House
Legislative
Analysis
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LUST LIABILITY

House Bills 5380 and 5381 as introduced
First Analysis (11-30-95)

Sponsor: Rep. Ken Sikkema
Committee: Conservation, Environment, and Great Lakes

THE APPARENT PROBLEM:

Public Acts 22 and 71 of 1995 overhauled the Natural Resources and Environmental Protection Act (NREPA) to eliminate liability for cleanup costs for owners and operators who did not cause contamination at a facility, and to revise the procedures for reporting and cleaning up releases from underground storage tanks, respectively. However, the provisions of Public Act 71 reportedly contain ambiguous language regarding the liability of certain persons for the cleanup costs associated with contamination: the act specifies that, at sites where a release is solely from an underground storage tank system, the owner or operator is subject to the provisions of Part 213 of the act, which requires the use of procedures outlined in the American Society for Testing and Materials document, "Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA), with specific degrees of cleanup for regulated substances that pose a carcinogenic risk or an adverse health affect on humans. The act also specifies that if a release is not solely from an underground storage tank system, then the owner or operator may or may not choose to conduct the corrective actions specified in Part 213. In either situation, the act specifies that the owner or operator is excluded from liability for cleanup costs. On the other hand, Public Act 71 also imposes civil penalties upon a person responsible for an activity causing a release that exceeds the concentrations allowed under the act for residential, commercial, recreational, or industrial use. Legislation has been proposed that would clear up this ambiguity by stressing that the owner or operator of a leaking underground storage tank is liable only if he or she caused the contamination, and by specifying that situations involving leaking underground storage tanks are to be governed by the provisions of Part 213 of the act.

THE CONTENT OF THE BILLS:

House Bills 5380 and 5381 (MCL 34.20101 et. al.) would amend the Natural Resources and Environmental Protection Act (NREPA) to clarify who is liable for cleanup costs for leaking underground storage tanks (LUSTs); and to specify, among other things, that the response activities executed on a release from an underground storage tank system would have to be conducted according to the corrective actions specified in Part 213, and not under the provisions specified in Part 201 of the act. The bills would also specify that the liability provisions regarding LUSTs, as specified under Public Act 22 of 1995, are given retroactive application. The bills are tie-barred to each other.

LUST Liability. Currently, NREPA specifies that the owner or operator of an underground storage tank system is exempt from liability for cleanup costs if the release is solely from an underground storage tank system and is subject to the corrective actions required under Part 213 of NREPA, which requires the use of procedures outlined in the American Society for Testing and Materials document, "Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA), relating to leaking underground storage tanks. The act further specifies that, in a "mixed" site where the release is not solely from a LUST, then the owner or operator may or may not choose to conduct the corrective actions required under Part 213. In either situation, the owner or operator is excluded from liability for cleanup costs. House Bill 5380 would amend the act to clarify these provisions, as follows:

**In situations where a release or threat of release at a facility is caused solely by a leaking underground storage tank system, then the corrective actions performed would have to be those specified in Part 213 of NREPA, and the response activities required under Part 201 of the act would not have to be undertaken.

**A person who became the owner or operator of a facility that contained an underground storage tank prior to June 5, 1995 would be liable for response activities only if he or she were responsible for the release.

In addition, the bills would specify that, if a release was not solely from a LUST, the owner or operator could choose to perform either the response activities required under Part 201 or those required under Part 213.

Civil Liability. The act specifies that after June 5, 1995, a person who is responsible for an activity causing a release is subject to a civil fine if the release exceeds the concentrations allowed under the act for residential, commercial, recreational, or industrial use, unless the person makes a good faith effort to prevent the release. House Bill 5380 would amend the act to specify that this provision does not apply in situations involving leaking underground storage tanks (LUSTs). House Bill 5381 would, in addition, delete the current provision which excludes from liability a lender who does not participate in the management of an underground storage tank system, and would specify that the liability provisions specified under Public Act 22 of 1995 be given retroactive application.

Cleanup Criteria. Currently, under the Natural Resources and Environmental Protection Act, the Department of Natural Resources (DNR) must establish cleanup criteria for corrective action activities involving underground storage tanks, based on the procedures outlined in the American Society for Testing and Materials document, "Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA). The act specifies that, if a cleanup criterion for groundwater differs from a) the state drinking water standard or b) criteria for adverse aesthetic characteristics derived under the Administrative Code, the cleanup criterion may comply with either a) or b), unless a consultant retained by the owner or operator determines that compliance is unnecessary because the groundwater use would be reliably restricted according to the provisions of the act. House Bill 5381 would amend the act to require, instead, that the cleanup criterion must be the more stringent of a) or b). The bill would also delete a provision of the act which requires that the DNR determine the applicable laws and regulations to define the cleanup requirements in situations where there are both regulated and unregulated releases at a cleanup site.

Definitions. "Facility" would be redefined under House Bill 5380 to include any area, place, or property where a hazardous substance existed that exceeded the cleanup criteria established under Part 213 for unrestricted residential use. Under the bill, an area at which corrective action had been satisfactorily completed for unrestricted residential use would not be defined as a "facility." Under the act, a "hazardous substance" may be defined as any substance that the department has demonstrated, on a case by case basis, as posing an unacceptable risk to the public health, safety, or welfare, or to the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources; or a hazardous substance as defined under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). It may also include petroleum, as defined in the act. House Bill 5380 would clarify that this refers, instead, to a "regulated substance," as defined in Part 213 of the act, which may include petroleum. In addition, House Bill 5381 would redefine "owner" or "operator" to include a person who is liable for the environmental response activities required under Part 201 of the act.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bills would clarify who is liable for cleanup costs for leaking underground storage tanks (LUSTs). The bills would also clarify that the response activities executed on a release from an underground storage tank system would have to be conducted according to the corrective actions specified in Part 213 of the act -- which establishes cleanup criteria for corrective action activities using procedures outlined in the American Society for Testing and Materials document, "Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites" (RBCA) -- and not according to those specified in Part 201 of the act, which pertains to general environmental response provisions, and which includes the requirement that a Baseline Environmental Assessment (BEA) be conducted at the time of purchase or occupancy of a facility to define the existing environmental conditions.

POSITIONS:

The Department of Environmental Quality (DEQ) supports the bills. (11-28-95)

The Michigan Municipal League supports the bills. (11-29-95)

The Michigan Petroleum Association supports the bills. (11-29-95)

The Michigan State Chamber of Commerce supports the bills. (11-29-95)

The Small Business Association of Michigan supports the bills. (11-29-95)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.