

Act No. 115
Public Acts of 1996
Approved by the Governor
March 5, 1996
Filed with the Secretary of State
March 6, 1996

**STATE OF MICHIGAN
88TH LEGISLATURE
REGULAR SESSION OF 1996**

Introduced by Reps. Sikkema, Alley and Middaugh

Reps. Bodem, Brewer, Bush, Byl, Dalman, DeLange, DeMars, Dolan, Fitzgerald, Gagliardi, Geiger, Gernaat, Gnodtke, Goschka, Green, Harder, Horton, Jaye, Jellema, Jersevic, Kukuk, Law, LeTarte, London, Lowe, McBryde, McManus, McNutt, Middleton, Oxender, Perricone, Randall, Rocca, Ryan, Vaughn and Voorhees named co-sponsors

ENROLLED HOUSE BILL No. 5380

AN ACT to amend sections 20101, 20107a, 20114a, and 20126 of Act No. 451 of the Public Acts of 1994, entitled "An act to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, and assessments; to prescribe penalties and provide remedies; to repeal certain parts of this act on a specific date; and to repeal certain acts and parts of acts," section 20101 as amended by Act No. 117 of the Public Acts of 1995 and sections 20107a and 20114a as added and section 20126 as amended by Act No. 71 of the Public Acts of 1995, being sections 324.20101, 324.20107a, 324.20114a, and 324.20126 of the Michigan Compiled Laws; and to add section 20115a.

The People of the State of Michigan enact:

Section 1. Sections 20101, 20107a, 20114a, and 20126 of Act No. 451 of the Public Acts of 1994, section 20101 as amended by Act No. 117 of the Public Acts of 1995 and sections 20107a and 20114a as added and section 20126 as amended by Act No. 71 of the Public Acts of 1995, being sections 324.20101, 324.20107a, 324.20114a, and 324.20126 of the Michigan Compiled Laws, are amended and section 20115a is added to read as follows:

Sec. 20101. (1) As used in this part:

(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) "Baseline environmental assessment" means an evaluation of environmental conditions which exist at a facility at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstance at the facility so that, in the event of a subsequent release, there is a means of distinguishing the new release from existing contamination.

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

(f) "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous substance into or on any land or water so that the hazardous substance or any constituent of the hazardous substance may enter the environment or be emitted into the air or discharged into any groundwater or surface water.

(g) "Enforcement costs" means court expenses, reasonable attorney fees of the attorney general, and other reasonable expenses of an executive department that are incurred in relation to enforcement under this part or rules promulgated under this part, or both.

(h) "Environment" or "natural resources" means land, surface water, groundwater, subsurface, strata, air, fish, wildlife, or biota within the state.

(i) "Environmental contamination" means the release of a hazardous substance, or the potential release of a discarded hazardous substance, in a quantity which is or may become injurious to the environment or to the public health, safety, or welfare.

(j) "Evaluation" means those activities including, but not limited to, investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are needed to determine the nature, extent, and impact of a release or threat of release and necessary response activities.

(k) "Exacerbation" means the occurrence of either of the following caused by an activity undertaken by the person who owns or operates the property, with respect to existing contamination:

(i) Contamination that has migrated beyond the boundaries of the property which is the source of the release at levels above cleanup criteria specified in section 20120a(1)(a) unless a criterion is not relevant because exposure is reliably restricted pursuant to section 20120b.

(ii) A change in facility conditions that increases response activity costs.

(l) "Facility" means any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use.

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

(n) "Foreclosure" means possession of a property by a lender on which it has foreclosed on a security interest or the expiration of a lawful redemption period, whichever occurs first.

(o) "Free product" means a hazardous substance in a liquid phase equal to or greater than 1/8 inch of measurable thickness that is not dissolved in water and that has been released into the environment.

(p) "Fund" means the environmental response fund established in section 20108.

