN ACT to amend sections 3 and 12a of Act No. 307 of the Public Acts of 1982, entitled as amended "An act to provide for the identification, risk assessment, and priority evaluation of environmental contamination at certain sites in this state; to provide for response activity at certain facilities and sites; to prescribe the powers and duties of the governor, certain state agencies and officials, and other persons; to provide for the promulgation of rules; to require record notice regarding the status of certain facilities; to create certain funds and provide for their expenditures; to provide for public participation; to provide for methods of dispute resolution; to authorize grants, loans, and awards; to create certain boards, councils, and offices and to prescribe their powers and duties; to provide for judicial review; and to provide certain remedies and penalties," section 3 as amended by Act No. 234 of the Public Acts of 1990 and section 12a as added by Act No. 233 of the Public Acts of 1990, being sections 299.603 and 299.612a of the Michigan Compiled Laws; and to add section 3a.

The People of the State of Michigan enact:

Section 1. Sections 3 and 12a of Act No. 307 of the Public Acts of 1982, section 3 as amended by Act No. 234 of the Public Acts of 1990 and section 12a as added by Act No. 233 of the Public Acts of 1990, being sections 299.603 and 299.612a of the Michigan Compiled Laws, are amended and section 3a is added to read as follows:

Sec. 3. As used in this act:

(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) "Attorney general" means the department of the attorney general.

(d) "Commercial lending institution" 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, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws.

(*vi*) A motor vehicle finance company subject to the motor vehicle finance act, Act No. 27 of the Extra Session of 1950, being sections 492.101 to 492.141 of the Michigan Compiled Laws, 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.

(*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.

(e) "Department" means the director of the department of natural resources or his or her designee.

(f) "Director" means the director of the department of natural resources.

(g) "Directors" means the directors or their designees of the departments of natural resources, public health, agriculture, and state police.

(h) "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.

(i) "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 act or rules promulgated under this act, or both.

(j) "Environment" or "natural resources" means any land, surface water, groundwater, subsurface, strata, air, fish, wildlife, or biota within the state.

(k) "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.

(*l*) "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.

(m) "Facility" means any area, place, or property where a hazardous substance has been released, deposited, stored, disposed of, or otherwise comes to be located.

(n) "Feasibility study" means a process for developing, evaluating, and selecting appropriate response activities.

(o) "Fund" means the environmental response fund established in section 9.

(p) "Hazardous substance" means 1 or more of the following:

(*i*) A chemical or other material which is or may become injurious to the public health, safety, or welfare or to the environment.

(*ii*) "Hazardous substance" as defined in the comprehensive environmental response, compensation, and liability act of 1980, Public Law 96-510, 94 Stat. 2767.

(*iii*) "Hazardous waste" as defined in the hazardous waste management act, Act No. 64 of the Public Acts of 1979, being sections 299.501 to 299.551 of the Michigan Compiled Laws.

(*iv*) "Petroleum" as described in section 4(5)(b) of the leaking underground storage tank act, Act No. 478 of the Public Acts of 1988, being section 299.834 of the Michigan Compiled Laws.

(q) "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.

(r) "Local health department" means that term as defined in section 1105 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.1105 of the Michigan Compiled Laws.

(s) "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.

(t) "Operator" means a person that is in control of or responsible for the operation of a facility. Operator does not include any of the following:

(*i*) A person that 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 defined under section 3a.

(*ii*) The state or a local unit of government that acquired ownership or control of the facility involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a commercial lending institution pursuant to section 12a(9), or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function or as provided in this act, a local unit of government to which ownership or control of the facility is transferred by the state, or the state or a local unit of government that acquired ownership or control of the facility by seizure, receivership, or forfeiture pursuant to the operation of law or by court order. In case of an acquisition described in this subparagraph by the state or a local unit of government, operator means a person that was in control of or responsible for operation of the facility immediately before the state or local unit of government acquired ownership or control. The exclusion provided in this subparagraph shall not apply to the state or a local unit of government that caused or contributed to the release or threat of a release from the facility.

