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BILL ANALYSIS

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Senate Bills 528 through 533 (as enacted) **PUBLIC ACTS 108-113 of 2012**
Sponsor: Senator Tom Casperson (S.B. 528)
Senator Darwin L. Booher (S.B. 529)
Senator Phil Pavlov (S.B. 530)
Senator Arlan Meekhof (S.B. 531)
Senator Mike Kowall (S.B. 532)
Senator Mike Green (S.B. 533)
Senate Committee: Natural Resources, Environment and Great Lakes
House Committee: Natural Resources, Tourism, and Outdoor Recreation

Date Completed: 1-21-15

CONTENT

The bills amended Parts 201 (Environmental Remediation), 213 (Leaking Underground Storage Tanks), and 215 (Refined Petroleum Fund) of the Natural Resources and Environmental Protection Act (NREPA) to revise procedures related to environmental contamination caused by leaking underground storage tanks (LUSTs), which are based on the American Society for Testing and Materials (ASTM) Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites ("RBCA").

Senate Bill 528 amended Part 213 to do the following:

- **Require LUST sites to be classified consistent with the process outlined in RCBA; and delete a requirement that the Department of Environmental Quality (DEQ) establish a classification system considering impacts on public health, safety, and welfare, and the environment.**
- **Establish a 90-day window for the DEQ to audit a required submission or report.**
- **Allow the DEQ to audit a report more than once only upon request by an owner or operator.**
- **Provide that a required report will be considered in compliance with Part 213 unless audited and found to be noncompliant.**
- **Provide that an owner or operator that was responsible for a release or threat of release is liable under Part 213.**
- **Provide that a person who became an owner or operator on or after June 5, 1995, is liable under Part 213 unless the person conducts a baseline environmental assessment.**
- **Exempt certain people from liability.**
- **Provide that a person who desires to change land use or resource use restrictions specified in a closure report is responsible for any necessary additional corrective action.**
- **Provide that an owner or operator whose corrective action fails to meet performance objectives is liable for the corrective action needed to satisfy the objectives.**
- **Require the DEQ to bear the burden of proof in establishing liability under Part 213.**
- **Authorize the Attorney General to bring an action to abate an imminent and substantial endangerment to the public health, safety, or welfare, or the environment.**
- **Establish joint and several liability for a liable person.**

-- Provide for the apportionment of liability in the case of two or more liable people acting independently.
-- Allow a person to seek contribution from any other liable person during or after a civil action.
-- Establish maximum liability for a release or threat of release of the total cost of corrective action and fines, plus $50.0 million in damages for the destruction of natural resources.
-- Allow the State to give a person a covenant not to sue concerning liability, under certain circumstances.
-- Authorize the DEQ and the Attorney General to enter into a consent order with a liable person to perform corrective action.
-- Allow a person whose health or enjoyment of the environment is adversely affected by a release, a violation of Part 213, or a failure to perform a nondiscretionary act or duty, to commence a civil action.
-- Limit the time period for filing actions under Part 213.

Senate Bill 529 amended Parts 201 and 213 to do the following:

-- Allow a person who submits an initial assessment, final assessment report, or closure report under Part 213 to appeal a DEQ decision regarding a technical or scientific dispute by petitioning the DEQ Director.
-- Require at least three of the members selected for a Response Activity Review Panel meeting regarding a dispute involving an underground storage tank (UST) system to have relevant experience in the ASTM RBCA process.
-- Allow an owner or operator to petition the DEQ for a contested case hearing to resolve disputes with the Department.
-- Allow an owner or operator to appeal a final DEQ decision to affix a violation placard or issue an administrative order requiring corrective action, and require the court to set aside the decision if the petitioner's rights are found to have been prejudiced based on certain grounds.

Senate Bill 530 amended Part 213 to do the following:

-- Require an owner or operator to submit an initial assessment report to the DEQ within 180 days after a release is discovered, rather than within 90 days as required previously.
-- Revise the information that must be included in an initial assessment, final assessment, or closure report.
-- Prohibit the DEQ from requiring a report to include information beyond that specified in Part 213.
-- Require a closure report to contain signed affidavits attesting to the fact that the information in the report is complete and true, and that all corrective actions comply with the requirements of the applicable RBCA standard.
-- Require a person who submits a closure report to retain all related documents and data for at least six years, and make them available to the DEQ upon request.

Senate Bill 531 amended Part 213 to revise the definitions of terms used in that part and the other bills, and add new definitions.

Senate Bill 532 amended Part 213 to do the following:

-- Authorize the Attorney General, on behalf of the DEQ, to commence a civil action seeking declaratory judgment on liability for future corrective action costs.
-- Allow a person who is fined for failing to submit a report by the prescribed deadline to appeal to the Response Activity Review Panel, rather than the circuit court.

The bill also deleted provisions allowing a person to whom an administrative order is issued and who believes the order is arbitrary and capricious to petition the DEQ for reimbursement of costs incurred, and file an action against the Department in court if

the DEQ refused to grant the petition. Under the bill, instead, the person may file a petition to resolve any disputes with the DEQ related to the order.

Senate Bill 533 amended Part 213 to do the following:

-- Prohibit the DEQ from promulgating rules to implement Part 213, beginning on the bill's effective date.
-- Provide that a DEQ guideline, bulletin, interpretive statement, operational memorandum, or form with instructions published under Part 213 is advisory, and may not be given the force of law.

The bill also amended Part 215 to do the following:

-- Require the DEQ to establish an UST Cleanup Advisory Board.
-- Require the Advisory Board, by March 1, 2013, to make recommendations regarding a program to provide financial assistance for corrective actions required under Part 213.
-- Require the Auditor General, by March 1, 2013, to conduct an audit of expenditures from the Refined Petroleum Fund from October 12, 2004, through the bills' effective date.

Additionally, the bill repealed sections of Part 215 pertaining to a DEQ list of qualified consultants, providing for certification of UST professionals by the DEQ, and creating the Temporary Reimbursement Program Advisory Board and the UST Financial Assurance Policy Board.

The bills took effect on May 1, 2012. They are described below in further detail. (The definitions in Senate Bill 531 are incorporated in the descriptions of the other bills.)

Senate Bill 528

Corrective Action Activities

Corrective action activities undertaken pursuant to Part 213 must be conducted in accordance with the process outlined in RBCA in a manner that protects the public health, safety, and welfare, and the environment.

The bill also requires corrective action activities that involve a discharge into air, ground water, or surface water to be consistent with Parts 31 (Water Resources Protection) and 55 (Air Pollution Control) of NREPA.

(Under Part 213, "corrective action" means the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment, or the taking of other actions necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or the environment or natural resources.

Senate Bill 531 defines "air" as ambient or indoor air at the point of exposure, and defines "ground water" as water below the land surface the zone of saturation and the capillary fringe. Previously, the definition of "ground water" did not refer to the capillary fringe. Also, the bill defines "surface water" as all of the following, excluding groundwater or an enclosed sewer, other utility line, storm water retention basis, or drainage ditch:

-- The Great Lakes and their connecting waters.
-- All inland lakes.
-- Rivers, streams, and impoundments.)

Previously, the DEQ was required to establish cleanup criteria for corrective action activities using the process outlined in RBCA. The Department could use only reasonable and relevant exposure assumptions and pathways in determining the cleanup criteria. The bill deleted these

provisions. Instead, the tier I risk-based screening levels for regulated substances are the unrestricted residential and nonresidential generic cleanup criteria developed by the DEQ pursuant to Part 201 (Environmental Remediation) of NREPA and must be used in accordance with the process outlined in RBCA as screening levels only.

The bill provides that corrective action at sites where a release has occurred or a threat of release exists from an UST system must be regulated under Part 213 exclusively.

Moving Soil

Part 213 prohibits a person from removing soil from a site to an off-site location unless the person determines that the soil can be lawfully relocated without posing a threat to the public health, safety, or welfare, or the environment.

The bill deleted a provision requiring prior DEQ approval for the moving of soil off-site from or to, or relocated on-site at a site where corrective actions would occur.

