



HOUSE BILL No. 5365

February 22 1994 Introduced by Reps Alley Middaugh and Bennane and referred to the Committee on Conservation Environment and Great Lakes

A bill to amend sections 14, 14a, 15, and 16 of Act No 307 of the Public Acts of 1982 entitled as amended

The environmental response act,"

sections 14 14a and 15 as added by Act No 234 of the Public Acts of 1990 and section 16 as added by Act No 233 of the Public Acts of 1990 being sections 299 614 299 614a 299 615 and 299 616 of the Michigan Compiled Laws and to add section 13a

THE PEOPLE OF THE STATE OF MICHIGAN ENACT

1 Section 1 Sections 14 14a 15 and 16 of Act No 307 of
2 the Public Acts of 1982 sections 14 14a, and 15 as added by Act
3 No 234 of the Public Acts of 1990 and section 16 as added by Act
4 No 233 of the Public Acts of 1990, being sections 299 614
5 299 614a 299 615 and 299 616 of the Michigan Compiled Laws, are
6 amended and section 13a is added to read as follows

1 SEC 13A (1) FOR 5 YEARS FOLLOWING THE EFFECTIVE DATE OF
2 THIS SECTION A COUNTY IN WHICH THERE IS A CITY WITH A POPULATION
3 OF 750 000 OR MORE MAY DESIGNATE A COUNTY AGENCY WITHIN THAT
4 COUNTY TO IMPLEMENT, ADMINISTER, AND ENFORCE ANY PORTION OF THIS
5 ACT EXCEPT FOR THE AUTHORITY TO PROMULGATE RULES AS PROVIDED FOR
6 IN SECTION 5

7 (2) THE COUNTY AGENCY DESIGNATED BY THE COUNTY SHALL DO ALL
8 OF THE FOLLOWING

9 (A) ADMINISTER IMPLEMENT AND ENFORCE THIS ACT AND RULES
10 PROMULGATED UNDER THIS ACT

11 (B) COMPLY WITH THIS ACT AND RULES PROMULGATED UNDER THIS
12 ACT

13 (C) PROVIDE PUBLIC NOTICE AND PUBLIC PARTICIPATION REQUIRE-
14 MENTS THAT ARE CONSISTENT WITH THIS ACT AND RULES PROMULGATED
15 UNDER THIS ACT

16 (3) NOTWITHSTANDING ANY OTHER STATUTORY PROVISION RULE OR
17 ORDINANCE A COUNTY AGENCY THAT HAS BEEN DESIGNATED PURSUANT TO
18 THIS SECTION SHALL ADMINISTER IMPLEMENT AND ENFORCE THE DELE-
19 GATED AUTHORITY IN THE SAME MANNER AND TO THE SAME EXTENT AS THE
20 STATE THE DEPARTMENT AND THE DEPARTMENT S REPRESENTATIVES AND
21 AGENTS

22 (4) NOTWITHSTANDING ANY OTHER STATUTORY PROVISION RULE OR
23 ORDINANCE, ANY ACTION TAKEN BY A DESIGNATED COUNTY AGENCY PURSU-
24 ANT TO AUTHORITY DESIGNATED TO IT UNDER THIS SECTION INCLUDING
25 THE TAKING OF OR APPROVING OF RESPONSE ACTIVITIES ENTERING INTO
26 CONSENT JUDGMENTS OR CONSENT ORDERS ENTERING INTO COVENANTS NOT
27 TO SUE, OR ASSESSING CIVIL OR CRIMINAL FINES OR PENALTIES, SHALL

1 BE IN LIEU OF ANY SUCH ACTION TAKEN BY THE STATE THE DEPARTMENT
2 OR THE DEPARTMENT S AGENTS A CONSENT JUDGMENT CONSENT AGREE-
3 MENT OR COVENANT NOT TO SUE ENTERED INTO BETWEEN A RESPONSIBLE
4 PARTY AND COUNTY TO WHICH APPROPRIATE AUTHORITY HAS BEEN DESIG-
5 NATED, HAS THE SAME FORCE AND EFFECT AND IS EQUIVALENT TO A
6 CONSENT JUDGMENT, CONSENT AGREEMENT OR COVENANT NOT TO SUE
7 ENTERED INTO WITH THE STATE