(*iii*) The operator of an underground storage tank system, as defined in the leaking underground storage tank act, Act No. 478 of the Public Acts of 1988, being sections 299.831 to 299.850 of the Michigan Compiled Laws, from which there is a release or threat of release if all of the following conditions are met:

(A) The operator reported the release or threat of release to the department of state police, fire marshal division, within 24 hours after confirmation of the release or threat of release.

(B) The release or threat of release at the facility is solely the result of a release or threat of release of a regulated substance as defined in Act No. 478 of the Public Acts of 1988 from an underground storage tank system.

(C) The operator is in compliance with the requirements of Act No. 478 of the Public Acts of 1988, and any promulgated rules or any order, agreement, or judgment issued or entered into pursuant to that act.

(*iv*) A state or local unit of government that holds or acquires an easement interest in a facility, holds or acquires an interest in a facility by dedication in a plat, or by dedication pursuant to Act No. 283 of the Public Acts of 1909, being sections 220.1 to 239.6 of the Michigan Compiled Laws. The exclusion provided in this subparagraph shall not apply to the state or a local unit of government that holds an easement or dedication if the state or that local unit of government caused or contributed to a release or threat of release, or if equipment owned or operated by the state or that local unit of government caused or contributed to the release or threat of release.

(*v*) A person that holds an easement interest in a facility for the purpose of conveying or providing goods or services, including, but not limited to, utilities, sewers, roads, railways, and pipelines; or a person that acquires access through an easement. The exclusion provided in this subparagraph shall not apply to a person that holds an easement if that person caused or contributed to a release or threat of release, or if equipment owned or operated by that person caused or contributed to the release or threat of release.

(*vi*) A person that satisfies all of the following:

(A) The release was caused solely by a third party who is not an employee or agent of the person, or whose action was not associated with a contractual relationship with the person.

(B) The hazardous substance was not deposited, stored, or disposed of on the property upon which the person operates.

(C) The person at the time of transfer of the right to operate on the property discloses any knowledge or information concerning the general nature and extent of the release as required in section 10c.

(u) "Owner" means a person that owns a facility. Owner does not include any of the following:

(*i*) A person that, without participating in the management of the facility, 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.

(*ii*) The state or a local unit of government that acquired ownership or control of the facility involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a commercial lending institution pursuant to section 12a(9), or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function or as provided in this act, a local unit of government to which ownership or control of the facility is transferred by the state, or the state or a local unit of government that acquired ownership or control of the facility by seizure, receivership, or forfeiture pursuant to the operation of law or by court order. In case of an acquisition described in this subparagraph by the state or a local unit of government, owner means any person who owned or controlled activities at the facility immediately before the state or local unit of government acquired ownership or control. The exclusion

provided in this subparagraph shall not apply to the state or a local unit of government that caused or contributed to the release or threat of a release from the facility.

(*iii*) A person that satisfies all of the following:

(A) The release was caused solely by a third party, who is not an employee or agent of the person, or whose action was not associated with a contractual relationship with the person.

(B) The hazardous substance was not deposited, stored, or disposed of on that person's property.

(C) The person at the time of transfer of the property discloses any knowledge or information concerning the general nature and extent of the release as required in section 10c.

(*iv*) The owner of an underground storage tank system or the property on which an underground storage tank system is located, as defined in the leaking underground storage tank act, Act No. 478 of the Public Acts of 1988, being sections 299.831 to 299.850 of the Michigan Compiled Laws, from which there is a release or threat of release if all of the following conditions are met:

(A) The owner reported the release or threat of release to the department of state police, fire marshal division, within 24 hours after confirmation of the release or threat of release.

(B) The release or threat of release at the facility is solely the result of a release or threat of release of a regulated substance as defined in Act No. 478 of the Public Acts of 1988 from an underground storage tank system.

(C) The owner is in compliance with the requirements of Act No. 478 of the Public Acts of 1988, and any promulgated rules or any order, agreement, or judgment issued or entered pursuant to that act.

