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BILL ANALYSIS

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Senate Bills 528 through 533 (as introduced 6-28-11)
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)
Committee: Natural Resources, Environment and Great Lakes

Date Completed: 6-29-11

CONTENT

Senate Bills 528 through 533 would amend Parts 213 (Leaking Underground Storage Tanks) and 215 (Refined Petroleum Fund) of the Natural Resources and Environmental Protection Act to revise procedures related to environmental contamination caused by leaking underground storage tanks.

Senate Bill 528 would amend Part 213 to do the following:

- **Establish a 90-day window for the Department of Environmental Quality (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 would 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 would be liable under Part 213.**
- **Provide that a person who became an owner or operator on or after June 5, 1995, would be liable under Part 213 unless the person conducted a baseline environmental assessment.**
- **Exempt certain people from liability.**
- **Provide that a person who desired to change land use or resource use restrictions specified in a closure report would be responsible for any necessary additional corrective action.**
- **Provide that an owner or operator whose corrective action failed to meet performance objectives would be liable for the corrective action needed to satisfy the objectives.**
- **Provide that the DEQ would 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 $5.0 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 was 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 would amend Part 215 to do the following:

-- Delete provisions pertaining to the Michigan Underground Storage Tank Financial Assurance Policy Board, and create the Michigan Underground Storage Tank Policy Board.
-- Require the Board to hear petitions to resolve disputes between the DEQ and owners, operators, and underground storage tank professionals and consultants.

Senate Bill 530 would amend Part 213 to limit the information included in an initial or final assessment report or a closure report to the specific information required in the part.

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

Senate Bill 532 would amend Part 213 to lower the penalties for missing a reporting deadline, and revise the penalties for a person who fails to comply with an administrative order requiring corrective action.

Senate Bill 533 would amend Part 213 to do the following:

-- Prohibit the DEQ from promulgating rules that were more stringent than applicable Federal standards.
-- Require the DEQ to conduct a study on whether the benefits of a proposed rule would exceed the costs to owners and operators.
-- Provide that certain DEQ documents would be advisory, and could not be given the force of law.

The bills are tie-barred to each other. They are described below in further detail.

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.

(Under Part 213, "RBCA" means the American Society for Testing and Materials (ASTM) document entitled "Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites, Designation E 1739-95".

"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.)

The DEQ must establish cleanup criteria for corrective action activities using the process outlined in RBCA. The Department may use only reasonable and relevant exposure assumptions and pathways in determining the cleanup criteria. The bill specifies that, for purposes of Part 213, surface water or a surface water pathway would not include groundwater or an enclosed sewer or other utility line.

Corrective Action Plan

Upon confirmation of a release from an underground storage tank system, the owner or operator must report the release and whether free product has been discovered to the DEQ within 24 hours after discovery. ("Free product" means 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.

If initial response actions have not resulted in completion of a corrective action, a consultant retained by an owner or operator must prepare a corrective action plan to address contamination at the site. The corrective action plan must 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.

The bill would delete the reference to the Michigan Administrative Code and the requirement that the amount be approved by the DEQ. The bill also would delete the reference to the costs of oversight and other costs required by the Department. The financial assurance mechanism requirement would apply if the corrective action plan included the operation of an active soil and/or groundwater remediation system.

(Under Part 213, "contamination" means the presence of a regulated substance in soil or groundwater. Senate Bill 531 would refer to a regulated substance that has been released from an underground storage tank system at a concentration exceeding cleanup criteria for residential use.)

Corrective Action Audit

Part 213 requires 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 may audit a site at any time before receiving a closure report and within six months afterward. Under the bill, the Department could audit a required submission or report, including a closure report, within 90 days after receiving it.

Currently, if the DEQ conducts an audit, and the audit confirms that the cleanup criteria have been met, the Department must give the owner or operator a letter describing the audit and its results. Under the bill, the Department would have to give the owner or operator the letter within 14 days after completing the audit, and would have to provide the letter regardless of the results.

