

FERTILIZER REGULATION

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Senate Bill 840 (S-5)

Sponsor: Sen. Wayne Kuipers

House Committee: Agriculture

Senate Committee: Agriculture, Forestry and Tourism

Complete to 11-30-06

A SUMMARY OF SENATE BILL 840 (S-5) AS PASSED BY THE SENATE 6-29-06

BRIEF SUMMARY:

The bill (S-5) would amend Part 85 (Fertilizers) of the Natural Resources and Environmental Protection Act (NREPA) to do the following, among other things:

- Revise fertilizer labeling and invoice requirements, and provide exemptions if no primary nutrients were claimed.
- Remove a prohibition on the sale of fertilizer containing less than a total of 20 percent of certain primary nutrients.
- Revise registration requirements for specialty fertilizers and soil conditioners to require the payment of groundwater and freshwater protection fees, and provide that a distributor would not have to register a brand of fertilizer that was registered by another person, if the label did not differ in any respect.
- Require manufacturers and distributors of *custom blended specialty fertilizers* for nonfarm uses to license their firms for an annual fee of \$100. Manufacturers and distributors of *custom blended soil conditioners* could either license their firms for an annual fee of \$100 or register each grade distributed for a fee of \$25.
- Raise the minimum penalty for nonpayment of inspection fees from \$10 to \$50.
- Prohibit a person from distributing an adulterated product.
- Adopt sampling and analysis methods established by the Association of American Plant Food Control Officials or the Association of Analytical Communities, International, and allow the adoption of other methods as appropriate.
- Establish criminal and civil penalties and enforcement procedures for violations of Part 85.
- Establish a "Fertilizer Control Fund," that would receive all fees, administrative and civil fines, and payments for costs of investigations.
- Provide for the Fund to be used for administering and enforcing Part 85, as well as the development of training programs to ensure the proper use and storage of fertilizer.
- Unlike previous versions of the bill, the S-5 version would *not* authorize the Department of Agriculture to promulgate rules regarding anhydrous ammonia storage, and transfer and application equipment.

- Specific management practices for the application of fertilizer on general turf found in previous versions of the bill, including limits on the amount of phosphorus fertilizer that could be applied without a soil test, have been *removed*.
- Unlike previous versions of the bill, the S-5 version would make *no changes* to Section 8517 concerning local fertilizer regulation.

FISCAL IMPACT:

Because violation of the applicable provisions would continue to be a misdemeanor punishable by up to 90 days in jail, the bill would have no fiscal impact on state or local correctional systems. It would, however, increase allowable fines and thus could benefit local libraries, which are the constitutionally-designated recipients of such revenues.

The bill would have minimal fiscal impact on the Department of Agriculture.

DETAILED SUMMARY:

The following is a more detailed summary of the bill's provisions.

Labels of packaged fertilizers and soil conditioners. The bill would allow, but not require, *soil conditioners* to be labeled by *volume*, in contrast to fertilizers which must be labeled by net weight. Also, the label of material sold as a soil conditioner or as a fertilizer for which no primary nutrients are claimed would not have to list its grade (percentage guarantee of total nitrogen, available phosphate, and soluble potash). Note also that the definition of packaged fertilizers would be amended to eliminate weight and volume limitations on what could be considered a packaged fertilizer.

Invoices of bulk fertilizers. The grade of a fertilizer would no longer have to be listed on the invoice of a fertilizer distributed in bulk if no primary nutrients are claimed.

Purchasers of *custom blends* would have to receive a written or printed invoice at the time of delivery containing the following information "in clearly legible and conspicuous form":

- Name and address of the licensed manufacturer or distributor.
- Name and address of purchaser.
- Date of sale.
- Either the net weight and guaranteed analysis of the custom blend or the net weight and guaranteed analysis of each material used in the formulation of the custom blend, or both.

Grade/guaranteed analysis. Under Part 85, a guaranteed analysis for total nitrogen, available phosphoric acid, and soluble potash must be expressed as whole number percentages on the label, in that order. The bill would require the guaranteed analysis to show the *minimum* percentage of total nitrogen, *available phosphate*, and soluble potash, in that order.

Part 85 currently prohibits the sale of a mixed fertilizer if the sum of its nitrogen, available phosphoric acid, and soluble potash is less than 20 percent, except for certain specialty fertilizers. If elemental guarantees are required by rules promulgated under Part 85, the guaranteed analysis must be expressed as percentages of available phosphorus and soluble potassium. The bill would remove both of these provisions.