Owner/Operator Duties

Under the bill, a person who owns or operates property and knows that it is or was a site (a location where a release from an UST system has occurred or a threat of release exists) must do all of the following:

-- Undertake necessary measures to prevent exacerbation.
-- Exercise due care by undertaking corrective action necessary to mitigate unacceptable exposure to regulated substances, mitigate fire and exposure hazards due to regulated substances, and allow for the intended use of the property in a manner that protects the public health and safety.
-- Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result.
-- Comply with any land or resource use restrictions established or relied on in connection with the corrective action activities at the property.
-- Not impede the effectiveness or integrity of any land or resource use restriction employed at the property in connection with corrective action activities.
-- Provide reasonable cooperation, assistance, and access to people authorized to conduct corrective action activities at the property.

The requirement to provide access may be interpreted to provide any right of access not expressly authorized by law, including access authorized pursuant to a warrant or a court order, or to preclude access allowed pursuant to a voluntary agreement.

A person's obligations under these requirements must be based upon the applicable RBSL or SSTL.

A person who violates any of these requirements and is not otherwise liable under Part 213 for the release at the property is liable for corrective action activity costs and natural resources damages attributable to any exacerbation and any fines or penalties imposed under Part 213 resulting from the violation, but is not liable for performance of additional activities unless the person is otherwise liable under Part 213 for their performance. The party seeking relief must bear the burden of proof in a dispute as to what constitutes exacerbation.

The bill provides that compliance with these requirements does not satisfy a person's obligation to perform corrective action activities as otherwise required.

Under certain circumstances, the requirements to take measures to prevent exacerbation, take corrective action, and take reasonable precautions against third-party acts or omissions do not apply to a person or to the State or a local unit of government that is not liable under Part 213 for environmental contamination from an UST (as discussed below). Specifically, the State or a

local unit is not responsible for an activity causing a release or threat of release, and is not subject to the owner/operator requirements, under the following circumstances:

-- The State or local unit acquired ownership or control of the property involuntarily by virtue of its governmental function or pursuant to the operation of law or by court order.
-- The State or local unit holds or acquires an interest in property for a transportation or utility corridor or public right-of-way.
-- The State or local unit holds an easement interest or utility franchise for the purpose of conveying or providing goods or services or acquires access through an easement.
-- The State or local unit leases property to another person.

In addition, the requirements do not apply to the State or a local unit if it acquired property by purchase, gift, transfer, or condemnation, or to a person who is exempt from liability because the release or threat of release was caused solely by an act of God, an act of war, or an act or omission of a third party or a person in a contractual relationship with a liable person.

If the State or a local unit, acting as the operator of a parcel that the State or local unit knows is or was a site, offers access to the parcel on a regular or continuous basis pursuant to an express public purposes, and invites the general public to use the property for that purpose, the State or local unit is subject to these owner/operator requirements but only with respect to the portion of the property opened to and used by the general public for that purpose. "Express public purpose" includes activities such as a public park, municipal office building, or municipal public works operation. The term does not include activities surrounding the acquisition or compilation of parcels for the purpose of future development.

An exception to the same owner/operator requirements applies to a person who is exempt from liability under the following circumstances, except with regard to that person's activities at the property:

-- The person holds an easement interest or a utility franchise for the purpose of conveying or providing goods or services, or the person acquires access through an easement.
-- The person owns or leases severed subsurface mineral rights or formations.

The bill prohibits a real property owner who has knowledge or information or is on notice through a recorded instrument that the property is a site from transferring an interest in that property unless the owner gives the transferee written notice that the property is a site and of the general nature and extent of the release. Upon completion of all corrective action activities, the owner of real property for which this notice has been recorded may record with the county register of deeds a certification that all corrective action activity required in an approved final assessment report has been completed.

The bill also prohibits a person from transferring an interest in real property unless the person fully discloses any land or resource use restrictions that apply to the property as part of corrective action that has been or is being implemented in compliance with Part 213.

Initial Action

Under Part 213, upon confirmation of a release from an UST system, the owner or operator must report the release to the DEQ within 24 hours after discovery. Previously, the owner or operator also had to report a release of free product within 24 hours after it was discovered. The bill deleted that requirement. ("Free product" meant a regulated substance in a liquid phase equal to or greater than one-eighth of an inch of measureable thickness, that is not dissolved in water, and that has been released into the environment.)

After a report, the owner or operator immediately must perform specified initial response actions. Previously, the required actions included the identification and recovery of free product, and further action was required if free product was identified. The bill deleted all of the actions involving free product. The bill added to the initial actions taking steps necessary and feasible

under Part 213 to address unacceptable immediate risks, using the process outlined by the RBCA.

Corrective Action Plan

If initial actions have not resulted in completion of a corrective action, an owner or operator must prepare a corrective action plan using the RBCA process to address contamination at the site. Under the bill, the plan also must be based on the site information and characterization results of the initial assessment report.

(As defined in Senate Bill 531, "contamination" means the presence of a regulated substance in soil, surface water, groundwater, or air that has been released from an UST system at a concentration exceeding cleanup criteria for the categories of residential and nonresidential.)

A corrective action plan must include an operation and maintenance plan if any element of the corrective action requires operation and maintenance. Previously, that plan had to include specific information, such as the name, telephone number, and address of the person responsible for operation and maintenance; design and construction plans; and a safety plan. The bill instead requires the operation and maintenance plan to include information that describes the proposed operation and maintenance actions.

If monitoring of environmental media and/or site activities is required to confirm the effectiveness and integrity of the remedy, a corrective action plan also must include a monitoring plan. The bill deleted requirements that the monitoring plan include a contingency plan to address ineffective monitoring, and an operation and maintenance plan for monitoring.

Previously, the corrective action plan had to include a financial assurance mechanism as provided for in the Michigan Administrative Code, in an amount approved by the DEQ, to pay for monitoring, operation and maintenance, oversight, and other costs if required by the DEQ as necessary to assure the effectiveness and integrity of the corrective action remediation system.

Under the bill, instead, if the corrective action plan includes the operation of a mechanical soil and/or groundwater remediation system, the plan must contain a financial assurance mechanism to pay for monitoring, operation, and maintenance necessary to assure the effectiveness and integrity of the corrective action remediation system.

Under Part 213, if provisions for operation and maintenance, monitoring, or financial assurance are included in the corrective action plan and they are not complied with, the plan is void from the time of lapse or violation until the lapse or violation is corrected. Previously, the lapse or violation had to be corrected to the satisfaction of the DEQ.

If a corrective action plan does not result in an unrestricted use of the property, the owner or operator must notify the public by means designed to reach those members of the public directly affected by the release and the proposed corrective action. The bill refers to members of the public directly affected by the release "above a residential RBSL". In addition, the bill deleted language allowing a consultant retained by the owner or operator to provide the public notice.

Under the bill, if the corrective action activities at a site result in a final remedy that relies on a nonresidential RBSL or an SSTL, institutional controls must be implemented. Previously, this provision referred to tier I commercial or industrial criteria, rather than a nonresidential RBSL or SSTL. A notice of corrective action must be recorded with the county register of deeds before a closure report is submitted. The bill eliminated a provision requiring the form and content of the notice to be approved by the DEQ.

Previously, a person who implemented corrective action activities had to give notice of land use restrictions that were part of the corrective action plan to the applicable local unit of government within 30 days of submitting the plan, unless otherwise approved by the DEQ. Under the bill, instead, the person must give notice within 30 days of filing the land use restrictions with the county register of deeds. The bill eliminated the reference to approval by the DEQ.

Classification System

Previously, Part 213 required the DEQ to establish and implement a classification system for sites considering impacts on public health, safety, and welfare, and the environment. At sites posing an imminent risk, corrective action had to be implemented immediately. The bill deleted these provisions, and instead requires sites to be classified consistent with the RBCA process.

If the DEQ determines that no imminent risk to the public health, safety, or welfare, or the environment exists at the site, the Department may allow corrective action to be conducted on a schedule approved by the Department. Previously, Part 213 stated that the DEQ could not use this provision to limit the ability of an owner, operator, or consultant to submit a claim to the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund, or delay payment on a valid claim. (The MUSTFA is described below, under **BACKGROUND**.)