If the audit did not confirm that corrective action had been conducted in compliance with Part 213, or did not confirm that cleanup criteria had been met, the audit letter would have to include both of the following:

-- The specific deficiencies and the section or sections of Part 213 or rules that supported the DEQ's conclusion of noncompliance or that cleanup criteria had not been met.
-- Specific recommendations about corrective actions or documentation that would address the deficiencies.

Under the bill, the DEQ could audit a required report only once. If the audit identified deficiencies, the Department could audit a revised report if requested by the owner or operator to evaluate whether the deficiencies had been corrected. This audit would have to be completed within 90 days of the report's submission to the DEQ.

Any required report would be considered in compliance with Part 213 unless it were audited and found to be noncompliant.

Delivery of Regulated Substance

A person may not knowingly deliver a regulated substance to an underground storage tank system that is not in compliance with Part 213 or Part 211 (Underground Storage Tank Regulations), or rules promulgated either part. A person who knowingly delivers a regulated substance to an underground storage tank system is guilty of a misdemeanor punishable by imprisonment for up to 90 days and/or a maximum fine of $500.

Under the bill, the penalty would apply to a person who delivered a regulated substance to an underground storage tank system that was not in compliance with Part 213.

Liability

Under the bill, except as otherwise provided, if an owner or operator were responsible for an activity causing a release or threat of release, that person would be liable under Part 213. In addition, a person who became an owner or operator on or after June 5,

1995, would be liable unless the owner or operator complied with both of the following:

-- A baseline environmental assessment (BEA) was conducted before or within 45 days after the earliest of the date of purchase, occupancy, or foreclosure.
-- The owner or operator provided 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 would not constitute occupancy.

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

(Under Senate Bill 531, "baseline environmental assessment" would mean 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 could be conducted within 45 days after the date of acquisition of a property and the components of an all appropriate inquiry could be 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 defined 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 underground storage tank system, excluding any location where corrective action was completed that satisfies the cleanup criteria for unrestricted residential use under Part 213.)

Subject to exemptions from liability for a liable person or lender conducting corrective action, an owner or operator who complied with the BEA requirements would not be liable for contamination existing at the property on which an underground storage tank system was located at the earliest of the date of purchase, occupancy, or foreclosure, unless the person were responsible for an activity causing the contamination. The BEA provisions would not alter a person's liability with regard to a subsequent release or threat of release from an underground storage tank system if the person were responsible for an activity causing the subsequent release or threat of release.

The following people would not be liable under Part 213 with respect to contamination at property on which an underground storage tank system was located resulting from a release or threat of release unless the person were responsible for an activity causing it:

-- A person who held an easement interest in property or held a utility franchise to provide services, for the purpose of conveying or providing goods or services; or a person who acquired access through an easement.
-- A person who owned severed subsurface mineral rights or formations or who leased such rights or formations.
-- The State or a local unit that leased property to a person, if the State or local unit were not liable under Part 213 for contamination at the property.
-- A person who acquired 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 used the leased property for a retail, office, or commercial purpose regardless of the lessee's level of regulated substance use.
-- 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 would have to 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 would have to 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 would apply to the State or a local unit of government that acquired 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 acquired title or control by virtue of its governmental function; a local unit to which ownership or control was transferred by the State or by another local unit that was not liable; or the State or a local unit that acquired ownership or control by seizure, receivership, or forfeiture pursuant to the operation of law or by court order.

In addition, the liability exemption would apply to a State or local unit that held or acquired an easement interest in the property, held or acquired an interest in property by dedication in a plat, or by dedication as a highway or road, or otherwise held or acquired an interest in property for a transportation or utility corridor.

