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BILL ANALYSIS

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Senate Bill 840 (as introduced 10-25-05)
Sponsor: Senator Wayne Kuipers
Committee: Agriculture, Forestry and Tourism

Date Completed: 6-14-06

CONTENT

The bill would amend Part 85 (Fertilizers) of the Natural Resources and Environmental Protection Act to do the following:

- **Revise fertilizer labeling and invoice requirements, and provide exemptions when no primary nutrients were claimed.**
- **Establish separate invoice requirements for custom blend fertilizers.**
- **Remove a prohibition on the sale of fertilizer containing less than a total of 20% of certain primary nutrients.**
- **Revise registration requirements of specialty fertilizers and soil conditioners, 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 blend soil conditioners or fertilizers to be licensed for an annual fee of \$100, instead of registering each grade distributed for a fee of \$25.**
- **Waive payment of fertilizer inspection fees or refunds of inspection fees less than \$5.**
- **Raise the minimum penalty for nonpayment of inspection fees from \$10 to \$50.**
- **Require a person who registered fertilizer or soil conditioner to maintain a three-year record of quantities and grades sold or distributed.**
- **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.**
- **Authorize the Michigan Department of Agriculture (MDA) to promulgate rules regarding anhydrous ammonia storage and transfer and application equipment.**
- **Establish standards for the application of fertilizer on general turf.**
- **Establish penalties for violations of Part 85.**
- **Provide exemptions from penalties and sanctions for commercial carriers and public officials under certain conditions.**
- **Prohibit a court from allowing the recovery of damages by a person whose fertilizer had been ordered seized under the Act, if the court found probable cause for the order.**

Labeling; Definitions

Currently, "labeling" means all labels and other written, printed, or graphic matter upon or accompanying fertilizer at any time, including advertising or sales literature. The bill also would include electronic material, brochures, posters, and internet, television, and radio announcements used in promoting the sale of the fertilizer.

Under Part 85, packaged fertilizer distributed in the State, including custom mixed fertilizer and soil conditioner, must have an

affixed label. The bill would refer to mixed fertilizer, instead of custom mixed fertilizer. (Under Part 85, "mixed fertilizer" means a fertilizer containing any combination or mixture of fertilizer materials designed for use or claimed to have value in promoting plant growth, including mixtures of fertilizer and pesticide. Under the bill, "mixed fertilizer" would mean a fertilizer containing any combination or mixture of fertilizer materials.)

The affixed label must include the net weight of the contents, except for peat or peat moss, which must be designated by volume. Under the bill, soil conditioners, peat, or peat moss could, but would not have to be, designated by volume.

The label also must include the fertilizer grade unless the material is peat, peat moss, or material sold as a soil conditioner. The bill states that the grade would not be required on the label when no primary nutrients were claimed. "Primary nutrients" would mean total nitrogen, available phosphate, or soluble potash, or any combination of those nutrients.

Currently, "package" or "packaged" means any type of product regulated by Part 85 that is distributed in individual containers with a capacity not exceeding 55 gallons for liquids and 200 pounds for solids. The bill would remove the weight and volume restrictions.

"Soil conditioner", under Part 85, means a substance that is used or intended for use solely for the improvement of the physical nature of soil and for which no claims are made for plant nutrients content; the term does not include guaranteed plant nutrients, hormones, bacterial inoculants, or products used in directly influencing or controlling plant growth. The bill would include in the definition materials such as peat moss and peat products, composted products, synthetic soil conditioners, or other products that are worked into the soil or applied on the surface to improve the properties of the soil for enhancing plant growth. "Soil conditioner" would not include guaranteed plant nutrients, agricultural liming materials, pesticides, unmanipulated animal or vegetable manures, hormones, bacterial inoculants, or products used in directly influencing or controlling plant growth. A soil conditioner that was claimed to have

nutrient value would be considered a fertilizer under Part 85.

Part 85 defines "fertilizer material" as any substance containing any recognized plant nutrient, which is used as a fertilizer or for compounding mixed fertilizers. Under the bill, "fertilizer material" would mean a fertilizer that is any of the following:

- Contains not more than one of the following as primary nutrients: total nitrogen, available phosphate, or soluble potash.
- Has 85% or more of its plant nutrient content present in the form of a single chemical compound.
- Is derived from a plant or animal residue or by-product or natural material deposit that has been processed in such a way that its content of plant nutrients has not been materially changed except by purification and concentration.

Invoice

Part 85 requires a fertilizer distributed in this State in bulk to be accompanied by an invoice or statement to be furnished to the purchaser at the time of delivery, containing the following information:

- Name and address of the licensed manufacturer or distributor.
- Name and address of the purchaser.
- Date of sale.
- Brand or product name.
- Grade.
- Guaranteed analysis.
- Net weight.