Corrective Action Audit

Previously, Part 213 required the DEQ to design and implement a program to selectively audit or oversee all aspects of corrective actions undertaken to assure compliance with the part. The DEQ could audit a site at any time before receiving a closure report and within six months afterward. The bill, instead, requires the Department to design and implement a program to selectively audit final assessment reports and closure reports.

The bill deleted a requirement that the Department give the owner or operator a letter describing the audit and its results, if the DEQ conducted an audit and the audit confirmed that the cleanup criteria had been met.

Under the bill, upon receiving a final assessment or closure report, the DEQ has 90 days to determine whether it will audit the report, and inform the owner or operator of its intention to audit within seven days of the determination. If the DEQ does not inform the owner or operator of its intention within the required time limit, the Department may not audit the report. If the Department determines that it will conduct an audit, the audit must be completed within 180 days of the submission. The Department must inform the owner or operator in writing of the results within 14 days after completing the audit. All audits must be conducted based on the standards, criteria, and procedures in effect when the final assessment or closure report was submitted.

The DEQ had 270 days from the bill's effective date to selectively audit reports that were submitted within six months before or 60 days after the bill took effect.

Under the bill, if the Department conducts an audit, the results must approve, approve with conditions, or deny the report or notify the owner that the report does not contain sufficient information for the Department to make a decision. If the report does not contain sufficient information, the Department must identify the information required. If a report is approved with conditions, the Department's approval must state the conditions with specificity.

If the DEQ does not perform an audit and provide a written response as provided above to a report submitted after June 15, 2012, the report is considered approved. An owner or operator may request written confirmation from the DEQ that the report is considered approved, and the Department must provide the confirmation within 14 days.

Any time frame required by the bill may be extended by mutual written agreement of the DEQ and an owner or operator submitting a report.

The bill requires the DEQ to include both of the following in its written response, if an audit does not confirm that corrective action has been conducted in compliance with Part 213, or does not confirm that applicable RBSLs or SSTLSs have been met:

-- The specific deficiencies and the section or sections of Part 213 or rules or applicable RBCA standard that support the DEQ's conclusion of noncompliance or that applicable RBSLs or SSTLs have not been met.
-- Recommendations about corrective actions or documentation that may address the deficiencies.

If the DEQ denies a report, an owner or operator must revise and resubmit it for approval, submit a petition for review of scientific or technical disputes to the Response Activity Review Panel (described below) and pay a fee, or submit a petition to the DEQ's Office of Administrative Hearings for a contested case hearing. If the owner or operator submits a petition to the Review Panel, the fee is $300 in lieu of the $3,500 fee set forth for the petition in Part 213.

(The Act requires the DEQ Director to establish a 15-member Response Activity Review Panel to advise him or her on technical or scientific disputes under Part 201. Senate Bill 529 amended Part 201 as described below to include Part 213 disputes among those that the Review Panel may consider.)

Previously, if an audit did not confirm that corrective action had been conducted in compliance with Part 213 or that cleanup criteria were met, the DEQ could require an owner or operator to do either or both of the following:

-- Provide additional information related to any requirement of Part 213.
-- Retain a consultant to take additional corrective actions necessary to comply with Part 213 or to protect public health, safety, or welfare, or the environment.

The bill deleted these provisions.

Under the bill, the DEQ may audit a required report only once. If the audit identifies deficiencies, the Department may audit a revised report to evaluate whether the deficiencies have been corrected. This audit must be completed within 90 days of the report's submission to the DEQ.

Violation Placard; Delivery of Regulated Substance

Upon discovery of the operation an UST system in violation of Part 213, Part 211 (Underground Storage Tank Regulation), or Part 213 or 211 rules, the DEQ must provide notification prohibiting delivery of regulated substances to the system by affixing a placard giving notice of the violation in plain view to the system. The bill requires the DEQ to provide at least 15 days' notice to the liable owner or operator before affixing a placard, unless the violation causes an imminent and substantial endangerment to the public health, safety, or welfare or the environment.

The bill prohibits a person from knowingly delivering a regulated substance to an UST system that has had a placard affixed to it (rather than a system that was not in compliance with Part 213 or Part 211, or rules promulgated either part). A violation is a misdemeanor punishable by imprisonment for up to 90 days and/or a maximum fine of $500. The bill provides that a person is considered to have knowledge if placards have been affixed to the UST system at the property and are visible at the time of the delivery.

Corrective Action by DEQ

Part 213 allows the Department to take corrective action necessary to protect the public health, safety, or welfare or the environment if the DEQ learns of a suspected or confirmed release from an UST system. Under the bill, this provision applies at sites where liable people are not financially viable or not readily identifiable, or where liable people have not implemented corrective action necessary to abate an imminent and substantial endangerment, or to facilitate brownfield redevelopment.

Liability

Under the bill, except as otherwise provided, if an owner or operator is responsible for an activity causing a release or threat of release, that person is liable under Part 213. In addition, a person who became an owner or operator on or after March 6, 1996, is liable unless the owner or operator complies with both of the following:

-- A baseline environmental assessment (BEA) is conducted before or within 45 days after the earliest of the date of purchase, occupancy, or foreclosure.
-- The owner or operator provides a BEA to the DEQ and subsequent purchaser or transferee within six months after the earliest of the date of purchase, occupancy, or foreclosure.

Assessing property to conduct a BEA does not constitute occupancy.

The estate or trust of a person described above also is liable under Part 213.

(Under Senate Bill 531, "baseline environmental assessment" means a written document describing the results of an all appropriate inquiry and the sampling and analysis that confirm that the property is a site. For purposes of a BEA, the all appropriate inquiry may be conducted within 45 days after the date of acquisition of a property and the components of an all appropriate inquiry may be updated within 45 days after the date of acquisition.

"All appropriate inquiry" means 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 Federal regulations.

"Site" means a location where a release has occurred or a threat of release exists from an UST system, excluding any location where corrective action was completed that satisfies the cleanup criteria for unrestricted residential use under the applicable RBSL or SSTL.)

Under Senate Bill 528, an owner or operator who complies with the BEA requirements is not liable for contamination existing at the property on which an UST system is located at the earliest of the date of purchase, occupancy, or foreclosure, unless the person is responsible for an activity causing the contamination. The BEA provisions do not alter a person's liability with regard to a subsequent release or threat of release from an UST system if the person is responsible for an activity causing the subsequent release or threat of release.

The following people are not liable under Part 213 with respect to contamination at property on which an UST system is located resulting from a release or threat of release unless the person is responsible for an activity causing it:

-- A person who holds an easement interest in property or holds a utility franchise to provide services, for the purpose of conveying or providing goods or services; or a person who acquires access through an easement.
-- A person who owns or leases severed subsurface mineral rights or formations.
-- The State or a local unit that leases property to a person, if the State or local unit is not liable under Part 213 for contamination at the property.
-- A person who acquires property as a result of the death of the previous owner or operator, whether by inheritance, devise, or transfer from an inter vivos or testamentary trust.
-- A utility performing normal construction, maintenance, and repair activities in the normal course of its utility services business.
-- A lessee who uses the leased property for a retail, office, or commercial purpose regardless of the lessee's level of regulated substance use, unless otherwise provided.
-- A person who did not know and had no reason to know that the property was contaminated.

To establish that a person did not know and did not have a reason to know that property was contaminated, the person must have undertaken at the time of acquisition all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice. A determination of liability under these provisions must take into account

any specialized knowledge or experience on the person's part, the relationship of the purchase price to the value of the property if uncontaminated by a regulated substance, commonly known or reasonable ascertainable information about the property, the obviousness of the presence or likely presence of a release or threat of release, and the ability to detect a release or threat of release by appropriate inspection.

The exemption from liability also applies to the State or a local unit of government that acquires ownership or control of the property involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a lender or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function; a local unit to which ownership or control is transferred by the State or by another local unit that is not liable; or the State or a local unit that acquires ownership or control by seizure, receivership, or forfeiture pursuant to the operation of law or by court order.