The following people also would not be liable under Part 213:

-- A lender that engaged in or conducted a lawful marshaling or liquidation of personal property, if the lender did not cause or contribute to the environmental contamination.
-- The owner or operator of property onto which contamination had migrated, unless the person were responsible for an activity causing the release that was the source of the contamination.
-- A person who owned or operated property on which 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 other than an employee or agent of the person or a person in a contractual relationship with a person who was liable.

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

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

If the closure report relied on land use or resource use restrictions, an owner or operator who desired to change those restrictions would be 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 no further action report.

If the closure report relied on monitoring necessary to assure the effectiveness and integrity of the corrective action, an owner or operator who was otherwise liable for environmental contamination addressed in a closure report would be 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 failed to meet performance objectives that were identified in the report, an owner or operator who was otherwise liable for environmental contamination addressed in the report would be liable under Part 213 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 had not participated in the management of the property would not be 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 would apply only to corrective action undertaken before foreclosure. This provision would 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 would bear the burden of proof.

Notwithstanding the BEA provisions, if a person became the owner or operator of property on or after June 5, 1995, and before March 6, 1996, and the property contained an underground storage tank system, the person would be liable only if the person were responsible for an activity causing a release or threat of release. An owner or operator who was in compliance with the BEA provisions before the bill took effect would be considered to be in compliance.

Corrective Action Contractor/Employee

Except as otherwise provided, a person who was a corrective action contractor for any release or threatened release would not be 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 resulted from the release or threatened release. This exemption from liability would not apply if a release or threatened release were caused by the contractor's negligent or grossly negligent conduct or intentional misconduct.

("Corrective action contract" would mean a contract or agreement entered into by a corrective action contractor with the DEQ, the Department of Community Health, or a person who was arranging for corrective action under Part 213. "Corrective action contractor" would mean one or both of the following: a person who entered into a corrective action contract with respect to a release or threatened release and was carrying out the terms of a contract; or a person who was retained or hired by such a person to provide any service relating to a corrective action.)

These provisions would not affect the liability of a person under any warranty under Federal, State, or common law. In addition, they would not affect the liability of an employer who was 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 provided services relating to a corrective action while acting in the scope of his or her authority as a governmental employee would have the same exemption from liability as a corrective action contractor.

Except as otherwise provided, these provisions would 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 would not be liable for corrective action costs or damages that resulted 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 were 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 would not apply to any of the following:

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

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

These provisions would 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 complied with the BEA provisions, a person who was liable would be 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 would 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 would have the burden of establishing that they were not reasonably incurred under the circumstances that existed at that time.

The amounts recoverable in an action would 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 would be 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 would have to 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 would preclude 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 could 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 would have to be pursuant to other applicable law, in lieu of Part 213. With respect to a permitted release, this provision would 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 determined that there could 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 underground storage tank system, the Attorney General could bring an action against any person who was liable or any other appropriate person to secure the relief necessary to abate the danger or threat. The court would have jurisdiction to grant relief as required by the public interest and the equities of the case.

The recoverable costs could be recovered in an action brought by the State or any other person.

Apportionment of Liability; Contribution

If two or more people acting independently were liable under the bill and there were a reasonable basis for division of harm according to each person's contribution, each person would be 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 was capable of division would have the burden of proof as to the divisibility of the harm and the apportionment of liability.

If two or more people were liable for an indivisible harm, each person would be subject to liability for the entire harm.

A person could seek contribution from any other liable person during or after a civil action brought under Part 213. This provision would 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 would have to consider specific factors in allocating corrective action costs and damages among liable people.

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

A person who had resolved his or her liability to the State in an administrative or judicially approved consent order would not be liable for claims for contribution

regarding matters addressed in the order. The consent order would not discharge any of the other liable people unless its terms provided for the discharge, but the potential liability of the other people would be reduced by the amount of the order.

A person who was not liable under Part 213 would be considered to have resolved his or her liability to the State in an administratively approved settlement under the applicable Federal law, and would be granted contribution protection under Federal law and Part 213 by operation of law in the same manner that contribution protection was provided to a person who resolved his or her liability to the State in an approved consent order.