(*v*) A state or local unit of government that holds or acquires an easement interest in a facility, holds or acquires an interest in a facility by dedication in a plat, or by dedication pursuant to Act No. 283 of the Public Acts of 1909, being sections 220.1 to 239.6 of the Michigan Compiled Laws. The exclusion provided in this subparagraph shall not apply to the state or a local unit of government that holds an easement or dedication if that state or local unit of government caused or contributed to a release or threat of release, or if equipment owned or operated by the state or that local unit of government caused or contributed to the release or threat of release.

(*vi*) A person that holds an easement interest in a facility for the purpose of conveying or providing goods or services, including, but not limited to, utilities, sewers, roads, railways, and pipelines; or a person that acquires access through an easement. The exclusion provided in this subparagraph shall not apply to a person that holds an easement if that person caused or contributed to a release or threat of release, or if equipment owned or operated by that person caused or contributed to the release or threat of release.

(*vii*) A person that holds only subsurface mineral rights to the property and has not caused or contributed to a release on the property.

(v) "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 of 1980, Public Law 96-510, 94 Stat. 2767.

(w) "Person" means an individual, sole proprietorship, partnership, joint venture, trust, firm, joint stock company, corporation, including a government corporation, association, local unit of government, commission, the state, a political subdivision of the state, an interstate body, the federal government, a political subdivision of the federal government, or any other legal entity.

(x) "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, chapter 1073, 68 Stat. 919, if the release is subject to requirements with respect to financial protection established by the nuclear regulatory commission under section 170 of the atomic energy act of 1954, chapter 1073, 71 Stat. 576, 42 U.S.C. 2210, or, any release of source by-product, or special nuclear material from any processing site designated under section 102(a)(1) title I or 302(a) of title III of the uranium mill tailings radiation control act of 1978, 42 U.S.C. 7912 and 7942.

(*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 a pesticide, or a combination

of these substances. As used in this subparagraph, fertilizer and soil conditioner have the meaning given to these terms in the fertilizer act of 1975, Act No. 198 of the Public Acts of 1975, being sections 286.751 to 286.767, and pesticide has the meaning given to that term in the pesticide control act, Act No. 171 of the Public Acts of 1976, being sections 286.551 to 286.581 of the Michigan Compiled Laws.

(y) "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.

(z) "Remedial action plan" means a work plan for performing remedial action under this act.

(aa) "Response activity" means evaluation, interim response activity, remedial action, 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 public health, and enforcement actions related to any response activity.

(bb) "Response activity costs" or "costs of response activity" means all costs incurred in taking or conducting a response activity, including enforcement costs.

(cc) "Rule" means a rule promulgated pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(dd) "Science advisory council" means the science advisory council created in section 11d.

(ee) "Site" means the location of environmental contamination.

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

Sec. 3a. (1) For purposes of this act, a commercial lending institution holding a security interest in a facility or other person holding a security interest in a facility participates in the management of the facility if that institution or person engages in acts of facility management that constitute actual participation in the management or operational affairs of a facility and that exceed the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations. A commercial lending institution or other person holding a security interest is participating in the management of a facility, while the borrower is still in possession of the facility encumbered by the security interest, if the commercial lending institution or person holding a security interest does any of the following:

(a) Exercises decision making control over the borrower's environmental compliance.

(b) Undertakes responsibility for the borrower's hazardous substance handling or disposal practices.

(c) Exercises control at a level comparable to that of a manager of the borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decision making of the enterprise with respect to either or both of the following:

(*i*) Environmental compliance.

(*ii*) All, or substantially all, of the operational aspects of the enterprise other than environmental compliance. As used in this subparagraph, "operational aspects of the enterprise" includes functions such as that of facility or plant manager, operations manager, chief operating officer, or chief executive officer. Operational aspects of the enterprise do not include the financial or administrative aspects of the enterprise such as that of credit manager, accounts payable or receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(2) For purposes of this act, the following do not constitute participation in the management of a facility by a commercial lending institution or other person holding a security interest in the facility:

(a) The mere capacity to influence, or ability to influence, or the unexercised right to control facility operations.

