

HOUSE BILL No. 5552

January 18, 2006, Introduced by Reps. Hune, Gaffney and Mortimer and referred to the Committee on Natural Resources, Great Lakes, Land Use, and Environment.

A bill to amend 1994 PA 451, entitled
"Natural resources and environmental protection act,"
by amending sections 20126 and 20126a (MCL 324.20126 and
324.20126a), section 20126 as amended by 1999 PA 196 and section
20126a as added by 1995 PA 71.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

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

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

1 of release.

2 (b) The owner or operator of a facility at the time of
3 disposal of a hazardous substance if the owner or operator is
4 responsible for an activity causing a release or threat of release
5 **OR IF THE PERSON OR PERSONS WHO ARE OTHERWISE LIABLE UNDER THIS**
6 **PART CANNOT BE DETERMINED OR LOCATED. AN OWNER OR OPERATOR OF A**
7 **FACILITY WHO IS LIABLE UNDER THIS SUBDIVISION BECAUSE THE PERSON OR**
8 **PERSONS WHO ARE OTHERWISE LIABLE UNDER THIS PART CANNOT BE**
9 **DETERMINED OR LOCATED IS LIABLE ONLY FOR THE COSTS LISTED IN**
10 **SECTION 20126A(1) AND (2).**

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

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

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

23 (d) A person who by contract, agreement, or otherwise arranged
24 for disposal or treatment, or arranged with a transporter for
25 transport for disposal or treatment, of a hazardous substance owned
26 or possessed by the person, by any other person, at a facility
27 owned or operated by another person and containing the hazardous

1 substance. This subdivision does not include any of the following:

2 (i) A person who, on or after June 5, 1995, arranges for the
3 sale or transport of a secondary material for use in producing a
4 new product. As used in this subparagraph, secondary material means
5 scrap metal, paper, plastic, glass, textiles, or rubber, which has
6 demonstrated reuse or recycling potential and has been separated or
7 removed from the solid waste stream for reuse or recycling, whether
8 or not subsequent separation and processing is required, if
9 substantial amounts of the material are consistently used in the
10 manufacture of products which may otherwise be produced from a raw
11 or virgin material.

12 (ii) A person who, prior to June 5, 1995, arranges for the sale
13 or transport of a secondary material for use in producing a new
14 product unless the state has incurred response activity costs
15 associated with these secondary materials prior to ~~the effective~~
16 ~~date of the 1999 amendments to this section~~ **DECEMBER 17, 1999**. As
17 used in this subparagraph, secondary material means scrap metal,
18 paper, plastic, glass, textiles, or rubber, which has demonstrated
19 reuse or recycling potential and has been separated or removed from
20 the solid waste stream for reuse or recycling, whether or not
21 subsequent separation and processing is required, if substantial
22 amounts of the material are consistently used in the manufacture of
23 products which may otherwise be produced from a raw or virgin
24 material.

25 (iii) A person who arranges the lawful transport or disposal of
26 any product or container commonly used in a residential household,
27 which is in a quantity commonly used in a residential household,

1 and which was used in the person's residential household.

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

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

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

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

18 (a) The state or a local unit of government that acquired
19 ownership or control of a facility involuntarily through
20 bankruptcy, tax delinquency, abandonment, a transfer from a lender
21 pursuant to subsection (7), or other circumstances in which the
22 government involuntarily acquires title or control by virtue of its
23 governmental function or as provided in this part, a local unit of
24 government to which ownership or control of a facility is
25 transferred by the state or by another local unit of government
26 that is not liable under subsection (1), or the state or a local
27 unit of government that acquired ownership or control of a facility

1 by seizure, receivership, or forfeiture pursuant to the operation
2 of law or by court order.

3 (b) A state or local unit of government that holds or acquires
4 an easement interest in a facility, holds or acquires an interest
5 in a facility by dedication in a plat, or by dedication pursuant to
6 1909 PA 283, MCL 220.1 to 239.6, or otherwise holds or acquires an
7 interest in a facility for a transportation or utility corridor or
8 public right of way.

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

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

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

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

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

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

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

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

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

23 (a) The owner or operator of a hazardous waste treatment,
24 storage, or disposal facility regulated pursuant to part 111 from
25 which there is a release or threat of release solely from the
26 treatment, storage, or disposal facility, or a waste management
27 unit at the facility and the release or threat of release is

1 subject to corrective action under part 111.

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

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

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

12 (i) An act of God.

13 (ii) An act of war.

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

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

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

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

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

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

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

25 (d) If the department has issued an order pursuant to section
26 20119, the lender has complied with the order to the department's
27 satisfaction.

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

5 (8) The department shall establish minimum technical standards
6 for baseline environmental assessments conducted under this section
7 in guidelines pursuant to the administrative procedures act of
8 1969, 1969 PA 306, MCL 24.201 to 24.328.

9 (9) Notwithstanding subsection (1)(c), if the owner or
10 operator of the facility became the owner or operator of the
11 facility on or after June 5, 1995 and prior to March 6, 1996, and
12 the facility contains an underground storage tank system as defined
13 in part 213, that owner or operator is liable under this part only
14 if the owner or operator is responsible for an activity causing a
15 release or threat of release.