If the State obtained less than complete relief from a person who had resolved his or her liability to the State in an administrative or judicially approved consent order, the State could bring an action against any other liable person who had not resolved his or her liability.

A person who had resolved his or her liability to the State for some or all of a corrective action in an approved consent order could seek contribution from any person who was not a party to the order.

In a contribution action, the rights of any person who had resolved his or her liability to the State would be subordinate to the rights of the State, if the State filed an action under Part 213.

Transfer of Liability

The bill provides that an indemnification, hold harmless, or similar agreement or conveyance would not be 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 would not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability.

Part 213 would not bar a cause of action that a liable person or guarantor 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 could not exceed the total of all the costs of corrective action and fines, plus $5.0 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 would be the full and total costs and damages in either of the following circumstances:

-- The release or threatened release of a regulated substance was the result of willful misconduct or gross negligence of the party.
-- The primary cause of the release or threat was 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 could 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 were on or off the property on which an underground storage tank system was located, if each of the following conditions were met:

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

A covenant not to sue concerning future liability to the State could not take effect until the DEQ certified that corrective action had been completed in accordance with the requirements of Part 213 at the property that was the subject of the covenant.

In assessing the appropriateness of a covenant not to sue, the State would have to consider whether it was in the public

interest on the basis of factors prescribed in the bill.

A covenant not to sue would be subject to a person's satisfactory performance of his or her obligations under the agreement.

A covenant not to sue concerning future liability to the State would have to include an exception that allowed the State to sue that person concerning future liability resulting from the release or threatened release that was the subject of the covenant if the liability arose out of conditions that were unknown at the time the DEQ certified that corrective action had been completed.

In extraordinary circumstances, the State could 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 were sufficient to provide all reasonable assurances that the public health and the environment would be protected from any future releases at or from the property.

The State could include any provisions for future enforcement action that were 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 would authorize the State to give a person who proposed to redevelop or reuse property contaminated by a release from an underground storage tank 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 were met:

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

In addition, based on available information, the DEQ would have to determine that the redevelopment or reuse would not be 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 requested a covenant not to sue would have to demonstrate to the State's satisfaction both of the following:

-- That the person was financially capable of redeveloping and reusing the property in accordance with the covenant.
-- That the person was not affiliated in any way with any person who was liable under the bill for a release or a threat of release at the property.

A covenant could address only past releases or threats at a property, and would have to 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 arose under Part 213.
-- Interference with or failure to cooperate with the DEQ, its contractors, or other people conducting corrective action.

A covenant would have to 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

Under the bill, the DEQ and the Attorney General could enter into a consent order with a person who was liable under the bill

or any group of people who were liable to perform corrective action, if the Department and the Attorney General determined that the liable people would properly implement the corrective action and that the consent order was in the public interest, would expedite effective corrective action, and would minimize litigation. As determined appropriate by the DEQ and the Attorney General, the consent order could 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 would not be subject to judicial review.

Whenever practical and in the public interest, as determined by the DEQ, the Department and the Attorney General would have to reach a final settlement with a person in an administrative or civil action as promptly as possible if the settlement involved 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 were met:

-- The amount of regulated substances the person contributed to the property and their toxic or other regulated effects were minimal in comparison to other regulated substances at the property.
-- The person was the owner of the property on or in which the underground storage tank system was 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 could 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 could be set aside if information obtained after it indicated that the person settling did 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 was or could be adversely affected by a release or threat of a release from an underground storage tank 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, could 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 was 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 was located.
-- One or more of the Directors if it were alleged that at least one of them failed to perform a nondiscretionary act or duty.

The circuit court would have 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 would have to be deposited in the General Fund.

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

-- The plaintiff had 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 had not commenced and was not diligently prosecuting an action under Part 213 or other appropriate legal authority to obtain injunctive relief concerning the underground storage tank system or the property on which it was located or to require compliance with Part 213 or a rule or order under it.

