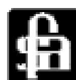

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bills 1345 through 1349 (as introduced 5-25-10)
Sponsor: Senator Patricia L. Birkholz (S.B. 1345)
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)
Committee: Natural Resources and Environmental Affairs

Date Completed: 6-8-10

CONTENT

The bills would amend Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) to revise provisions related to the cleanup of environmental contamination.

Senate Bill 1345 would do the following:

-- **Allow a liable facility owner or operator to pursue response activities by conducting a self-implemented cleanup or obtaining Department of Natural Resources and Environment (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 by which a person proposing or implementing a response activity involving venting groundwater could demonstrate compliance with Part 201.**
-- **Repeal a section prescribing a process by which a person may petition the DNRE for an exemption from liability after completion of a baseline environmental assessment (BEA).**
-- **Repeal a section providing for a municipal landfill cost-share grant program.**
-- **Rescind certain administrative rules pertaining to response activities.**

Senate Bill 1346 provides 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 would 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 would eliminate references to violations of Part 201 rules in certain provisions regarding civil and criminal penalties.

Senate Bill 1349 would 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.**

The bills are tie-barred to each other and to House Bill 4903 or Senate Bill 437. House Bill 4903 would prohibit the DNRE from establishing or enforcing cleanup criteria for a hazardous substance that were more stringent than criteria of the U.S. Environmental Protection Agency. Senate Bill 437 would make other revisions to Part 201, including the establishment of a Response Activity Review Panel to which a person could appeal the DNRE's decision on a response activity plan or a no further action report. Senate Bills 1345 through 1349 are described below in further detail.

Senate Bill 1345

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.

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. (Under Senate Bill 1346, "no further action report" would mean a report detailing the completion of remedial actions and including a postclosure plan and postclosure agreement (described below).)

(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.

(Under Senate Bill 1346, "response activity plan" would mean a submittal to the DNRE containing 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.)

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 the plan was submitted, unless it required public participation. In that case, the DNRE would have to respond within 180 days. If the Department responded that the plan did not include sufficient information, the DNRE would have to identify the information required for it to make a decision. If a 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.

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, "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 would have to be submitted on a form developed by the DNRE, which would have to make the form available on its website.

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, "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 consummate a conveyance of 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.

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 alternative terms than those included within the proposed agreement. The DNRE would have to provide its determination within 150 days after the report was submitted unless it required public participation. In that case, the Department would have to respond within 180 days. 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. 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. If the DNRE failed to provide a written response within the required time frame, then no further action report would be considered approved.

(Under Senate Bill 1346, "no further action letter" would mean a written response provided by the DNRE confirming that a no further action report had been 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 the proposed change. The process for review and approval would be the same as the process for original no further action reports.

Remedial Action 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 persistence, toxicity, mobility, and propensity to bioaccumulate of the hazardous substances.
-- 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 comment.
-- 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 the Department 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 and revise, if appropriate, the cleanup criteria; and prepare and submit to the Legislature a report detailing the revisions. The bill would delete these requirements. Instead, the DNRE would have to evaluate and revise the criteria at least once every four years, beginning one year after the bill took effect. The Department would have to make draft cleanup criteria available for public comment at least 90 days before issuing final criteria. The Department would have to take into account relevant comments provided by the public during that time, and summarize responses to the comments in a document made available to the public when the final cleanup criteria were issued.

The Department also would have to make available publicly, in conjunction with the draft and final cleanup criteria, the toxicological and physical-chemical data used to develop the draft and final criteria. The Department would have to publish the final criteria on its website and distribute notice of their availability in a manner calculated to effectively inform interested parties. On the effective date of the first revision, R 299.5744, R 299.5746, R 299.5748, R 299.5750, and R 299.5752 of the Michigan Administrative Code would be rescinded. (Those rules prescribe generic groundwater and soil cleanup criteria for all categories and the toxicological and physical-chemical properties used to calculate the criteria.)

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 also would refer to the restriction of the use of an aquifer under a postclosure plan or agreement.

<u>Response Activity Plan: Site-Specific Criteria</u>

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 were provided for in a response activity that complied with Part 201.

