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BILL ANALYSIS

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Senate Bill 437 (Substitute S-9 as passed by the Senate)
Senate Bill 1345 (Substitute S-2 as passed by the Senate)
Senate Bill 1346 (Substitute S-3 as passed by the Senate)
Senate Bill 1347 (Substitute S-3 as passed by the Senate)
Senate Bill 1348 (Substitute S-3 as passed by the Senate)
Senate Bill 1349 (Substitute S-3 as passed by the Senate)
Senate Bill 1442 (Substitute S-2 as reported)
Senate Bill 1443 (Substitute S-2 as reported)
Sponsor: Senator Jason E. Allen (S.B. 437)
Senator Patricia L. Birkholz (S.B. 1345 & 1442)
Senator Alan Sanborn (S.B. 1346)
Senator Raymond E. Basham (S.B. 1347)
Senator John Gleason (S.B. 1348)
Senator Buzz Thomas (S.B. 1349)
Senator Jud Gilbert, II (S.B. 1443)
Committee: Natural Resources and Environmental Affairs

Date Completed: 11-1-10

RATIONALE

In 1995, amendments to Part 201 of the Natural Resources and Environmental Protection Act (NREPA) made significant changes to Michigan law regarding the cleanup of sites contaminated by hazardous substances, or "brownfields". Key to these revisions was a shift from strict liability for environmental contamination to a causation-based standard, which protects new owners from liability for contamination previously caused by others. In 2005, the former Department of Environmental Quality (now the Department of Natural Resources and Environment, or DNRE) asked Public Sector Consultants to facilitate a stakeholder-driven process to review the cleanup law. The review process used four workgroups to address specific aspects of Part 201. A report compiled by Public Sector Consultants containing the workgroups' recommendations was issued in 2007. The recommendations included changing the basis for liability protection, streamlining the program, reducing the technical complexity of Part 201 rules, and simplifying DNRE administrative procedures. It has been suggested that adopting some of the recommendations, along with other revisions to Part 201, would increase the efficiency and cost-effectiveness of the cleanup process.

In a related matter, some have proposed that money from the State Water Pollution Control Revolving Fund (SRF) and the Strategic Water Quality Initiatives Fund (SWQIF) also could be used to facilitate the cleanup of abandoned brownfields. These funds were created as a result of the Great Lakes Water Quality Bond proposal, which voters approved at the 2002 general election. The program authorizes the State to borrow up to $1.0 billion and issue general obligation bonds to finance sewage treatment projects, storm water projects, and nonpoint source projects that improve the State's water quality.

CONTENT

The bills would amend various parts of NREPA to revise provisions related to the cleanup of environmental contamination and funding for strategic water quality initiatives.

Senate Bill 437 (S-9) would amend Part 201 (Environmental Remediation) to do the following:

-- Require the DNRE Director to establish a Response Activity Review Panel to advise him or her on technical or scientific disputes concerning response activity plans or "no further action" reports.
-- Allow a person to petition the Panel for review of a DNRE determination, and prescribe a $3,500 petition fee.
-- Exempt a person from liability for environmental contamination if the DNRE approved his or her no further action report.
-- Delete provisions allowing a lender that is not responsible for an activity causing a release at a facility to transfer the property to the State under certain circumstances.
-- Prohibit the DNRE from enforcing specific administrative rules pertaining to baseline environmental assessments (BEAs).

Senate Bill 1345 (S-2) would amend Part 201 to do the following:

-- Allow a liable facility owner or operator to pursue response activities by conducting a self-implemented cleanup or obtaining DNRE approval of his or her response activities.
-- Require a person who pursued a self-implemented cleanup to submit to the DNRE a "no further action" report detailing completion of the response activities.
-- Prescribe factors that the DNRE would have to consider in selecting or approving a remedial action.
-- Revise the categories used in determining the appropriate remedial action.
-- Allow the DNRE to approve a response activity plan based on site-specific criteria under certain circumstances.
-- Rescind administrative rules related to a DNRE list identifying and categorizing environmental contamination sites.
-- Prescribe methods to demonstrate compliance with Part 201 in regard to a response activity involving venting groundwater.
-- Repeal a section prescribing a process to petition the DNRE for an exemption from liability after completion of a BEA.
-- Repeal a section providing for a municipal landfill cost-share grant program.
-- Rescind certain administrative rules pertaining to response activities.

Senate Bill 1346 (S-3) would amend Part 201 to provide that a guideline, bulletin, interpretive statement, or operational memorandum of the DNRE could not be given the force and effect of law. Additionally, the bill would define several terms used in the other bills and revise definitions of existing terms used in Part 201, including "facility".

Senate Bill 1347 (S-3) would amend Part 201 to do the following:

-- Require the owner or operator of a facility from which a hazardous substance emanated to notify the DNRE and the owners of property to which the substance migrated.
-- Require the DNRE to create an inventory of known facilities.
-- Require the DNRE to compile data on and notify the Legislature of requests for approval of response activity plans and no further action reports and BEAs the Department received.

Senate Bill 1348 (S-3) would amend Part 201 to revise provisions regarding civil and criminal penalties (reflecting changes made by the other bills).

Senate Bill 1349 (S-3) would amend Part 201 to do the following:

-- Expand the responsibilities of the owner or operator of a facility where hazardous substances are present.
-- Require the State or a local unit of government to take certain actions regarding hazardous substances if it invited the public onto its property.
-- Authorize the DNRE to renegotiate the terms of an outstanding loan from the Revitalization Revolving Loan Fund.

Senate Bill 1442 (S-2) would amend Parts 52 (Strategic Water Quality Initiatives) and 197 (Great Lakes Water Quality Bond Implementation) to allow the SWQIF to be used for response activities that would address nonpoint source water pollution at contaminated facilities, and for brownfield redevelopment grants and loans. Specifically, the bill would do the following:

- **Authorize the DNRE to spend up to $140.0 million for response activities.**
- **Authorize the DNRE to spend up to $10.0 million to provide brownfield redevelopment grants and loans to municipalities and brownfield redevelopment authorities.**
- **Specify a legislative intent that SWQIF money not be used for response activities to address nonpoint source water pollution at facilities once the combined $150.0 million was spent.**
- **Revise the allocation of money from the Great Lakes Water Quality Bond Fund, increasing the amount deposited in the SWQIF and decreasing the allocation to the SRF.**

Senate Bill 1443 (S-2) would amend Parts 52 and 53 (Clean Water Assistance) to do the following:

- **Increase from $40.0 million to $80.0 million the maximum amount available for grants to eligible municipalities from the Strategic Water Quality Initiatives Grant Program.**
- **Allow grants from the Program to be used for assistance to municipalities to complete loan application requirements for financing sources other than the SRF.**
- **Create the SRF Advisory Committee.**
- **Require the Committee to evaluate Part 53 and make recommendations to the DNRE and the Legislature on how it could be amended to achieve prescribed outcomes.**

Senate Bill 437 (S-9) is tie-barred to Senate Bills 1345, 1346, and 1348 and to House Bills 6360 and 6363 (which would amend Part 201 in a manner similar to Senate Bills 1349 (S-3) and 1347 (S-3), respectively). Senate Bill 1345 (S-2) is tie-barred to Senate Bills 1346 and 1348 and to House Bills 6360, 6363, and 6359 (which proposes amendments similar to those proposed by Senate Bill 437 (S-9)). Senate Bill 1346 (S-3) is tie-barred to Senate Bills 1345 and 1348 and to the three House bills. Senate Bill 1347 (S-3) is tie-barred to Senate Bills 1345, 1346, and 1348 and to House Bills 6359 and 6360. Senate Bill 1348 (S-3) is tie-barred to Senate Bills 1345 and 1346 and to House Bills 6359, 6360, and 6363. Senate Bill 1349 (S-3) is tie-barred to Senate Bills 1345, 1346, and 1348 and to House Bills 6359 and 6363. Senate Bills 1442 (S-2) and 1443 (S-2) are tie-barred to each other, to Senate Bills 1345, 1346, and 1348, and to the three House bills. The Senate bills are described below in further detail.

Senate Bill 437 (S-9)

Response Activity Review Panel

The bill would require the DNRE Director to establish a Response Activity Review Panel to advise him or her on technical or scientific disputes, including those regarding assessment of risk, concerning response activity plans and no further action reports. The Panel would have to consist of 15 people appointed by the Director. Each member would have to meet one or more of the following:

- Hold a current professional engineer's or professional geologist's license or registration from a state, tribe, U.S. territory, or Puerto Rico, and have the equivalent of six years of full-time relevant experience.
- Have a bachelor's degree in engineering or science and the equivalent of 10 years of full-time relevant experience.
- Have a master's degree in engineering or science and the equivalent of eight years of full-time relevant experience.

In addition, each member would have to remain current in his or her field through participation in continuing education or other activities.

An individual could not be a Panel member if any of the following were true:

-- The person was a current employee of any office, department, or agency of the State.
-- The person was a party to one or more contracts with the DNRE and the compensation paid under those contracts represented more than 5% of his or her annual gross revenue in any of the preceding three years.
-- The person was employed by an entity that was a party to one or more contracts with the DNRE and the compensation paid to his or her employer under those contracts represented more than 5% of the employer's annual gross revenue in any of the preceding three years.
-- The person was employed by the DNRE within the preceding three years.