In addition, the liability exemption applies to a State or local unit that holds or acquires an easement interest in the property, holds or acquires an interest in property by dedication in a plat, or by dedication pursuant to the Public Highways and Private Roads Act, or otherwise holds or acquires an interest in property for a transportation or utility corridor.

The following people also are not liable under Part 213:

-- A lender that engages in or conducts a lawful marshaling or liquidation of personal property, if the lender does not cause or contribute to the environmental contamination.
-- The owner or operator of property onto which contamination has migrated, unless the person is responsible for an activity causing the release that is the source of the contamination.
-- A person who owns or operates property on which the release or threat of release is caused solely by an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the person or a person in a contractual relationship with a person who is liable.

A person is not liable for environmental contamination addressed in a closure report approved by the DEQ. A person may be liable, however, for the following:

-- A subsequent release not addressed in the closure report, if the person is otherwise liable under Part 213 for that release.
-- Environmental contamination that is not addressed in the closure report and for which the person is otherwise liable under Part 213.

If the closure report relies on land use or resource use restrictions, an owner or operator who desires to change those restrictions is responsible for any corrective action necessary to comply with Part 213 for any land or resource use other than the use that was the basis for the closure report.

If the closure report relies on monitoring necessary to assure the effectiveness and integrity of the corrective action, an owner or operator who is otherwise liable for environmental contamination addressed in a closure report is liable under Part 213 for additional corrective action activities necessary to address any potential exposure to the contamination demonstrated by the monitoring in excess of the levels relied on in the closure report.

If the corrective actions that were the basis for the closure report fail to meet performance objectives that are identified in the report or prescribed in Part 213, an owner or operator who is otherwise liable for environmental contamination addressed in the report is liable for corrective action necessary to satisfy the performance objectives or otherwise comply with Part 213.

Notwithstanding any other provision of Part 213, the State or a local unit or a lender who has not participated in the management of the property is not liable under Part 213 for costs or damages as a result of corrective action taken in response to a release or threat of release. For a lender, this provision applies only to corrective action undertaken before foreclosure. This provision does

not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the State or a local unit.

In establishing liability, the DEQ bears the burden of proof.

An owner or operator who was in compliance with the BEA provisions before the bill took effect is considered to be in compliance.

Corrective Action Contractor/Employee

Under the bill, a person who is a corrective action contractor for any release or threatened release is not liable to any person for injuries, costs, damages, expenses, or other liability, including claims for indemnification or contribution and claims by third parties for death, personal injuries, illness, or loss of or damages to property or economic loss that results from the release or threatened release. This exemption from liability does not apply, however, if a release or threatened release is caused by the contractor's negligent or grossly negligent conduct or intentional misconduct.

(The bill defines "corrective action contract" as a contract or agreement entered into by a corrective action contractor with the DEQ, the Department of Community Health, or a person who is arranging for corrective action under Part 213. "Corrective action contractor" means all of the following:

-- A person who enters into a corrective action contract with respect to a release or threatened release and is carrying out the terms of a contract.
-- A person who is retained or hired by such a person to provide any service relating to a corrective action.
-- A qualified UST consultant.)

These provisions do not affect the liability of a person under any warranty under Federal, State, or common law. In addition, they do not affect the liability of an employer who is a corrective action contractor to any employee under law, including any law relating to worker's compensation.

An employee of the State or a local unit who provides services relating to a corrective action while acting in the scope of his or her authority as a governmental employee has the same exemption from liability as provided to a corrective action contractor.

Except as otherwise provided, these provisions do not affect the liability of any person under Part 213 or under any other Federal or State law.

Notwithstanding any other provision of law, a person is not liable for corrective action costs or damages that result from an act or a failure to act in the course of rendering care, assistance, or advice with respect to a release of petroleum into or on the surface waters of the State or on the adjoining shorelines if the act or failure to act is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan or as otherwise directed by the Federal on-scene coordinator or the DEQ Director. This provision does not apply to any of the following:

-- A liable person who is a responsible party.
-- An action with respect to personal injury or wrongful death.
-- A person who is grossly negligent or engaged in willful misconduct.

A liable person who is a responsible party is liable for any corrective action costs and damages that another person is relieved of with regard to the release of petroleum into or onto surface water.

These provisions do not affect a plaintiff's burden of establishing liability under Part 213.

Joint & Several Liability; Recoverable Costs

Under the bill, except for an owner or operator who complies with the BEA provisions, a person who is liable under Part 213 is jointly and severally liable for all of the following:

-- All costs of corrective action lawfully incurred by the State relating to the selection and implementation of corrective action.
-- All costs of corrective action reasonably incurred under the circumstances by any other person.
-- Damages for the full value of injury to, destruction of, or loss of natural resources resulting from the release.

The recoverable costs of corrective action include all costs reasonably incurred by the State before the promulgation of rules relating to the selection and implementation of corrective action under Part 213. A person challenging the recovery of costs has the burden of establishing that they were not reasonably incurred under the circumstances that existed at that time.

The amounts recoverable in an action include interest, attorney fees, witness fees, and the costs of litigation to the prevailing or substantially prevailing party.

In the case of injury to, destruction of, or loss of natural resources, liability is to the State for natural resources belonging to, managed by, controlled by, appertaining to, or held in trust by the State or a local unit of government. Sums recovered by the State for natural resources damages must be retained by the DEQ for use only to restore, repair, replace, or acquire the equivalent of the injured natural resources, or to acquire their equivalent or substitute. The bill precludes double recovery under Part 213 for natural resources damages, including the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition, for the same release and natural resource.

A person may not be required to undertake corrective action for a permitted release. Recovery by any person for corrective action costs or damages resulting from a permitted release must be pursuant to other applicable law, in lieu of Part 213. With respect to a permitted release, this provision does not affect or modify the obligations or liability of any person under any other State law, including common law, for damages, injury, or loss resulting from a release of a regulated substance or for corrective action or the costs of corrective action.

If the DEQ determines that there may be an imminent and substantial endangerment to the public health, safety, or welfare or to the environment because of an actual or threatened release from an UST system, the Attorney General may bring an action against any person who is liable or any other appropriate person to secure the relief necessary to abate the danger or threat. The court has jurisdiction to grant relief as required by the public interest and the equities of the case.

The costs recoverable under these provisions may be recovered in an action brought by the State or any other person.

Apportionment of Liability; Contribution

If two or more people acting independently are liable under the bill and there is a reasonable basis for division of harm according to each person's contribution, each person is subject to liability under Part 213 only for the portion of the total harm attributable to that person. A person seeking to limit his or her liability on the grounds that the entire harm is capable of division has the burden of proof as to the divisibility of the harm and the apportionment of liability.

If two or more people are liable for an indivisible harm, each person is subject to liability for the entire harm.

A person may seek contribution from any other liable person during or after a civil action brought under Part 213. This provision does not diminish a person's right to bring an action for contribution in the absence of a civil action by the State. In a contribution action, the court must consider specific factors in allocating corrective action costs and damages among liable people.

In a contribution action, if the court determines that all or part of a person's share of liability is uncollectible from that person, the court may reallocate any uncollectible amount among the other liable people according to the factors prescribed in the bill. A person whose share is determined to be uncollectible continues to be subject to contribution and to any continuing liability to the State.

A person who has resolved that person's liability to the State in an administrative or judicially approved consent order is not be liable for claims for contribution regarding matters addressed in the order. The consent order does not discharge any of the other liable people unless its terms provide for the discharge, but the potential liability of the other people is reduced by the amount of the order.

A person who is not liable under Part 213, including a person who was issued a written determination affirming that the person meets the criteria for an exemption from liability, and who is otherwise in compliance with the Act's owner and operator requirements, must be considered to have resolved that person's liability to the State in an administratively approved settlement under the applicable Federal law, and must be granted contribution protection under Federal law and Part 213 by operation of law in the same manner that contribution protection is provided to a person who resolves liability to the State in an approved consent order.

If the State obtains less than complete relief from a person who has resolved the person's liability to the State in an administrative or judicially approved consent order, the State may bring an action against any other liable person whose liability has not been resolved.

