



HOUSE BILL No. 4721

May 6, 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 and referred to the Committee on Conservation, Environment and Great Lakes.

A bill to amend sections 3 and 12a of Act No. 307 of the Public Acts of 1982, entitled as amended

"The environmental response act,"

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:

1 Section 1. Sections 3 and 12a of Act No. 307 of the Public
2 Acts of 1982, section 3 as amended by Act No. 234 of the Public
3 Acts of 1990 and section 12a as added by Act No. 233 of the
4 Public Acts of 1990, being sections 299.603 and 299.612a of the
5 Michigan Compiled Laws, are amended and section 3a is added to
6 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 ~~a~~ ANY OF THE FOLLOWING:

(i) A state or nationally chartered bank. ~~, a~~

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

(iii) A state or federally chartered credit union. ~~, or~~

(iv) ANY other state or federally chartered lending institution or ~~a~~ regulated affiliate or ~~a~~ regulated subsidiary of any ~~of these entities~~ ENTITY LISTED IN THIS SUBPARAGRAPH OR SUBPARAGRAPHS (i) TO (iii).

1 (v) AN INSURANCE COMPANY AUTHORIZED TO DO BUSINESS IN THIS
2 STATE PURSUANT TO THE INSURANCE CODE OF 1956, ACT NO. 218 OF THE
3 PUBLIC ACTS OF 1956, BEING SECTIONS 500.100 TO 500.8302 OF THE
4 MICHIGAN COMPILED LAWS.

5 (vi) A MOTOR VEHICLE FINANCE COMPANY SUBJECT TO THE MOTOR
6 VEHICLE FINANCE ACT, ACT NO. 27 OF THE EXTRA SESSION OF 1950,
7 BEING SECTIONS 492.101 TO 492.141 OF THE MICHIGAN COMPILED LAWS,
8 WITH NET ASSETS IN EXCESS OF \$50,000,000.00.

9 (vii) A FOREIGN BANK.

10 (viii) A RETIREMENT FUND REGULATED PURSUANT TO STATE LAW OR
11 A PENSION FUND REGULATED PURSUANT TO FEDERAL LAW WITH NET ASSETS
12 IN EXCESS OF \$50,000,000.00.

13 (ix) A STATE OR FEDERAL AGENCY AUTHORIZED BY LAW TO HOLD A
14 SECURITY INTEREST IN REAL PROPERTY.

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

17 (f) "Director" means the director of the department of natu-
18 ral resources.

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

22 (h) "Disposal" means the discharge, deposit, injection,
23 dumping, spilling, leaking, or placing of any hazardous substance
24 into or on any land or water so that the hazardous substance or
25 any constituent of the hazardous substance may enter the environ-
26 ment or be emitted into the air or discharged into any
27 groundwater or surface water.

1 (i) "Enforcement costs" means court expenses, reasonable
2 attorney fees of the attorney general, and other reasonable
3 expenses of an executive department that are incurred in relation
4 to enforcement under this act or rules promulgated under this
5 act, or both.

6 (j) "Environment" or "natural resources" means any land,
7 surface water, groundwater, subsurface, strata, air, fish, wild-
8 life, or biota within the state.

9 (k) "Environmental contamination" means the release of a
10 hazardous substance, or the potential release of a discarded haz-
11 ardous substance, in a quantity, which is or may become injurious
12 to the environment, or to the public health, safety, or welfare.

13 (l) "Evaluation" means those activities including, but not
14 limited to, investigation, studies, sampling, analysis, develop-
15 ment of feasibility studies, and administrative efforts, that are
16 needed to determine the nature, extent, and impact of a release
17 or threat of release and necessary response activities.

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

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

23 (o) "Fund" means the environmental response fund established
24 in section 9. ~~, except as otherwise provided in section 11f.~~

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

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

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

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

10 (iv) "Petroleum" as ~~defined~~ DESCRIBED in SECTION 4(5)(B)
11 OF the leaking underground storage tank act, Act No. 478 of the
12 Public Acts of 1988, being ~~sections 299.831 to 299.850~~
13 SECTION 299.834 of the Michigan Compiled Laws.

14 (q) "Interim response activity" means the cleanup or removal
15 of a released hazardous substance or the taking of other actions,
16 prior to the implementation of a remedial action, as may be nec-
17 essary to prevent, minimize, or mitigate injury to the public
18 health, safety, or welfare, or to the environment. Interim
19 response activity also includes, but is not limited to, measures
20 to limit access, replacement of water supplies, and temporary
21 relocation of people as determined to be necessary by the
22 department. In addition, interim response activity means the
23 taking of other actions as may be necessary to prevent, minimize,
24 or mitigate a threatened release.