An individual appointed to the Panel would serve for a term of three years and could be reappointed for one additional three-year term. After serving two consecutive terms, he or she could not be a member for at least two years. The first members would serve staggered terms so that not more than five vacancies would occur in a single year. Panel members would serve without compensation, but could be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

The Panel would be subject to the Open Meetings Act and the Freedom of Information Act.

A person who submitted a response activity plan or a no further action report could appeal a decision made by the DNRE regarding a technical or scientific dispute, including a dispute regarding risk assessment, concerning a response activity plan or a no further action report by submitting a petition to the Director. The petition would have to include the issues in dispute, the relevant facts upon which the dispute was based, factual data, analysis, opinion, and supporting documentation. In addition, the petitioner would have to submit a fee of $3,500. The Director would have to forward the fee to the State Treasurer for deposit into the Cleanup and Redevelopment Fund.

If the DNRE Director believed that the dispute could be resolved without convening the Panel, he or she could contact the petitioner and negotiate a resolution. The negotiation period could not exceed 45 days. If the dispute were resolved without the Panel's convening, any fee submitted with the petition would have to be returned.

(Under Senate Bill 1346 (S-3), "response activity plan" would mean a plan for undertaking response activities. A response activity plan could include a plan to undertake interim response activities, a plan for evaluation studies, a feasibility study, and/or a remedial action plan. "No further action report" would mean a report detailing the completion of remedial actions and including a postclosure plan and postclosure agreement (described below).)

If a dispute were not resolved through negotiation, the DNRE Director would have to schedule a meeting of five members, selected on the basis of their expertise, within 45 days. A selected member would have to agree not to accept employment by the person bringing the dispute before the Panel, or to undertake any employment concerning the facility in question for one year after the decision was made if that employment would represent more than 5% of the member's gross revenue in any of the preceding three years.

The Director would have to give the selected members a copy of all supporting documentation. Any action by the selected members would require a majority of the votes cast. At a meeting scheduled to hear the dispute, representatives of the petitioner and the DNRE each would be given an opportunity to present their positions to the Panel.

Within 45 days after hearing the dispute, the participating Panel members would have to make a recommendation and notify the DNRE Director and the petitioner. The written recommendation would have to include the specific scientific or technical rationale for it. The recommendation could be to adopt, modify, or reverse, in whole or in part, the DNRE's decision. If the Panel did not make its recommendation within 45 days, the Department's decision would be the final decision of the Director.

Within 60 days after receiving the notice, the DNRE Director would have to issue a final decision regarding the petition. This time period could be extended by agreement

between the Director and the petitioner. If the Director agreed with the Panel's recommendation, the DNRE would have to incorporate it into its response to the response activity plan or the no further action report. If the Director rejected the Panel's recommendation, he or she would have to issue to the petitioner a decision with a specific rationale. If the Director failed to issue a final decision within 60 days, the Panel's recommendation would be considered the Director's final decision. The final decision would be subject to review by the circuit court.

A recommendation, notice, decision, or agreement would have to be in writing.

Upon the Director's request, the Panel would have to make a recommendation to the DNRE on whether a member should be removed. Before making this recommendation, the Panel could convene a peer review panel to evaluate the member's conduct with regard to compliance with Part 201.

A Panel member could not participate in the dispute resolution process for any appeal in which he or she had a conflict of interest. A member could be selected to replace a member who had a conflict of interest. For these purposes, a member would have a conflict of interest if a petitioner had hired him or her, or his or her employer, on any environmental matter within the preceding three years.

Part 201 Liability

People who are liable under Part 201 include a person who became an owner or operator of a facility after June 5, 1995, unless a baseline environmental assessment is conducted before or within 45 days after the earliest of the date of purchase, occupancy, or foreclosure; and the owner or operator gives a BEA to the DNRE and subsequent purchaser or transferee, if the BEA confirms that the property is a facility. Under the bill, the owner or operator would have to give the BEA to the subsequent purchaser or transferee within six months after the earliest of the date of purchase, occupancy, or foreclosure (regardless of whether the BEA confirmed that the property was a facility). An owner or operator who was in compliance with the existing BEA provisions before the bill took effect would be considered in compliance with these requirements.

Currently, certain people are not liable for a release or threat of release unless they are responsible for an activity causing it. These people include a lessee who uses the leased property for a retail, office, or commercial purpose. Under the bill, this exemption would apply regardless of the lessee's level of hazardous substance use.

Under Part 201, certain people are not subject to any liability. Under this exemption, the bill would include any person for environmental contamination addressed in a no further action report approved by the DNRE or considered approved (as proposed by Senate Bill 1345 (S-2)). Such a person, however, could be liable for either of the following:

-- A subsequent release not addressed in the no further action report if the person were otherwise liable under Part 201 for that release.
-- Environmental contamination not addressed in the no further action report and for which the person was otherwise liable under Part 201.

In addition, if the no further action report relied on land or resource use restrictions, an owner or operator who desired to change the restrictions would be responsible for any response activities necessary to comply with Part 201 for any land or resource use other than the use that was the basis for the report. If the report relied on monitoring necessary to assure the effectiveness and integrity of the remedial action, an owner or operator who was otherwise liable for environmental contamination addressed in a report would be liable under Part 201 for response activities to the extent necessary to address any potential exposure to the contamination demonstrated by the monitoring in excess of the levels relied on in the no further action report. If the remedial actions that were the basis for the report failed to meet identified performance objectives, an owner or operator who was otherwise liable for environmental contamination addressed in the report would be liable under Part 201 for response activities necessary to satisfy the performance objectives or otherwise comply with Part 201.

Part 201 provides that the DNRE bears the burden of proof in establishing liability. If the Department provides a prima facie case against a person, he or she must bear the burden of showing by a preponderance of the evidence that he or she is not liable; the bill would delete this provision.

Currently, a lender that is not responsible for an activity causing a release at a facility and that establishes that it has met certain BEA requirements with respect to that facility may transfer the property to the State if the lender lists the facility with an agent or advertises it as being for sale or disposition, has taken reasonable care in maintaining and preserving the property, gives the DNRE related environmental information, and has undertaken appropriate response activities to abate a threat of fire or explosion or a hazard through direct contact with hazardous substances. The bill would delete these provisions.

Baseline Environmental Assessments

Part 201 requires the DNRE to establish minimal technical standards for BEAs in guidelines. The bill would delete this requirement. Instead, beginning on the bill's effective date, the DNRE could not implement or enforce R 299.5901 through R 299.5919 of the Michigan Administrative Code (which pertain to a BEA conducted to establish an exemption from liability for pre-existing contamination), except for the following:

-- Subrules (2), (6), (8), and (9) of Rule 903 (R 299.5903).
-- Subrules (2) through (6) of Rule 905 (R 299.5905).
-- Rule 919 (R 299.5919).

The specified subrules of Rule 903 do the following:

-- Prescribe requirements for a BEA that describes the condition of property that is being transferred.
-- Provide that a BEA may include reliable and relevant data and information from studies prepared by others or conducted for other purposes to define conditions at the property at the time of purchase, occupancy, or foreclosure.
-- Prescribe a specific time period and DNRE notice requirements for the purposes of a BEA prepared to establish a liability exemption for a person who is a permittee for subsurface oil, gas, storage, or mineral rights.
-- Provide that, for purposes of compliance with BEA rules, an acquiring agency in a condemnation proceeding is not the owner or operator of property that is a facility or a portion of a facility until possession of the facility or portion has been transferred to the acquiring agency.

The specified subrules of Rule 905 do the following:

-- Provide that a person who was the operator of a facility before the date provided by law and who becomes the owner on or after that date without interruption in his or her status as owner or operator is not eligible or required to complete a BEA to establish his or her liability for existing contamination; and specify the provisions of Part 201 under which such a person's liability is determined.
-- Provide that a person who was a lessee or who held another possessory interest in a facility, but who did not become the owner or operator until on or after the date provided by law is eligible to conduct a BEA.
-- Require a person who does not have continuous status as an owner or operator to conduct a BEA if he or she wishes to establish liability protection for contamination attributable to intervening owners or operators.
-- Require a land contract vendor who, on or after the date provided by law, regains possession of a facility as a result of default and who wishes to establish an exemption from liability for contamination existing when the vendor regains possession, to conduct a BEA within 45 days.

("Date provided by law" means March 6, 1996, with regard to underground storage tanks and June 5, 1995, for all other facilities.)

Rule 919 requires a person who wishes to effectuate and maintain liability protection under Part 201 to disclose the results of a BEA to the DRNE and subsequent purchasers or transferees, and prescribes disclosure procedures.

Senate Bill 1345 (S-2)

Petition for Exemption from Liability

The bill would repeal Section 20129a, which prescribes the process by which a person may petition the DNRE for a determination that the person meets the requirements for an exemption from liability. The person must submit the petition, along with a fee of $750, to the DNRE within six months after completion of a BEA. The DNRE must deposit the fee into the Cleanup and Redevelopment Fund.