(q) "Hazardous substance" means 1 or more of the following, but does not include fruit, vegetable, or field crop residuals or processing by-products, or aquatic plants, that are applied to the land for an agricultural use or for use as an animal feed, if the use is consistent with generally accepted agricultural management practices developed pursuant to the Michigan right to farm act, Act No. 93 of the Public Acts of 1981, being sections 286.471 to 286.474 of the Michigan Compiled Laws:

(i) Any substance that the department demonstrates, on a case by case basis, poses an unacceptable risk to the public health, safety, or welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources.

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

(iii) Hazardous waste as defined in part 111.

(iv) Petroleum as described in part 213.

(r) "Interim response activity" means the cleanup or removal of a released hazardous substance or the taking of other actions, prior to the implementation of a remedial action, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment. Interim response activity also includes, but is not limited to, measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by the department. In addition, interim response activity means the taking of other actions as may be necessary to prevent, minimize, or mitigate a threatened release.

(s) "Lender" means any of the following:

(i) A state or nationally chartered bank.

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

- (iii) A state or federally chartered credit union.
- (iv) Any other state or federally chartered lending institution or regulated affiliate or regulated subsidiary of any entity listed in this subparagraph or subparagraphs (i) to (iii).
- (v) An insurance company authorized to do business in this state pursuant to the insurance code of 1956, Act No. 218 of the Public Acts of 1956, being sections 500.100 to 500.8302 of the Michigan Compiled Laws.
- (vi) A motor vehicle finance company subject to the motor vehicle finance act, Act No. 27 of the Extra Session of 1950, being sections 492.101 to 492.141 of the Michigan Compiled Laws, with net assets in excess of \$50,000,000.00.
- (vii) A foreign bank.
- (viii) A retirement fund regulated pursuant to state law or a pension fund regulated pursuant to federal law with net assets in excess of \$50,000,000.00.
- (ix) A state or federal agency authorized by law to hold a security interest in real property or a local unit of government holding a reversionary interest in real property.
- (x) A nonprofit tax exempt organization created to promote economic development in which a majority of the organization's assets are held by a local unit of government.
- (xi) Any other person who loans money for the purchase of or improvement of real property.
- (xii) Any person who retains or receives a security interest to service a debt or to secure a performance obligation.
- (t) "Local health department" means that term as defined in section 1105 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.1105 of the Michigan Compiled Laws.
- (u) "Local unit of government" means a county, city, township, or village, an agency of a local unit of government, an authority or any other public body or entity created by or pursuant to state law. Local unit of government does not include the state or federal government or a state or federal agency.
- (v) "Operator" means a person who is in control of or responsible for the operation of a facility. Operator does not include either of the following:
 - (i) A person who holds indicia of ownership primarily to protect the person's security interest in the facility, unless that person participates in the management of the facility as described in section 20101a.
 - (ii) A person who is acting as a fiduciary in compliance with section 20101b.
- (w) "Owner" means a person who owns a facility. Owner does not include either of the following:
 - (i) A person who holds indicia of ownership primarily to protect the person's security interest in the facility, including, but not limited to, a vendor's interest under a recorded land contract, unless that person participates in the management of the facility as described in section 20101a.
 - (ii) A person who is acting as a fiduciary in compliance with section 20101b.
- (x) "Permitted release" means 1 or more of the following:
 - (i) A release in compliance with an applicable, legally enforceable permit issued under state law.
 - (ii) A lawful and authorized discharge into a permitted waste treatment facility.
 - (iii) A federally permitted release as defined in the comprehensive environmental response, compensation, and liability act of 1980, Public Law 96-510, 94 Stat. 2767.
- (y) "Release" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance. Release does not include any of the following:
 - (i) A release that results in exposure to persons solely within a workplace, with respect to a claim that these persons may assert against their employers.
 - (ii) Emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel.
 - (iii) A release of source, by-product, or special nuclear material from a nuclear incident, as those terms are defined in the atomic energy act of 1954, chapter 1073, 68 Stat. 919, if the release is subject to requirements with respect to financial protection established by the nuclear regulatory commission under section 170 of chapter 14 of title I of the atomic energy act of 1954, chapter 1073, 71 Stat. 576, 42 U.S.C. 2210, or any release of source by-product or special nuclear material from any processing site designated under section 102(a)(1) of title I or 302(a) of title III of the uranium mill tailings radiation control act of 1978, Public Law 95-604, 42 U.S.C. 7912 and 7942.
 - (iv) If applied according to label directions and according to generally accepted agricultural and management practices, the application of a fertilizer, soil conditioner, agronomically applied manure, or pesticide, or fruit, vegetable, or field crop residuals or processing by-products, aquatic plants, or a combination of these substances. As used in this subparagraph, fertilizer and soil conditioner have the meaning given to these terms in part 85, and pesticide has the meaning given to that term in part 83.