Under the bill, the grade would not be required when no primary nutrients were claimed. Custom blends would be exempted from these requirements, and would instead have to be accompanied by an invoice or statement containing the following information:

- 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 guaranteed analysis and net weight of each material used in the formulation of the custom blend, or both.

"Custom blend" would mean a fertilizer blended according to specifications provided to a blender or to meet specific consumer requests prior to blending.

Guaranteed Analysis

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

Part 85 prohibits the sale of a mixed fertilizer if the sum of the guarantees for nitrogen, available phosphoric acid, and soluble potash totals less than 20%, except for specialty fertilizers registered with the MDA. If elemental guarantees are required by rules authorized under Section 8516 (which authorizes the MDA Director to promulgate rules), the guaranteed analysis must be expressed as percentages of available phosphorus and soluble potassium. The bill would remove those provisions.

The bill would require that the grade for mixed fertilizers be given in whole numbers only. Specialty fertilizers with a guarantee of less than 1% of total nitrogen, available phosphate, and soluble potash, however, could use fractional units. Fertilizer materials, bone meal, manures, and similar materials could 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, the total phosphate or degree of fineness, or both, also could be guaranteed.

Under Part 85, additional plant nutrients claimed to be present must be guaranteed on the elemental basis and approved by the MDA Director, 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 MDA Director.

Specialty Fertilizers & 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 MDA. The bill would remove the reference to the manufacturer or distributor, instead prohibiting a person from distributing a specialty fertilizer or soil conditioner unless it was registered with the MDA.

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

The bill states that 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. (The bill would define "distributor" as any person who distributes fertilizer for sale or use in this State.)

A manufacturer or distributor of custom blend soil conditioners, or of custom blend specialty fertilizers for home lawns, golf courses, recreational areas, or other nonfarm areas, would not be required to register each brand, blend, or grade distributed, but would have to license the firm on an application furnished by the Director for an annual fee of \$100 and label the fertilizer or soil conditioner as required under Part 85. The label of each fertilizer or 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

Part 85 provides for an inspection fee of 10 cents per ton to be paid to the MDA for all fertilizers or soil conditioners distributed in the State. Payments due or refunds of less than \$1 are waived. The bill would waive payments due of less than \$5, and refunds of less than \$5 would not be processed unless requested in writing.

Under Part 85, a penalty of 10% 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% or \$50, whichever was greater, for any report not filed with the MDA 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.)

Records

Part 85 requires each licensee to maintain for three years a record of quantities and grades of fertilizer and soil conditioner sold or distributed by the licensee and to make the records available for inspection and audit on request of the MDA. The bill would extend those requirements to registrants of fertilizer or soil conditioners. 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 for three years shipping data pertaining to fertilizer and soil conditioner. The bill instead would require each distributor to maintain the data.

Prohibitions

Part 85 prohibits a person from selling or distributing fertilizer or soil conditioner in violation of the requirements of the part or rules promulgated under it. The bill also would prohibit the use of fertilizer or soil conditioner that violated those requirements.

The bill would prohibit a person from distributing an adulterated product. (Part 85 defines "adulterated product" as a product that contains any deleterious or harmful substance in sufficient amount to render it injurious to beneficial plant life, animal life, human life, or soil or water when applied in accordance with the directions on the label.)

Inspection & Analysis

Under Part 85, the MDA must inspect, sample, and analyze fertilizers and soil conditioners distributed within the State as necessary to determine compliance with the part. The bill 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, as those standards existed on the bill's effective date. The standards would be incorporated by reference, and the

MDA could promulgate rules to update them. The Director also could adopt, by rule, other methods considered appropriate in cases not covered by the specified methods or in cases when demonstrably improved methods were available.

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.

Fertilizer Storage & Application

Part 85 authorizes the MDA to promulgate rules regarding the bulk storage of fertilizers. The bill would extend that authority to rules for anhydrous ammonia storage and transfer and application equipment.

Under the bill, the following management practices would apply only to fertilizer use on general turf:

- Application would have to be in a manner that prevented fertilizer from remaining on a highway, street, sidewalk, parking lot, concrete, or other surface material that obstructed or prevented the filtration of water into the soil.
- Application would have to be in a manner that prevented discharge of wash water from fertilization or a fertilizer spreader into waters of the State.
- Application could not be made on soil that was frozen or saturated to field capacity.
- Application of phosphorus fertilizer could not be made at a rate in excess of 0.5 pound per 1,000 square feet per year, except when a soil test conducted by a laboratory and method approved by the MDA indicated the need for phosphorus fertilizer.
- Application of fertilizer could not be made within 10 feet of waters of the State unless approved by the MDA.