A person who receives an affirmative determination under these provisions is not liable for a claim for response activity costs, fine or penalties, natural resources damage, or equitable relief under Part 17 (Michigan Environmental Protection Act), Part 31, or common law resulting from the contamination identified in the petition or existing on the property when the person took ownership or control.

Response Activity: Self-Implemented

Under the bill, subject to applicable NREPA requirements and other applicable law, a person could undertake response activities without prior approval by the DNRE unless they were being conducted under an administrative order or agreement or judicial decree that required prior Department approval. Except as otherwise provided, conducting response activities would not relieve any person who was liable under Part 201 from the obligation to conduct further response activities as required by the DNRE under Part 201 or other applicable law.

(As described below, Senate Bill 1347 (S-3) would delete comparable provisions in current law.)

Upon completion of remedial actions that satisfied the cleanup criteria established under Part 201, a person undertaking the actions could submit to the DNRE a no further action report.

(Part 201 defines "response activity" as 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 natural resources. The term also includes health assessments or health effect studies carried out under the supervision, or with the approval, of the Department of Community Health and enforcement actions related to any response activity. "Remedial action" includes 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.)

Response Activity: DNRE Approval

Under the bill, upon the DNRE's request, a person undertaking response activity could submit to the Department a response activity plan that included a request for approval of one or more aspects of response activity. If the person were not subject to an administrative order or agreement or judicial decree that required prior Department approval, the person would have to submit a plan review request form with the response activity plan. The DNRE would have to specify the required content of the request form and make it available on the Department's website.

Upon receiving a response activity plan submitted for approval, the DNRE would have to approve, approve with conditions, or deny the plan, or notify the submitter that it did not contain sufficient information for the Department to make a decision. The DNRE would have to provide its determination within 150 days after receiving the plan, or within 180 days if the plan required public participation. If the Department responded that the plan did not include sufficient information, the DNRE would have to identify the information it required. If the plan were approved with conditions, the approval would have to specify the conditions. If the plan were denied, the denial would have to specify the reasons, to the extent practical.

If the DNRE failed to provide a written response within the required time frame, the response activity plan would be considered approved. If the Department denied a plan, a person could revise it and resubmit it for approval. Any time frame established by the bill could be extended by mutual agreement of the DNRE and a person submitting a plan.

A person requesting approval of a plan could appeal the DNRE's decision by petitioning to convene the proposed Response Activity Review Panel, if applicable.

Remedial Action

Part 201 provides for a remedial action plan to be implemented in the cleanup of environmental contamination. A remedial action plan must include certain elements, such as land use and resource use restrictions if necessary to protect human health, safety, and welfare, or the environment and to assure the effectiveness and integrity of a remedial action. Under certain circumstances, the restrictions must be described in a restrictive covenant. A remedial action may rely on an institutional control in lieu of a restrictive covenant, if exposure to hazardous substances can be restricted reliably that way.

The bill would delete all of the provisions pertaining to a remedial action plan, but would reenact similar provisions, referring instead to a postclosure plan.

(Part 201 defines "remedial action plan" as a work plan for performing remedial action under Part 201. Under the Senate Bill 1346 (S-3), "postclosure plan" would mean a plan for land or resource use restrictions or permanent markers at a facility upon completion of remedial actions.)

Upon completion of remedial actions at a facility for a category of cleanup that did not satisfy cleanup criteria for unrestricted residential use, the person conducting the actions would have to prepare and implement a postclosure plan for that facility. A postclosure plan would have to include land use or resource use restrictions as prescribed in the bill; and permanent markers to describe restricted areas of the facility and the nature of the restrictions. A permanent marker would not be required if the only applicable land or resource use restrictions related to one or more of the following:

-- A facility at which remedial action satisfied the cleanup criteria for the nonresidential category (described below).
-- Use of groundwater.
-- Construction requirements or limitations for structures that could be built in the future.
-- Protecting the integrity of exposure controls, composed solely of asphalt, concrete, or landscaping materials, that prevented contact with soil.

The provision regarding the exposure controls would not apply if the hazardous substances that the barrier addressed exceeded a cleanup criterion based on acute toxic effects, reactivity, corrosivity, ignitability, explosivity, or flammability, or if any of the hazardous substances were present at a concentration of more than 10 times the applicable soil direct contact cleanup criterion.

No Further Action Report; Postclosure Plan & Agreement

Under the bill, upon completion of remedial actions that satisfied applicable cleanup criteria and all other requirements under Part 201 applicable to remedial action, a person could submit to the DNRE a no further action report. The report would have to document the basis for concluding that the remedial actions had been completed. A report could include a request that, upon approval, the facility be designated as a residential closure. A report would have to be submitted on a form developed by the DNRE, which would have to make the form available on its website.

(Under Senate Bill 1346 (S-3), "residential closure" would mean a facility at which the contamination had been addressed in a no further action report that satisfied the limited residential cleanup criteria or the site-specific residential cleanup criteria, that contained land use or resource use restrictions, and that was approved or considered approved by the DNRE.

If the remedial action at the facility satisfied the cleanup criteria for unrestricted residential use, neither a postclosure plan nor a proposed postclosure agreement would have to be submitted with a no further action report. If the remedial action required only land use or resource use restrictions and financial assurance were not required or were de minimis, a postclosure plan would have to be submitted, but a proposed postclosure agreement would not be required. For all other facilities, a

postclosure plan and a proposed postclosure agreement would have to be submitted with a no further action report.

(Under Senate Bill 1346 (S-3), "postclosure agreement" would mean an agreement between the DNRE and a person who had submitted a no further action report that prescribed, as appropriate, activities required to be undertaken upon completion of remedial actions.)

A proposed postclosure agreement submitted as part of a no further action report would have to include all of the following:

-- Provisions for monitoring, operation and maintenance, and oversight necessary to assure the effectiveness and integrity of the remedial action.
-- Financial assurance to pay for monitoring, operation and maintenance, oversight, and other costs the DNRE determined necessary to assure the effectiveness and integrity of the remedial action.
-- A provision granting the DNRE the right to enter the property at reasonable times to determine and monitor compliance with the postclosure plan and agreement, including the right to take samples, inspect the operation of the remedial action measures, and inspect records.
-- A provision requiring notice to the DNRE of the owner's intent to convey any interest in the facility 14 days in advance.

The property owner could not convey title, an easement, or other interest in the property without adequate and complete provision for compliance with the terms and conditions of the postclosure plan and agreement.

The person submitting a no further action report would have to include a signed affidavit attesting to the fact that the information upon which the report was based was complete and true to the best of that person's knowledge. The report also would have to include a signed affidavit from a qualified environmental consultant who prepared the report, attesting to the fact that the remedial actions detailed in it complied with all applicable requirements and that the information was true and complete to the best of that person's knowledge. In addition, the environmental consultant would have to attach a certificate of insurance demonstrating that the consultant obtained at least all of the following from an authorized carrier:

-- Statutory worker compensation insurance as required in Michigan.
-- Professional liability errors and omissions insurance with a limit of at least $1.0 million per claim.
-- Contractor pollution liability insurance with limits of at least $1.0 million per claim, if not included under the professional liability errors and omissions insurance.
-- Commercial general liability insurance with limits of at least $1.0 million per claim and $2.0 million aggregate.
-- Automobile liability insurance with limits of at least $1.0 million per claim.

The professional liability errors and omissions insurance policy could not exclude bodily injury, property damage, or claims arising out of pollution for environmental work. The contractor pollution liability insurance requirement would not apply to environmental consultants who did not perform contracting functions.

A person submitting a no further action report would have to maintain all documents and data prepared, acquired, or relied upon in connection with the report for at least 10 years after the DNRE approved the report, or the date on which no further monitoring, operation, or maintenance was required to be undertaken, whichever was later. All of the documents and data would have to be made available to the DRNE upon request.

Upon receiving a report, the DNRE would have to approve or deny it, or notify the submitter that it did not contain sufficient information for the Department to make a decision. If the report required a postclosure agreement, the DNRE could negotiate terms alternative to those included within the proposed agreement. The DNRE would have to provide its determination within 150 days after receiving the report, or within 180 days if the report required public participation. If the Department responded that the report did not include sufficient information, the DNRE would have to identify the information it required. If the report were denied, the denial would have to

specify the reasons, to the extent practical. If the report, including any required postclosure plan and agreement, were approved, the Department would have to give the person who submitted it a no further action letter (a written response confirming the DNRE's approval). If the DNRE failed to provide a written response within the required time frame, the no further action report would be considered approved.

The DNRE would have to review and provide a written response within the prescribed time frames for at least 90% of the reports submitted in each calendar year.

A person who requested approval of a report could appeal the DNRE's decision by submitting a petition to convene the proposed Response Activity Review Panel.

Any time frame established by the bill could be extended by mutual written agreement of the DNRE and a person submitting a no further action report.

Following approval of a no further action report, an owner or operator could submit to the DNRE an amended report, which would have to include the proposed changes to the original report and an accompanying rationale for them. The process for review and approval would be the same as the process for original no further action reports.