25 (r) "Local health department" means that term as defined in
26 section 1105 of the public health code, Act No. 368 of the Public

1 Acts of 1978, being section 333.1105 of the Michigan Compiled
2 Laws.

3 (s) "Local unit of government" means a county, city, town-
4 ship, or village, an agency of a local unit of government, an
5 authority or any other public body or entity created by or pursu-
6 ant to state law. Local unit of government does not include the
7 state or federal government or a state or federal agency.

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

11 ~~(i) A person that, without participating in the management~~
12 ~~of the facility, holds indicia of ownership primarily to protect~~
13 ~~the person's security interest in the facility, including, but~~
14 ~~not limited to, a vendor's interest under a recorded land~~
15 ~~contract. For the purposes of this act, a commercial lending~~
16 ~~institution shall not be construed to be participating in the~~
17 ~~management of a facility by extending credit, providing financial~~
18 ~~services, providing financial advice, or supervising a plan to~~
19 ~~resolve financial difficulties for an operator, or conducting or~~
20 ~~causing to be conducted a prudent or legally required review or~~
21 ~~investigation of environmental matters related to the facility or~~
22 ~~the operator of the facility, if the actions of the commercial~~
23 ~~lending institution do not suggest, condone, or encourage the~~
24 ~~treatment or handling of a hazardous substance by the operator in~~
25 ~~a manner that results in a release.~~

26 (i) ~~(ii)~~ The state or a local unit of government that
27 acquired ownership or control of the facility involuntarily

1 through bankruptcy, tax delinquency, abandonment, A TRANSFER FROM
2 A COMMERCIAL LENDING INSTITUTION PURSUANT TO SECTION 12A(9), or
3 other circumstances in which the government involuntarily
4 acquires title or control by virtue of its governmental function
5 OR AS PROVIDED IN THIS ACT, a local unit of government to which
6 ownership or control of the facility is transferred by the state,
7 or the state or a local unit of government that acquired owner-
8 ship or control of the facility by seizure, receivership, or for-
9 feiture pursuant to the operation of law or by court order. In
10 case of an acquisition described in this subparagraph by the
11 state or a local unit of government, operator means a person that
12 was in control of or responsible for operation of the facility
13 immediately before the state or local unit of government acquired
14 ownership or control. The exclusion provided in this subpara-
15 graph shall not apply to the state or a local unit of government
16 that caused or contributed to the release or threat of a release
17 from the facility.

18 (ii) ~~(iii)~~ The operator of an underground storage tank
19 system, as defined in the leaking underground storage tank act,
20 Act No. 478 of the Public Acts of 1988, being sections 299.831 to
21 299.850 of the Michigan Compiled Laws, from which there is a
22 release or threat of release if all of the following conditions
23 are met:

24 (A) The operator reported the release or threat of release
25 to the department of state police, fire marshal division, within
26 24 hours after confirmation of the release or threat of release.

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

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

9 (iii) ~~(iv)~~ A state or local unit of government that holds
10 or acquires an easement interest in a facility, holds or acquires
11 an interest in a facility by dedication in a plat, or by dedica-
12 tion pursuant to Act No. 283 of the Public Acts of 1909, being
13 sections 220.1 to 239.6 of the Michigan Compiled Laws. The
14 exclusion provided in this subparagraph shall not apply to the
15 state or a local unit of government that holds an easement or
16 dedication if the state or that local unit of government caused
17 or contributed to a release or threat of release, or if equipment
18 owned or operated by the state or that local unit of government
19 caused or contributed to the release or threat of release.

20 (iv) ~~(v)~~ A person that holds an easement interest in a
21 facility for the purpose of conveying or providing goods or serv-
22 ices, including, but not limited to, utilities, sewers, roads,
23 railways, and pipelines; or a person that acquires access through
24 an easement. The exclusion provided in this subparagraph shall
25 not apply to a person that holds an easement if that person
26 caused or contributed to a release or threat of release, or if

1 equipment owned or operated by that person caused or contributed
2 to the release or threat of release.

3 (v) ~~(vi)~~ A person that satisfies all of the following:

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

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

9 (C) The person at the time of transfer of the right to oper-
10 ate on the property discloses any knowledge or information con-
11 cerning the general nature and extent of the release as required
12 in section 10c.