A person who has resolved that person's liability to the State for some or all of a corrective action in an approved consent order may seek contribution from any person who is not a party to the order.

In a contribution action, the rights of any person who has resolved liability to the State are subordinate to the rights of the State, if the State files an action under Part 213.

Transfer of Liability

The bill provides that an indemnification, hold harmless, or similar agreement or conveyance is not effective to transfer the liability imposed under Part 213 from a person liable to the State for evaluation or corrective action costs or damages for a release or threat of release to any other person. This provision does not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability.

Also, the bill specifies that Part 213 does not bar a cause of action that a liable person or guarantor has or would have by reason of subrogation or otherwise against any person.

Costs & Damages

Under the bill, except as provided below, the liability under Part 213 for each release or threat of release may not exceed the total of all the costs of corrective action and fines, plus $50.0 million in damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction, or loss.

Notwithstanding those limitations, a person's liability under Part 213 must be the full and total costs and damages in either of the following circumstances:

-- The release or threatened release of a regulated substance is the result of willful misconduct or gross negligence of the party.

-- The primary cause of the release or threat is a knowing violation of applicable safety, construction, or operating standards or regulations.

Covenant Not to Sue: Liability to the State

Under the bill, the State may give a person a covenant not to sue concerning any liability to the State under Part 213, including future liability, resulting from a release or threatened release addressed by corrective action, whether the action is on or off the property on which an UST system is located, if each of the following conditions is met:

-- The covenant is in the public interest.
-- The covenant will expedite corrective action consistent with rules promulgated under Part 213.
-- There is full compliance with a consent order for response to the release or threatened release.
-- The corrective action has been approved by the DEQ.

In assessing the appropriateness of a covenant not to sue, the State must consider whether it is in the public interest on the basis of factors prescribed in the bill.

A covenant not to sue is subject to a person's satisfactory performance of that person's obligations under the agreement.

A covenant not to sue concerning future liability to the State may not take effect until the DEQ certifies that corrective action has been completed in accordance with the requirements of Part 213 at the property that is the subject of the covenant.

A covenant not to sue a person concerning future liability to the State must include an exception that allows the State to sue that person concerning future liability resulting from the release or threatened release that is the subject of the covenant if the liability arises out of conditions that are unknown at the time the DEQ certifies that corrective action has been completed.

In extraordinary circumstances, the State may determine, after assessment of relevant factors and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception if other terms, conditions, or requirements of the agreement containing the covenant are sufficient to provide all reasonable assurances that the public health and the environment will be protected from any future releases at or from the property.

The State may include any provisions for future enforcement action that are necessary and appropriate to assure protection of the public health, safety, and welfare and the environment, in the DEQ's discretion.

Covenant Not to Sue: Reuse or Redevelopment

The bill authorizes the State to give a person who proposes to redevelop or reuse property contaminated by a release from an UST system, including a vacant manufacturing or abandoned industrial site, a covenant not to sue concerning liability under Part 213, if all of the following conditions are met:

-- The covenant is in the public interest.
-- The covenant will yield new resources to facilitate implementation of corrective action.
-- The covenant will expedite corrective action consistent with the rules promulgated under Part 213, when appropriate.
-- The proposal to redevelop or reuse the property has economic development potential.

In addition, based on available information, the DEQ must determine that the redevelopment or reuse is not likely to do any of the following:

-- Exacerbate or contribute to the existing release or threat of release.
-- Interfere with the implementation of corrective action.
-- Pose health risks related to the release or threat of release to people who might be present at or in the vicinity of the property.

A person who requests a covenant not to sue must demonstrate to the State's satisfaction all of the following:

-- That the person is financially capable of redeveloping and reusing the property in accordance with the covenant.
-- That the person is not affiliated in any way with any person who is liable under Part 213 for a release or a threat of release at the property.
-- Compliance with the requirements of Part 213 applicable to an owner or operator who knows that property is contaminated.

A covenant may address only past releases or threats at a property, and must expressly reserve the right of the State to assert all other claims against the person proposing to redevelop or reuse the property, including claims arising from either of the following:

-- The release or threat of release of any regulated substance resulting from the redevelopment or reuse of the property to the extent that such claims otherwise arise under Part 213.
-- Interference with or failure to cooperate with the DEQ, its contractors, or other people conducting corrective action.

A covenant must provide for an irrevocable right of entry to the DEQ, its contractors, or other people performing corrective action related to the release or threat addressed by the covenant and for monitoring compliance with the covenant.

Consent Order/Settlement

The bill allows the DEQ and the Attorney General to enter into a consent order with a person who is liable under Part 213 or any group of people who are liable to perform corrective action, if the Department and the Attorney General determine that the liable people will properly implement the corrective action and that the consent order is in the public interest, will expedite effective corrective action, and will minimize litigation. As determined appropriate by the DEQ and the Attorney General, the consent order may provide for implementation by a liable person or any group of liable people of any portion of corrective action at the property. A decision of the Attorney General not to enter into a consent order under Part 213 is not subject to judicial review.

Whenever practical and in the public interest, as determined by the DEQ, the Department and the Attorney General must reach a final settlement with a person in an administrative or civil action as promptly as possible if the settlement involves only a minor portion of the response costs at the property and, in the judgment of the Department and the Attorney General, either of the following conditions is met:

-- The amount of regulated substances the person contributed to the property and their toxic or other regulated effects are minimal in comparison to other regulated substances at the property.
-- The person is the owner of the property on or in which the UST system is located; did not conduct or permit the generation, transportation, storage, treatment, or disposal of any regulated substance at the property; and did not contribute to the release or threat of release of a regulated substance at the property through any action or omission.

A settlement may not be made with regard to the second condition if the person purchased the property with actual or constructive knowledge that it was used for the generation, transportation, storage, treatment, or disposal of a regulated substance.

A settlement may be set aside if information obtained after it indicates that the person settling does not meet the conditions prescribed in the bill.

Civil Action

Under the bill, except as otherwise provided, a person, including a local unit of government on behalf of its citizens, whose health or enjoyment of the environment is or may be adversely affected by a release or threat of a release from an UST system, by a violation of Part 213 or a rule promulgated under it, or by the failure of the Directors to perform a nondiscretionary act or duty under Part 213, may commence a civil action against any of the following:

-- A liable owner or operator for injunctive relief necessary to prevent irreparable harm to the public health, safety, or welfare or the environment from a release or threatened release in relation to the storage tank system on the property on which it is located.
-- A person liable for a violation of Part 213 or a rule or order issued under Part 213 in relation to the storage tank system on the property on which it is located.
-- One or more of the Directors if it is alleged that at least one of them failed to perform a nondiscretionary act or duty.

An action may not be filed against a Director until the plaintiff has given the Directors at least 60 days' notice of the plaintiff's intent to sue.

The circuit court has jurisdiction to grant injunctive relief, order action necessary to correct a violation and impose any civil fine provided for in Part 213, and order a Director to perform a nondiscretionary act or duty, as applicable. A civil fine must be deposited in the General Fund.

An action may not be filed against a liable owner or operator, or a liable person who violates Part 213 or a rule or order, unless both of the following conditions are met:

-- The plaintiff has given to the DEQ, the Attorney General, and the proposed defendants at least 60 days' notice of the plaintiff's intent to sue, the basis for the suit, and the relief to be requested.
-- The State has not commenced and is not diligently prosecuting an action under Part 213 or other appropriate legal authority to obtain injunctive relief concerning the UST system or the property on which it is located or to require compliance with Part 213 or a rule or order under it.

In issuing a final order, the court must award costs of litigation, including reasonable attorney and expert witness fees, to the prevailing or substantially prevailing party.

All unpaid costs and damages for which a person is liable constitute a lien in favor of the State upon a property that has been the subject of corrective action by the State and is owned by that person. The lien has priority over all other liens and encumbrances except those recorded before the date the lien under the bill is recorded. A lien arises when the State first incurs costs for corrective action at the property for which the person is responsible.