Remedial Action Selection & Approval

Under the bill, when the DNRE was selecting or approving a remedial action, or when another person was selecting a remedial action, all of the following would have to be considered:

-- The effectiveness of alternatives in protecting the public health, safety, and welfare and the environment.
-- The long-term uncertainties associated with the proposed remedial action.
-- The hazardous substances' persistence, toxicity, mobility, and propensity to bioaccumulate.
-- The short- and long-term potential for adverse health effects from human exposure.
-- Reliability of the alternatives.
-- The potential for future remedial action costs if an alternative failed.
-- The potential threat to human health, safety, and welfare and the environment associated with excavation, transportation, and redisposal or containment.
-- The ability to monitor remedial performance.
-- The public's perspective about the extent to which the proposed remedial action effectively addressed requirements of Part 201, for remedial actions that required the opportunity for public participation.
-- Costs of remedial action, including long-term maintenance costs.

The cost of a remedial action, however, would have to be a factor in choosing only among alternatives that adequately protected the public health, safety, and welfare and the environment, consistent with the requirements of Part 201 pertaining to cleanup criteria.

Evaluation of the prescribed factors would have to consider all factors in balance with one another as necessary to achieve the objectives of Part 201. No single factor could be considered the most important.

Cleanup Criteria Categories

Part 201 authorizes the DNRE to establish cleanup criteria and approve of remedial actions in prescribed categories. The proposed category is the option of the person proposing the remedial action, subject to DNRE approval, if required, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:

-- Residential.
-- Commercial.
-- Recreational.
-- Industrial.
-- Other land use-based categories established by the DNRE.
-- Limited residential.
-- Limited commercial.
-- Limited recreational.
-- Limited industrial.
-- Other limited categories established by the DNRE.

Under the bill, the categories would be residential, limited residential, nonresidential, and limited nonresidential. Beginning on the bill's effective date, the

nonresidential cleanup criteria would be the former industrial categorical cleanup criteria developed by the DNRE until it developed and published new nonresidential cleanup criteria.

Under Part 201, remedial actions must meet the residential categorical cleanup criteria or provide for acceptable land use or resource use restrictions. Under the bill, response activities would have to meet the cleanup criteria for unrestricted residential use or provide for acceptable land or resource use restrictions in a postclosure plan or agreement.

Part 201 requires the DNRE annually to evaluate cleanup criteria and revise them if appropriate; and prepare and submit to the Legislature a report detailing the revisions. Under the bill, within two years of its effective date, the DNRE would have to evaluate and revise the criteria. Following the revision, the Department periodically would have to evaluate whether new information were available regarding the cleanup criteria and make revisions as appropriate.

Part 201 prescribes methods for the derivation of cleanup criteria for hazardous substances that pose a carcinogenic risk and/or a risk of an adverse health effect other than cancer. If a cleanup criterion derived under those provisions for groundwater in an aquifer differs from either the State drinking water standard established under the Safe Drinking Water Act or criteria for adverse aesthetic characteristics derived under the Michigan Administrative Code, the cleanup criterion must be the more stringent of the two unless the DNRE determines that compliance with the requirement is not necessary because the use of the aquifer is reliably restricted under Part 201.

The bill would delete the reference to the criteria under the Michigan Administrative Code, and require the cleanup criterion to be the most stringent of the State drinking water standard; the national secondary drinking water regulations established under the Federal Safe Drinking Water Act; or, if there were no national secondary drinking water regulation for a contaminant, the concentration determined by the DNRE according to methods approved by the U.S. Environmental Protection Agency below which taste, odor, appearance, or other aesthetic characteristics were not adversely affected.

The bill would authorize the DNRE to approve cleanup criteria if necessary to address conditions that prevented a hazardous substance from being measured reliably at levels that were consistently achievable in samples from the facility in order to allow for comparison with generic cleanup criteria. A person seeking approval of a criterion under this provision would have to document the basis for determining that the relevant published target detection limit could not be achieved in samples from the facility.

Response Activity Plan: Site-Specific Criteria

Part 201 authorizes the DNRE to approve a remedial action plan based on site-specific criteria that satisfy applicable requirements and rules. Under the bill, the DNRE would have to approve site-specific criteria in a response activity plan if such criteria, in comparison to generic criteria, better reflected best available information concerning the toxicity or exposure risk posed by the hazardous substance and, for nonnumeric criteria, provided protection equivalent to, or better than, the risk and hazard levels set forth in Part 201.

Site-specific criteria could do the following, as appropriate:

-- Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.
-- Alter any default value established by rule that was not expressly determined by Part 201.
-- Consider the depth below the ground surface of contamination, which could reduce the potential for exposure and serve as an exposure barrier.
-- Be based on information related to the specific facility or information of general applicability, including peer-reviewed scientific literature.
-- Use probabilistic methods of calculation.
-- Use nonlinear-threshold-based calculations where scientifically justified.

A site-specific remedial action could include presumptive remedies, exposure controls, use restrictions, removal actions, or other response activities that provided protection

equivalent to meeting the risk and hazard levels set forth in Part 201.

Venting Groundwater

Under Part 201, if a remedial action plan allows for venting groundwater, the discharge must comply with Part 31 (Water Resources Protection) and the rules promulgated under it or an alternative method established by rule. The bill would delete this provision.

Currently, if the discharge of venting groundwater is provided for in a remedial action plan that is approved by the DNRE, a permit for the discharge is not required. Under the bill, a permit would not be required if the discharge complied with Part 201.

The bill would allow a person to demonstrate compliance with Part 201 for a response activity providing for venting groundwater by meeting any of the following, singly or in combination:

-- Generic groundwater-surface water interface (GSI) criteria, which would be water quality standards for surface water developed by the DNRE.
-- Mixing zone-based GSI criteria established under Part 201.
-- Site-specific criteria established under the bill.

The use of surface water quality standards would be allowable in any of the designated cleanup categories. The use of mixing zone-based criteria would be allowable in any of the designated cleanup categories and under the site-specific criteria. With regard to site-specific criteria, the use of mixing zones could be applied to, or included as, site specific criteria.

A person could proceed to undertake the following response activities without prior DNRE approval:

-- Evaluation activities associated with a response activity providing for venting groundwater using GSI monitoring wells or alternative monitoring points.
-- Response activities that relied on monitoring from GSI monitoring wells to demonstrate compliance with the generic GSI criteria.
-- Except as otherwise provided, response activities that relied on monitoring from alternative monitoring points to demonstrate compliance with generic GSI criteria if the person gave the DNRE, at least 30 days before relying on the alternative points, a notice that contained substantiating evidence that they complied with the bill's requirements.

A person would have to submit to the DNRE a response activity plan containing a request for approval to undertake response activities that relied on monitoring from alternative monitoring points to demonstrate compliance with the generic GSI criteria, if one or more of the following conditions applied to the venting groundwater:

-- An applicable criterion was based on acute toxicity endpoints.
-- The venting groundwater contained a bioaccumulative chemical of concern as identified in the water quality standards for surface waters developed under Part 31 and for which the person was liable under Part 201.
-- The venting groundwater was entering a surface water body protected for coldwater fisheries identified in publications of the former Department of Natural Resources.
-- The venting groundwater was entering a surface water body designated as an outstanding State resource water or outstanding international resource water as identified in the water quality standards.

Alternative monitoring points could demonstrate compliance with the bill if they met the following standards:

-- The locations where venting groundwater entered surface water had been identified sufficiently to allow monitoring for the evaluation of compliance with criteria.
-- The alternative monitoring points would allow for venting groundwater to be sampled at a point before mixing with surface water.
-- The proposed alternative points allowed for reliable, representative monitoring of groundwater quality at the GSI.
-- The potential fate and transport mechanisms for groundwater contaminants were identified.

In addition, sentinel monitoring points would have to be used in conjunction with the alternative points to assure that any potential exceedance of the applicable water quality standard could be identified with sufficient notice to allow the implementation of necessary additional response activity that would prevent the exceedance.

If a person intended to use mixing zone-based GSI criteria or site-specific criteria in conjunction with alternative monitoring points, the person would have to submit to the DNRE a response activity plan that included the following:

-- A demonstration of compliance with the prescribed standards.
-- Documentation that it was possible to estimate accurately the volume of venting groundwater, if compliance with a mixing zone-based GSI criterion were to be determined with data from the alternative points.

If the DNRE denied a response activity plan containing a proposal for alternative monitoring points, it would have to state the reasons, including the scientific and technical bases for the denial.

Notwithstanding any other provision of Part 201, a response activity plan that included a mixing zone relating to groundwater venting to surface water would be subject to a 30-day comment period.

A person could appeal a Department decision in a response activity plan or no further action report regarding venting groundwater as a scientific or technical dispute by petitioning for the Response Activity Review Panel to be convened.

Municipal Landfill Grant Program

The bill would repeal Section 20109a, which establishes a municipal landfill cost-share grant program to make grants to reimburse local units of government for a portion of the response activity costs at certain municipal solid waste landfills. The grant program is administered by the Brownfield Redevelopment Board, which must allocate the funds available for cost-share grants to eligible facilities according to specific criteria, which are listed in priority order. To receive a cost-share grant, approved applicants must enter into an agreement with the Board. The agreement must contain certain information, including a list of Board-approved eligible costs for which the recipient will be reimbursed up to 50%.