(b) An act or omission prior to the time that indicia of ownership are held primarily to protect a security interest.

(c) Undertaking or requiring an environmental inspection of the facility in which indicia of ownership are to be held, or requiring a prospective borrower to undertake response activities at a facility or to comply or come into compliance, whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest, with any applicable law, rule, or regulation.

(d) Actions that are consistent with holding ownership indicia primarily to protect a security interest. The authority for the commercial lending institution or other person holding a security interest to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations, or promises from the borrower. Loan policing and workout activities cover and include all activities up to foreclosure and its equivalents.

(e) Engaging in policing activities prior to foreclosure if the commercial lending institution or other person holding a security interest does not by such actions participate in the management of the facility as described in subsection (1)(a) to (c). Permissible actions include, but are not limited to, 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 applicable federal, state, and local environmental and other laws, rules, and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the facility, including on-site inspections, in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest. A commercial lending institution or other person holding a security interest who engages in workout activities prior to foreclosure and its equivalents will remain within the exemption provided that the commercial lending institution or other person holding a security interest does not by such action participate in the management of the facility.

(3) As used in this section, "workout" refers to those actions by which a commercial lending institution or other person holding a security interest, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor or to preserve, or prevent the diminution of, the value of the security. Workout activities include, but are not limited to, restructuring or renegotiating the terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance.

Sec. 12a. (1) A person shall not be liable under section 12 if that person establishes by a preponderance of the evidence that the release or threat of release was caused solely by:

(a) An act of God.

(b) An act of war.

(c) An act or omission of a third party other than an employee or agent of the person that may be liable under section 12, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person that may be liable under section 12 if the person that may be liable under section 12 establishes by a preponderance of the evidence both of the following:

(*i*) That he or she exercised due care with respect to the hazardous substance, taking into consideration the characteristics of the hazardous substance, in light of all relevant facts and circumstances.

(*ii*) That he or she took reasonable precautions against reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.

(d) Any combination of subdivision (a), (b), or (c).

(2) The term contractual relationship, as used in subsection (1)(c), includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession, unless both of the following are established:

(a) The real property on which the facility is located was acquired by the person that may be liable under section 12 after the disposal or placement of the hazardous substance on, in, or at the property.

(b) The person that may be liable under section 12 by a preponderance of the evidence proves 1 or more of the following:

(*i*) At the time the person that may be liable under section 12 acquired the property, that person did not know and had no reason to know that a hazardous substance that is the subject of the release or threat of a release was disposed of on, in, or at the facility.

(*ii*) The person that may be liable under section 12 is a state or local unit of government that acquired the property by purchase, gift, transfer, dedication, or condemnation, and, for property acquired after July 1, 1991, the state or local unit of government does all of the following:

(A) Conducts or causes to be conducted a visual inspection of the property and a review of the ownership and use history of the property to determine whether a probability exists that the property is a facility. If the visual inspection or the ownership and use history, or both, show that there may be a release or threat of release, the state or local unit of government shall conduct, or cause to be conducted, an environmental assessment of the property that includes an on-site evaluation of the nature and extent, if any, of the release or threat of release, and an inspection of all permanent structures on the property for the presence of a hazardous substance.

(B) Prior to final acquisition, if the environmental assessment required in subparagraph (*ii*)(A) discloses a release or threat of release, the state or local unit of government shall do all of the following:

(I) Provide a report of the findings and conclusions of the environmental assessment to the governing body of the unit of government.

(II) Provide a public notice of the availability of the report of the findings and conclusions of the environmental assessment.

(III) Submit the report and the environmental assessment to the department.

(C) After final acquisition, if the environmental assessment required in subparagraph (*ii*)(A) disclosed a release or threat of release, the state or local unit of government shall provide the department with a right of entry to the property at all reasonable times for any of the purposes listed in section 10d(3)(a) through (e).

