House
Legislative
Analysis
Section

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LUST LIABILITY

House Bill 5380 as enrolled
Public Act 115 of 1996

House Bill 5381 as enrolled
Public Act 116 of 1996

Second Analysis (7-15-96)

Sponsor: Rep. Ken Sikkema
House Committee: Conservation, Environment and Great Lakes
Senate Committee: Natural Resources and Environmental Affairs

THE APPARENT PROBLEM:

Public Acts 22 and 71 of 1995 overhauled the "polluter pay" provisions of 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 324.20101 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); to repeal current provisions of the act pertaining to "de minimis" spills; 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; and that the liability provisions regarding LUSTs, as specified under Public Act 22 of 1995, would be given retroactive application. The bills are tie-barred to each other, and would have immediate effect.

Definitions. House Bill 5381 would exclude from the definition of "contaminated site" a site where corrective action had been completed that satisfied the cleanup criteria for unrestricted residential use. "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. 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.

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 regulated under Part 213 of NREPA, then the corrective actions performed would have to be those specified in Part 213, 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 between June 5, 1995 and the effective date of the bill 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.

"Due Care" Obligations. House Bill 5380 would imposes an additional obligation on the owner or operator of a property site on which environmental contamination existed. Currently, a person who owns or operates a "facility" must exercise the following "due care" measures with regard to any contamination that existed at the site: undertake the measures necessary to prevent exacerbation of the existing contamination; exercise due care on the property site, by undertaking any response activity necessary to mitigate any unacceptable exposure to hazardous substances and to allow the property to be used as intended and in a manner that protected the public health and safety; and take reasonable precautions against foreseeable acts or omissions of a third party and against the foreseeable consequences of these acts. ("Exacerbation" is defined to mean the occurrence of either of the following, resulting from an owner or operator's activity, with respect to existing contamination: contamination that has migrated beyond the boundaries of the property that is the source of the release at levels above the cleanup criteria specified under the bill, unless the criteria is irrelevant because exposure is reliably restricted according to the requirements of the bill; or a change in facility conditions that increased response costs). House Bill 5380 would require, in addition, that the owner or operator of a property exercise due care by undertaking response activity necessary to mitigate fire and explosion hazards due to hazardous substances.

Removal of Contaminated Soil. House Bill 5381 would prohibit the removal of soil from a "site," or contaminated location, to an off-site location unless a determination was made -- based on knowledge of the person undertaking or approving the removal, or on characterization of the soil -- that the soil could be lawfully relocated without posing a threat to the public

health, safety, or welfare, or the environment. Included in this determination would be a consideration of whether the soil was subject to the act's regulations on hazardous waste management and solid waste management. The bill would also specify that soil would be considered a threat to the public health, safety, or welfare, or the environment, if it contained concentrations of regulated substances in excess of the appropriate established cleanup criteria applicable for the location where the soil would be moved. However, if the soil were to be removed from the site for disposal or treatment, then it would have to satisfy the appropriate disposal or treatment regulatory criteria. The bill would also specify the following:

* If land use restrictions were required in order to meet cleanup criteria, they would have to be in place at the location to which the soil would be moved.

* Soil could be relocated only to another location that was similarly contaminated, considering the general nature, concentration, and mobility of regulated substances present at the location to which it would be removed.

* Contaminated soil could not be moved to a location that was not a "site" or contaminated location unless it was taken there for treatment or disposal in conformance with applicable laws and regulations.

* Soil could not be relocated within a site of environmental contamination where a corrective action plan had been approved unless assurances -- based on knowledge of the person undertaking or approving the removal, or on characterization of the soil -- were made that the same degree of control required for cleanup criteria would be provided. However, this prohibition would not apply to soils that were temporarily relocated in order to accomplish corrective actions or utility construction, if these activities were completed in a timely fashion and the short-term hazards were appropriately controlled.

* If soil were being moved off-site from, moved to, or relocated on-site at a site where corrective actions would occur, then the soil could not be removed without prior approval from the department.

* If soil were being relocated in another manner, the owner or operator of the site from which it was moved would have to notify the department within 14 days after it was moved, indicating the location from which it would be removed; the location to which it would be taken; the volume of soil to be removed; a summary of information or data on which the determination was based that the soil did not present a threat to the public health, safety or welfare, or to the environment; and, if land use restrictions applied to the soil when it was relocated, documentation that those restrictions were in place.

Under the bill, the provisions regarding removal of contaminated soil would not apply to soil that had been designated by the department as an "inert material," as that term is defined under Part 115 of the act.

Reporting Requirements. Currently, "executive summaries" of initial assessment, final assessment, and closure reports may be submitted to the department. House Bill 5381 would delete this provision. In addition, the bill would require that, if a "free product" (defined under the act to mean a regulated substance in a liquid phase equal to or greater than 1/8 inch of measurable thickness that was not dissolved in water and that had been released into the environment) was discovered at a "site" after an initial assessment report had been submitted, an owner, operator, or consultant could perform initial response actions and submit an amendment to his or her initial assessment report within 30 days describing the response actions taken as a result of the free product discovery.

Penalties. Currently, the act prescribes penalties that may be imposed on those who fail to complete or submit a required report. House Bill 5381 would specify that -- as of the effective date of the bill -- a penalty could not begin to accrue unless the department had first notified the person on whom the penalty was imposed that he or she was subject to the penalties. The bill would also clarify that the prescribed penalties could not be more than $100 per day for the first 7 days; not more than $500 per day for the next 7 days; and not more than $1,000 per day for each day beyond day 14 that a report was late.

Institutional Controls. Currently, institutional controls must be implemented if the corrective action activities at a site, based on a tier I evaluation, result in anything other than an unrestricted use of the site. House Bill 5381 would, instead, require that institutional controls be implemented if the corrective action activities at a site resulted in a final remedy that relied on tier I commercial or industrial criteria.

Actions Excluded From Provisions. Under the bill, the provisions of Part 213 of the act that were in effect as of May 1, 1995 would be incorporated by reference, and the following actions would still be governed by the provisions of Part 213 of the act that were in effect on that date:

**Any judicial action or bankruptcy claim that had been initiated on or before May 1, 1995.

**An administrative order that had been issued on or before May 1, 1995.

**An enforceable agreement with the state that had been entered into on or before May 1, 1995, under Part 213.

However, the bill would specify that, upon request of a person who had not completed the required corrective actions, the department would approve changes in corrective action to be consistent with the corrective action activities required under Part 213.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency (HFA), a fiscal year 1996-97 supplemental bill for underground storage tank removal and site cleanup would appropriate $150 million from the Underground Storage Tank Financial Assurance Fund to pay invoices received by the state on or before June 29, 1995. The HFA estimates that another appropriation might be needed to cover June, 1995 invoices. In addition, the HFA reports that bond revenue will be derived through a 7/8 cent gas tax. The state intends to sell $100 million of these bonds immediately; and another $50 million sale may be scheduled later in the 1996-97 fiscal year. The HFA also reports that, based on Department of Management and Budget estimates, the 7/8 cent gas tax will be needed through fiscal year 2012-13 to cover eligible expenses. (3-25-96)

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.

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■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.