Site Identification & List

Under Part 201, upon discovering a site of environmental contamination, the DNRE must identify and evaluate it for the purpose of assigning to it a priority score for response activities. Every four years, the Department must give the Legislature a list of the sites, categorized by response activity, ownership, and status. The Department also must report to the Legislature and the Governor those sites that have been removed from the list and the source of the funds used to undertake response activities at each site, and perform other specified duties. A site may not be removed until any necessary response activity is complete.

The bill would rescind administrative rules R 299.5209 through R 299.5219, which do the following:

-- Require the DNRE to notify certain people and entities of sites proposed to be added to the list.
-- Prescribe procedures for a person who wishes to dispute the inclusion of a site on the list.
-- Prescribe criteria that a site must meet in order for the DNRE to consider it for inclusion on the list.
-- Require the list to include the status of response activity implemented or completed at each site.
-- Require the DNRE to review site information on an ongoing basis and revise it as needed.
-- Require the DNRE to rescore listed sites using a specific site assessment model.

The bill also would rescind administrative rules R 299.5801 to R 299.5823, which prescribe the site assessment model and scoring procedure for the inclusion of sites on the DNRE's environmental contamination list, and prescribe categories for the designation of sites based on their scores.

Remedial Action Rules

The bill would rescind administrative rules R 299.5601 to R 299.5607, which do the following:

-- Require remedial actions to achieve a degree of cleanup that is protective of the public health, safety, and welfare, and the environment; and to meet applicable State and Federal requirements.
-- Prescribe factors that must be considered when a remedial action is selected or approved; and provide that no single factor should be considered the most important.
-- Require the DNRE to compile an administrative record of the decision process leading to the selection or approval of any remedial action.

Senate Bill 1346 (S-3)

DNRE Authority

Part 201 requires the DNRE to coordinate all required activities and promulgate rules to provide for the performance of response activities; to provide for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release; and to implement the Department's powers and duties under Part 201, and as otherwise necessary to carry out the requirements of Part 201.

The bill would permit, rather than require, the DNRE to promulgate rules. The bill also would delete references to the specific purposes of the rules.

Under the bill, a guideline, bulletin, interpretive statement, or operational memorandum under Part 201 could not be given the force and effect of law. The specified documents would not be legally binding on any person.

Definitions

In addition to the terms described elsewhere, the bill would amend the definitions of "facility" and "baseline environmental assessment".

Part 201 defines "facility" as any area, place, or property where a hazardous substance in excess of the concentrations satisfying requirements specified in that part or the cleanup criteria for unrestricted residential use under Part 213 (Leaking Underground Storage Tanks) has been released, deposited, or disposed of, or otherwise comes to be located. The term does not include any area, place, or property at which response activities that satisfy the residential category cleanup criteria in Part 201 have been completed, or at which corrective action under Part 213 that satisfies cleanup criteria for unrestricted residential use has been completed.

The bill also would exclude from the definition of "facility" any area, place, or property where site-specific criteria approved by the DNRE for application at that location are satisfied and both of the following conditions are met:

-- The site-specific criteria do not depend on any land or resource use restriction to assure protection of the public health, safety, or welfare or the environment.
-- Hazardous substances at the area, place, or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.

Currently, "baseline environmental assessment" means an evaluation of environmental conditions that exist at a facility at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the facility so that, in the event of a subsequent release, there is a means of distinguishing the new release from existing contamination. The bill would delete this definition.

The bill would define "baseline environmental assessment" as a written document that describes the results of an all appropriate inquiry and the sampling and analysis that confirm that the property is a facility. "All appropriate inquiry" would mean an evaluation of environmental conditions at a property at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the property in conformance with 40 CFR 312. (That Federal regulation governs "all appropriate inquiries" for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). It requires all appropriate inquiries to be conducted within one year before a site is acquired, and requires certain components or updates to be conducted within 180 days before acquisition.) For purposes of a BEA, however, the all appropriate inquiry under the Federal regulation could be conducted

within 45 days after the date of acquisition, and certain components could be conducted or updated within 45 days after the date of acquisition.

Senate Bill 1347 (S-3)

Notification of Release; Pursuit of Response Activities

Under Part 201, an owner or operator of property who has knowledge that the property is a facility and who is liable must determine the nature and extent of a release at the facility, and report it to the DNRE within 24 hours after obtaining knowledge of it. The reporting requirement applies to reportable quantities of hazardous materials under specific Federal regulations, unless the DNRE establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment. The bill would eliminate the reference to the DNRE's establishment of rules.

In addition, if the owner or operator had reason to believe that one or more hazardous substances were emanating or had emanated from and were present beyond the boundary of his or her property at a concentration in excess of cleanup criteria for unrestricted residential use, he or she would have to notify the DNRE and owners of property where the substances were present within 30 days after obtaining knowledge that the release had migrated.

If the release resulted from an activity that was subject to permitting under Part 615 (Supervisor of Wells) and the owner or operator did not own the surface property and the release resulted in hazardous substances concentrations in excess of cleanup criteria for unrestricted residential use, he or she would have to notify the DNRE and the surface owner within 30 days after obtaining knowledge of the release.

Also, under Part 201, an owner or operator who knows that the property is a facility and who is liable must diligently pursue response activities necessary to achieve the cleanup criteria specified in Part 201 and rules promulgated under it. The bill would delete the reference to the rules. Under the bill, except as otherwise provided, in pursuing response activities, the owner or operator could follow the proposed procedures either to conduct self-implemented activities or to obtain DNRE approval of one or more aspects of planning response activities.

Under Part 201, an owner or operator of a facility also must take the following actions, upon written request by the DNRE:

-- Provide a plan for and undertake interim response activities.
-- Provide a plan for and undertake evaluation activities.
-- Take any other response activity determined by the DNRE to be technically sound and necessary to protect the public health, safety, welfare, or the environment.
-- Submit to the DNRE for approval a remedial action plan that, when implemented, will achieve the cleanup criteria specified in Part 201 and rules.
-- Implement an approved remedial action plan in accordance with a schedule approved by the DNRE.

The bill would refer to a response activity plan containing a plan for undertaking interim response activities and evaluation activities, and a response activity plan containing a remedial action plan. The bill also would delete the reference to Part 201 rules. In addition, the bill would require a person to pursue remedial action under a self-implemented cleanup and, upon completion, submit a no further action report.

("Interim response activity" means the cleanup or removal or a released hazardous substance or the taking of other actions, before the implementation of a remedial action, as necessary to prevent, minimize, or mitigate injury to the public health, safety, and welfare or the environment. "Evaluation" means activities including investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts necessary to determine the nature, extent, and impact of a release or threat of release and necessary response activities.)

Part 201 allows a person to undertake response activity without prior DNRE approval unless it is being done pursuant to an administrative order or agreement or judicial decree that requires prior approval. Such action does not relieve the person of liability for further response activity as the

DNRE may require. The bill would delete these provisions.

Under the bill, all of the requirements imposed on an owner or operator would not preclude a person from simultaneously undertaking one or more aspects of planning or implementing response activities at a facility under the proposed self-implemented cleanup provisions without the prior approval of the Department, unless one or more response activities were being conducted pursuant to an administrative order or judicial decree that required prior approval, and submitting a response activity plan to the DNRE.

Currently, upon a DNRE determination that a person has completed all response activity at a facility under an approved remedial action plan, the Department, upon a person's request, must execute and present a document stating that all required response activities have been completed. The bill would delete this provision.

The bill also would delete provisions setting a timetable for the DNRE to grant or deny any request for approval of a plan, and specifying that a request is considered approved if the Department does not act within that time period.

DNRE Inventory; Data Compilation

The bill would require the DNRE to create, and update on an ongoing basis, an inventory of residential closures and a separate inventory of other known facilities. Each inventory would have to contain at least the following information, if applicable, for each facility:

-- Location.
-- Whether one or more response activity plans were submitted to the DNRE and the status of Department approval.
-- Whether a no further action report was submitted to the DNRE and whether it included a postclosure plan or proposed postclosure agreement and the status of Department approval.

The DNRE could categorize facilities on the inventory in a manner that the Department believed was useful for the general public, and would have to make the inventories available on its website.

Also, the DNRE would have to compile on a quarterly basis and post on its website the number of response activity plans and no further action reports received by the Department, itemized as follows:

-- Approved by the DNRE.
-- Disapproved by the DNRE.
-- Recommended for approval by the proposed Response Activity Review Panel.
-- Recommended for disapproval by the Panel.
-- Approved by operation of law.

Additionally, the DNRE would have to compile and make available on its website the number of baseline environmental assessments the Department received.

Annually, the DNRE would have to determine the percentage of no further action reports approved by operation of law (under Senate Bill 1345). If the percentage in any year exceeded 10%, the Department would have to notify the standing committees of the Legislature with jurisdiction over issues related to natural resources and the environment.

Report

The bill would delete a requirement that the DNRE submit to the Legislature a biennial report on the effectiveness of Part 201 in restoring the economic value of sites of environmental contamination.