(D) After final acquisition, unless waived by the director through the exercise of his or her discretion, if the environmental assessment required in subparagraph (*ii*)(A) disclosed a release or threat of release, the state or local unit of government shall not transfer any legal interest, or any equitable or possessory interest that relinquishes control over that property for more than 45 days, unless the state or local unit of government does all of the following:

(I) Provide any transferee with a copy of the environmental assessment required in subparagraph (*ii*)(A) prior to the transfer of the property.

(II) Include in any contract for transfer of the property a statement that, absent a covenant not to sue from the state as provided by section 14a, the transferee will be a person that may be liable under section 12 of this act.

(III) Include as a condition to the transfer in any contract for the transfer of the property that the transferee agrees to provide the department with a right of entry to the property at all reasonable times for any of the purposes listed in section 10d(3)(a) through (e) related to a release or threat of release disclosed in the environmental assessment required in subparagraph (*ii*)(A).

(IV) Provide the department with a copy of the contract for transfer of the property and a description of the intended use of the property by the transferee within 14 days of the execution of the transfer.

(*iii*) The person that may be liable under section 12 acquired the property by inheritance.

(3) In addition to establishing 1 or more of the circumstances described in subsection (2)(b)(*i*), (*ii*), or (*iii*), the person that may be liable under section 12 shall establish that he or she has satisfied the requirements of subsection (1)(c)(*i*) and (*ii*).

(4) To establish that the person that may be liable under section 12 had no reason to know, as required under subsection (2)(b)(*i*), the person that may be liable under section 12 shall have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the person that may be liable under section 12, the relationship of the purchase price to the value of the property if uncontaminated by a hazardous substance, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of a release or threat of release at the property, and the ability to detect a release or threat of release by appropriate inspection.

(5) This section shall not diminish the liability of a previous owner or operator of a facility that would otherwise be liable under this act. Notwithstanding this section, if the person that may be liable under section 12 obtained actual knowledge of the release or threat of release at the facility when that person owned the real property and then transferred ownership of the property to another person without disclosing this knowledge, the person shall be liable under section 12 and a defense under this section shall not be available to that person. Nothing in this section shall affect the liability under this act of a person that may be liable under section 12 that, by an act or omission, caused or contributed to the release or threat of release that is the subject of a response activity at the facility.

(6) The state or a local unit of government shall not be liable under this act for costs or damages as a result of response activity taken in response to a release or threat of release. This subsection shall not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the state or local unit of government.

(7) A commercial lending institution that has not participated in the management of a facility prior to taking title acquires a property that is a facility through foreclosure or through acceptance of a deed in lieu of foreclosure for the sole purpose of realizing on a security interest shall not be liable under this act, if 1 or more of the following are true:

(a) The property is a residential property.

(b) The property is an agricultural property.

(c) The commercial lending institution acquired ownership or control of the property involuntarily through a court order or other involuntary circumstance.

(d) The commercial lending institution would otherwise be liable solely under section 12(1)(c) and the commercial lending institution acquired ownership or control of the property prior to August 1, 1990.

(8) If a commercial lending institution that has not participated in the management of a facility prior to taking title, other than those properties described in subsection (7)(a) or (b), conducts, within 180 days before or after taking title to the property, a valid foreclosure environmental assessment prior to disposition of that property, and that foreclosure environmental assessment does not indicate that there was a release or threat of release on the property, there is a rebuttable presumption that the commercial lending institution has satisfied the criteria specified in subsection (1)(c) with respect to that property. The defense to liability in this subsection does not apply to a release that started after the date on which the commercial lending institution acquired title to the property and during the time the commercial lending institution held title to the property.