(v) A release does not include fruits, vegetables, field crop processing by-products, or aquatic plants, that are applied to the land for an agricultural use or for use as an animal feed, if the use is consistent with generally accepted agricultural and management practices developed pursuant to the Michigan right to farm act, Act No. 93 of the Public Acts of 1981, being sections 286.471 to 286.474 of the Michigan Compiled Laws.

(z) "Remedial action" includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.

(aa) "Remedial action plan" means a work plan for performing remedial action under this part.

(bb) "Response activity" means evaluation, interim response activity, remedial action, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of public health and enforcement actions related to any response activity.

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

(dd) "Security interest" means any interest, including a reversionary interest, in real property created or established for the purpose of securing a loan or other obligation. Security interests include, but are not limited to, mortgages, deeds of trusts, liens, and title pursuant to lease financing transactions. Security interests may also arise from transactions such as sale and leasebacks, conditional sales, installment sales, trust receipt transactions, certain assignments, factoring agreements, accounts receivable financing arrangements, consignments, or any other transaction in which evidence of title is created if the transaction creates or establishes an interest in real property for the purpose of securing a loan or other obligation.

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

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

(2) As used in this part, the phrase "a person who is liable" includes a person who is described as being subject to liability in section 20126. The phrase "a person who is liable" does not presume that liability has been adjudicated.

Sec. 20107a. (1) A person who owns or operates property that he or she has knowledge is a facility shall do all of the following with respect to hazardous substances at the facility:

(a) Undertake measures as are necessary to prevent exacerbation of the existing contamination.

(b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.

(c) Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.

(2) Notwithstanding any other provision of this part, a person who violates subsection (1) is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and any fines or penalties imposed under this part resulting from the violation of subsection (1) but is not liable for performance of additional response activities unless the person is otherwise liable under this part for performance of additional response activities. The burden of proof in a dispute as to what constitutes exacerbation shall be borne by the party seeking relief.

(3) Compliance with this section does not satisfy a person's obligation to perform response activities as otherwise required under this part.

(4) Subsection (1) does not apply to the state or to a local unit of government that is not liable under section 20126(3)(a), (b), (c), or (e) or to a local unit of government that acquired property by purchase, gift, transfer, or condemnation prior to the effective date of this section or to a person who is exempt from liability under section 20126(4)(d).

(5) Subsection (1) does not apply to a person who is exempt from liability under section 20126(3)(c) or (d) except with regard to that person's activities at the facility.

Sec. 20114a. (1) A person who, after June 5, 1995, is responsible for an activity causing a release in excess of the concentrations that satisfy the criteria established pursuant to section 20120a(1)(a) through (e), as appropriate for the use of the property, is subject to a civil fine as provided in this part unless a fine or penalty has already been imposed for the release under another part of this act. However, a civil fine shall not be imposed under this section against a person who made a good faith effort to prevent the release and to comply with the provisions of this part.

(2) This section does not apply to a release from an underground storage tank system as defined in part 213.

