

## ENVIRONMENTAL CLEANUP REQUIREMENTS; REVISE

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**Senate Bill 891 (reported from committee as Substitute H-2)**

**Sponsor: Sen. Tom Casperson**

**House Committee: Natural Resources**

**Senate Committee: Natural Resources, Environment, and Great Lakes**

**Complete to 12-16-14**

*(Enacted as Public Act 542 of 2014)*

### A SUMMARY OF SENATE BILL 891 AS REPORTED FROM HOUSE COMMITTEE AND PASSED BY THE HOUSE

Senate Bill 891 would amend Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) by amending criteria related to plans to be implemented by the owners of sites where hazardous or potentially hazardous substances have been released. It would allow the Department of Environmental Quality (DEQ) to approve site-specific cleanup criteria in certain instances. The bill also would create new definitions and amend current provisions to reflect other changes made regarding remediation and cleanup at sites where hazardous substances have been released.

#### **Definitions**

As used in the bill, nonresidential would mean the category of land use for parcels, or portions of parcels, that is not residential. This category might include, but is not limited to, any of the following:

- Industrial, commercial, retail, office, and service uses.
- Recreational properties that are not contiguous to residential property.
- Hotels, hospitals, and campgrounds.
- Natural Areas such as woodlands, brushlands, grasslands, and wetlands.

Residential would be defined as the category of land use for parcels, or portions of parcels, where people live and sleep for significant periods of time such that the frequency of exposure is reasonably expected or foreseeable to meet the exposure assumptions used by the DEQ to develop generic residential cleanup criteria as set forth in rules promulgated under Part 201. Homes and surrounding yards, condominiums, and apartments are examples of this category.

Source would be defined as any storage, handling, distribution, or processing equipment from which the release originates and first enters the environment.

A provision listing sites that do not fall under the definition of facility would be amended by adding certain actions and activities and by eliminating a requirement that site-specific criteria that have been approved by the DEQ for application at an area does not depend on any land use or resource use restriction to ensure protection of the public health, safety, or welfare of the environment.

Added by the bill to the list of sites that are not a facility are: pieces of a property which have been lawfully divided from a facility and do not contain hazardous substances in excess of concentrations that satisfy the cleanup criteria for unrestricted residential use, and sites where natural attenuation or other natural processes have reduced the concentrations of hazardous substances below the criteria for unrestricted residential use.

### **Changes to clean-up and remediation requirements**

Senate Bill 891 would revise the way the DEQ calculates the background concentration of a hazardous substance. Generally speaking, the current system relies on the department's 2005 Michigan Background Soil Survey. The bill would add additional ways of calculating the background levels based upon the location being tested. The cleanup criteria for unrestricted residential use would be amended to include site-specific cleanup criteria approved by the DEQ for that use.

Some of the obligations of an owner or operator of property classified as a facility would be revised under the bill. Generally speaking, the current provisions require an owner/operator of a facility to take immediate action to begin containment and removal of a hazardous substance. Several of the subdivisions would be amended by changing "...and provide protection to the environment" to "*abate an unacceptable risk to the public health, safety, or welfare, or the environment.*" [The underlined words would be replaced with the words in italics.]

Another significant change regarding a facility owner/operator is to a provision stating that an owner/operator is required to "immediately initiate removal of a hazardous substance that is in a liquid phase, that is not dissolved in water, and that has been released." The bill would amend this subsection so that the owner/operator would instead be required to

"Initiate a remedial action that is necessary and feasible to address unacceptable risks associated with residential NAPL saturation, migrating NAPL, and mobile NAPL using best practices for managing NAPL, including, but not limited to, best practices developed by the American Society for Testing and Materials or the Interstate Technology and Regulatory Council."

### **Site-specific criteria**

The bill also would set criteria for developing site-specific clean-up plans. The criteria would apply to instances where there is no analytical method or generic cleanup criteria available for that particular hazardous substance. The following approaches could be used in such an instance:

- If another hazardous substance with an available analytical method was released at the same location and has similar fate and mobility characteristics, then determine the nature and extent of that hazardous substance as a surrogate.
- For venting groundwater, use a modeling demonstration, an ecological demonstration, or a combination of both, to determine whether the hazardous substance has reached surface water.

- Develop and propose to the department an analytical method for approval by the department.

In lieu of determining the nature and extent of the hazardous substance release, an owner/operator would also have the option of eliminating the potential for exposure in areas where the hazardous substance is expected to be located through removal, containment, exposure barriers, or land use or resource use restrictions.

"Available analytical method" would mean "a method that is approved and published by a governmental agency, is conducted routinely by commercial laboratories in the United States, and identifies and quantitatively measures the specific hazardous substance or class of substances."

The DEQ would be required to make available the algorithms used to calculate all residential and nonresidential generic cleanup criteria along with any other tables or algorithm factors or variables used in the department's calculations.