Cleanup & Redevelopment Fund

Money required to implement Part 201 programs and to pay for recommended response activities must be appropriated from the Cleanup and Redevelopment Fund and any other source the Legislature considers necessary to implement the requirements of Part 201.

Money from the Fund may be appropriated only for response activities at sites that have been subjected to the risk assessment process described in Section 20105 (which Senate Bill 1345 (S-2) would repeal). The bill would delete this provision.

Part 201 requires the DNRE annually to submit to the Governor a request for appropriation from the Fund, and prescribes the purposes for which Fund money may be

used. The request must include a lump sum amount for national priority list municipal landfill cost-share grants and a lump sum amount for emergency response actions for facilities to be determined by the DNRE. The bill would eliminate the reference to the lump sum amount for the landfill cost-share grants, and would eliminate those grants from the list of eligible purposes.

The bill would refer to a "facility", rather than a "site", throughout these provisions.

Senate Bill 1348 (S-3)

Under Part 201, a person who does any of the following is guilty of a felony and must be fined at least $2,500 but not more than $25,000 for each violation:

-- Intentionally makes a false statement, representation, or certification in any document filed or required to be maintained under Part 201.
-- Intentionally renders inaccurate any monitoring device or record required to be maintained under Part 201.
-- Misrepresents his or her qualifications in a document prepared in relation to a petition for exemption from liability after completion of a BEA.

The bill would refer to a misrepresentation of qualifications in relation to a no further action report or an appeal to the proposed Response Activity Review Panel.

The bill also would revise the provisions regarding civil and criminal penalties to reflect amendments proposed by the other bills.

Senate Bill 1349 (S-3)

Facility: Hazardous Substances

Under Part 201, a person who owns or operates property that he or she knows is a facility must take certain actions with regard to hazardous substances at the facility. Under the bill, the actions would include the following:

-- Providing reasonable cooperation, assistance, and access to the people authorized to conduct response activities at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response activity at the facility.
-- Complying with any land or resource use restrictions established or relied on in conjunction with the response activities at the facility.
-- Not impeding the effectiveness or integrity of any land or resource use restriction employed at the facility in connection with response activities.

The bill specifies that the provision regarding reasonable cooperation, assistance, and access could not be interpreted to provide any right of access not expressly authorized by law, including access authorized pursuant to a warrant or court order, or to preclude access allowed under a voluntary agreement.

The owner's or operator's obligations would be based upon the numeric cleanup criteria.

Liability: Exacerbation of Existing Contamination

Under Part 201, a person who does not take the required actions with regard to hazardous substances at a facility is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and any fines or penalties imposed under Part 201 resulting from the violation, but is not liable for the performance of additional response activities unless the person is otherwise liable under Part 201. Under the bill, this provision would apply to a person who was not otherwise liable under Part 201 for a release at the facility.

The actions a person is required to take regarding hazardous substances at a facility include the following:

-- Undertaking measures as necessary to prevent exacerbation.
-- Exercising due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.
-- Taking responsible precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that could foreseeably result.

These requirements do not apply to the State or a local unit of government that is not liable under certain circumstances or to the State or a local unit that acquired property before June 5, 1985, or to a person who is exempt from liability for contamination that has migrated onto his or her property. Under the bill, however, if the State or a local unit, acting as the operator of a parcel of property knowing that it was a facility, offered access to the property on a regular or continuous basis pursuant to an express public purpose and invited the general public to use the property for that purpose, these requirements would apply but only with respect to the portion of the facility that was opened to and used by the general public for that express purpose. "Express public purpose" would include activities such as a public park, municipal office building, or municipal public works operation. The term would not include activities surrounding the acquisition or compilation of parcels for future development.

Revolving Loan Program

Under Part 201, the DNRE administers the Revitalization Revolving Loan Fund to make loans to local units of government for eligible activities at certain properties in order to promote economic development. Part 201 prescribes the interest rate and repayment requirements, including a requirement that loan recipients repay loans in equal installments of principal and interest beginning a maximum of five years after execution of a loan agreement and concluding a maximum of 15 years after execution of the agreement. The bill would refer to the first draw of the loan, rather than execution of the loan agreement.

Under the bill, upon request of a loan recipient and a showing of financial hardship related to the project that was financed in whole or in part by the loan, the DNRE could renegotiate the terms of any outstanding loan, including the length, interest rate, and repayment terms.

Senate Bill 1442 (S-2)

Strategic Water Quality Initiatives Fund

The SWQIF exists within the State Treasury. The Michigan Municipal Bond Authority, in consultation with the DNRE, may spend SWQIF money, upon appropriation, only for loans and grants to municipalities under the Strategic Water Quality Initiatives Loan Program and the costs of the Authority and the DNRE in administering the Fund. Under the bill, SWQIF money also could be spent, upon appropriation, on response activities to address nonpoint source water pollution and grants and loans for brownfield sites, as described below.

("Response activity" would mean that term as it is defined in Part 201.)

Response Activities. The bill would create Section 5204b, which would authorize the DNRE to spend up to $140.0 million, upon appropriation, for response activities to address nonpoint source water pollution at facilities. A maximum of $50.0 million could be authorized for expenditure each year for State fiscal years 2010-11 and 2011-12. Beginning on October 1, 2012, any remaining money could be spent only if the DNRE documented that it had achieved the following performance objectives:

-- Increasing the level of investment in sewage collection and treatment systems.
-- Providing incentives for actions that both improved water quality and resulted in pollution prevention.
-- Optimizing the cost-benefit ratio of alternative designs of sewage collection and treatment systems.
-- Demonstrating progress toward maximizing risk reduction and economic development objectives identified for funded projects.

("Facility" would mean that term as it is defined in Part 201.)

An expenditure under these provisions would have to be used to improve the quality of the State's water. The expenditure could be used only for facilities in which the DNRE did not know the identity of the person or people who were liable under Part 201 for the release resulting in the water pollution, or in which the person or people who were liable did not have sufficient resources to fund the required response activities.

The facilities would have to include property located within the identified planning area boundaries of a publicly owned sanitary

sewer system eligible for funding under the State Water Pollution Control Revolving Fund.

An expenditure would have to be used for response activities necessary to address existing or imminent unacceptable exposure risks arising from conditions that contributed to nonpoint source water pollution, including expenses for project management within the DNRE.

In using funds to address nonpoint source water pollution projects, the DNRE would have to select projects that, to the extent practicable, provided maximum benefit to the State in protecting public health and the environment and contributing to economic development.

Money spent to support project management within the DNRE to manage response activities at a facility would have to be spent pursuant to generally accepted accounting principles (GAAP).

The DNRE would have to submit an annual report describing the projects funded under the bill to the Senate and House standing committees and Appropriations subcommittees with jurisdiction over natural resources and environmental issues. The report would have to include an evaluation of how the expenditures, to the extent practicable, provided maximum benefit to the State in protecting public health and the environment and contributing to economic development. In addition, the report would have to include all of the following:

-- How the project met the bill's criteria.
-- The extent to which the project improved water quality or prevented a risk to water quality as measured by the number of individuals who benefited from it.
-- The extent to which the project preserved infrastructure investments that protected public health or prevented risks to water quality as measured by the risk posed or the public health protected.
-- A breakdown of the amount used to support the project management as justified using GAAP, if the project included funding for project management within the DNRE.

The report also would have to indicate the extent to which the project enhanced economic development as measured by a net increase in the value of the properties in the project's vicinity, the creation of jobs, and the extent to which the project contributed to leveraging private investment in its vicinity.

Brownfield Redevelopment. Under the bill, the DNRE could spend $10.0 million from the SWQIF to provide brownfield redevelopment grants and loans to municipalities and brownfield redevelopment authorities for response activities to address nonpoint source water pollution at facilities. Of this money, $5.0 million could be used for grants and a maximum of $5.0 million could be used for loans. On September 30, 2014, if any of the money had not been appropriated for these purposes, the money could be used as described above for response activities under proposed Section 5204b. The DNRE would have to develop grant and loan application materials to implement these provisions, and accept applications at any time during the year.

Legislative Finding & Intent. The bill specifies a legislative finding that "the use of the [SWQIF] for response activities to address nonpoint source water pollution at facilities is appropriate and necessary at this time". The bill also specifies a legislative intent that "money from the fund shall not be utilized for response activities to address nonpoint source water pollution at facilities when the $150,000,000.00 has been expended".

Great Lakes Water Quality Bond Fund

Part 197 requires the State Treasurer annually to transfer money in the Great Lakes Water Quality Bond Fund as follows:

-- In aggregate, not more than $900.0 million must be deposited into the SRF.
-- In aggregate, not more than $100.0 million must be deposited into the SWQIF.

The bill would reduce the maximum amount deposited in the SRF to $750.0 million and increase the maximum amount deposited in the SWQIF to $250.0 million. In addition, the bill provides that, whenever Great Lakes Water Quality Bonds were issued to support the transfer of money into the SWQIF, at

least an equivalent amount of bonds would have to be issued to support the transfer of money into the SRF.