Sec. 20115a. (1) Notwithstanding any other provision of this part, if a release or threat of release at a facility is 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 shall be the corrective actions required under part 213, and the requirements of section 20114 shall not apply to that release.

(2) Notwithstanding any other provision of this part, if a release or threat of release at a facility is 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 may choose to conduct corrective actions of the release from the underground storage tank system pursuant to part 213, and the requirements of section 20114 shall not apply to that release.

Sec. 20126. (1) Notwithstanding any other provision or rule of law and except as provided in subsections (2), (3), (4), and (5) and section 20128, the following persons are liable under this part:

(a) The owner or operator of a facility if the owner or operator is responsible for an activity causing a release or threat of release.

(b) The owner or operator of a facility at the time of disposal of a hazardous substance if the owner or operator is responsible for an activity causing a release or threat of release.

(c) An owner or operator of a facility who becomes an owner or operator on or after June 5, 1995, unless the owner or operator complies with both of the following:

(i) A baseline environmental assessment is conducted prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure. For purposes of this section, accessing property to conduct a baseline environmental assessment does not constitute occupancy.

(ii) The owner or operator discloses the results of a baseline environmental assessment to the department and subsequent purchaser or transferee if the baseline environmental assessment confirms that the property is a facility.

(d) A person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, by any other person, at a facility owned or operated by another person and containing the hazardous substance. This subdivision does not include either of the following:

(i) A person who arranges the sale or transport of a secondary material for use in producing a new product. As used in this subparagraph, secondary material means scrap metal, paper, plastic, glass, textiles, or rubber, which has demonstrated reuse or recycling potential and has been separated or removed from the solid waste stream for reuse or recycling, whether or not subsequent separation and processing is required, if substantial amounts of the material are consistently used in the manufacture of products which may otherwise be produced from a raw or virgin material.

(ii) A person who arranges the lawful transport or disposal of any product or container commonly used in a residential household, which is in a quantity commonly used in a residential household, and which was used in the person's residential household.

(e) A person who accepts or accepted any hazardous substance for transport to a facility selected by that person.

(f) The estate or trust of a person described in subdivisions (a) to (e).

(2) Subject to section 20107a, an owner or operator who complies with subsection (1)(c) is not liable for contamination existing at the facility at the earlier of the date of purchase, occupancy, or foreclosure, unless the person is responsible for an activity causing the contamination existing at the facility. Subsection (1)(c) does not alter a person's liability with regard to a subsequent release or threat of release at a facility if the person is responsible for an activity causing the subsequent release or threat of release.

(3) Notwithstanding subsection (1), the following persons are not liable under this part unless the person is responsible for an activity causing a release at the facility:

(a) The state or a local unit of government that acquired ownership or control of a facility involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a lender pursuant to subsection (7), or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function or as provided in this part, a local unit of government to which ownership or control of a facility is transferred by the state or by another local unit of government that is not liable under subsection (1), or the state or a local unit of government that acquired ownership or control of a facility by seizure, receivership, or forfeiture pursuant to the operation of law or by court order.

(b) A state or local unit of government that holds or acquires an easement interest in a facility, holds or acquires an interest in a facility by dedication in a plat, or by dedication pursuant to Act No. 283 of the Public Acts of 1909, being sections 220.1 to 239.6 of the Michigan Compiled Laws, or otherwise holds or acquires an interest in a facility for a transportation or utility corridor or public right of way.

(c) A person who holds an easement interest in a facility or holds a utility franchise to provide service, for the purpose of conveying or providing goods or services, including, but not limited to, utilities, sewers, roads, railways, and pipelines; or a person that acquires access through an easement.

(d) A person who owns severed subsurface mineral rights or severed subsurface formations or who leases subsurface mineral rights or formations.

(e) The state or a local unit of government that leases property to a person if the state or the local unit of government is not liable under this part for environmental contamination at the property.

(f) A person who owns or occupies residential real property if hazardous substance use at the property is consistent with residential use.