8 (5) UNLESS PRIOR CONSENT IS GIVEN BY THE DESIGNATED COUNTY
9 AGENCY THE STATE THE DEPARTMENT AND THE DEPARTMENT S AGENTS
10 AND REPRESENTATIVES SHALL NOT ADMINISTER IMPLEMENT OR ENFORCE
11 ANY AUTHORITY UNDER THIS ACT WITHIN THE JURISDICTIONAL LIMITS OF
12 A COUNTY IN WHICH AN AGENCY HAS BEEN DESIGNATED PURSUANT TO THIS
13 SECTION FOR 5 YEARS FOLLOWING THE EFFECTIVE DATE OF THIS
14 SECTION

15 (6) A COUNTY THAT DESIGNATES AN AGENCY PURSUANT TO THIS SEC-
16 TION SHALL ESTABLISH A SEPARATE FUND MONEY DEPOSITED IN THE
17 FUND SHALL BE USED TO DEFRAY THE COSTS INCURRED BY THE AGENCY IN
18 IMPLEMENTING ADMINISTERING AND ENFORCING THIS ACT

19 (7) ANY FINE OR PENALTY COLLECTED BY A COUNTY AGENCY DESIG-
20 NATED UNDER THIS SECTION, AND ANY FINE OR PENALTY ASSESSED BY A
21 COURT PURSUANT TO SECTION 15 SHALL BE PAID TO THE FUND ESTAB-
22 LISHED PURSUANT TO SUBSECTION (6)

23 Sec 14 (1) The state may in its discretion provide a
24 person with a covenant not to sue concerning any liability to the
25 state under this act including future liability, resulting from
26 a release or threatened release addressed by response activities

1 whether that action is on a facility or off a facility if each
2 of the following is met

3 (a) The covenant not to sue is in the public interest

4 (b) The covenant not to sue would expedite response activity
5 consistent with rules promulgated under this act

6 (c) There is full compliance with a consent order under this
7 act for response to the release or threatened release concerned

8 (d) The response activity has been approved by the
9 department

10 (2) The state shall provide a person to whom the department
11 is authorized under subsection (1) to issue a covenant not to sue
12 for the portion of response activity described in subdivision (a)
13 or (b) with a covenant not to sue with respect to future liabil-
14 ity to the state under this act for a future release or threat-
15 ened release and a person provided the covenant not to sue shall
16 not be liable to the state under section 12 with respect to that
17 release or threatened release at a future time The portion of
18 response activity to which the covenant not to sue pertains is
19 either of the following

20 (a) The transport and secure disposition off site of hazard-
21 ous substances in a facility meeting the requirements of
22 sections 3004(c) (d) (e), (f), (g) (m), (o), (p), (u) and (v)
23 and 3005(c) of the solid waste disposal act title II of Public
24 Law 89-272, 42 U S C 6924 and 6925, if the department has
25 required off-site disposition and has rejected proposed remedial
26 action that is consistent with the rules promulgated under this
27 act that does not include off-site disposition

1 (b) The treatment of hazardous substances so as to destroy
2 eliminate or permanently immobilize the hazardous constituents
3 of the substances so that in the judgment of the department
4 the substances no longer present any current or currently fore-
5 seeable future significant risk to the public health, safety or
6 welfare or to the environment no by-product of the treatment or
7 destruction process presents any significant hazard to the public
8 health safety or welfare or the environment and all
9 by-products are themselves treated destroyed or contained in a
10 manner that assures that the by-products do not present any cur-
11 rent or currently foreseeable future significant risk to the
12 public health safety or welfare or the environment