(9) If a commercial lending institution that prior to taking title of a property through foreclosure or through acceptance of a deed in lieu of foreclosure has not participated in the management of property, other than a property described in subsection (7)(a) or (b), performs a foreclosure environmental assessment on the property within 180 days before or after taking title to the property, and that foreclosure environmental assessment indicates that there is a release or threat of release on that property, the commercial lending institution shall not dispose of that property unless the commercial lending institution provides the department with a complete copy of the results of the foreclosure environmental assessment, and the commercial lending institution enters into an agreement with the department regarding disposition of the property. If a commercial lending institution submits a proposal to the department regarding disposition of the property, the department shall, within 6 months, review the proposal and either approve the proposal or submit changes to the commercial lending institution that would result in approval of the proposal. However, if the commercial lending institution and the department are unable to reach an agreement pertaining to disposition of the property, the commercial lending institution shall not transfer the property, other than to the state. A commercial lending institution that establishes that it has met the requirements of this subsection is not liable under section 12 with respect to that property. After meeting all the provisions of this subsection, a commercial lending institution may immediately transfer to the state property on which there has been a release or a threat of a release if the commercial lending institution complies with all of the following:

(a) Within 9 months following foreclosure and for a period of at least 120 days, the commercial lending institution either lists the facility with a broker, dealer, or agent who deals with the type of property in question, or advertises the facility as being for sale or disposition on at least a monthly basis in either a real estate publication, a trade or other publication suitable for the facility in question, or a newspaper of general circulation of over 10,000 covering the area where the property is located.

(b) The commercial lending institution has taken reasonable care in maintaining and preserving the real estate and permanent fixtures.

(c) The commercial lending institution provides to the department a complete copy of the foreclosure environmental assessment and all other environmental information related to the facility that is available to the commercial lending institution.

(d) If the department has issued an order pursuant to section 10f, the commercial lending institution has complied with the order to the department's satisfaction.

(e) If conditions on the property pose a threat of fire or explosion or present an imminent hazard through direct contact with hazardous substances, the commercial lending institution has undertaken appropriate response activities to abate the threat or hazard.

(10) A commercial lending institution or other person that has not participated in the management of a property prior to assuming ownership or control of the property as a fiduciary, as defined by section 5, or in a representative capacity for a disabled person under section 495, of the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.5 and 700.495 of the Michigan Compiled Laws, and that is acting or has acted in a capacity permitted by the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.1 to 700.993 of the Michigan Compiled Laws, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, or negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution or other person; or any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(11) A commercial lending institution that has not participated in the management of a property prior to assuming ownership or control of the property in a fiduciary capacity, and pursuant to a fiduciary agreement entered into on or before August 1, 1990 owns or controls the property in a fiduciary capacity that is not regulated by Act No. 642 of the Public Acts of 1978 but is authorized by the banking code of 1969, Act No. 319 of the Public Acts of 1969, being sections 487.301 to 487.598 of the Michigan Compiled Laws, or the national bank act, chapter 106, 13 Stat. 99, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution; or any other estate or trust of the decedent, grantor, ward, or other

person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(12) A commercial lending institution that has not participated in the management of a property prior to assuming ownership or control of the property in a fiduciary capacity, and pursuant to a fiduciary agreement entered into after August 1, 1990 owns or controls the property in a fiduciary capacity that is not regulated by Act No. 642 of the Public Acts of 1978 but is authorized by Act No. 319 of the Public Acts of 1969, or the national bank act, chapter 106, 13 Stat. 99, that has served only in an administrative, custodial, or financial capacity with respect to the property, and has not exercised sufficient involvement to control the owner's or operator's handling of a hazardous substance, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution; or any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(13) The defenses to liability under section 12 in subsections (7) to (12) in regard to a facility do not apply when a commercial lending institution, or its agent, employee, or a person retained by the commercial lending institution, caused or contributed to a release or threat of release.

(14) As used in subsections (8) and (9), "foreclosure environmental assessment" means to conduct, or cause to be conducted, a visual inspection of property and a review of the ownership and use history of the property to determine whether there is a release or threat of release. If a visual inspection or the ownership and use history, or both, show that there may be a release or threat of release, a site specific on-site evaluation of the nature and extent, if any, of the release or threat of release shall be conducted, and an inspection of all permanent structures on the property to determine the presence of a hazardous substance shall be conducted.

This act is ordered to take immediate effect.

Co-Clerk of the House of Representatives.

Secretary of the Senate.

Approved _____

Governor.