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BILL ANALYSIS

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House Bill 5380 (Substitute H-1 as passed by the House)
House Bill 5381 (Substitute H-1 as passed by the House)
Sponsor: Representative Ken Sikkema
House Committee: Conservation, Environment and Great Lakes
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 2-6-96

CONTENT

The bills would amend the Natural Resources and Environmental Protection Act to specify liability for cleanup costs for leaking underground storage tanks and require that response activities executed on a release from an underground storage tank system be conducted according to the corrective actions specified in Part 213 (Underground Storage Tanks), and not under Part 201 (Environmental Response).

The bills are tie-barred to each other.

Following is a more detailed description of the bills.

House Bill 5380 (H-1)

The Act specifies that a person who, after June 5, 1995, is responsible for an activity causing a release in excess of the concentrations that satisfy certain criteria, as appropriate for the use of the property, is subject to a civil fine as provided in Part 201 (Environmental Response) unless a fine or penalty has already been imposed for the release under another part of the Act, or the person made a good faith effort to prevent the release and to comply with Part 201. The bill specifies that this provision would not apply to a release from an underground storage tank system as defined in Part 213 (Leaking Underground Storage Tanks).

The Act currently exempts from liability the owner or operator of an underground storage tank system or the property on which an underground storage tank system is located, as defined in Part 213, from which there is a release or threat of release if the release or threat is solely from an underground storage tank system and is subject to corrective action under Part 213. If the release at a facility was not solely the result of a release or threat of release from an underground storage tank system, the owner or operator of the system or the property on which it is located may choose to conduct corrective actions of the release from the underground storage tank system under Part 213.

The bill would delete these provisions and specify, instead, that in spite of any other provision of Part 201, if a release or threat of release at a facility were solely the result of a release or threat of release from an underground storage tank system regulated under Part 213, the response activities implemented at the facility would have to be the corrective actions required under Part 213, and the requirements of Part 201 would not apply to that release. If a release or threat of release at a facility were not solely the result of a release or threat of release from an underground storage tank system, the owner or operator of the underground storage tank system as defined in Part 213 could choose to conduct corrective actions of the release from the system under Part 213, and the requirements of Part 201 would not apply to that release.

The bill also specifies that if the owner or operator of a facility became the owner or operator of the facility on or after June 5, 1995, and prior to the effective date of the bill, and the facility contained an underground storage tank system as defined in Part 213, he or she would be liable under Part 201 only if the owner or operator were responsible for an activity causing a release or threat of release.

The bill would require a person who owned or operated property that he or she knew was a

facility to mitigate fire and explosion hazards due to hazardous substances.

The Act defines "facility" as any area, place, or property where a hazardous substance in excess of the concentrations that satisfy certain requirements specified in Part 201 has been released, deposited, disposed of, or otherwise comes to be located. "Facility" does not include any area, place, or property at which there have been completed response activities that satisfy the cleanup criteria for the residential category provided for in Part 201. The bill would include in the definition of "facility" any area, place, or property where a hazardous substance in excess of the concentrations that satisfied the cleanup criteria for unrestricted residential use under Part 213 had been released, deposited, disposed of, or otherwise came to be located. The bill also would exempt from the definition any area, place, or property at which there had been completed under Part 213 corrective action that satisfied the cleanup criteria for unrestricted residential use.

House Bill 5381 (H-1)

The bill states that the changes in liability provided for in the bill would have to be given retroactive application.

The bill specifies that, in spite of any other provision of Part 213, the following actions would be governed by the provisions of Part 213 that were in effect on May 1, 1995:

-- Any judicial action or claim in bankruptcy that was initiated by any person by May 1, 1995.
-- Any administrative order that was issued by May 1, 1995.
-- An enforceable agreement with the State entered into by May 1, 1995, by any person under Part 213.
-- The provisions of Part 213 that were in effect on May 1, 1995, would be incorporated by reference.

Notwithstanding these provisions, upon request of a person who had not completed implementing corrective actions under Part 213, the Department of Natural Resources (DNR) would have to approve changes in corrective action to be consistent with the Act and the bill.

The Act defines "owner" as a person who holds, or at the time of a release who held, a legal, equitable, or possessory interest of any kind in an underground storage tank system or in the property on which an underground storage tank system is located including, but not limited to, a trust, vendor, vendee, lessor, or lessee. Under the bill, "owner" would apply to a person who held an interest in an underground storage tank system or the property on which it was located *and* who was liable under Part 201. The bill also would delete language that 1) exempts from the definition of "owner" a person or a regulated financial institution who, without participating in the management of an underground storage tank system and who is not otherwise engaged in petroleum production, refining, or marketing relating to the system, is acting in a fiduciary capacity or who holds indicia of ownership primarily to protect the person's or the institution's security interest in the underground storage tank system or the property on which it is located, and 2) specifies that the exclusion does not apply to a person who could benefit financially from the exclusion other than by receiving payment for fees and expenses related to the administration of a trust.

