

**STATE OF MICHIGAN
93RD LEGISLATURE
REGULAR SESSION OF 2005**

**Introduced by Reps. Moolenaar, Hoogendyk, Pearce, Pastor, Caul, Gaffney, Robertson, Stahl, Gosselin,
Sheen and Shaffer**

ENROLLED HOUSE BILL No. 4617

AN ACT to amend 1994 PA 451, 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, assessments, and donations; to provide certain appropriations; to prescribe penalties and provide remedies; and to repeal acts and parts of acts," by amending sections 20101 and 20120a (MCL 324.20101 and 324.20120a), section 20101 as amended by 1996 PA 383 and section 20120a as added by 1995 PA 71.

The People of the State of Michigan enact:

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) "Area of concern" means a geographic area identified by the department that meets all of the following conditions:

(i) The area is composed of more than 50 parcels of property.

(ii) The primary concern with regard to necessary response activities within the area is the presence of persistent, bioaccumulative, and toxic pollutants, other than mercury or polychlorinated biphenyls (PCBs).

(iii) The predominant mechanisms of transport of the substances described in subparagraph (ii) within the area are air deposition and deposition of contaminated soil and sediment carried by flood waters.

(d) "Attorney general" means the department of the attorney general.

(e) "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.

(f) "Board" means the brownfield redevelopment board created in section 20104a.

(g) "Department" means the director of the department of environmental quality or his or her designee to whom the director delegates a power or duty by written instrument.

(h) "Director" means the director of the department of environmental quality.

(i) "Directors" means the directors or their designees of the departments of environmental quality, community health, agriculture, and state police.

(j) "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.

(k) "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.

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

(m) "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.

(n) "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.

(o) "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.

(p) "Facility" means a parcel of property or a portion of a parcel of 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. A determination that a parcel or portion of a parcel of property is a facility due to soil contamination that is made after the effective date of the 2005 amendments to this section or that is made for property within an area of concern shall be based upon testing conducted according to scientifically accepted methods on soil collected from the parcel or portion of the parcel. In the absence of testing, a parcel or a portion of a parcel of property may be considered a facility if the owner of the property and the department, in writing, based on the presence of hazardous substances in the vicinity of the property, agree to the designation. However, if a person who is or may be liable under section 20126 for any contamination on the property disagrees with the designation, that person may contest such designation by testing the property in a timely manner after obtaining written notice of such a determination from the department and access is provided by the owner. If the testing determines that hazardous substances in excess of the concentrations necessary to designate the parcel or portion of the parcel a facility are not found to be present on the property, the person or persons conducting the testing shall be reimbursed by the department for the costs of the testing. Facility does not include either of the following:

(i) A parcel of property or a portion of a parcel of 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.

(ii) A remediated site.

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

(r) "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.

(s) “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.

(t) “Fund” means the cleanup and redevelopment fund established in section 20108.

(u) “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, 1981 PA 93, MCL 286.471 to 286.474:

(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, 42 USC 9601 to 9675.

(iii) Hazardous waste as defined in part 111.

(iv) Petroleum as described in part 213.

(v) “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.

(w) “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, 1956 PA 218, MCL 500.100 to 500.8302.

(vi) A motor vehicle finance company subject to the motor vehicle finance act, 1950 (Ex Sess) PA 27, MCL 492.101 to 492.141, 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.

(x) “Local health department” means that term as defined in section 1105 of the public health code, 1978 PA 368, MCL 333.1105.

(y) “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.

(z) “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.

(aa) “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.

(bb) “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, 42 USC 9601 to 9675.

(cc) “Persistent, bioaccumulative, and toxic pollutant” means a substance that is toxic and long-lasting in the environment that can build up in the food chain to levels that are harmful to human and ecosystem health.

(dd) “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 42 USC 2014, if the release is subject to requirements with respect to financial protection established by the nuclear regulatory commission under 42 USC 2210, or any release of source by-product or special nuclear material from any processing site designated under 42 USC 7912 or 42 USC 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, 1981 PA 93, MCL 286.471 to 286.474.

(ee) “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.

(ff) “Remedial action plan” means a work plan for performing remedial action under this part.

(gg) “Remediated site” means a parcel of property or a portion of a parcel of property at which all response activities required to meet applicable standards under this part have been completed. However, remediated site does not include a parcel of property or a portion of a parcel of property under any of the following circumstances:

(i) A new release occurs after the date on which the response activities required to meet applicable standards under this part were completed.