The bill would require that the grade for mixed fertilizers be given in whole numbers only, except for specialty fertilizers with a guarantee of less than one percent of total nitrogen, available phosphate, and soluble potash, which could use fractional units. Fertilizer materials, bone meal, manures, and similar materials could also be guaranteed in fractional units. Grades for custom blends could either be given in whole numbers or expressed to the nearest one-tenth of a percent in decimal form. For unacidulated mineral phosphate materials and basic slag, bone, tankage, and other organic phosphatic materials, the total phosphate or degree of fineness, or both, could also be guaranteed.

Under Part 85, additional plant nutrients, other than nitrogen, claimed to be present must be guaranteed on the elemental basis, at certain minimum levels established by rules. The materials must be approved by the director of the Department of Agriculture, with the advice of the director of the Michigan Agricultural Experiment Station. The bill, instead, provides that other beneficial compounds or substances, determinable by laboratory methods, could be guaranteed if approved by the director of the Department of Agriculture.

Registration of specialty fertilizers and soil conditioners. Under Part 85, a person is prohibited from distributing a specialty fertilizer or soil conditioner until the manufacturer or distributor registers it with the Department of Agriculture. The bill would remove the reference to *manufacturer* or *distributor*, and would instead prohibit a person from distributing a specialty fertilizer or soil conditioner unless it was registered with the department.

The bill would also delete a requirement that an application for registration be submitted in duplicate.

Under the bill, a person applying to register a specialty fertilizer or soil conditioner would have to pay not only a registration fee of \$25, as is currently required, but also appropriate groundwater and freshwater protection fees provided for in Section 8715, for each brand and product name of each grade.

A distributor would *not* be required to register a brand of fertilizer that was registered by another person, if the label did not differ in any respect.

A manufacturer or distributor of *custom blended specialty fertilizers* for home lawns, golf courses, recreational areas, or other nonfarm areas would *not* be required to register each grade distributed, but would have to license its firm on an application furnished by the Agriculture Department Director for an annual fee of \$100 and would have to label the fertilizer as required by Section 8502. The label of each fertilizer distributed under this

provision would have to be maintained by the manufacturer or distributor for one year for inspection by the director.

A manufacturer or distributor of *custom blended soil conditioners* would be required either (1) to register each brand or blend distributed or (2) to license its firm on an application furnished by the director for an annual fee of \$100. The fertilizer or soil conditioner distributed under this provision would have to be labeled as required Section 8502. The label of soil conditioner distributed under this provision would have to be maintained by the manufacturer or distributor for one year for inspection by the director.

Inspection fees and penalties. Part 85 provides for an inspection fee of 10 cents per ton to be paid to the Department of Agriculture for all fertilizers or soil conditioners distributed in Michigan (with the exception of peat and peat moss, to which a lesser fee applies, and specialty fertilizers or soil conditioners sold or distributed only in packages of 10 pounds or less, to which no fee applies). Payments due or refunds of less than \$1 are waived. The bill would waive payments due of less than \$5. Refunds of less than \$5 would not be processed, unless requested in writing.

Under Part 85, a penalty of 10 percent of the amount due, with a minimum of \$10, must be assessed against the licensee for all amounts not paid when due. The bill, instead, would require the assessment of a penalty of 10 percent or \$50, whichever was greater, for any report not filed with the department by the due date. (Part 85 requires that a report, with remittance to cover the inspection fees, be filed with the department within 30 days of the close of each period of the year, as specified by the director.)

Current section 8506(3) would be extended so that when more than one person is involved in the distribution of fertilizer or soil conditioners, the last person who is licensed or has the fertilizer or soil conditioner registered and who distributes to either a nonlicensee or *nonregistrant* is responsible for reporting the tonnage and paying the inspection fee. The bill previously only referenced distribution to a nonlicensee.

Records. Part 85 requires each *licensee* to maintain for three years a record of the quantities and grades of fertilizers and soil conditioners sold or distributed by the licensee and to make the records available for inspection and audit on request by the Department of Agriculture. The bill would extend those requirements to *registrants* of fertilizer or soil conditioners in addition to licensees. Records would have to be made available for inspection or audit *during normal business hours*.

Under Part 85, each *vendor of fertilizer and soil conditioner* must maintain shipping data pertaining to fertilizer and soil conditioner such as invoices and freight bills for three years. The bill instead would require each *distributor* to maintain the data.