13 (3) A covenant not to sue concerning future liability to the
14 state shall not take effect until the department certifies that
15 remedial action has been completed in accordance with the
16 requirements of this act at the facility that is the subject of
17 the covenant

18 (4) In assessing the appropriateness of a covenant not to
19 sue granted under subsection (1) and any condition to be included
20 in a covenant not to sue under subsection (1) or (2) the state
21 shall consider whether the covenant or condition is in the public
22 interest on the basis of factors such as the following

23 (a) The effectiveness and reliability of the remedial
24 action, in light of the other alternative remedial actions con-
25 sidered for the facility concerned

26 (b) The nature of the risks remaining at the facility

1 (c) The extent to which performance standards are included
2 in the consent order

3 (d) The extent to which the response activity provides a
4 complete remedy for the facility, including a reduction in the
5 hazardous nature of the substances at the facility

6 (e) The extent to which the technology used in the response
7 activity is demonstrated to be effective

8 (f) Whether the fund or other sources of funding would be
9 available for any additional response activities that might even-
10 tually be necessary at the facility

11 (g) Whether response activity will be carried out, in whole
12 or in significant part by persons that may be liable under
13 section 12

14 (5) A covenant not to sue under this section shall be
15 subject to the satisfactory performance by a person of its obli-
16 gations under the agreement concerned

17 (6) Except for the portion of the remedial action that is
18 subject to a covenant not to sue under subsection (2) or under
19 section ~~11f or~~ 11g a covenant not to sue a person concerning
20 future liability to the state shall include an exception to the
21 covenant that allows the state to sue that person concerning
22 future liability resulting from the release or threatened release
23 that is the subject of the covenant if the liability arises out
24 of conditions that are unknown at the time the department certi-
25 fies under subsection (3) that remedial action has been completed
26 at the facility concerned

1 (7) In extraordinary circumstances the state may determine
2 after assessment of relevant factors such as those referred to in
3 subsection (4) and volume, toxicity mobility strength of evi-
4 dence ability to pay litigative risks public interest consid-
5 erations, precedential value, and inequities and aggravating fac-
6 tors, not to include the exception in subsection (6) if other
7 terms, conditions or requirements of the agreement containing
8 the covenant not to sue are sufficient to provide all reasonable
9 assurances that the public health and the environment will be
10 protected from any future releases at or from the facility

11 (8) The state is authorized to include any provisions pro-
12 viding for future enforcement action under section 10f or 16 that
13 in the discretion of the department are necessary and appropriate
14 to assure protection of the public health safety, welfare, and
15 the environment

16 (9) FOR 5 YEARS FOLLOWING THE EFFECTIVE DATE OF THIS SEC-
17 TION UNLESS A COVENANT NOT TO SUE EXPRESSLY PROVIDES OTHERWISE
18 LIABILITY OF A PERSON UNDER ACT NO 245 OF THE PUBLIC ACTS OF
19 1929 BEING SECTIONS 323 1 TO 323 13A OF THE MICHIGAN COMPILED
20 LAWS ARISING FROM A RELEASE OR A THREATENED RELEASE THAT IS
21 BEING ADDRESSED BY RESPONSE ACTIVITIES SHALL BE INCLUDED WITHIN
22 AND SHALL BE CONCURRENT WITH A COVENANT NOT TO SUE ISSUED TO
23 SUCH PERSON UNDER THIS SECTION FOR THE RELEASE OR THREAT OF
24 RELEASE

25 Sec 14a (1) The state may provide a person who proposes
26 to redevelop or reuse a facility including a vacant
27 manufacturing or abandoned industrial site, with a covenant not

1 to sue concerning liability under section 12 if all of the
2 following conditions are met

3 (a) The covenant not to sue is in the public interest

4 (b) The covenant not to sue will yield new resources to
5 facilitate implementation of response activity

6 (c) The covenant not to sue would expedite response activity
7 consistent with the rules promulgated under this act

8 (d) Based upon available information the department deter-
9 mines that the redevelopment or reuse of the facility is not
10 likely to do any of the following