(ii) A prior release is discovered at the site that was not previously identified or addressed by the response activities completed to meet applicable standards under this part.

(iii) Institutional or engineered controls, or both, designed to assure the long-term reliability and efficacy of the response activities required to meet applicable standards under this part have failed or are not being operated and maintained in compliance with an approved plan for environmental response activities.

(iv) Changes in the use or uses of the site render invalid the risk assessment scenarios and assumptions which were the basis for the selection of applicable standards under this part.

(hh) “Response activity” means evaluation, interim response activity, remedial action, demolition, 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.

(ii) “Response activity costs” or “costs of response activity” means all costs incurred in taking or conducting a response activity, including enforcement costs.

(jj) “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.

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

(ll) "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. 20120a. (1) The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection. The cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:

- (a) Residential.
- (b) Commercial.
- (c) Recreational.
- (d) Industrial.
- (e) Other land use based categories established by the department.
- (f) Limited residential.
- (g) Limited commercial.
- (h) Limited recreational.
- (i) Limited industrial.
- (j) Other limited categories established by the department.

(2) The department may approve a remedial action plan based on site specific criteria that satisfy the applicable requirements of this part and the rules promulgated under this part. The department shall utilize only reasonable and relevant exposure pathways in determining the adequacy of a site specific criterion. Additionally, the department may approve a remedial action plan for a designated area-wide zone encompassing more than 1 facility, and may consolidate remedial actions for more than 1 facility. Within an area of concern, the department shall incorporate into a remedial action plan area-wide or site-specific cleanup criteria derived from peer-reviewed bioavailability studies, peer-reviewed site-specific human exposure data, and any other peer-reviewed scientifically based risk assessment studies that are available and relevant. A person who is or may be liable under section 20126 may submit to the department studies or data described in this subsection, or other relevant information, including information that has not been peer reviewed, that the person believes may assist the department in developing or approving a remedial action plan.

(3) The department shall develop cleanup criteria pursuant to subsection (1) based on generic human health risk assessment assumptions determined by the department to appropriately characterize patterns of human exposure associated with certain land uses. The department shall utilize only reasonable and relevant exposure pathways in determining these assumptions. The department may prescribe more than 1 generic set of exposure assumptions within each category described in subsection (1). If the department prescribes more than 1 generic set of exposure assumptions within a category, each set of exposure assumptions creates a subcategory within a category described in subsection (1). The department shall specify site characteristics that determine the applicability of criteria derived for these categories or subcategories.

(4) If a hazardous substance poses a carcinogenic risk to humans, the cleanup criteria derived for cancer risk under this section shall be the 95% upper bound on the calculated risk of 1 additional cancer above the background cancer rate per 100,000 individuals using the generic set of exposure assumptions established under subsection (3) for the appropriate category or subcategory. If the hazardous substance poses a risk of an adverse health effect other than cancer, cleanup criteria shall be derived using appropriate human health risk assessment methods for that adverse health effect and the generic set of exposure assumptions established under subsection (3) for the appropriate category or subcategory. A hazard quotient of 1.0 shall be used to derive noncancer cleanup criteria. For the noncarcinogenic effects of a hazardous substance present in soils, the intake shall be assumed to be 100% of the protective level, unless compound and site-specific data are available to demonstrate that a different source contribution is appropriate. If a hazardous substance poses a risk of both cancer and 1 or more adverse health effects other than cancer, cleanup criteria shall be derived under this section for the most sensitive effect.

(5) If a cleanup criterion derived under subsection (4) for groundwater in an aquifer differs from either: (a) the state drinking water standard established pursuant to section 5 of the safe drinking water act, 1976 PA 399, MCL 325.1005, or (b) criteria for adverse aesthetic characteristics derived pursuant to R 299.5709 of the Michigan administrative code, the cleanup criterion shall be the more stringent of (a) or (b) unless the department determines that compliance with this rule is not necessary because the use of the aquifer is reliably restricted pursuant to section 20120b(4) or (5).

(6) The department shall not approve of a remedial action plan in categories set forth in subsection (1)(b) to (j), unless the person proposing the plan documents that the current zoning of the property is consistent with the categorical criteria being proposed, or that the governing zoning authority intends to change the zoning designation so that the proposed criteria are consistent with the new zoning designation, or the current property use is a legal nonconforming use. The department shall not grant final approval for a remedial action plan that relies on a change in zoning designation until a final determination of that zoning change has been made by the local unit of government. The department may approve of a remedial action that achieves categorical criteria that is based on greater exposure potential than the criteria applicable to current zoning. In addition, the remedial action plan shall include documentation that the current property use is consistent with the current zoning or is a legal nonconforming use. Abandoned or inactive property shall be considered on the basis of zoning classifications as described above.