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

15 (i) A person that, without participating in the management
16 of the facility, holds indicia of ownership primarily to protect
17 the person's security interest in the facility, including, but
18 not limited to, a vendor's interest under a recorded land
19 contract. ~~For the purposes of this act, a commercial lending~~
20 ~~institution shall not be construed to be participating in the~~
21 ~~management of a facility by extending credit, providing financial~~
22 ~~services, providing financial advice, or supervising a plan to~~
23 ~~resolve financial difficulties for an owner, or conducting or~~
24 ~~causing to be conducted a prudent or legally required review or~~
25 ~~investigation of environmental matters related to the facility or~~
26 ~~the owner of the facility, if the actions of the commercial~~
27 ~~lending institution do not suggest, condone, or encourage the~~

~~1 treatment or handling of a hazardous substance by the owner in a~~
~~2 manner that results in a release.~~

3 (ii) The state or a local unit of government that acquired
4 ownership or control of the facility involuntarily through bank-
5 ruptcy, tax delinquency, abandonment, A TRANSFER FROM A COMMER-
6 CIAL LENDING INSTITUTION PURSUANT TO SECTION 12A(9), or other
7 circumstances in which the government involuntarily acquires
8 title or control by virtue of its governmental function OR AS
9 PROVIDED IN THIS ACT, a local unit of government to which owner-
10 ship or control of the facility is transferred by the state, or
11 the state or a local unit of government that acquired ownership
12 or control of the facility by seizure, receivership, or forfei-
13 ture pursuant to the operation of law or by court order. In case
14 of an acquisition described in this subparagraph by the state or
15 a local unit of government, owner means any person who owned or
16 controlled activities at the facility immediately before the
17 state or local unit of government acquired ownership or control.
18 The exclusion provided in this subparagraph shall not apply to
19 the state or a local unit of government that caused or contrib-
20 uted to the release or threat of a release from the facility.

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

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

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

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

4 (iv) The owner of an underground storage tank system OR THE
5 PROPERTY ON WHICH AN UNDERGROUND STORAGE TANK SYSTEM IS LOCATED,
6 as defined in the leaking underground storage tank act, Act
7 No. 478 of the Public Acts of 1988, being sections 299.831 to
8 299.850 of the Michigan Compiled Laws, from which there is a
9 release or threat of release if all of the following conditions
10 are met:

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

14 (B) The release or threat of release at the facility is
15 solely the result of a release or threat of release of a regu-
16 lated substance as defined in Act No. 478 of the Public Acts of
17 1988 from an underground storage tank system.

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

22 (v) A state or local unit of government that holds or
23 acquires an easement interest in a facility, holds or acquires an
24 interest in a facility by dedication in a plat, or by dedication
25 pursuant to Act No. 283 of the Public Acts of 1909, being sec-
26 tions 220.1 to 239.6 of the Michigan Compiled Laws. The
27 exclusion provided in this subparagraph shall not apply to the

1 state or a local unit of government that holds an easement or
2 dedication if that state or local unit of government caused or
3 contributed to a release or threat of release, or if equipment
4 owned or operated by the state or that local unit of government
5 caused or contributed to the release or threat of release.

6 (vi) A person that holds an easement interest in a facility
7 for the purpose of conveying or providing goods or services,
8 including, but not limited to, utilities, sewers, roads, rail-
9 ways, and pipelines; or a person that acquires access through an
10 easement. The exclusion provided in this subparagraph shall not
11 apply to a person that holds an easement if that person caused or
12 contributed to a release or threat of release, or if equipment
13 owned or operated by that person caused or contributed to the
14 release or threat of release.

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

18 (v) "Permitted release" means 1 or more of the following:

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

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

23 (iii) A federally permitted release as defined in the com-
24 prehensive environmental response, compensation, and liability
25 act of 1980, Public Law 96-510, 94 Stat. 2767.

26 (w) "Person" means an individual, sole proprietorship,
27 partnership, joint venture, trust, firm, joint stock company,

1 corporation, including a government corporation, association,
2 local unit of government, commission, the state, a political sub-
3 division of the state, an interstate body, the federal govern-
4 ment, a political subdivision of the federal government, or any
5 other legal entity.