16 Sec. 20126a. (1) Except as provided in section 20126(2), a
17 person who is liable under section 20126 is jointly and severally
18 liable for all of the following:

19 (a) All costs of response activity lawfully incurred by the
20 state relating to the selection and implementation of response
21 activity under this part.

22 **(B) ALL COSTS OF RESPONSE ACTIVITY LAWFULLY INCURRED BY A**
23 **LOCAL UNIT OF GOVERNMENT OR AN AUTHORITY ESTABLISHED TO PROVIDE**
24 **FIRE PROTECTION OR EMERGENCY RESPONSE FOR RESPONSE ACTIVITIES**
25 **UNDERTAKEN BY THE MUNICIPALITY OR AUTHORITY.**

26 **(C) ~~-(b)-~~** Any other necessary costs of response activity
27 incurred by any other person consistent with rules relating to the

1 selection and implementation of response activity promulgated under
2 this part.

3 (D) ~~-(e)-~~ Damages for the full value of injury to,
4 destruction of, or loss of natural resources, including the
5 reasonable costs of assessing the injury, destruction, or loss
6 resulting from the release.

7 (E) DAMAGES FOR THE LOSS OR DESTRUCTION OF BUILDINGS OR OTHER
8 REAL OR PERSONAL PROPERTY.

9 (2) The costs of response activity recoverable under
10 subsection (1) shall also include all of the following:

11 (a) All costs of response activity reasonably incurred by the
12 state prior to ~~the promulgation of rules relating to the selection~~
13 ~~and implementation of response activity under this part~~ **JULY 12,**
14 **1990**, excepting those cases where cost recovery actions have been
15 filed before July 12, 1990. A person challenging the recovery of
16 costs under this subdivision has the burden of establishing that
17 the costs were not reasonably incurred under the circumstances that
18 existed at the time the costs were incurred. Recoverable costs
19 include costs incurred reasonably consistent with the rules
20 relating to the selection and implementation of response activity
21 in effect on July 12, 1990.

22 (b) Any other necessary costs of response activity reasonably
23 incurred by any other person prior to ~~the promulgation of rules~~
24 ~~relating to the selection and implementation of response activity~~
25 ~~under this part~~ **JULY 12, 1990**. A person seeking recovery of these
26 costs has the burden of establishing that the costs were reasonably
27 incurred under the circumstances that existed at the time the costs

1 were incurred.

2 (3) The amounts recoverable in an action under this section
3 shall include interest. This interest shall accrue from the date
4 payment is demanded in writing, or the date of the expenditure or
5 damage, whichever is later. The rate of interest on the outstanding
6 unpaid balance of the amounts recoverable under this section shall
7 be the same rate as is specified in section 6013(5) of the revised
8 judicature act of 1961, ~~Act No. 236 of the Public Acts of 1961,~~
9 ~~being section 600.6013 of the Michigan Compiled Laws~~ **1961 PA 236,**
10 **MCL 600.6013.**

11 (4) In the case of injury to, destruction of, or loss of
12 natural resources under subsection ~~-(1)(e)-~~ **(1)(D)**, liability shall
13 be to the state for natural resources belonging to, managed by,
14 controlled by, appertaining to, or held in trust by the state or a
15 local unit of government. Sums recovered by the state under this
16 part for natural resource damages shall be retained by the
17 department, for use only to restore, repair, replace, or acquire
18 the equivalent of the natural resources injured or acquire
19 substitute or alternative resources. There shall **NOT** be ~~no~~ **A**
20 double recovery under this part for natural resource damages,
21 including the costs of damage assessment or restoration,
22 rehabilitation, replacement, or acquisition, for the same release
23 and natural resource.

24 (5) A person shall not be required under this part to
25 undertake response activity for a permitted release. Recovery by
26 any person for response activity costs or damages resulting from a
27 permitted release shall be pursuant to other applicable law, in

1 lieu of this part. With respect to a permitted release, this
2 subsection does not affect or modify the obligations or liability
3 of any person under any other state law, including common law, for
4 damages, injury, or loss resulting from a release of a hazardous
5 substance or for response activity or the costs of response
6 activity.

7 (6) If the department **OR THE FIRE CHIEF OR FIRE CODE**
8 **ENFORCEMENT OFFICIAL OF A LOCAL UNIT OF GOVERNMENT** determines that
9 there may be an imminent and substantial endangerment to the public
10 health, safety, or welfare, or to the environment because of an
11 actual or threatened release from a facility, the attorney general
12 **OR A LOCAL LAW ENFORCEMENT OFFICIAL, A FIRE CHIEF, OR A FIRE CODE**
13 **ENFORCEMENT OFFICIAL OF A LOCAL UNIT OF GOVERNMENT** may bring an
14 action against any person who is liable under section 20126 or any
15 other appropriate person to secure the relief that may be necessary
16 to abate the danger or threat. The court has jurisdiction to grant
17 such relief as the public interest and the equities of the case may
18 require.

19 (7) The costs recoverable under this section may be recovered
20 in an action brought by the state, **A LOCAL UNIT OF GOVERNMENT**, or
21 any other person. **A LOCAL UNIT OF GOVERNMENT MAY ENACT AN ORDINANCE**
22 **THAT PROVIDES FOR RECOVERY OF COSTS THAT ARE RECOVERABLE UNDER THIS**
23 **SECTION.**