11 (i) Exacerbate or contribute to the existing release or
12 threat of release

13 (ii) Interfere with the implementation of response
14 activities

15 (iii) Pose health risks related to the release or threat of
16 release to persons who may be present at or in the vicinity of
17 the facility

18 (e) The proposal to redevelop or reuse the facility has eco-
19 nomic development potential

20 (2) A person that requests a covenant not to sue under
21 subsection (1) shall demonstrate to the satisfaction of the state
22 all of the following

23 (a) That the person is financially capable of redeveloping
24 and reusing the facility in accordance with the covenant not to
25 sue

1 (b) That the person is not affiliated in any way with any
2 person that may be liable under section 12 for a release or
3 threat of release at the facility

4 (c) That the redevelopment or reuse of the facility by the
5 person will not result in a release or threat of release

6 (3) A covenant not to sue issued under this section shall
7 address only past releases or threats of release at a facility
8 and shall expressly reserve the right of the state to assert all
9 other claims against the person who proposes to redevelop or
10 reuse the facility, including but not limited to those claims
11 arising from any of the following

12 (a) The release or threat of release of any hazardous sub-
13 stance resulting from the redevelopment or reuse of the
14 facility

15 (b) Exacerbation or contribution of the existing release or
16 threat of release

17 (c) Interference with or failure to cooperate with the
18 department, its contractors or other persons conducting response
19 activities approved by the department

20 (d) Failure to exercise due care with respect to any release
21 or threat of release at the facility

22 (4) A covenant not to sue issued under this section shall
23 provide for an irrevocable right of entry to the department its
24 contractors or other persons performing response activity
25 related to the release or threat of release addressed by the cov-
26 enant not to sue for the purposes listed in section 10d(3)(a)

1 through (e) and for monitoring compliance with the covenant not
2 to sue

3 (5) UNLESS A COVENANT NOT TO SUE EXPRESSLY PROVIDES OTHER-
4 WISE LIABILITY OF A PERSON UNDER ACT NO 245 OF THE PUBLIC ACTS
5 OF 1929 BEING SECTIONS 323 1 TO 323 13A OF THE MICHIGAN COMPILED
6 LAWS, ARISING FROM A PAST RELEASE OR A THREATENED RELEASE AT A
7 SITE PROPOSED FOR REDEVELOPMENT UNDER THIS SECTION SHALL BE
8 INCLUDED WITHIN AND SHALL BE CONCURRENT WITH A COVENANT NOT TO
9 SUE ISSUED TO A PERSON UNDER THIS SECTION

10 Sec 15 (1) Except as otherwise provided in this act, a
11 person including a local unit of government on behalf of its
12 citizens whose health or enjoyment of the environment is or may
13 be adversely affected by a release from a facility or threat of
14 release from a facility other than a permitted release or a
15 release in compliance with applicable federal state and local
16 air pollution control laws by a violation of this act or a rule
17 promulgated or order issued under this act, or by the failure of
18 the directors OR A COUNTY AGENCY DESIGNATED UNDER SECTION 13A to
19 perform a nondiscretionary act or duty under this act may com-
20 mence a civil action against any of the following

21 (a) An owner or operator for injunctive relief necessary to
22 prevent irreparable harm to the public health safety, or wel-
23 fare or the environment from a release or threatened release in
24 relation to that facility

25 (b) A person that is alleged to be in violation of this act
26 or a rule promulgated or order issued under this act in relation
27 to that facility

1 (c) One or more of the directors if it is alleged that 1 or
2 more of the directors failed to perform a nondiscretionary act or
3 duty under this act

4 (D) AN AGENCY DESIGNATED BY A COUNTY PURSUANT TO SECTION 13A
5 IF IT IS ALLEGED THAT THE DESIGNATED COUNTY AGENCY FAILED TO PER-
6 FORM A NONDISCRETIONARY ACT OR DUTY DELEGATED UNDER THIS ACT