6 (x) "Release" includes, but is not limited to, any spilling,
7 leaking, pumping, pouring, emitting, emptying, discharging,
8 injecting, escaping, leaching, dumping, or disposing of a hazard-
9 ous substance into the environment, or the abandonment or dis-
10 carding of barrels, containers, and other closed receptacles con-
11 taining a hazardous substance. Release does not include any of
12 the following:

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

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

18 (iii) A release of source, by-product, or special nuclear
19 material from a nuclear incident, as those terms are defined in
20 the atomic energy act of 1954, chapter 1073, 68 Stat. 919, if
21 the release is subject to requirements with respect to financial
22 protection established by the nuclear regulatory commission under
23 section 170 of the atomic energy act of 1954, chapter 1073, 71
24 Stat. 576, 42 U.S.C. 2210, or, any release of source by-product,
25 or special nuclear material from any processing site designated
26 under section 102(a)(1) title I or 302(a) of title III of the

1 uranium mill tailings radiation control act of 1978, 42 U.S.C.
2 7912 and 7942.

3 (iv) If applied according to label directions and according
4 to generally accepted agricultural and management practices, the
5 application of a fertilizer, soil conditioner, agronomically
6 applied manure, or a pesticide, or a combination of these
7 substances. As used in this subparagraph, fertilizer and soil
8 conditioner have the meaning given to these terms in the fertil-
9 izer act of 1975, Act No. 198 of the Public Acts of 1975, being
10 sections 286.751 to 286.767, and pesticide has the meaning given
11 to that term in the pesticide control act, Act No. 171 of the
12 Public Acts of 1976, being sections 286.551 to 286.581 of the
13 Michigan Compiled Laws.

14 (y) "Remedial action" includes, but is not limited to,
15 cleanup, removal, containment, isolation, destruction, or treat-
16 ment of a hazardous substance released or threatened to be
17 released into the environment, monitoring, maintenance, or the
18 taking of other actions that may be necessary to prevent, mini-
19 mize, or mitigate injury to the public health, safety, or wel-
20 fare, or to the environment.

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

23 (aa) "Response activity" means evaluation, interim response
24 activity, remedial action, or the taking of other actions neces-
25 sary to protect the public health, safety, or welfare, or the
26 environment, or the natural resources. Response activity also
27 includes health assessments or health effect studies carried out

1 under the supervision, or with the approval of, the department of
2 public health, and enforcement actions related to any response
3 activity.

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

7 (cc) "Rule" means a rule promulgated pursuant to the admin-
8 istrative procedures act of 1969, Act No. 306 of the Public Acts
9 of 1969, being sections 24.201 to 24.328 of the Michigan Compiled
10 Laws.

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

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

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

18 SEC. 3A. (1) FOR PURPOSES OF THIS ACT, A COMMERCIAL LENDING
19 INSTITUTION HOLDING A SECURITY INTEREST IN A FACILITY OR OTHER
20 PERSON HOLDING A SECURITY INTEREST IN A FACILITY PARTICIPATES IN
21 THE MANAGEMENT OF THE FACILITY IF THAT INSTITUTION OR PERSON
22 ENGAGES IN ACTS OF FACILITY MANAGEMENT THAT CONSTITUTE ACTUAL
23 PARTICIPATION IN THE MANAGEMENT OR OPERATIONAL AFFAIRS OF A
24 FACILITY AND THAT EXCEED THE MERE CAPACITY TO INFLUENCE, OR ABIL-
25 ITY TO INFLUENCE, OR THE UNEXERCISED RIGHT TO CONTROL FACILITY
26 OPERATIONS. A COMMERCIAL LENDING INSTITUTION OR OTHER PERSON
27 HOLDING A SECURITY INTEREST IS PARTICIPATING IN THE MANAGEMENT OF

1 A FACILITY, WHILE THE BORROWER IS STILL IN POSSESSION OF THE
2 FACILITY ENCUMBERED BY THE SECURITY INTEREST, IF THE COMMERCIAL
3 LENDING INSTITUTION OR PERSON HOLDING A SECURITY INTEREST DOES
4 ANY OF THE FOLLOWING:

5 (A) EXERCISES DECISION MAKING CONTROL OVER THE BORROWER'S
6 ENVIRONMENTAL COMPLIANCE.

7 (B) UNDERTAKES RESPONSIBILITY FOR THE BORROWER'S HAZARDOUS
8 SUBSTANCE HANDLING OR DISPOSAL PRACTICES.