### **Surrogate substance**

If a hazardous substance is expected to have a similar fate, mobility, bioaccumulation, and toxicity characteristics as another hazardous substance, the cleanup criteria for the similar substance may be used as a surrogate. Prior to the surrogate being used, the owner/operator must notify the DEQ, seeking approval, and explain why the surrogate is suitable. The department would then have 90 days to disapprove the request; if not disapproved by then, the chosen surrogate would automatically be considered approved.

### **Restrictive covenant**

Under the act currently, land use or resource use restrictions that assure the effectiveness and integrity of any containment or exposure barrier, or other land use or resource use restrictions necessary to assure the effectiveness and integrity of the remedy are required to be described in a restrictive covenant. Such a covenant applies to the site regardless of who owns the property and contains a clause granting the DEQ authority to enforce the restrictions detailed in the covenant. The covenant is also required to be filed by the property owner or that person's authorized agent with the register of deeds in the county where the property is located.

Section 324.20114c(3), which contains the requirements for restrictive covenants, would be repealed by the bill and replaced with a new section, Section 20121, which would contain many of the same or similar provisions as the section being repealed. Any covenants in effect at the time that the bill is enacted would remain in effect and enforceable.

This new section to NREPA would modify the purpose of land or resource use restrictions to include: reducing or restricting exposure to hazardous substances, eliminating a potential exposure pathway, providing for access and to otherwise assure the effectiveness of response activities being undertaken at the property, in addition to the purposes currently stated.

In addition to being placed on a property by the owner/operator, restrictions on land and/or resource use could be imposed on a property, or part of a property, as part of a conservation easement or a court order or judicially-approved settlement involving the property. Institutional control also could be used via a local ordinance or state law or regulation that limits or prohibits the use of contaminated groundwater, raising livestock, development in certain locations, or how the land is used through a zoning ordinance.

In the instance of zoning ordinances, the local unit of government must notify the department at least 30 days prior to the modification, lapsing, or repeal of an existing ordinance. Alternate instruments and means may be used with department approval and the department itself may place restrictions with the approval of the state administrative board.

A restrictive covenant would have to be written in "plain, everyday language" to the extent possible and contain a legal description of the property to which the covenant applies. The following would be required to be a part of a restrictive covenant:

- A legal description of the property, or part of the property, and a brief narrative of the response activities and environmental contamination at the property.
- A granting to the DEQ of the ability to enforce the restrictive covenant by legal action in a court of appropriate jurisdiction.
- The signature of the property owner or that owner's authorized agent, unless otherwise ordered by the court of appropriate jurisdiction.

A covenant could also contain additional information, such as one of the following:

- A provision requiring notice to the department or other persons upon transfer or before construction or changes in use that could affect environmental contamination or increase exposure at the property.
- A provision granting rights of access to the department or other persons. These rights may include, but are not limited to, the right to enter the property for the purpose of monitoring compliance with the restrictive covenant, the right to take samples, and the right to implement response activities.
- A provision subordinating a property interest that has priority, if agreed to by the person that owns the superior interest.
- A provision granting the right to enforce the restrictive covenant to persons in addition to the department, including, but not limited to, the local unit of government in which the property is located or the United States Environmental Protection Agency.
- A provision obligating the owner of the land subject to the covenant to inspect or maintain exposure barriers, permanent markers, fences, or other aspects of the response action or remedy.
- A provision limiting the restrictive covenant to a specific duration, or terminating the restrictive covenant upon the occurrence of a specific event or condition, such as the completion of additional response activities that are approved by the department.
- A provision providing notice of hazardous substances that exceed aesthetic-based cleanup criteria.

A restrictive covenant so recorded runs with the land and is perpetual unless, by its terms, it is limited to a specific duration or is terminated by the occurrence of a specific event.

**FISCAL IMPACT:**

Senate Bill 891 would have a minimal fiscal impact on the Department of Environmental Quality through the introduction of new administrative costs. This bill allows DEQ to approve new site-specific criteria governing the cleanup of hazardous releases. This approval would include reviewing the analytical methods proposed for cleaning up hazardous materials which do not already have existing cleanup standards. The DEQ would also be required to publish all algorithms used to calculate cleanup criteria and list hazardous substances by toxicity used in these calculations. This bill alters the procedures for addressing and reporting the release of hazardous substances for site owners and operators, as well as the DEQ. It is uncertain at this time as to what that precise fiscal impact of these administrative changes will be on the department, though it does not appear that the impact will be major.

**POSITIONS:**

Indicating support for the bill were:

The Michigan Chamber of Commerce (12-2-14)

The Michigan Department of Environmental Quality (12-2-14)

Legislative Analyst: Josh Roesner  
Fiscal Analyst: Austin Scott

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.