If the Attorney General determines that the lien is insufficient to protect the State's interest in recovering corrective action costs at the property, the Attorney General may file a petition in the circuit court of the county in which the facility is located seeking either or both of the following:

-- A lien upon the property owned by the liable person, subject to corrective action that takes priority over all other liens and encumbrances that are or have been recorded on the property.
-- A lien upon real or personal property or rights to real or personal property, other than the property that was the subject of the corrective action, owned by the liable person, having priority over all other liens and encumbrances except those recorded before the date the lien is recorded under the bill.

The following are not subject to the lien upon a liable person's other real or personal property:

-- Assets of a qualified pension plan or individual retirement account under the Internal Revenue Code.
-- Assets held expressly for the purpose of financing a dependent's college education.
-- Up to $500,000 in nonbusiness real or personal property or rights to such property, except that not more than $25,000 of this amount may be cash or securities.

A petition submitted by the Attorney General must set forth with as much specificity as possible the type of lien sought, the property that would be affected, and the reasons the Attorney General believes the lien is necessary.

Upon receiving a petition from a person who is adversely affected by a release or threat of release, the court promptly must schedule a hearing to determine whether the petition should be granted. Notice of the hearing must be given to the Attorney General, the property owner, and any people holding liens or perfected security interest in the property subject to corrective action. A lien may not be granted under these provisions against the property owner if the owner is not liable under Part 213.

In addition to the liens described above, if the State incurs costs for corrective action that increases the market value of real property that is the location of a release or threatened release, to the extent that the State incurred unpaid costs and damages, the increase in the value constitutes a lien in favor of the State upon the real property. This lien has priority over all other liens or encumbrances that are or have been recorded upon the property.

Any lien under the bill is perfected against real property when the DEQ files a notice of lien with the county register of deeds. A lien upon personal property initiated by the Attorney General is perfected when the DEQ files a notice of lien in accordance with applicable law and regulation for the perfection of a lien on that type of property. In addition, when filing the notice, the DEQ must give a copy to the property owner by certified mail.

A lien continues until the liability for the costs and damages is satisfied or resolved or becomes unenforceable through the operation of the statute of limitations provided in Part 213. Upon satisfaction of the liability, the DEQ must file a notice of release of lien in the same manner as provided for the notice of lien.

When or before the notice of release of lien is filed, if the DEQ has determined that the liable person has completed all of the corrective action, the Department must execute and file with the notice a document stating that all corrective action has been completed.

Access for Corrective Action

Under the bill, a liable person or a lender that has a security interest in property on which there is contamination from a release of regulated substances from an UST system may file a petition in the circuit court seeking access to the property in order to conduct corrective action. If it grants access, the court may do any of the following:

-- Provide compensation to the property owner or operator for damages related to the granting of access to the property, including compensation for loss of use.
-- Enjoin interference with the corrective action.
-- Grant any other appropriate relief.

If a court grants access to property, the owner or operator is not liable for either of the following:

-- A release caused by the corrective action, unless the owner or operator is otherwise liable.
-- Conditions associated with the response activity that may present a threat to public health or safety.

Limitation Period

The bill provides that the limitation period for filing actions under Part 213 is as follows:

-- For the recovery of corrective action costs and natural resources damages under Part 213, within six years of initiation of physical on-site construction activities for the corrective action at the property by the person seeking recovery, except as provided below.
-- For a subsequent action for recovery of corrective action costs pursuant to Section 21323b (the section providing for joint and several liability), at any time during the corrective action, if commenced within three years after completion of all corrective action at the property.
-- For civil fines under Part 213, within three years after discovery of the violation.

Immunity for Performance of Corrective Action

Under the bill, except as otherwise provided, a person who complies with the requirements of Part 213 or is exempt from liability under it is not subject to a claim in law or equity for performance of corrective action under Part 17 (Michigan Environmental Protection Act), Part 31 (Water Resources Protection), or common law.

This provision does not bar any of the following:

-- Tort claims unrelated to performance of corrective action.
-- Tort claims for damages resulting from corrective action.
-- Tort claims related to the exercise or failure to exercise responsibilities under Section 20107a (which requires an owner or operator to take certain actions with respect to hazardous substances).

Qualified Consultant

The bill provides that a person is considered a qualified UST consultant if the person has experience in all phases of UST work and possesses or employs at least one of the following:

-- A professional engineer license with at least three years of relevant corrective action experience, preferably involving USTs.
-- A professional geologist certification or a similar approved designation such as a professional hydrologist or a certified groundwater professional, with at least three years of relevant corrective action experience, preferably involving USTs.
-- A person with a master's degree from an accredited institution of higher education in a discipline of engineering or science and eight years of full-time relevant experience, or a person with a baccalaureate degree in an engineering or science discipline and 10 years of full-time relevant experience.
-- A person who was certified by the DEQ as a UST professional at the time of the bill's effective date.

In addition, to be considered a qualified consultant, the person must have all of the following insurance policies written by carriers authorized to write such business, or approved as an eligible surplus lines insurer, by the State and that are placed with an insurer listed in A.M. Best's with a rating of at least B+ VII:

-- Worker's compensation insurance.
-- Professional liability errors and omissions insurance that does not exclude bodily injury, property damage, or claims arising out of pollution for environmental work, and that is issued with a limit of at least $1.0 million per occurrence.
-- Contractor pollution liability insurance with limits of at least $1.0 million per occurrence, if not included under the professional liability errors and omissions insurance.
-- Commercial general liability insurance with limits of at least $1.0 million per occurrence and $2.0 million aggregate.
-- Automobile liability insurance with limits of at least $1.0 million per occurrence.

(The contractor pollution liability insurance is not required for consultants who do not perform contracting functions.)

A qualified consultant also must have demonstrated compliance with the Federal Occupational Safety and Health Act and regulations promulgated under it, and the Michigan Occupational Safety and Health Act and the rules promulgated under it; and be able to demonstrate that all of the rules and regulations have been complied with during the person's previous corrective action activity.

DEQ Report

Under the bill, by November 1 each year, beginning 2013, the DEQ must submit a report to the standing committees of the Senate and House of Representatives with jurisdiction primarily pertaining to natural resources and the environment. The report must contain all of the following:

-- The number of closure reports submitted and approved by the DEQ and the number of closure reports that were approved by operation of law under Part 213.
-- The number of closure reports that were submitted to the DEQ and not approved.
-- The number of contested case hearings held under Section 21332.
-- The number of issues resolved by the Response Activity Review Panel.

(Section 21332 was added by Senate Bill 529 and allows an owner or operator to petition the DEQ for a contested case hearing.)

Senate Bill 529

Response Activity Review Panel

Part 201 requires the DEQ Director to establish a Response Activity Review Panel to advise him or her on technical or scientific disputes concerning response activity plans and no further action reports under that part. A person who submitted a response activity plan or a no further action report under Part 201 may appeal a DEQ decision regarding a technical or scientific dispute by submitting to the Director a petition accompanied by a fee of $3,500. (Senate Bill 528 specifies that the $3,500 fee applies to a petition regarding a dispute under Part 201, and establishes a fee of $300 for a petition regarding a dispute under Part 213.) If the dispute is not resolved by an appeal to the DEQ, the Director must schedule a meeting of five Panel members, selected on the basis of their relevant experience. The Panel must make a recommendation to the Director, who must issue a final decision. The final decision is subject to review pursuant to the Revised Judicature Act (RJA).

Under Senate Bill 529, these provisions also apply to technical or scientific disputes concerning initial assessment reports, final assessment reports, and closure reports under Part 213. The bill provides, however, that an issue that was addressed as part of the Director's final decision or that is the subject of a contested case hearing is not eligible for review by the Panel.

The bill requires at least three of the Panel members selected to hear the matter to have relevant experience in the RBCA process, if the dispute involves an UST system.

"Relevant experience" means active participation in the preparation, design, implementation, and assessment of remedial investigations, feasibility studies, interim response activities, and remedial actions under Part 201 or, under the bill, experience in the RBCA process.

Contested Case Hearing

The bill allows an owner or operator to petition the DEQ for a contested case hearing pursuant to the Administrative Procedures Act (APA) regarding any of the following:

-- Corrective action proposed, commenced, or completed.