9 (C) EXERCISES CONTROL AT A LEVEL COMPARABLE TO THAT OF A
10 MANAGER OF THE BORROWER'S ENTERPRISE, SUCH THAT THE HOLDER HAS
11 ASSUMED OR MANIFESTED RESPONSIBILITY FOR THE OVERALL MANAGEMENT
12 OF THE ENTERPRISE ENCOMPASSING THE DAY-TO-DAY DECISION MAKING OF
13 THE ENTERPRISE WITH THE RESPECT TO EITHER OR BOTH OF THE
14 FOLLOWING:

15 (i) ENVIRONMENTAL COMPLIANCE.

16 (ii) ALL, OR SUBSTANTIALLY ALL, OF THE OPERATIONAL ASPECTS
17 OF THE ENTERPRISE OTHER THAN ENVIRONMENTAL COMPLIANCE. AS USED
18 IN THIS SUBPARAGRAPH, "OPERATIONAL ASPECTS OF THE ENTERPRISE"
19 INCLUDES FUNCTIONS SUCH AS THAT OF FACILITY OR PLANT MANAGER,
20 OPERATIONS MANAGER, CHIEF OPERATING OFFICER, OR CHIEF EXECUTIVE
21 OFFICER. OPERATIONAL ASPECTS OF THE ENTERPRISE DO NOT INCLUDE
22 THE FINANCIAL OR ADMINISTRATIVE ASPECTS OF THE ENTERPRISE SUCH AS
23 THAT OF CREDIT MANAGER, ACCOUNTS PAYABLE OR RECEIVABLE MANAGER,
24 PERSONNEL MANAGER, CONTROLLER, CHIEF FINANCIAL OFFICER, OR SIMI-
25 LAR FUNCTIONS.

26 (2) FOR PURPOSES OF THIS ACT, THE FOLLOWING DO NOT
27 CONSTITUTE PARTICIPATION IN THE MANAGEMENT OF A FACILITY BY A

1 COMMERCIAL LENDING INSTITUTION OR OTHER PERSON HOLDING A SECURITY
2 INTEREST IN THE FACILITY:

3 (A) THE MERE CAPACITY TO INFLUENCE, OR ABILITY TO INFLUENCE,
4 OR THE UNEXERCISED RIGHT TO CONTROL FACILITY OPERATIONS.

5 (B) AN ACT OR OMISSION PRIOR TO THE TIME THAT INDICIA OF
6 OWNERSHIP ARE HELD PRIMARILY TO PROTECT A SECURITY INTEREST.

7 (C) UNDERTAKING OR REQUIRING AN ENVIRONMENTAL INSPECTION OF
8 THE FACILITY IN WHICH INDICIA OF OWNERSHIP ARE TO BE HELD, OR
9 REQUIRING A PROSPECTIVE BORROWER TO UNDERTAKE RESPONSE ACTIVITIES
10 AT A FACILITY OR TO COMPLY OR COME INTO COMPLIANCE, WHETHER PRIOR
11 OR SUBSEQUENT TO THE TIME THAT INDICIA OF OWNERSHIP ARE HELD PRI-
12 MARILY TO PROTECT A SECURITY INTEREST, WITH ANY APPLICABLE LAW,
13 RULE, OR REGULATION.

14 (D) ACTIONS THAT ARE CONSISTENT WITH HOLDING OWNERSHIP INDI-
15 CIA PRIMARILY TO PROTECT A SECURITY INTEREST. THE AUTHORITY FOR
16 THE COMMERCIAL LENDING INSTITUTION OR OTHER PERSON HOLDING A
17 SECURITY INTEREST TO TAKE SUCH ACTIONS MAY, BUT NEED NOT, BE CON-
18 TAINED IN CONTRACTUAL OR OTHER DOCUMENTS SPECIFYING REQUIREMENTS
19 FOR FINANCIAL, ENVIRONMENTAL, AND OTHER WARRANTIES, COVENANTS,
20 CONDITIONS, REPRESENTATIONS, OR PROMISES FROM THE BORROWER. LOAN
21 POLICING AND WORKOUT ACTIVITIES COVER AND INCLUDE ALL ACTIVITIES
22 UP TO FORECLOSURE AND ITS EQUIVALENTS.