The Act defines "site" as a location where a release has occurred or a threat of release from an underground storage tank system exists. The bill would exclude any location where there was completed corrective action that satisfied the cleanup criteria for unrestricted residential use under Part 213.

The Act specifies that if a cleanup criterion for groundwater differs from either the State drinking water standard, or the criteria for adverse aesthetic characteristics, the cleanup criterion must comply with either of these two standards unless a consultant retained by the owner or operator determines that compliance with either standard is not necessary because the groundwater is reliably restricted. The bill would require the cleanup criterion to comply with the more stringent of the two standards.

The Act specifies that if corrective action is required at a site where there are releases that are regulated under Part 213 and releases that are not regulated under the part, the DNR must determine the applicable laws and regulations to define the cleanup requirements. The bill would delete this provision and specify instead that notwithstanding any other provision of Part 213, if a release or threat of release at a site were not solely the result of a release or threat of release from an underground storage tank system, the owner or

operator of the system could choose to perform response activities under Part 201 in lieu of corrective actions under Part 213.

Further, the bill would prohibit an owner or operator from removing soil, or allowing soil to be removed, from a site to an off-site location unless that person determined that the soil could be lawfully relocated without posing a threat to the public health, safety, or welfare, or the environment. The determination would have to consider whether the soil was subject to regulation under Parts 111 and 115. For these purposes, soil would pose a threat to the public health, safety, or welfare, or the environment if concentrations of regulated substances in the soil exceeded the cleanup criteria that applied to the location to which the soil would be moved or relocated. If, however, the soil were removed from the site for disposal or treatment, it would have to satisfy the appropriate regulatory criteria for disposal or treatment. Any land use restriction that would be required for the application of a criterion 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 the contaminated soil would be removed. Contaminated soil could not be moved to a location that was not a site unless it was taken there for treatment or disposal in conformance with applicable laws and regulations.

The bill specifies that an owner or operator could not relocate soil, or allow soil to be relocated, within a site of environmental contamination where a corrective action plan was approved unless that person provided assurances that the same degree of control required for application of the criteria were provided for the contaminated soil.

The prohibition against relocation of contaminated soil within a site of environmental contamination would not apply to soils that were temporarily relocated for the purpose of implementing corrective actions or utility construction if the corrective actions or utility construction 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 where corrective actions would occur, the soil could not be removed without the prior approval of the DNR. If soil were being otherwise relocated, the owner or operator of the site from which the soil was being moved would have to notify the DNR within 14 days after the soil was moved. The notice would have to include all of the following

-- The location from which soil would be removed.
-- The location to which the soil would be taken
-- The volume of soil to be removed.
-- A summary of information or data on which the owner or operator was basing the determination that the soil did not present a threat to the public health, safety, or welfare, or to the environment.
-- If land use restrictions would apply to the soil when it was relocated, documentation that those restrictions were in place.

The required determination would have to be based on knowledge of the person undertaking or approving the removal or relocation of soil, or on characterization of the soil for the purpose of compliance with these requirements.

The bill specifies that these provisions would not apply to soil that was designated as an inert material.

The Act specifies that within 90 days after a release has been discovered, a consultant retained by the owner or operator must complete an initial assessment report. The consultant must complete a final assessment report within 365 days after the discovery, and a closure report within 30 days after completion of the corrective action. The consultant must submit the reports or executive summaries of them to the DNR. The bill would delete the option of submitting an executive summary. Further, the Act requires the DNR to impose monetary penalties for failure to complete or submit reports in a timely fashion. The bill would allow, rather than require, the DNR to impose the penalties. The bill provides that the penalties specified would be maximum penalties, and that the penalty provision would take effect on the effective date of the bill. In addition, the bill provides that a penalty would not begin to accrue unless the DNR had first notified the person on whom the penalty was imposed that he or she was subject to the penalties.

The bill specifies that if free product were discovered at a site after the submittal of an initial assessment report, the owner or operator, or consultant retained by the owner or operator would have to perform initial response actions as

specified in the Act, and submit to the DNR an amendment to the initial assessment report within 30 days of discovery of the free product describing response actions taken as a result of the free product discovery.

The Act provides that if the corrective action activities at a site, based on a tier I evaluation, will result in anything other than an unrestricted use of the site, certain institutional controls must be implemented. The bill specifies, instead, that the institutional controls would have to be implemented if the corrective action activities at a site resulted in a final remedy that relied on tier I commercial or industrial criteria. The bill also provides that if corrective action activities at a site relied on institutional controls other than those specified for a tier I evaluation, the institutional controls would have to be implemented according to other provisions of the Act. If the corrective action activities at a site relied on a tier II or tier III evaluation, the institutional controls would have to be implemented according to the Act.

The bill would repeal provisions of the Act that pertain to de minimis spills.

MCL 324.20101 et al. (H.B. 5380)
324.21301a et al. (H.B. 5381)

Legislative Analyst: L. Burghardt

FISCAL IMPACT

Fiscal information is not available at this time.

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