(7) Cleanup criteria from 1 or more categories in subsection (1) may be applied at a facility, if all relevant requirements are satisfied for application of a pertinent criterion.

(8) Except as provided in subsection (4) and subsections (9) to (13), compliance with the residential category in subsection (1)(a) shall be based on R 299.5706a to R 299.5710, R 299.5714, R 299.5718, and R 299.5722 to R 299.5726 of the Michigan administrative code.

(9) The need for soil remediation to protect an aquifer from hazardous substances in soil shall be determined by R 299.5720 of the Michigan administrative code, considering the vulnerability of the aquifer or aquifers potentially affected if the soil remains at the facility. Migration of hazardous substances in soil to an aquifer is a pertinent pathway if appropriate based on consideration of site specific factors.

(10) The department may establish cleanup criteria for a hazardous substance using a biologically based model developed or identified as appropriate by the United States environmental protection agency if the department determines all of the following:

(a) That application of the model results in a criterion that more accurately reflects the risk posed.

(b) That data of sufficient quantity and quality are available for a specified hazardous substance to allow the scientifically valid application of the model.

(c) The United States environmental protection agency has determined that application of the model is appropriate for the hazardous substance in question.

(11) If the cleanup criterion for a hazardous substance determined by R 299.5707 of the Michigan administrative code is greater than a cleanup criterion developed for a category pursuant to subsection (1), the criterion determined pursuant to R 299.5707 of the Michigan administrative code shall be the cleanup criterion for that hazardous substance in that category.

(12) In determining the adequacy of a land-use based response activity to address sites contaminated by polychlorinated biphenyls, the department shall not require response activity in addition to that which is subject to and complies with applicable federal regulations and policies that implement the toxic substances control act, 15 USC 2601 to 2692.

(13) Response activity to address the release of uncontaminated mineral oil satisfies R 299.5709 for groundwater or R 299.5720 for soil under the Michigan administrative code if all visible traces of mineral oil are removed from groundwater and soil.

(14) Approval by the department of a remedial action plan based on 1 or more categorical standard in subsection (1)(a) to (e) shall be granted only if the pertinent criteria are satisfied in the affected media. The department shall approve the use of probabilistic or statistical methods or other scientific methods of evaluating environmental data when determining compliance with a pertinent cleanup criterion if the methods are determined by the department to be reliable, to be scientifically valid, and to best represent actual site conditions and exposure potential.

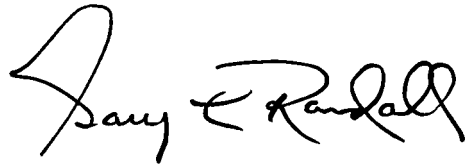
(15) If a remedial action allows for venting groundwater, the discharge shall comply with requirements of part 31, and the rules promulgated under that part or an alternative method established by rule. If the discharge of venting groundwater is provided for in a remedial action plan that is approved by the department, a permit for the discharge is not required. As used in this subsection, "venting groundwater" means groundwater that is entering a surface water of the state from a facility.

(16) A remedial action plan shall provide response activity to meet the residential categorical criteria, or provide for acceptable land use or resource use restrictions pursuant to section 20120b.

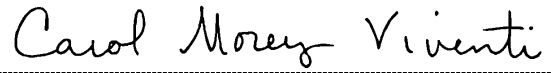
(17) A remedial action plan that relies on categorical cleanup criteria developed pursuant to subsection (1) shall also consider other factors necessary to protect the public health, safety, and welfare, and the environment as specified by the department, if the department determines based on data and existing information that such considerations are relevant to a specific facility. These factors include, but are not limited to, the protection of surface water quality and consideration of ecological risks if pertinent to the facility based on the requirements of R 299.5728 of the Michigan administrative code.

(18) The department shall annually evaluate and revise, if appropriate, the cleanup criteria derived under this section. The evaluation shall incorporate knowledge gained through research and studies in the areas of fate and

transport and risk assessment. The department shall prepare and submit to the legislature a report detailing revisions made to cleanup criteria under this section.



.....
Clerk of the House of Representatives



.....
Secretary of the Senate

Approved

.....
Governor