An action could not be filed against a Director until the plaintiff had given the Directors at least 60 days' notice.

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

Corrective Action Petition

Under the bill, a liable person or a lender that had a security interest in property on which contamination from a release of regulated substances from an underground storage tank system could file a petition in the circuit court seeking access to the property in order to conduct corrective action. If it granted access, the court could 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 granted access to property, the owner or operator would not be liable for either of the following:

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

Limitation Period

The bill provides that the limitation period for filing actions under Part 213 would be 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 under Part 201 (Environmental Remediation), 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

Except as otherwise provided, a person who complied with the requirements of Part 213 or was exempt from liability under it would not be 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 would 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).

Senate Bill 529

Michigan Underground Storage Tank Policy Board

Part 215 provides for the creation of the Michigan Underground Storage Tank Financial Assurance Policy Board within the Department of Natural Resources. (The Board was abolished under Executive Reorganization Order 2007-4 and its powers and duties were transferred to the DEQ.) The bill would delete provisions establishing procedures for the Board's review and evaluation of underground storage tank consultants.

The bill would create the Michigan Underground Storage Tank Policy Board within the DEQ. The Board would have to include the DEQ Director and seven individuals appointed by the Governor with the advice and consent of the Senate, as follows:

-- One representing an independent petroleum wholesale distributor-marketer trade association.

-- One representing a petroleum refiner-supplier trade association.
-- One representing a service station dealers' trade association.
-- One representing an environmental public interest organization who was not associated with any of the previous organizations.
-- Two representing the general public who were not associated with any of the other organizations and who were certified professionals experienced in the RCBA process.

Board members would serve four-year terms. The Board would have to advise the DEQ on all matters related to the implementation of Part 215.

Review & Evaluation Process

Part 215 contains procedures for an owner or operator seeking reimbursement for corrective actions from the Refined Petroleum Fund (RPF). (Public Act 390 of 2004 created the RPF and transferred the balance of the Michigan Underground Storage Tank Financial Assurance Fund to it.) The procedures include a requirement that the owner or operator retain a consultant, who must submit certain items for competitive bidding in accordance with DEQ procedures.

The Fund administrator or the DEQ may submit to the Board, for its review and evaluation, the competitive bidding process employed by a consultant. The Board may convene a peer review panel in conducting the review and evaluation. If the Board finds the consultant's practices to be inappropriate, it may recommend that the DEQ remove the consultant from the list of qualified consultants.

The Board also must make a recommendation on whether a consultant should be removed from the list upon request of the administrator or the DEQ, and may convene a peer review panel to evaluate the consultant's conduct with regard to compliance with Part 215.

The bill would eliminate the provisions related to the Board's authority to convene peer review panels and review and evaluate consultants.

Instead, the Board would have to conduct hearings on petitions to resolve disputes between an owner, an operator, a certified underground storage tank professional, or a qualified underground storage tank consultant and the DEQ regarding the following:

-- The DEQ's refusal to place a person on the list of qualified underground storage tank consultants.
-- The DEQ's refusal to certify an individual as a qualified underground storage tank professional.
-- The attempt to remove a qualified consultant from the approved list.
-- The attempt to suspend or revoke the certification of a professional.
-- Corrective action undertaken pursuant to Part 213.
-- The imposition of penalties for an owner's or operator's failure to meet reporting deadlines under Part 213.
-- The results of any audit under Part 213.
-- The placement or removal of placards prohibiting delivery of a regulated substance on an underground storage tank system.
-- The issuance of a DEQ administrative order requiring an owner or operator to perform corrective actions.
-- The request for information from an owner or operator from the DEQ.

Hearings related to the DEQ's refusal to list a consultant or certify a professional, an attempt to remove a consultant from the list or to suspend or revoke a professional's certification, corrective action, and information requests would have to be conducted pursuant to the applicable provisions of the Administrative Procedures Act.

