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SFA BILL ANALYSIS

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Senate Bill 109 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Shirley Johnson
Committee: Natural Resources and Environmental Affairs

Date Completed: 3-20-01

RATIONALE

Sanitary sewer overflows (SSOs) can pose a severe problem to the environment and public health. These are discharges of raw or inadequately treated sewage from a separate sanitary sewer collection system before the sewage reaches a wastewater treatment plant. The discharges can back up into basements and buildings, flow out of manholes or weak spots in the collection system, and reach ground or surface waters. According to the Department of Environmental Quality (DEQ), SSOs have risen sharply with the aging and inadequate wastewater infrastructure coupled with factors such as groundwater infiltration, heavy rainstorms or snowmelts, equipment or pump failures, blockages, and power failures. The discharges can contain disease-causing bacteria, floating human waste, toxic pollutants, pesticides, and other contaminants that can threaten public health and the environment, contaminate drinking water sources, and damage buildings.

Governmental agencies are required to provide certain necessary services, such as sewer systems, within municipalities, and are responsible for maintaining and upgrading these systems. Some residents blame their municipality for an aging sewer system and its frequent sewer backups. According to an article in the *Detroit Free Press* (1-30-01), at least 110 homes in Birmingham, 91 homes in Beverly Hills, and 20 homes in Farmington Hills experienced sewer overflows in their basements after heavy rain deluged the system in 1998. According to the sanitary sewer overflow county lookup program established by the DEQ, the following counties, among others, have reported cases of SSOs since July 10, 2000: Ingham County, 20 cases; Macomb County, 23 cases; Oakland County, 41 cases; Washtenaw County, 26 cases; and Wayne County, 35 cases.

Under the governmental immunity Act, governmental agencies are immune from tort liability in the exercise or discharge of a governmental function. There are several exceptions to governmental immunity, however, that allow recovery by people injured as a result of a municipality's negligence. In 1998, the Court of Appeals held that municipalities could be held liable for sewer backups without a showing of negligence to establish liability under the trespass-nuisance exception to governmental immunity (*CS&P, Inc.* v *City of Midland*, 229 Mich App141). Apparently, this decision has resulted in numerous lawsuits against municipalities for sewer overflows. Some people believe that a municipality should not be liable for noneconomic damages in sewer overflow lawsuits if the municipality is complying with the DEQ to correct a sewage system violation.

CONTENT

The bill would amend the governmental immunity Act to provide that a political subdivision would be immune from civil liability for noneconomic damages caused as the result of the backup of a sewer system built, operated, maintained, or repaired, or otherwise under the jurisdiction of, the political subdivision under either of the following circumstances:

-- The political subdivision was in full compliance with an order, permit, or other document with an enforceable schedule for addressing the political subdivision's sewage-related water pollution problems that was issued by the Department of Environmental Quality or entered into as part of an action brought by the State against the political subdivision.
-- The political subdivision was not subject to an order, permit, or other document with an enforceable schedule for addressing its sewage-related water pollution problems, but met all of the following: the political subdivision was properly operating and maintaining the sewer system at the time of the backup; the backup was the first experienced by the sewer system; and, following the backup, the political subdivision entered into an order, permit, or other document with an enforceable schedule for addressing the political subdivision's sewage-related water pollution problems.

(Under the Act, "political subdivision" means a municipal corporation, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of two or more of these acting jointly; a district or authority authorized by law or formed by one or more political subdivisions; or an agency, department, court, board, or council of a political subdivision.)

Proposed MCL 691.1416

BACKGROUND

CS&P, Inc. v *City of Midland* involved a case in which water and sewage emanating from toilets and floor drains invaded the premises of a commercial building located in Midland, and caused extensive damage to the building and its contents. Evidently, broken risers in the sewer on a street adjacent to the building caused a blockage, and diverted the water and sewage into the building. The city admitted that it owned the sewer system, and that it was responsible for maintaining, installing, and repairing sanitary sewers. Although the section of the sewer that failed had been cleaned and inspected, no problems had been found.

The plaintiffs alleged that Midland was liable for damages to the building and its contents under a trespass-nuisance theory. The city moved for summary disposition, arguing that because maintenance of a sewer system is a governmental function, the plaintiffs' claims were barred by governmental immunity. The trial court held that the plaintiffs had pleaded causes of action under the trespass-nuisance exception to governmental immunity, and denied the city's motions. The trial court also ruled that negligence was not an element the plaintiffs would have to prove at trial in order to establish Midland's liability under a trespass-nuisance theory. After a jury trial, the plaintiffs were awarded damages.

The sole issue on appeal was whether the trial court had erred by ruling that the plaintiffs did not have to prove negligence in order to establish liability under the trespass-nuisance exception to governmental immunity. The Court of Appeals affirmed the decision of the trial court. As described by the Court of Appeals, trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage". The Court followed a 1994 ruling of the Michigan Supreme Court, which held that negligence is not a necessary element of the cause of action, even if the instrumentality causing the trespass-nuisance was built with all due care and in strict conformity to the plan adopted by a governmental agency or department (*Peterman* v *Department of Natural Resources*, 446 Mich 177).

Although the Michigan Supreme Court in October 1999 granted leave to appeal the Court of Appeals decision in *CS&P*, the Supreme Court reversed its order in January 2000. Therefore, the Court of Appeals decision is final.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would protect municipalities from liability for noneconomic damages caused by sewer backups if they were complying with a DEQ-approved plan to correct and eliminate a sewage system violation. Municipalities could continue to be held accountable for economic damages resulting from a sewage discharge. For example, a city could be required to pay a homeowner for repairing a flooded basement and replacing its contents, but the city would not have to pay additional damages to compensate the homeowner for the unpleasant experience of having sewage in the basement.

According to *CS&P, Inc.* v *City of Midland* (1998), local units are subject to a strict liability standard because plaintiffs need not prove that a local unit was negligent in order to hold it liable under the trespass-nuisance doctrine, which applies only to governmental agencies. This is a higher standard of liability than applies to private entities, who must intend to intrude on the property of another in order to be held liable for trespass. Furthermore, governmental units are being held liable for events beyond their control. For example, an electric utility is generally not liable for damage caused by a power outage resulting from lightening, yet municipalities can be held liable for damages caused by a sewer backup resulting from an unusually large rainstorm. Although the bill would not change the trespass-nuisance doctrine, it would protect governmental units from the imposition of unexpected legal and financial burdens from noneconomic damage awards. While the recovery of economic damage is appropriate, awarding noneconomic damages does little to address the problem of an aging infrastructure.

Opposing Argument

When raw sewage overflows into a home's basement and fills it with stench and slime, sometimes even at knee-deep levels, full restitution of damages, including noneconomic damages, should be allowed. The repugnant smell, harmful indoor mold, decreased home resale value, and

emotional distress are all concerns to be considered after a raw sewage backup in a home.

Response: The bill would have little effect on current cases since noneconomic damages are rarely awarded in basement flooding cases.

Legislative Analyst: N. Nagata
S. Lowe

FISCAL IMPACT

The bill would have an indeterminate impact on local units of government. The extent to which the bill would prevent the payment of noneconomic damages is not determinable.

Fiscal Analyst: B. Bowerman

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