-- The SSTLs proposed for a site.
-- The imposition of penalties under Part 213.
-- The results of any audit performed under Part 213.

Upon receiving a petition from an owner or operator, the DEQ must conduct the hearing pursuant to the APA. An issue that was addressed as part of the final decision of the Director or that is being considered by the Response Activity Review Panel, however, is not eligible for review as part of a contested case hearing.

Appeal to Circuit Court

Upon discovery of the operation of an UST system in violation of Part 213 or Part 211 (UST Regulations), or rules promulgated under either part, the DEQ must provide notification prohibiting delivery of regulated substances to the system by affixing a placard to it. Additionally, the DEQ may issue an administrative order to a liable owner or operator requiring the person to perform corrective actions relating to a site, or to take any other action required by Part 213. The bill allows an owner or operator to appeal a final agency decision to affix a placard or issue an administrative order to the circuit court for the county where the UST system is located or the Ingham County Circuit Court in the same manner as and according to the same procedures provided for appeals to the circuit court under the RJA. The court must set aside the final agency decision if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

-- In violation of the Constitution or a statute.
-- In excess of the agency's statutory authority or jurisdiction.
-- Made upon unlawful procedure resulting in material prejudice to a party.
-- Not supported by competent, material, and substantial evidence on the whole record.
-- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion.
-- Affected by other substantial and material error of law.

Senate Bill 530

Initial Assessment Report

Under Part 213, after a release is discovered, an initial assessment report must be completed and submitted to the DEQ. Previously, a consultant retained by the owner or operator had to complete and submit the report. The bill transferred this responsibility to the owner or operator. In addition, the bill requires the report to be submitted within 180 days after discovery of a release, rather than 90 as required under the previous law.

The report must include at least the following information:

-- Results of initial actions.
-- The DEQ's site classification based on the impact on public health, safety, and welfare and the environment.
-- Tier 1 or Tier II evaluation according to the RCBA process.
-- A work plan, including an implementation schedule for conducting a final assessment report, to determine the vertical and horizontal extent of the contamination as necessary for preparation of the corrective action plan.

With regard to the work plan, the bill refers specifically to contamination that exceeds the applicable RBSL or SSTL.

Part 213 also requires the report to include site information and site characterization results, including specific items as appropriate. Among the items, the bill refers to migrating or mobile NAPL, rather than free product, and refers to contamination that "exceeds the applicable RBSL or the applicable SSTL". With regard to a requirement that the specified items include laboratory analytical data, the bill allows the owner or operator to elect to obtain groundwater samples

using a grab sample technique for initial assessment and monitoring purposes that do not represent initial delineation of the limit of contamination or closure verification sampling.

The bill deleted a provision under which the report was not limited to the prescribed information. The bill prohibits the DEQ from requiring any additional information beyond that prescribed in Part 213 to be included in an initial assessment report. The bill requires the owner or operator to provide supporting documentation to the report's data and conclusions upon the Department's request.

Final Assessment Report

Within 365 days after discovery, a final assessment report that includes a corrective action plan must be completed and submitted to the DEQ. The bill transferred responsibility for this report from a consultant retained by an owner or operator to an owner or operator.

Previously, the report had to include the extent of contamination. Under the bill, instead, the report must include a site assessment under the RBCA process, as necessary for determining site classification, and the extent of contamination relative to the applicable RBSL or SSTL set forth in the corrective action plan.

The bill retained the requirement that the report also include Tier II and Tier III evaluation, as appropriate, under the RCBA process; a corrective action plan; a schedule for plan implementation; and a feasibility analysis, including information about on-site and off-site corrective action alternatives. The bill refers to cleanup criteria and regulated substances above the applicable RBSL or SSTL in the feasibility analysis provisions, and also requires the analysis to include an analysis of the recoverability and whether the NAPL is mobile or migrating.

Previously, if the preferred corrective action alternative were based on the use of institutional controls regarding off-site migration of regulated substances, the corrective action plan could not be implemented until the DEQ reviewed it and determined it to be in compliance with Part 213. The bill deleted this provision.

The bill requires the owner or operator to provide supporting documentation to the data and conclusions of the final assessment report upon the DEQ's request. The Department may not require any additional information beyond that prescribed in Part 213 to be included in its final assessment report.

Closure Report

Under Part 213, after corrective action is completed, a closure report must be completed and submitted to the DEQ. Previously, the report had to be submitted within 30 days following completion of corrective action. Under the bill, it must be submitted upon completion. In addition, the bill transferred responsibility for the report from a consultant to the owner or operator.

The report must include a summary of corrective action activities. Under the bill, it also must include documentation of the basis for concluding that corrective actions have been completed. The report also must include closure verification sampling results. The bill requires groundwater samples to be collected using a low-flow technique for closure verification or other method determined by the DEQ.

The bill deleted a requirement that the report include a closure certification prepared by the consultant retained by the owner or operator.

Under the bill, a person submitting a closure report must include a signed affidavit attesting to the fact that the information upon which the report is based is complete and true to the best of that person's knowledge. The report also must include a signed affidavit from the consultant who prepared the report attesting to the fact that the corrective actions detailed in it comply with all applicable requirements under the applicable RBCA standard and that the information upon which

the report is based is true and accurate to the best of the consultant's knowledge. In addition, the consultant must attach a certificate of insurance demonstrating that the consultant has obtained at least all of the insurance required under section 21325 (added by Senate Bill 528).

In addition, the bill requires a person submitting a closure report to maintain all documents and data prepared, acquired, or relied upon in connection with the report for at least six years after the report was submitted, and make them available to the DEQ upon request.

The bill provides that DEQ may not require any additional information beyond that prescribed in Part 213 to be included in a closure report.

Senate Bill 532

Missed Reporting Deadlines

Under Part 213, except as otherwise provided, if an initial or final assessment report or a closure report is not submitted to the DEQ within the required timeline, the Department may impose a penalty as follows:

-- Up to $100 per day for the first seven days that the report is late.
-- Up to $500 per day for days eight through 14.
-- Up to $1,000 per day for each additional day.

Previously, an appeal of a penalty could be taken pursuant to Section 631 of the Revised Judicature Act (which provides that an appeal may be made to the circuit court of the appellant's county of residence or Ingham County). The bill deleted this provision. (Under Senate Bill 529, the Response Activity Review Panel will hear petitions on these penalties.)

Violation of Administrative Order

Part 213 authorizes the DEQ to require an owner or operator to take action necessary to abate a danger or threat, if the Department determines that there may be an imminent risk to the public health, safety, or welfare, or the environment due to a release or threatened release. The Department may issue an administrative order requiring an owner or operator to perform corrective actions or take any other action required by Part 213. Within 30 days after an administrative order is issued, the person must indicate in writing whether the person intends to comply with it.

A person who violates or fails to properly comply with an administrative order without sufficient cause is liable for either or both of the following:

-- A civil fine of up to $25,000 for each day the violation or failure to comply continues.
-- Exemplary damages in an amount at least equal to the amount of any costs of response activity incurred by the State as a result of a failure to comply, but not more than three times the amount of these costs.

Previously, a person who complied with the terms of an administrative order and believed that the order was arbitrary and capricious or unlawful could petition the DEQ for reimbursement for the reasonable costs of the action plus interest and other necessary costs incurred in seeking reimbursement. If the DEQ refused to grant all or part of the petition, the petitioner could file an action against the Department in the Court of Claims seeking this relief. The Department's failure to grant or deny all or part of a petition within 120 days after receiving it constituted a denial that was reviewable as final agency action in the Court of Claims. To obtain reimbursement, the petitioner had to establish by a preponderance of the evidence that the petitioner was not an owner or operator or that the action ordered was arbitrary and capricious or unlawful, and that costs for which the petitioner sought reimbursement were reasonable in light of the action required by and undertaken under the relevant order. The bill deleted all of these provisions.
Instead, the bill allows a person to whom an administrative order is issued to appeal the order pursuant to Section 21333. (Added by Senate Bill 529, that section allows a liable owner or

operator to appeal to the circuit court for the county where the UST system is located or the Ingham County Circuit Court in the same manner as and according to the same procedures provided for appeals to the circuit court under the RJA.)