("Management practices" would mean structural, vegetative, or other practices that reduced or prevented the detachment, transport, and delivery of pollutants to waters of the State or groundwater. "General turf" would mean noncrop land

managed using turf grasses, including home lawns, cemeteries, park areas, and commercial, school, university, and government grounds. General turf would not include performance turf, forage production, sod farms, turf establishment, or other agricultural production. "Performance turf" would mean turf managed for use on golf courses and athletic fields. "Turf establishment" would mean an area where turf grasses were being established from seed or sod during the first year of growth. "Field capacity" would mean the amount of water a particular soil was able to contain once gravity had drained surplus water.)

Notwithstanding those provisions, in areas subject to a total maximum daily load (TMDL) of phosphorus, a person could not use or apply fertilizer containing any phosphorus except when a soil test conducted by a laboratory and method approved by the MDA indicated the need for phosphorus fertilizer.

(Under the bill, "TMDL" would mean the maximum pollutant load that could be discharged in waters of the State from all sources, as determined by the State and as required under the Federal Clean Water Act and the U.S. Environmental Protection Agency (USEPA) water quality management regulations.)

Local Regulation

As a rule, Part 85 prohibits a local unit of government from enacting, maintaining, or enforcing an ordinance, regulation, or resolution that conflicts in any manner with the part. If a local unit of government is under contract with the MDA to act as its agent or the local unit has received prior written authorization from the Department, the local unit may enact an ordinance that is identical to Part 85 and rules promulgated under it (subject to certain limitations). The local unit's response for a violation of the ordinance involving the manufacture, storage, distribution, or sale of products regulated by the part is limited to issuing a cease and desist order.

A local unit of government may enact an ordinance prescribing standards different from those contained in part 85 and that regulates the manufacture, storage, distribution, or sale of a product if unreasonable adverse affects on the

environment or public health will exist within the local unit of government, or if the local unit has determined that the manufacture, storage, distribution, or sale of a product regulated by the part has resulted or will result in the violation of other existing State or Federal laws.

The bill would extend these provisions to the use of regulated products, as well as their manufacture, storage, distribution, or sale.

An ordinance enacted by a local unit that differs from the standards contained in Part 85 may not be enforced until approved by the Agriculture Commission. If approval is denied, the Commission must provide a detailed explanation of the basis of the denial within 60 days. Under the bill, the MDA would have to provide that explanation.

Hearings & Penalties

Under the bill, a person aggrieved by an order issued pursuant to Part 85 could request a hearing pursuant to the Administrative Procedures Act (which provides for contested case hearings).

The bill states that if the MDA Director found, after an opportunity for an administrative hearing, that a person had violated any provision of the part or a rule promulgated under it, he or she could impose an administrative fine of not more than \$1,000 for each violation. If the Director found that a 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 a fine. If a person failed to pay an administrative fine, the Director would have to notify the Attorney General, who would have to bring an action in court to recover the fine.

Under the bill, a person who knowingly violated Part 85 or a rule promulgated under it would be guilty of a misdemeanor punishable by a maximum fine of \$5,000 for each offense in addition to any administrative fines imposed. A person who knowingly and with malicious intent violated the part or a rule would be guilty of a misdemeanor punishable by a maximum fine of \$25,000 for each offense.

The bill would authorize the Director to bring an action to enjoin the 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. The Attorney General also could file a civil action in which the court could impose a civil fine of up to \$5,000 for each violation of the part or a rule.

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 the part 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 an enforcement action, a court could order restitution to a party injured by the purchase of a product sold in violation of the part, in addition to other remedies or penalties provided by law.

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 lawfully transporting a commercial fertilizer in the State, 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 the part, 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.

The bill would prohibit a court from allowing the recovery of damages by a person against whom an administrative action was brought that 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.

The bill would repeal Section 8514, which provides that a person who violates Part 85 is guilty of a misdemeanor and is liable for all damages sustained by a purchaser of a product sold in violation of the part.

MCL 324.8501 et al.

Legislative Analyst: Curtis Walker

FISCAL IMPACT

The bill would have a minimal fiscal impact on the Department of Agriculture as its provisions mostly would further delineate existing responsibilities. The bill would establish a new annual license fee for custom blenders of fertilizer (\$100), which would affect only approximately 10 businesses and generate approximately \$1,000 in new revenue, according to the department. The bill also would establish a civil fine for violations of the Act, resulting in a total revenue amount not able to be determined at this time.

The bill's criminal penalty would have an indeterminate fiscal impact on local government. There are no data to indicate how many offenders would be convicted of violating Part 85, or how many offenders previously convicted of violating Part 85 have been sentenced to incarceration. Local governments would incur decreased costs of incarceration in local facilities, which vary by county. Additional penal fine revenue would benefit public libraries.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.