Currently, money from the Great Lakes Water Quality Bond Fund may not be used as the State match for receiving Federal funds for purposes of the SRF at 2002 State match levels. If Federal revenue becomes available at higher levels than were provided in 2002, however, money from the Fund may be used to match Federal revenue in excess of 2002 levels. The bill would delete these provisions.

Within two years after the bill's effective date, the Auditor General would have to conduct an audit of the Fund to assure that money in it had been spent in compliance with law. Within four years after the bill took effect, the Auditor General would have to update its initial audit.

Senate Bill 1443 (S-2)

Strategic Water Quality Initiatives Grant Program

Part 52 required the Michigan Municipal Bond Authority, in conjunction with the DNRE, to establish a Strategic Water Quality Initiatives Grant Program that provides grants totaling a maximum of $40.0 million to eligible municipalities. The bill would increase the maximum amount to $80.0 million.

Part 52 requires the grant program to provide assistance to municipalities to complete the requirements to apply for a loan from the SRF. Under the bill, the grant program also could provide assistance to municipalities to complete the loan application requirements for other sources of financing for sewage treatment works projects, stormwater treatment projects, or nonpoint source projects.

Existing provisions limit assistance from the grant program to 90% of the costs incurred by a municipality, and specify that the required 10% match is not eligible for loan assistance from the SRF or the SWQIF. These provisions also would apply to assistance under the bill.

The bill would delete a provision that required the DNRE to cease accepting grant applications two years after the first grant agreement was entered into.

Currently, the DNRE must publish notice of an application on its calendar within 30 days after receiving it. The bill would extend the deadline to 60 days.

Under Part 52, if the DNRE approves a grant, the DNRE and the Authority must enter into a grant agreement with the recipient before transferring the funds. The agreement must contain a requirement that the recipient repay the grant, with a maximum of 8% annual interest, under certain circumstances, including situations in which the project has been identified as being in the fundable range and the applicant declines the loan assistance from the SRF or the SWQIF in that fiscal year. Under the bill, the repayment requirement would apply if the applicant declined the loan assistance for two consecutive fiscal years, unless the applicant proceeded with funding from another source.

Currently, repayment also is required if the applicant opts to finance construction by means other than a grant from the SRF or the SWQIF. The bill would delete this provision.

Revolving Fund Advisory Committee

The bill would create the State Water Pollution Control Revolving Fund Advisory Committee within the DNRE. The Committee would have to consist of a representative of the DNRE and additional members appointed by the Department Director upon recommendation from at least the following organizations:

-- The American Council of Engineering Companies.
-- The American Waterworks Association.
-- The Michigan Townships Association.
-- The Michigan Chamber of Commerce.
-- The Michigan Association of Counties.
-- The Michigan Infrastructure and Transportation Association.
-- The Michigan Water and Environment Association.
-- A statewide organization of regional planning authorities.
-- A statewide environmental or conservation organization.
-- A statewide association representing drain commissioners.

The organizations also would include the Michigan Municipal League with regard to appointing members from the following: a rural municipality with a maximum population of 10,000 that operated a sewage treatment works system; a suburban municipality that operated a sewage treatment works system; and a city that operated a sewage treatment works system.

Members would have to be appointed within 60 days after the bill took effect. The Director could remove a member for incompetency, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or any other good cause.

The Director would have to call the first Committee meeting. The Committee would be subject to the Open Meetings Act and the Freedom of Information Act.

Committee members would serve without compensation. Staff from the DNRE would have to assist with the Committee's administrative tasks.

The Committee would have to evaluate Part 53 and make recommendations on how it could be amended to achieve the following outcomes:

-- Increasing the level of investment in sewage collection and treatment systems.
-- Providing incentives for actions that both improved water quality and resulted in pollution prevention.
-- Optimizing the cost-benefit ratio of alternative designs of sewage collection and treatment systems.

The Committee would have to review and make recommendations on revisions to Part 53 related to at least all of the following:

-- Revising procedures to accommodate concurrent design and build type procurement and other nontraditional contracting procedures.
-- Reducing and streamlining the cost-effectiveness review requirements to be more consistent with local planning needs.
-- Updating the scoring system to take into account infrastructure asset management.
-- Simplifying application procedures.
-- Reviewing options to provide grants to municipalities for timely and appropriate project planning, including disincentives for failure to demonstrate progress.
-- Establishing protocols for a premeeting process for the DNRE to provide informal feedback to review an application and determine the likelihood of funding.
-- Recommending a new model for establishing interest rates on a sliding scale based on the percentage of income paid in utility fees.
-- Reviewing options to enable municipalities to roll project plan expenses into the loans.
-- Alternative financing mechanisms for funding sewage treatment works projects, stormwater projects, and nonpoint source projects.

By August 1, 2011, the Committee would have to submit a report containing its conclusions and recommendations to the DNRE and to the Senate and House standing committees with jurisdiction over natural resources and environmental issues. The Committee would be abolished six months after it submitted its report.

MCL 324.20126 et al. (S.B. 437)
324.20114a et al. (S.B. 1345)
324.20101 et al. (S.B. 1346)
324.20112a et al. (S.B. 1347)
324.20129 et al. (S.B. 1348)
324.20107a & 324.20108b (S.B. 1349)
324.5204 et al. (S.B. 1442)
324.5204a et al. (S.B. 1443)

BACKGROUND

Public Act 71 of 1995

To a large extent, the current provisions in Part 201 of NREPA were enacted by Public Act 71 of 1995. In general, this Act eliminated liability for owners or operators who did not cause contamination at a facility. Previously, if there was a release or threatened release of contaminated or contaminating substances from a facility that caused response activity costs to be incurred, the people who were liable for the costs included virtually everyone who owned or operated the property at the time of or since the release, regardless of whether a person caused the contamination.

This liability, based on the status of the property rather than on who was responsible

for the causation of the contamination, evidently made many potential investors reluctant to purchase commercial or industrial property for fear that it might be contaminated and they would be burdened with the costs and responsibility of remediating the facility. It was considered safer and less costly to develop "greenfields", rather and try to redevelop contaminated urban areas, or brownfields.

Public Act 71 thus eliminated strict liability based on status in favor of liability based on causation, incorporating requirements for a baseline environmental assessment to distinguish a new release from preexisting contamination, so a new owner or operator is not held liable for releases previously caused by others.

Water Quality Funds

In the 2002 general election, Michigan voters approved the Great Lakes Water Quality Bond proposal, authorizing the State to borrow up to $1.0 billion and issue general obligation bonds to finance sewage treatment projects, storm water projects, and nonpoint source projects that improve the State's water quality. Public Act 397 of 2002 added Parts 52 (Strategic Water Quality Initiatives) and 197 (Great Lakes Water Quality Bond Implementation) to the Natural Resources and Environmental Protection Act to implement the bond proposal, effective November 5, 2002.

Public Act 397 created the Great Lakes Water Quality Bond Fund within the State Treasury; the Fund consists of the proceeds of sales of the bonds and any premium and accrued interest received on the delivery of the bonds, any interest or earnings generated by the sale proceeds, and any Federal or other funds received. The Act also required the State Treasurer to distribute 90% of the money to the State Water Pollution Control Revolving Fund, and the remaining 10% to the Strategic Water Quality Initiatives Fund. The SRF provides low-interest loans to assist municipalities in funding wastewater treatment improvements. The projects may include wastewater treatment plant upgrades or expansions, combined sewer overflow abatement, new sewers designed to reduce existing sources of pollution, nonpoint source pollution management measures, and other related wastewater treatment efforts. Qualified municipalities must meet Federal and State program requirements, and demonstrate environmentally sound water pollution control project plans.

Under the State Water Quality Initiatives Loan Program, the Michigan Municipal Bond Authority, in consultation with the DNRE, provides low-interest loans from the SWQIF to municipalities to provide assistance for one or both of the following sewage system improvements: improvements to reduce or eliminate the amount of groundwater or storm water entering a sanitary sewer lead or a combined sewer lead; and upgrades or replacements of failing on-site septic systems that are adversely affecting public health and/or the environment.

Several years after adoption of the bond proposal, local governments had not yet taken advantage of the available funding due to the significant initial planning and engineering costs of the loan application process. In response, Public Acts 253 through 257 of 2005 were enacted to direct some of the money from the sale of the bonds to a grant program to assist municipalities in applying for the loans from the SRF and SWQIF. Under that legislation, a grant may cover up to 90% of a municipality's costs to complete a loan application. The legislation also revised the distribution of money in the Bond Fund. Previously, 90% of the money had to be transferred to the SRF and the remaining 10% to the SWQIF. The legislation changed the amounts to $900.0 million and $100.0 million, respectively.

ARGUMENTS

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

Supporting Argument

An effective law regulating the cleanup of environmentally contaminated sites is critical to restoring the State's brownfields to productive use. The 1995 revisions facilitated advances toward that end; experience since then, however, has shown that the law could be further improved. Senate Bills 437 (S-9) and 1345 (S-2) through 1349 (S-3) would address several issues that have emerged regarding the efficiency and cost-effectiveness of the environmental cleanup program, facilitating

the redevelopment of thousands of contaminated sites in Michigan.