23 (E) ENGAGING IN POLICING ACTIVITIES PRIOR TO FORECLOSURE IF
24 THE COMMERCIAL LENDING INSTITUTION OR OTHER PERSON HOLDING A
25 SECURITY INTEREST DOES NOT BY SUCH ACTIONS PARTICIPATE IN THE
26 MANAGEMENT OF THE FACILITY AS DESCRIBED IN SUBSECTION (1)(A) TO
27 (C). PERMISSIBLE ACTIONS INCLUDE, BUT ARE NOT LIMITED TO,

1 REQUIRING THE BORROWER TO UNDERTAKE RESPONSE ACTIVITIES AT THE
2 FACILITY DURING THE TERM OF THE SECURITY INTEREST; REQUIRING THE
3 BORROWER TO COMPLY OR COME INTO COMPLIANCE WITH APPLICABLE FEDER-
4 AL, STATE, AND LOCAL ENVIRONMENTAL AND OTHER LAWS, RULES, AND
5 REGULATIONS DURING THE TERM OF THE SECURITY INTEREST; SECURING OR
6 EXERCISING AUTHORITY TO MONITOR OR INSPECT THE FACILITY, INCLUD-
7 ING ON-SITE INSPECTIONS, IN WHICH INDICIA OF OWNERSHIP ARE MAIN-
8 TAINED, OR THE BORROWER'S BUSINESS OR FINANCIAL CONDITION DURING
9 THE TERM OF THE SECURITY INTEREST. A COMMERCIAL LENDING INSTITU-
10 TION OR OTHER PERSON HOLDING A SECURITY INTEREST WHO ENGAGES IN
11 WORKOUT ACTIVITIES PRIOR TO FORECLOSURE AND ITS EQUIVALENTS WILL
12 REMAIN WITHIN THE EXEMPTION PROVIDED THAT THE COMMERCIAL LENDING
13 INSTITUTION OR OTHER PERSON HOLDING A SECURITY INTEREST DOES NOT
14 BY SUCH ACTION PARTICIPATE IN THE MANAGEMENT OF THE FACILITY.

15 (3) AS USED IN THIS SECTION, "WORKOUT" REFERS TO THOSE
16 ACTIONS BY WHICH A COMMERCIAL LENDING INSTITUTION OR OTHER PERSON
17 HOLDING A SECURITY INTEREST, AT ANY TIME PRIOR TO FORECLOSURE AND
18 ITS EQUIVALENTS, SEEKS TO PREVENT, CURE, OR MITIGATE A DEFAULT BY
19 THE BORROWER OR OBLIGOR OR TO PRESERVE, OR PREVENT THE DIMINUTION
20 OF, THE VALUE OF THE SECURITY. WORKOUT ACTIVITIES INCLUDE, BUT
21 ARE NOT LIMITED TO, RESTRUCTURING OR RENEGOTIATING THE TERMS OF
22 THE SECURITY INTEREST; REQUIRING PAYMENT OF ADDITIONAL RENT OR
23 INTEREST; EXERCISING FORBEARANCE; REQUIRING OR EXERCISING RIGHTS
24 PURSUANT TO AN ASSIGNMENT OF ACCOUNTS OR OTHER AMOUNTS OWING TO
25 AN OBLIGOR; REQUIRING OR EXERCISING RIGHTS PURSUANT TO AN ESCROW
26 AGREEMENT PERTAINING TO AMOUNTS OWING TO AN OBLIGOR; PROVIDING

1 SPECIFIC OR GENERAL FINANCIAL OR OTHER ADVICE, SUGGESTIONS,
2 COUNSELING, OR GUIDANCE.

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

6 (a) An act of God.

7 (b) An act of war.

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

15 (i) That he or she exercised due care with respect to the
16 hazardous substance, taking into consideration the characteris-
17 tics of the hazardous substance, in light of all relevant facts
18 and circumstances.

19 (ii) That he or she took reasonable precautions against rea-
20 sonably foreseeable acts or omissions of a third party and the
21 consequences that foreseeably could result from those acts or
22 omissions.

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

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

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

5 (b) The person that may be liable under section 12 by a pre-
6 ponderance of the evidence proves 1 or more of the following:

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

12 (ii) The person that may be liable under section 12 is a
13 state or local unit of government that acquired the property by
14 purchase, gift, transfer, dedication, or condemnation, and, for
15 property acquired after ~~the effective date of this section~~
16 JULY 1, 1990, the state or local unit of government does all of
17 the following:

18 (A) Conducts or causes to be conducted a visual inspection
19 of the property and a review of the ownership and use history of
20 the property to determine whether a probability exists that the
21 property is a facility. If the visual inspection or the owner-
22 ship and use history, or both, show that there may be a release
23 or threat of release, the state or local unit of government shall
24 conduct, or cause to be conducted, an environmental assessment of
25 the property that includes an on-site evaluation of the nature
26 and extent, if any, of the release or threat of release, and an

1 inspection of all permanent structures on the property for the
2 presence of a hazardous substance.