Under the bill, a person could 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 rely on monitoring points other than GSI monitoring wells. Alternative monitoring points would be acceptable only if approved by the DNRE in a response activity plan, in accordance with the requirements and procedures established under Part 201. A proposal for alternative monitoring points would have to include the following:

-- A demonstration that the locations where venting groundwater entered surface water had been identified sufficiently to allow monitoring for the evaluation of compliance with criteria.
-- A demonstration that the alternative monitoring points would allow for venting groundwater to be sampled at a point before mixing with surface water.
-- A demonstration that the proposed alternative points allowed for reliable, representative monitoring of groundwater quality.
-- Identification of the potential fate and transport mechanisms for groundwater contaminants, including any chemical, physical, or biological process that resulted in the reduction of hazardous substance concentrations between the monitoring wells and the proposed alternative monitoring points.
-- Identification of sentinel monitoring points that would 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 additional response activity to be implemented that would prevent the exceedance.

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

A person implementing a response activity providing for venting groundwater that complied with generic GSI criteria could undertake the activity without prior DNRE approval.

Notwithstanding any other provision of Part 201, a response activity plan or no further action report that included mixing-zone-based GSI criteria would be subject to a 30-day comment period.

A person could appeal a Department decision in a response activity report containing a proposal for venting groundwater related to a scientific or technical dispute, including the use of a

mixing zone, by petitioning for the Response Activity Review Panel to be convened.

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 fees 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 damages, 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.

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.

Rescinded Administrative Rules

The bill would rescind the administrative rules described below.

R 299.5601 to R 299.5607. These rules 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.

R 299.5801 to R 299.5823. These rules 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.

Senate Bill 1346

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, along with a written instruction, 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, and instead define the term 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. For purposes of a BEA, the all appropriate inquiry could be conducted within 45 days after the date of acquisition of a property, and the certain components of an all appropriate inquiry specified in Federal regulations could be conducted or updated within 45 days after the date of acquisition. "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 specific Federal regulations.

Senate Bill 1347

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 were a result of an activity that was subject to permitting under Part 615 (Supervisor of Wells) and the owner or operator did not own the surface property, 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.

Under Senate Bill 1346, "response activity plan" would mean a submittal to the DNRE containing a plan for undertaking response activities. A plan could include a plan to undertake interim response activities, a plan for evaluation activities, a feasibility study, and/or a remedial action plan.)

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.

Instead, 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 known facilities. The 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.
-- Whether a cleanup category was proposed for the facility in a remedial action plan or no further action report, or was met in an approved report.

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 inventory available on its website.

The bill would require the DNRE to compile on a quarterly basis and post on its website the number of response activity plans 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 similar data regarding no further action reports, as well as 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 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. 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.

Part 201 prescribes the purposes for which Fund money may be used, upon appropriation. The bill would eliminate national priority list municipal landfill cost-share grants from the list of eligible purposes.

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

Senate Bill 1348

Civil Action

Under Part 201, in addition to other relief authorized by law, the Attorney General may commence a civil action seeking a maximum civil fine of $10,000 for each day of violation of Part 201 or a rule promulgated under it. The bill would delete the reference to a violation of Part 201 rules.

Part 201 Felonies

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 making a false statement, representation, or certification in any document filed or required to be maintained under Part 201 or rules promulgated under it.
-- Intentionally rendering inaccurate any monitoring device or record required to be maintained under Part 201 or a rule promulgated under it.
-- Misrepresenting 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 delete the references to rules promulgated under Part 201, and refer to a misrepresentation of qualifications in relation to a no further action report or an appeal to the proposed Response Activity Review Panel.

Senate Bill 1349

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 full 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 institutional control employed at the facility in connection with response activities.

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 of the existing contamination.
-- 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 the property is 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 to the portion of the facility that was opened to and used by the general public for an express purpose.

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, the DNRE could renegotiate the terms of any outstanding loan, including the length, interest rate, and repayment terms. With respect to a property subject to a loan, "financial hardship" would mean that the property was not generating the anticipated tax increment, and the loan recipient's economic status was significantly worse than when the loan application was submitted.

MCL 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)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

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 bill package would have an indeterminate fiscal impact on State and local government.

Fiscal Analyst: Josh Sefton

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