7 (2) The circuit court ~~shall have~~ HAS jurisdiction in
8 actions brought under subsection (1)(a) to grant injunctive
9 relief necessary to protect the public health safety or wel-
10 fare or the environment from a release or threatened release
11 The circuit court ~~shall have~~ HAS jurisdiction in actions
12 brought under subsection (1)(b) to enforce this act or a rule
13 promulgated or order issued under this act by ordering such
14 action as may be necessary to correct the violation and to
15 impose any civil fine provided for in this act for the
16 violation A civil fine recovered under this section shall be
17 deposited in the fund HOWEVER A CIVIL FINE RECOVERED UNDER
18 THIS SECTION FOR A VIOLATION THAT OCCURS IN A COUNTY THAT HAS A
19 DESIGNATED AGENCY AS AUTHORIZED IN SECTION 13A SHALL BE DEPOSITED
20 AS PROVIDED IN SECTION 13A(6) The circuit court ~~shall have~~ HAS
21 jurisdiction in actions brought under subsection (1)(c) OR (D) to
22 order 1 or more of the directors OR THE COUNTY AGENCY DESIGNATED
23 UNDER SECTION 13A to perform the nondiscretionary act or duty
24 concerned

25 (3) An action shall not be filed under subsection (1)(a) or
26 (b) unless all of the following conditions exist

1 (a) The plaintiff has given at least 60 days notice in
2 writing of the plaintiff's intent to sue the basis for the suit
3 and the relief to be requested to each of the following

4 (i) The department

5 (ii) The attorney general

6 (iii) The proposed defendants

7 (iv) A COUNTY AGENCY DESIGNATED UNDER SECTION 13A, IN REGARD
8 TO AN ACTION BROUGHT AGAINST THAT AGENCY OR ARISING FROM A SITE
9 LOCATED IN THAT COUNTY

10 (b) The state OR A COUNTY AGENCY DESIGNATED UNDER SECTION
11 13A has not commenced and is not diligently prosecuting an action
12 under this act or under other appropriate legal authority to
13 obtain injunctive relief concerning the facility or to require
14 compliance with this act or a rule or an order under this act

15 (4) An action shall not be filed under subsection (1)(c)
16 until the plaintiff has given in writing at least 60 days notice
17 to the directors of the plaintiff's intent to sue the basis for
18 the suit and the relief to be requested AN ACTION SHALL NOT BE
19 FILED UNDER SUBSECTION (1)(D) UNTIL THE PLAINTIFF HAS GIVEN IN
20 WRITING AT LEAST 60 DAYS NOTICE TO THE DESIGNATED COUNTY AGENCY
21 OF THE PLAINTIFF'S INTENT TO SUE THE BASIS FOR THE SUIT AND THE
22 RELIEF TO BE REQUESTED

23 (5) In issuing a final order in an action brought pursuant
24 to this section the court may award costs of litigation, includ-
25 ing reasonable attorney and expert witness fees to the prevailing
26 or substantially prevailing party if the court determines that an
27 award is appropriate

1 (6) This section shall not affect or otherwise impair the
2 rights of any person under federal state or common law

3 (7) An action under subsection (1)(a) or (b) shall be
4 brought in the circuit court for the circuit in which the alleged
5 release threatened release or other violation occurred An
6 action under subsection (1)(c) shall be brought in the circuit
7 court for Ingham county AN ACTION UNDER SUBSECTION (1)(D) SHALL
8 BE BROUGHT IN THE CIRCUIT COURT FOR THE COUNTY IN WHICH THE
9 AGENCY HAS BEEN DESIGNATED PURSUANT TO SECTION 13A OF THIS ACT

10 Sec 16 (1) In addition to other relief authorized by law
11 the attorney general may on behalf of the state commence a
12 civil action seeking 1 or more of the following

13 (a) Temporary or permanent injunctive relief necessary to
14 protect the public health safety or welfare, or the environment
15 from the release or threat of release