No distribution of adulterated products. The bill would ban a person from distributing an adulterated product. [Section 8501 defines "adulterated product" as "a product which contains any deleterious or harmful substance in sufficient amount to render it injurious to beneficial plant life, animals, humans, aquatic life, soil or water when applied in

accordance with directions for use on the label, or if adequate warning statements or directions for use which may be necessary to protect plant life, animals, humans, aquatic life, soil or water are not shown on the label."]

Inspection and analysis. Under Part 85, the department must inspect, sample, and analyze fertilizers and soil conditioners distributed within Michigan as necessary to determine compliance with the part. The bill would change "Department" to "Director" and would require the sampling and analysis methods to be those established by the Association of American Plant Food Control Officials or the Association of Analytical Communities, International. The bill would incorporate by reference those standards as they exist on bill's effective date. The department could promulgate rules to update these standards. In addition, the director could adopt, by rule, other appropriate methods in cases not covered by such methods or "in cases where methods are available in which improved applicability has been demonstrated."

Under Part 85, department representatives and inspectors have free access during regular business hours to all premises where fertilizers or soil conditioners are manufactured, sold, or stored, and to all vehicles and vessels used in transporting a fertilizer or soil conditioner in the state. The bill also would provide for free access during *extended business hours*.

Elimination of criminal and civil penalties contained in current Section 8514. Section 8514 currently provides that: "A person who violates this part is guilty of a misdemeanor. A person who violates this part is liable for all damages sustained by a purchaser of a product sold in violation of this part. In an enforcement action, a court, in addition to other penalties provided by law, may order restitution to a party injured by the purchase of product sold in violation of this part." The bill would eliminate this section but provides for criminal and civil penalties in a new Section 8520, as described below.

Fertilizer Control Fund. The bill would create a Fertilizer Control Fund within the State Treasury. The State Treasurer would have to deposit into the Fund all fees, administrative or civil fines, and payments for the costs of investigations. The treasurer also could receive money or other assets from any source for deposit into the Fund and would direct the investment of the Fund. All interest and earnings from Fund investments would have to be credited to the Fund. Money in the Fund at the close of the fiscal year would remain in the Fund and would not lapse to the General Fund. The department could expend money from the Fund, upon appropriation, only for the administration and enforcement of Part 85, and for the development of training programs to ensure the proper use and storage of fertilizer.

Hearings for persons aggrieved by an order. Under the bill, a person aggrieved by an order issued pursuant to Part 85 could request a hearing under the Administrative Procedures Act of 1969.

Civil and criminal remedies and penalties. Under the bill, a person who violated Part 85 or a rule promulgated under it would be subject to the specified penalties regardless of whether he or she acted directly or through an employee or agent.

The bill states that if the director found, after notice and an opportunity for an administrative hearing, that a person had violated or attempted to violate any provision of Part 85 or a rule promulgated under it, he or she could impose an administrative fine of not more than \$1,000 for each violation or attempted violation. (If the director found that a violation or attempted violation had occurred despite the exercise of due care or did not result in significant harm to human health or the environment, he or she could issue a warning instead of imposing a fine.) If a person failed to pay an administrative fine, the director would have to notify the Attorney General, who would bring an action in court to recover the fine.

Moreover, the bill provides that a person who violates Part 85 or a rule promulgated under it, or who attempts to violate this part, is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$5,000 for each violation or attempted violation, in addition to any administrative fines imposed. A person *who knowingly and with malicious intent* violates Part 85 or a rule promulgated under it is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$25,000 for each offense.

The bill also would authorize the director to bring an action to enjoin a violation or threatened violation of Part 85 or a rule in a court of the county where the violation occurred or was about to occur. In addition, the Attorney General could file a civil action in which the court could impose a civil fine of up to \$5,000 for each violation or attempted violation of Part 85 or a rule promulgated under it. The Attorney General could also seek to recover the costs of an investigation from any person who violated or attempted to violate Part 85. Money recovered under these provisions would have to be deposited into the proposed Fertilizer Control Fund.

In defense of an action filed under these provisions, in addition to any other lawful defense, a person could present evidence as an affirmative defense that, at the time of the alleged violation, he or she was in compliance with Part 85 and rules promulgated under it.

A person who violated Part 85 would be liable for all damages sustained by a purchaser of a product sold in violation of the Part, in addition to other sanctions provided by law. In an enforcement action, a court could order restitution to a party injured by the purchase of a product sold in violation of the part. [This language is similar, but not identical, to the language of current Section 8514 which would be deleted by the bill. See above.]

The bill states that applicable provisions of the Revised Judicature Act would apply to civil actions filed under Part 85.