The Public Sector Consultants report noted that the current cleanup process under Part 201 is "overly complex and the endpoint is ambiguous". By establishing clear timelines for DNRE action on no further action reports and automatic approval if the Department failed to meet the deadlines, Senate Bill 1345 (S-2) would streamline the closure process. In addition, the bill would allow the use of private sector consultants in the self-implemented cleanup process, reducing the time and cost to the DNRE. These updated practices would bring Michigan in line with other states and help provide certainty for lenders regarding redevelopment projects, which would be conducive to the State's economic growth.

Senate Bill 437 (S-9) would establish an appropriate venue to address disputes between facility owners and the DNRE through the proposed Response Activity Review Panel. Currently, the only recourse for an owner who is dissatisfied with a DNRE determination is the court system, which frequently defers to the Department's judgment due to the highly technical nature of the subject matter. In contrast, the proposed Review Panel would consist of experts in the field of environmental remediation, ensuring that decisions were based on sound science.

Senate Bill 1345 (S-2) would further facilitate cleanups by giving land owners more flexibility in using site-specific criteria. The existing cleanup criteria under Part 201 are outdated and rely on broad assumptions about property use that might not apply to a particular property, resulting in an inefficient use of resources. While Part 201 currently allows for the use of site-specific criteria, in practice the process is often cumbersome and hinders the use of the best available science. Under the bill, property owners would be able to focus their efforts on genuine contamination problems. In addition, the bill would allow for more flexibility in monitoring to accurately measure water quality at the GSI, which would help eliminate a significant barrier to obtaining site closure.

The legislation also would streamline the BEA process by aligning it with the Federal all appropriate inquiry process under CERCLA. The bills would eliminate the need for a person to differentiate a new release from contamination caused by a previous owner. These changes would reduce the costs of the BEA process while maintaining liability protection for those who obtained property with a history of releases.

The bills would strike an appropriate balance between environmental protection and economic development. Overall, the legislation would provide clarity, transparency, and predictability for the regulated community, the lenders who provide the critical financing for cleanup projects, and the public.

Supporting Argument

For many of the State's environmentally contaminated sites, there is no party that can be held responsible; the owners are either insolvent or deceased. These "orphan sites" pose risks to natural resources, often having a direct impact on water quality. Senate Bills 1442 (S-2) and 1443 (S-2) would extend an existing water quality grant and loan program to the cleanup of these sites. The requirement that the DNRE demonstrate that specified performance objectives were met before additional funding was made available would ensure that the money was used effectively.

Response: Under the predominant model of wastewater management, water is transported to a site for use and then transported offsite for treatment. The emerging green building movement is examining ways to capture, treat, and recycle wastewater onsite multiple times, which conserves water resources and saves money. The proposed Advisory Committee should include a member with expertise in alternative wastewater treatment to encourage these types of projects.

Opposing Argument

While the proposed revisions to Part 201 could be beneficial, Senate Bills 437 (S-9) and 1345 (S-2) through 1349 (S-3) would create additional duties and costs for the DNRE at a time when funding and staff are being reduced. A funding source should be identified to implement the legislation.

In another matter, although the legislation could be effective in facilitating more cleanups and redevelopment, several elements fall short with regard to protecting public health and safety. For example, the

use of site-specific criteria under certain circumstances could be problematic. Generic cleanup criteria are developed based on a large body of science; disregarding the known data in favor of criteria that applied to a limited number of sites would be ill-advised. It also would be expensive and time-consuming for the DNRE. Furthermore, the feasibility of the proposed timelines for Department action is questionable.

Also, under the bills, facility owners would have to report only large releases of pollutants to the State. They would not have to report many small releases over time, even though cumulatively those releases could constitute a quantity that would compromise public health.

The bills contain superficial changes without meaningful reform. When Part 201 was implemented in 1995, it increased the permitted standard for environmental toxins while reducing liability for polluters. This legislation would continue in the same vein by giving facility owners more flexibility without protecting public health adequately.

Response: Returning to the previous risk standards would shut down cleanups that are occurring now and prevent more in the future. Halting these efforts would result in greater public health risks.

Opposing Argument

Under Senate Bills 1442 (S-2) and 1443 (S-2), Great Lakes Water Quality Bond money would be used in ways that were not approved by voters. The purpose of the grant and loan programs is to address local sewage overflow problems, which continue to be extensive. This money should not be diverted to clean up pollution attributed to private industry, especially when there is still a significant need in Michigan for sewer infrastructure funding--reportedly, about $7.0 billion. According to the DNRE, more than 40 billion gallons of raw or partially treated sewage are released into the State's waterways every year. The shuffling of dollars between programs would not provide a long-term solution to the State's environmental problems. Instead, access to the money for sewer projects should be improved and adequate funding sources for brownfield redevelopment and other programs to protect the environment should be identified.

Response: Abandoned brownfields are often the source of substances that pollute drinking water and otherwise have a negative impact on water quality; thus, the use of Water Quality Bond money to remediate these sites would be in keeping with voter intent. Furthermore, while the money for sewer projects has been available through the bond initiative for several years, communities have not used it as much as expected. For the first few years, some local units could not afford the costs associated with applying for loans, necessitating the creation of the grant program. More recently, some municipal sewer projects have stalled due to uncertainty resulting from the case *Bolt* v *City of Lansing* (459 Mich 152). (In that case, decided in 1998, the Michigan Supreme Court held that Lansing's storm water service charge was a tax that required voter approval, rather than a valid user fee. Because the city ordinance imposing the charge was not approved by the voters, the Court found that it violated the "Headlee Amendment" to the State Constitution.) Presumably, voters did not intend for this money to go unused. Senate Bills 1442 (S-2) and 1443 (S-2) would spur the deployment of some of these funds to communities for their environmental and economic benefit.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bills 437 (S-9) and 1345 (S-2) through 1349 (S-3)

The legislation would require the Director of the Department to establish a Response Activity Panel, whose members would serve without compensation. Panel members could be reimbursed for actual and necessary expenses associated with their service on the panel, and some costs would likely be incurred as a result.

The bills would change the way the adequacy of cleanups is determined. Under current law, the Department may promulgate generic rules for the adequacy of different types of environmental cleanup efforts. Under the bills, the Department would be required to analyze the adequacy of a given cleanup on a case-by-case basis. The Department has estimated in its analysis of a similar bill that this new standard could introduce inefficiencies into the determination process. Since no

additional appropriations to the Department would occur under the package, these inefficiencies could lead to backlogs in the cleanup determination process.

Other changes to Part 201 from this legislation would have an indeterminate fiscal impact on State and local government.

Senate Bills 1442 (S-2) and 1443 (S-3)

Senate Bill 1442 (S-2) would allow the Legislature to appropriate funds from the Strategic Water Quality Initiatives Fund to address certain nonpoint source water pollution issues. The Legislature would be allowed to appropriate up to $50.0 million in FY 2010-11 and $50.0 million in FY 2011-12 for these purposes. A total of an additional $40.0 million would be available for appropriation in subsequent fiscal years if the Department of Natural Resources and Environment met certain performance standards outlined in the bill.

The SWQIF was created as a part of (although not directly by) Proposal 2 of 2002, which authorized the issuance of up to $1.0 billion in general revenue bonds for the purpose of financing sewage treatment works projects, storm water projects, and nonpoint source projects. Senate Bill 1442 (S-2) would increase the portion of this authorization for the SWQIF from $100.0 million to $250.0 million and reduce the authorization of the State Water Pollution Control Revolving Fund from $900.0 million to $75.0 million. Currently, the SWQIF has $44.4 million in remaining bond authorization; the bill would increase this authorization to $194.4 million. The SRF has an available authorization of $810.0 million, which would be reduced to $660.0 million under the bill.

Senate Bill 1442 (S-2) also would allow the Legislature to appropriate, and the DNRE to spend, up to $10.0 million from the SWQIF on brownfield redevelopment grants and loans. The bill specifies that up to $5.0 million could be spent on grants and $5.0 million on loans. Senate Bill 1443 (S-2) would allow the Michigan Municipal Bond Authority, in conjunction with the DNRE, to spend an additional $40.0 million on grants under the Strategic Water Quality Initiatives Grant Program.

While neither bill would require any additional spending, the appropriations/spending authorized by the bills, if acted upon, would come from new bond issuances under Proposal 2. The table below shows a breakdown of the additional annual debt service that would result from spending under the authorizations contained in these bills assuming a 4.5% coupon rate and a 20-year maturity on bonds issued.

(dollar amounts in millions)

Program	Authorized Amount	Annual Debt Service
SWQIF – Nonpoint source pollution, initial amount	$100.0	$7.6
SWQIF – Nonpoint source pollution, potential additional amount	$40.0	$3.0
Brownfield Redevelopment Program – Grants	$5.0	$0.4
Brownfield Redevelopment Program – Loans	$5.0	$0.4
SWQIF – Loan application grants	$40.0	$3.0
Total	**$190.0**	**$14.4**

Senate Bill 1443 (S-2) would require DNRE staff to assist with various administrative functions associated with the proposed SRF Advisory Committee. This requirement could result in some relatively small additional costs to the DNRE.

Fiscal Analyst: Josh Sefton

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