16 (b) Recovery of state response activity costs pursuant to
17 section 12

18 (c) Damages for the full value of injury to destruction of
19 or loss of natural resources resulting from the release or threat
20 of release including the reasonable costs of assessing the
21 injury destruction or loss resulting from the release or threat
22 of release

23 (d) A declaratory judgment on liability for future response
24 costs and damages

25 (e) A civil fine of not more than \$1 000 00 for each day of
26 noncompliance without sufficient cause with a written request of
27 the director pursuant to section 10a(4) A fine imposed under

1 this subdivision shall be based on the seriousness of the
2 violation and any good faith efforts of the person to comply with
3 the request of the director

4 (f) A civil fine of not more than \$10 000 00 for each day of
5 violation of this act or a rule promulgated under this act A
6 fine imposed under this subdivision shall be based upon the seri-
7 ousness of the violation and any good faith efforts of the person
8 to comply with this act or a rule promulgated under this act

9 (g) A civil fine of not more than \$25 000 00 for each day of
10 violation of a judicial order or an administrative order issued
11 pursuant to section 10f, including exemplary damages pursuant to
12 section 10f

13 (h) Enforcement of an administrative order issued pursuant
14 to section 10f

15 (i) Enforcement of information gathering and entry authority
16 pursuant to section 10d

17 (j) Enforcement of the reporting requirements under section
18 10a(2) and (6)

19 (k) Any other relief necessary for the enforcement of this
20 act

21 (2) If an action is brought under this act by a plaintiff
22 other than the attorney general, the plaintiff shall, at the time
23 of filing, provide a copy of the complaint to the attorney
24 general, OR, IF THE ACTION IS BROUGHT WITH RESPECT TO A SITE IN A
25 COUNTY WITH AN AGENCY DESIGNATED UNDER SECTION 13A, THEN THE
26 PLAINTIFF SHALL, AT THE TIME OF FILING PROVIDE A COPY OF THE
27 COMPLAINT TO THE DESIGNATED COUNTY AGENCY

1 (3) Except as otherwise provided in this act an action
2 brought under this act may be brought in the circuit court for
3 the county of Ingham in the county in which the defendant
4 resides has a place of business, or in which the registered
5 office of a defendant corporation is located, or in the county
6 where the release occurred

7 (4) A state court shall not have jurisdiction to review
8 challenges to a response activity selected or approved by the
9 department under this act or to review an administrative order
10 issued under this act in any action except an action that is 1 of
11 the following

12 (a) An action to recover response costs, damages, or for
13 contribution

14 (b) An action by the state to enforce an administrative
15 order under this act or by any other person under
16 section 15(1)(b) to enforce an administrative order or to recover
17 a fine for violation of an order

18 (c) An action pursuant to section 10f(5) for review of a
19 decision by the department denying or limiting reimbursement

20 (d) An action pursuant to section 15 challenging a response
21 activity selected or approved by the department if such action
22 is filed after the completion of the response activity

23 (e) An action by the state pursuant to section 12(6) to
24 compel response activity

25 (5) In any judicial action under this act judicial review
26 of any issues concerning the selection or adequacy of a response
27 activity taken, ordered, or agreed to by the state shall be

1 limited to the administrative record If the court finds that
2 the record is incomplete or inadequate the court may consider
3 supplemental material in the action In considering objections
4 raised in a judicial action under this act, the court shall
5 uphold the state's decision in selecting a response activity
6 unless the objecting party can demonstrate based on the adminis-
7 trative record that the decision was arbitrary and capricious or
8 otherwise not in accordance with law In reviewing alleged pro-
9 cedural errors the court may disallow costs or damages only to
10 the extent the errors were so serious and related to matters of
11 such central importance that the activity would have been signif-
12 icantly changed had the errors not been made

13 (6) In an action commenced under this act, any person may
14 intervene as a matter of right if that person claims an interest
15 relating to the subject matter of the action and is situated so
16 that the disposition of the action may as a practical matter
17 impair or impede the person's ability to protect that interest
18 unless the court finds the person's interest is adequately repre-
19 sented by an existing party