Senate Bill 530

Under Part 213, within 90 days after a release has been discovered, a consultant retained by an owner or operator must complete an initial assessment report and submit it to the DEQ. The report must include at least the following information:

-- Results of initial response actions.
-- Site information and site characterization results.
-- 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.

Within 365 days after discovery, a consultant must complete a final assessment report that includes a corrective action plan and submit it to the DEQ. The report must include at least the following information:

-- The extent of contamination.
-- Tier II and Tier III evaluation, as appropriate, under the RCBA process.
-- A feasibility analysis, including information about on-site and off-site corrective action alternatives.
-- A corrective action plan.
-- A schedule for plan implementation.

Under the bill, the reports could include only the information required under Part 213.

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.

The bill would reduce the maximum penalties to $50, $250, and $500, respectively.

Currently, an appeal of a penalty may 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 would delete this provision. (Under Senate Bill 529, the Michigan Underground Storage Tank Policy Board would 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.

The bill would delete the second penalty.

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 underground storage tank system for each day of noncompliance with a requirement of Part 213 or a rule promulgated under it. Under the bill, this provision would apply subject to the provisions regarding penalties for late report submission.

Senate Bill 533

Upon request of the DEQ for the purpose of developing or assisting in the development of a rule, conducting an investigation, taking corrective action, or enforcing Part 213, an owner or operator must give the Department information about all of the following:

-- The underground storage tank system and its associated equipment.

-- The past or present contents of the system.
-- Any releases and investigations of releases.

Under the bill, this would not apply for the purpose of development or assistance in the development of a rule.

The bill would require the DEQ to promulgate rules to implement Part 213 within one year of the bill's effective date. The rules would have to adopt by reference specific ASTM documents.

The DEQ could not promulgate a rule that was more stringent than the applicable Federal standards. In addition, the DEQ could not promulgate a rule or a rule revision unless it had conducted a study to determine whether the benefit to the public health, safety, and welfare and the environment exceeded the cost of implementing the proposed rule by owners or operators. The results of the study would have to be included in the required notice of the public hearing on the proposed rule.

If a proposed rule established or modified a cleanup criterion for a corrective action, the DEQ would have to demonstrate that it complied with the requirements of Part 213 regarding the cleanup criteria for a regulated substance that poses a carcinogenic risk to humans.

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

MCL 324.21301a et al. (S.B. 528)
324.21502 & 324.21541 (S.B. 529)
324.21308a (S.B. 530)
324.21302 & 324.21303 (S.B. 531)
324.21313a et al. (S.B. 532)
324.21326 & 324.21327 (S.B. 533)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Overall, the package of bills would 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 estimated cost to remediate these sites is estimated to be $1.8 billion. To the extent that this package of bills caused 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 $20.0 million per year to address these releases, so marginal changes in the State's total LUST liability would have little effect on the Department's finances.

Senate Bill 528 would increase the responsibilities and costs of the Attorney General by an unknown amount, which would depend on the number of cases that required participation of the Attorney General in lawsuits or consent judgments that would be authorized by the bill.

Senate Bill 529 would create the Michigan Underground Storage Tank Policy Board in the Department of Environmental Quality. Some costs would likely be associated with the administration of the Board and those costs would be paid from existing Department resources.

Senate Bill 532 would halve the fees the Department may charge for late report submissions. The amount the Department collects on an annual basis from these fees is not available at this time, but it would be reasonable to conclude that the amount collected from the fees would drop by approximately half. However, to the extent that the fees act as a deterrent for late submission, revenue collected could drop by less than half as lower fees could be less of a deterrent for late submission.

Senate Bill 533 would require the Department to conduct studies on whether the benefits of a proposed rule would exceed

the costs to LUST owners and operators. It is unknown how much or how many of these studies would have to be conducted, but the requirement would likely introduce some costs to the Department.

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