3 (B) Prior to final acquisition, if the environmental assess-
4 ment required in subparagraph (ii)(A) discloses a release or
5 threat of release, the state or local unit of government shall do
6 all of the following:

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

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

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

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

21 (D) After final acquisition, unless waived by the director
22 through the exercise of his or her discretion, if the environmen-
23 tal assessment required in subparagraph (ii)(A) disclosed a
24 release or threat of release, the state or local unit of govern-
25 ment shall not transfer any legal interest, or any equitable or
26 possessory interest that relinquishes control over that property

1 for more than 45 days, unless the state or local unit of
2 government does all of the following:

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

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

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

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

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

23 (3) In addition to establishing 1 or more of the circum-
24 stances described in subsection (2)(b)(i), (ii), or (iii), the
25 person that may be liable under section 12 shall establish that
26 he or she has satisfied the requirements of subsection (1)(c)(i)
27 and (ii).

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

16 (5) This section shall not diminish the liability of a pre-
17 vious owner or operator of a facility that would otherwise be
18 liable under this act. Notwithstanding this section, if the
19 person that may be liable under section 12 obtained actual knowl-
20 edge of the release or threat of release at the facility when
21 that person owned the real property and then transferred owner-
22 ship of the property to another person without disclosing this
23 knowledge, the person shall be liable under section 12 and a
24 defense under this section shall not be available to that
25 person. Nothing in this section shall affect the liability under
26 this act of a person that may be liable under section 12 that, by
27 an act or omission, caused or contributed to the release or

1 threat of release that is the subject of a response activity at
2 the facility.

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

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

16 (a) The property is a residential property.

17 (b) The property is an agricultural property.

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

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

25 (8) If a commercial lending institution that has not partici-
26 ipated in the management of a facility prior to taking title,
27 other than those properties described in subsection (7)(a) or

1 (b), conducts, within 180 days before or after taking title to
2 the property, a valid foreclosure environmental assessment prior
3 to disposition of that property, and that foreclosure environmen-
4 tal assessment does not indicate that there was a release or
5 threat of release on the property, there is a rebuttable presump-
6 tion that the commercial lending institution has satisfied the
7 criteria specified in subsection (1)(c) with respect to that
8 property. The defense to liability in this subsection does not
9 apply to a release that started after the date on which the com-
10 mercial lending institution acquired title to the property and
11 during the time the commercial lending institution held title to
12 the property.

13 (9) If a commercial lending institution that prior to taking
14 title of a property through foreclosure or through acceptance of
15 a deed in lieu of foreclosure has not participated in the manage-
16 ment of property, other than a property described in
17 subsection (7)(a) or (b), performs a foreclosure environmental
18 assessment on the property within 180 days before or after taking
19 title to the property, and that foreclosure environmental assess-
20 ment indicates that there is a release or threat of release on
21 that property, the commercial lending institution shall not dis-
22 pose of that property unless the commercial lending institution
23 provides the department with a complete copy of the results of
24 the foreclosure environmental assessment, and the commercial
25 lending institution enters into an agreement with the department
26 regarding disposition of the property. If a commercial lending
27 institution submits a proposal to the department regarding

1 disposition of the property, the department shall, within 6
2 months, review the proposal and either approve the proposal or
3 submit changes to the commercial lending institution that would
4 result in approval of the proposal. However, if the commercial
5 lending institution and the department are unable to reach an
6 agreement pertaining to disposition of the property, the commer-
7 cial lending institution shall not transfer the property, other
8 than to the state. A commercial lending institution that estab-
9 lishes that it has met the requirements of this subsection
10 ~~shall~~ IS not ~~be~~ liable under section 12 with respect to that
11 property. AFTER MEETING ALL THE PROVISIONS OF THIS SUBSECTION, A
12 COMMERCIAL LENDING INSTITUTION MAY IMMEDIATELY TRANSFER TO THE
13 STATE PROPERTY ON WHICH THERE HAS BEEN A RELEASE OR A THREAT OF A
14 RELEASE IF THE COMMERCIAL LENDING INSTITUTION COMPLIES WITH ALL
15 OF THE FOLLOWING:

16 (A) WITHIN 9 MONTHS FOLLOWING FORECLOSURE AND FOR A PERIOD
17 OF AT LEAST 120 DAYS, THE COMMERCIAL LENDING INSTITUTION EITHER
18 LISTS THE FACILITY WITH A BROKER, DEALER, OR AGENT WHO DEALS WITH
19 THE TYPE OF PROPERTY IN QUESTION, OR ADVERTISES THE FACILITY AS
20 BEING FOR SALE OR DISPOSITION ON AT LEAST A MONTHLY BASIS IN
21 EITHER A REAL ESTATE PUBLICATION, A TRADE OR OTHER PUBLICATION
22 SUITABLE FOR THE FACILITY IN QUESTION, OR A NEWSPAPER OF GENERAL
23 CIRCULATION OF OVER 10,000 COVERING THE AREA WHERE THE PROPERTY
24 IS LOCATED.

25 (B) THE COMMERCIAL LENDING INSTITUTION DOES NOT REMOVE PER-
26 MANENT FIXTURES OR ALLOW PERMANENT FIXTURES TO BE REMOVED LEGALLY
27 OR ILLEGALLY BY OTHERS.

1 (C) THE COMMERCIAL LENDING INSTITUTION PROVIDES TO THE
2 DEPARTMENT A COMPLETE COPY OF THE FORECLOSURE ENVIRONMENTAL
3 ASSESSMENT AND ALL OTHER ENVIRONMENTAL INFORMATION RELATED TO THE
4 FACILITY THAT IS AVAILABLE TO THE COMMERCIAL LENDING INSTITUTION.

5 (D) IF THE DEPARTMENT HAS ISSUED AN ORDER PURSUANT TO SEC-
6 TION 10F, THE COMMERCIAL LENDING INSTITUTION HAS COMPLIED WITH
7 THE ORDER TO THE DEPARTMENT'S SATISFACTION.

8 (E) IF CONDITIONS ON THE PROPERTY POSE A THREAT OF FIRE OR
9 EXPLOSION OR EXPOSE INDIVIDUALS TO DIRECT CONTACT WITH HAZARDOUS
10 SUBSTANCES IN EXCESS OF DIRECT CONTACT CRITERIA ESTABLISHED IN
11 RULES PROMULGATED UNDER THIS ACT, THE COMMERCIAL LENDING INSTITU-
12 TION HAS UNDERTAKEN APPROPRIATE RESPONSE ACTIVITIES TO ABATE THE
13 THREAT OR EXPOSURE.

14 (10) A commercial lending institution or other person that
15 has not participated in the management of a property prior to
16 assuming ownership or control of the property as a fiduciary, as
17 defined by section 5 of the revised probate code, Act No. 642 of
18 the Public Acts of 1978, being section 700.5 of the Michigan
19 Compiled Laws, and that is acting or has acted in a capacity per-
20 mitted by the revised probate code, Act No. 642 of the Public
21 Acts of 1978, being sections 700.1 to 700.993 of the Michigan
22 Compiled Laws, shall not be personally liable as an owner or
23 operator of the property under this act. This subsection shall
24 not do either of the following:

25 (a) Relieve the fiduciary from personal liability as the
26 result of the fiduciary's assumption of personal liability, or

1 negligence, gross negligence, or reckless, willful, or
2 intentional misconduct.

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

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

24 (a) Relieve the fiduciary from personal liability as the
25 result of the fiduciary's assumption of personal liability, neg-
26 ligence, gross negligence, or reckless, willful, or intentional
27 misconduct.

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

10 (12) A commercial lending institution that has not partici-
11 pated in the management of a property prior to assuming ownership
12 or control of the property in a fiduciary capacity, and pursuant
13 to a fiduciary agreement entered into after August 1, 1990 owns
14 or controls the property in a fiduciary capacity that is not reg-
15 ulated by Act No. 642 of the Public Acts of 1978 but is autho-
16 rized by ~~the banking code of 1969,~~ Act No. 319 of the Public
17 Acts of 1969, ~~being sections 487.301 to 487.598 of the Michigan~~
18 ~~Compiled Laws,~~ or the national bank act, chapter 106, 13
19 Stat. 99, that has served only in an administrative, custodial,
20 or financial capacity with respect to the property, and has not
21 exercised sufficient involvement to control the owner's or
22 operator's handling of a hazardous substance, shall not be per-
23 sonally liable as an owner or operator of the property under this
24 act. This subsection shall not do either of the following:

25 (a) Relieve the fiduciary from personal liability as the
26 result of the fiduciary's assumption of personal liability,

1 negligence, gross negligence, or reckless, willful, or
2 intentional misconduct.

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

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

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