(g) A person who acquires a facility as a result of the death of the prior owner or operator of the facility, whether by inheritance, devise, or transfer from an inter vivos or testamentary trust.

(h) A person who did not know and had no reason to know that the property was a facility. To establish that the person did not know and did not have a reason to know that the property was a facility, the person shall have undertaken at the time of acquisition all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice. A determination of liability under this section shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated by a hazardous substance, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of a release or threat of release at the property, and the ability to detect a release or threat of release by appropriate inspection.

(i) A utility performing normal construction, maintenance, and repair activities in the normal course of its utility service business. This subsection does not apply to property owned by the utility.

(j) A lessee who uses property for a retail, office, or commercial purpose.

(4) Notwithstanding subsection (1), the following persons are not liable under this part:

(a) The owner or operator of a hazardous waste treatment, storage, or disposal facility regulated pursuant to part 111 from which there is a release or threat of release solely from the treatment, storage, or disposal facility, or a waste management unit at the facility and the release or threat of release is subject to corrective action under part 111.

(b) A lender that engages in or conducts a lawful marshalling or liquidation of personal property if the lender does not cause or contribute to the environmental contamination. This includes holding a sale of personal property on a portion of the facility.

(c) The owner or operator of property onto which contamination has migrated unless that person is responsible for an activity causing the release that is the source of the contamination.

(d) A person who owns or operates a facility in which the release or threat of release was caused solely by 1 or more of the following:

(i) An act of God.

(ii) An act of war.

(iii) An act or omission of a third party other than an employee or agent of the person or a person in a contractual relationship existing either directly or indirectly with a person who is liable under this section.

(5) Notwithstanding any other provision of this part, the state or a local unit of government or a lender who has not participated in the management of the facility is not liable under this part for costs or damages as a result of response activity taken in response to a release or threat of release. For a lender, this subsection applies only to response activity undertaken prior to foreclosure. This subsection does not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the state or local unit of government.

(6) In establishing liability under this section, the department bears the burden of proof. If the department proves a prima facie case against a person, the person shall bear the burden of showing by a preponderance of the evidence that he or she is not liable under this section.

(7) A lender that is not responsible for an activity causing a release at a facility that establishes that it has met the requirements of subsection (1)(c)(i) and (ii) with respect to that facility may immediately transfer to the state the property on which there has been a release or a threat of a release if the lender complies with all of the following:

(a) Within 9 months following foreclosure and for a period of at least 120 days, the lender either lists the facility with a broker, dealer, or agent who deals with the type of property in question, or advertises the facility as being for sale or disposition on at least a monthly basis in either a real estate publication, a trade or other publication suitable for the facility in question, or a newspaper of general circulation of over 10,000 covering the area where the property is located.

(b) The lender has taken reasonable care in maintaining and preserving the real estate and permanent fixtures.

(c) The lender provides to the department all environmental information related to the facility that is available to the lender.

(d) If the department has issued an order pursuant to section 20119, the lender has complied with the order to the department's satisfaction.

(e) If conditions on the property pose a threat of fire or explosion or present an imminent hazard through direct contact with hazardous substances, the lender has undertaken appropriate response activities to abate the threat or hazard.

(8) The department shall establish minimum technical standards for baseline environmental assessments conducted under this section in guidelines pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws.

(9) Notwithstanding subsection (1)(c), if the owner or operator of the facility became the owner or operator of the facility on or after June 5, 1995 and prior to the effective date of the amendatory act that added this subsection, and the facility contains an underground storage tank system as defined in part 213, that owner or operator is liable under this part only if the owner or operator is responsible for an activity causing a release or threat of release.

Section 2. This amendatory act shall not take effect unless House Bill No. 5381 of the 88th Legislature is enacted into law.

This act is ordered to take immediate effect.

Clerk of the House of Representatives.

Secretary of the Senate.

Approved -----

Governor.