The bill specifies that the penalties and sanctions provided for violations of Part 85 would *not* apply to any of the following:

-- A commercial carrier while lawfully transporting a commercial fertilizer within Michigan, if the carrier, upon request, permitted the Director to copy all records showing the transactions in and movement of the commercial fertilizer.

-- The shipment or movement of any commercial fertilizer considered to be in violation of Part 85, for the specific purpose of disposal or storage when conducted under the approval of the director.

-- Public officials of the state and the federal government while engaged in the performance of their official duties in administering Part 85 or rules promulgated under it.

Under the bill, a court would be prohibited from allowing the recovery of damages by a person against whom an administrative action was brought if it resulted in an order stopping the sale or use of fertilizer or fertilizer material or requiring its seizure, if the court found that there was probable cause for the action or order.

Anhydrous ammonia storage and management practices for application of fertilizer on general turf. A provision to give the department authority under Part 85 to promulgate rules regarding anhydrous ammonia storage, and transfer and application equipment, found in earlier versions of the bill has been removed. In addition, management practices for the application of fertilizer on general turf contained in previous versions of the bill, including limits on the amount of phosphorus fertilizer that could be applied without a soil test indicating a need for it, have been removed.

Local Regulation. Unlike previous versions of the bill, the S-5 version would make no changes to Section 8517.

Effective date. The bill would take effect on October 1, 2006.

Definitions. [Section 8501] The following definitions are either modified or appear for the first time in the bill:

- **"Custom blend"** would mean "a fertilizer blended according to specifications provided to a blender in a soil test nutrient recommendation or blended as specifically requested by the consumer prior to blending."
- **"Distributor"** would mean any person who distributes fertilizer for sale or use in Michigan.
- **"Fertilizer material"** would mean any of the following kinds of fertilizer: (1) one that contains not more than one of the following—total nitrogen, available phosphate, or soluble potash—as primary nutrients; (2) one that has 85 percent or more of its plant nutrient content present in the form of a single chemical compound; or (3) one that is derived from a plant or animal residue or by-product or natural material deposit which has been processed in such a way that its content of plant nutrients has not been materially changed except by purification and concentration.
- **"Fund"** would mean the Fertilizer Control Fund created by Section 8514 of the bill.
- **"Grade"** would mean the percentage guarantee of total nitrogen, available phosphate, and soluble potash of a fertilizer stated in that order. Indication of grade does not apply to peat or peat moss or soil conditioners.
- **"Labeling"** would mean all labels and other written, printed, electronic, or graphic matter upon or accompanying any fertilizer at any time, and includes

advertising, sales literature, brochures, posters, and internet, television, and radio announcements used in promoting the sale of that fertilizer.

- **"Licensee"** would mean a person who receives a license to manufacture or distribute fertilizers under Part 85.
- **"Lot"** would mean an identifiable quantity of fertilizer that could be sampled officially according to methods adopted under Section 8510, that amount contained in a single vehicle, or that amount delivered under a single invoice.
- The current definition of **"maximum contaminant level,"** would be removed.
- **"Mixed fertilizer"** would mean "a fertilizer containing any combination or mixture of fertilizer materials."
- **"Official sample"** would mean a sample of fertilizer taken by the Department of Agriculture in accordance with acceptable sampling methods under Section 8510.
- **"Package or Packaged"** would mean any type of product regulated by this part of the act that is distributed in individual labeled containers (weight and volume limitations found in the current definition would be removed).
- **"Person"** would mean an individual, partnership, association, firm, limited liability company, or corporation.
- **"Primary nutrients"** would mean total nitrogen, available phosphate, or soluble potash, or any combination of those nutrients.
- **"Registrant"** would mean a person who registers a product under Part 85.
- **"Soil conditioner"** would mean "any substance that is used or intended for use to improve the physical characteristics of soil." Examples given in the bill include peat moss, composted products "or other products that are worked into the soil or are applied on the surface to improve the properties of the soil for enhancing plant growth." The following are *not* considered soil conditioners under the bill: "guaranteed plant nutrients, agricultural liming materials, pesticides, unmanipulated animal or vegetable manures, hormones, bacterial inoculants, and products used in directly influencing or controlling plant growth." A soil conditioner for which claims are made of nutrient value would be considered a *fertilizer* for purposes of Part 85.
- **"Specialty fertilizer"** would mean any fertilizer distributed primarily for nonfarm use (use in homes, gardens, lawns, shrubbery, flowers, golf courses, parks, and cemeteries). It could include research and experimental fertilizers.

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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.