Civil Action

The Attorney General, on behalf of the DEQ, may commence a civil action seeking a civil fine of up to $10,000 for each UST system for each day of noncompliance with a requirement of Part 213 or a rule promulgated under it. Under the bill, this provision applies subject to the provisions regarding penalties for late report submission.

The bill also authorizes the Attorney General to commence a civil action seeking declaratory judgment on liability for future corrective action costs.

A civil action may be brought in the circuit court for the county in which the release occurred or where the defendant resides. Previously, a civil action also could be brought in the Ingham County Circuit Court.

Senate Bill 533

DEQ Rules & Documents

Under the bill, upon request of the DEQ for the purpose of conducting an investigation or taking corrective action, or enforcing Part 213, an owner or operator must give the Department available information about all of the following:

-- The UST system and its associated equipment.
-- The past or present contents of the system.
-- Any releases and investigations of releases.

Previously, this requirement also applied for the purpose of development or assistance in the development of a rule.

The bill deleted a provision that authorized the DEQ to promulgate rules to implement Part 213, and prohibits the Department from promulgating such rules.

The bill provides that a guideline, bulletin, interpretive statement, operational memorandum, or form with instructions published under Part 213 may not be given the force and effect of law by the DEQ and is considered merely advisory. The DEQ may not rely upon any of the specified documents to support its decision to act or refuse to act. A court may not rely upon the documents to uphold the DEQ's decision.

Cleanup Advisory Board; Fund Audit

The bill amended Part 215 to require the DEQ to establish a UST cleanup advisory board consisting of owners and operators of UST systems and other people with knowledge and expertise in corrective actions associated with releases from the systems and the financing of those corrective actions. By March 1, 2013, the advisory board had to submit to the DEQ and the Legislature a report that recommended a cleanup program, funded with money from the MUSTFA that would assist owners and operators in financing corrective actions required under Part 213.

The bill also required the Auditor General, by March 1, 2013, to conduct a financial audit of MUSTFA expenditures between October 12, 2004, and the bill's effective date.

Reimbursement Process

Under Part 215, an owner or operator is eligible to receive money from the MUSTFA or bond proceeds account for corrective action or indemnification if certain requirements are fulfilled. To receive MUSTFA money for corrective action, an owner or operator must submit a claim to the

MUSTFA administrator after work invoices in excess of $5,000 of the costs of corrective action have been incurred. The administrator must determine whether the owner or operator has met the prescribed requirements and, if so, approve the claim and forward a payment voucher to the State Treasurer. Payment must be made jointly to the owner or operator within 30 days if sufficient money exists in the MUSTFA or bond proceeds account. The bill deleted provisions allowing for direct payment within 60 days to an owner or operator who submitted to the administrator a signed affidavit stating that the consultant listed on a work invoice had been paid in full, unless the consultant submitted a written objection.

Previously, in order to receive money from the MUSTFA, an owner or operator had to retain a consultant to perform the responsibilities required under Part 213, and the consultant had to comply with specified requirements. The bill eliminated references to the consultant and transferred these responsibilities to the owner or operator.

Environmental Protection Regulatory Fee

The bill delayed the expiration date of Section 21508 from December 31, 2012, until December 31, 2015.

Under that section, an environmental protection regulatory fee of 7/8 cent per gallon is imposed on all refined petroleum products sold for resale or consumption in Michigan. All of the regulatory fee revenue must be deposited in the Refined Petroleum Fund.

Section 21508 provides that funding is not available for new claims, work invoices, and requests for indemnification received after June 29, 1995. Work invoices and requests for indemnification received before that date may be paid to the extent money is available in the MUSTFA under Part 215.

Temporary Reimbursement Program

Part 215 required the DEQ to establish the Temporary Reimbursement Program to promote the closure of leaking USTs by providing financial incentive to eligible people to conduct corrective action. The bill eliminated a requirement that an eligible person retain a consultant to perform corrective action in order to receive money under the program, and transferred the prescribed duties of a consultant to an eligible person.

The bill also repealed Section 21562, which created the Temporary Reimbursement Program Advisory Board to conduct reviews of denied work invoices upon the request of eligible people and to provide recommendations to the Department upon completion of the reviews.

UST Financial Assurance Policy Board

The bill repealed Section 21541, which created the UST Financial Assurance Policy Board to advise the Department and the MUSTFA Administrator on all matters related to implementation of Part 215.

The bill also repealed Section 21542, which required the Department, after consultation with the Board, annually to prepare and update a list of UST consultants who were qualified to carry out the responsibilities of consultants as provided in Part 213 and to oversee corrective actions.

MCL 324.21301 et al. (S.B. 528)
324.20114e et al. (S.B. 529)
324.21308a et al. (S.B. 530)
324.21302 & 324.21303 (S.B. 531)
324.21313a et al. (S.B. 532)
324.21326 et al. (S.B. 533)

BACKGROUND

Public Act 518 of 1980 established the MUSTFA Fund to assist underground storage tank owners in meeting financial assurance requirements required by Federal rules. Subsequent legislation provided for the phase-out of the MUSTFA program by prohibiting the acceptance of new claims for remediation and indemnification after December 22, 1998. The last day for filing a MUSTFA claim was later moved, however, to June 29, 1995, because the Fund became insolvent. Public Act 390 of 2004 earmarked some of the Fund revenue to be used for paying off bonds, and transferred the remaining balance into the newly created Refined Petroleum Fund for fuel inspection programs, cleanup of leaking underground storage tanks as allowed by law, and administrative costs associated with the Refined Petroleum Fund and programs receiving RPF dollars. Public Act 318 of 2006 added two allowable uses of the RPF: up to $15.0 million for the DEQ to establish a cleanup program for orphan sites; and up to $45.0 million to establish the Temporary Reimbursement Program for UST owners and operators. The temporary program allowed a limited pool of applicants to receive reimbursements until September 2009 for remediation actions taken on LUSTs.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Overall, the package of bills will have an indeterminate fiscal impact on the Department of Environmental Quality.

Under current law, leaking underground storage tanks (LUSTs) that have no liable party are the responsibility of the State, and funds from the Refined Petroleum Fund are used to perform remediation activities at these sites. According to Department estimates, there are over 9,000 known sites containing LUSTs, approximately half of which have no liable party. The total cost to remediate these sites is estimated to be $1.8 billion. To the extent that this package of bills causes more or fewer parties to be held liable for releases, that $1.8 billion figure could increase or decrease. Practically speaking, however, the DEQ is appropriated $32.9 million per year to address these releases, so marginal changes in the State's total LUST liability have little effect on the Department's finances.

Senate Bill 528 increases the responsibilities and costs of the Attorney General by an unknown amount, which depends on the number of cases that require participation of the Attorney General in lawsuits or consent judgments authorized by the bill. The Attorney General is authorized to place liens on property to recover costs of corrective actions, which will tend to increase State revenue.

Additionally, Senate Bill 528 allows an owner or operator to pay a $300 fee in lieu of a $3,500 fee if the DEQ denies a final assessment or closure report via the selective audit process, and the owner or operator chooses to submit a petition for review of scientific or technical disputes to the response activity panel. The DEQ has indicated that, in the 2.5 years since the bill went into effect, no petitions to review a final assessment have been made, so it is likely that in the long term, the reduction in this fee will have an insignificant fiscal impact on the DEQ.

Senate Bill 533 creates the Michigan Underground Storage Tank Cleanup Advisory Board in the Department of Environmental Quality. Some costs are associated with the administration of the Board and those costs are paid from existing Department resources.

Finally, Senate Bill 533 prohibits the DEQ from promulgating new rules to implement and enforce Part 213 (Leaking Underground Storage Tanks) of the Act. The DEQ estimates that promulgating rules costs approximately $233 per page. This prohibition will save an indeterminate amount, as it is unknown how many pages of rules DEQ would have promulgated absent the provisions of the bill.

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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.