HOUSE FISCAL AGENCY

UNDERGROUND STORAGE TANK CLEANUP PROGRAM REVISIONS

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Senate Bill 717 (substitute S-2 as passed by Senate)
Sponsor: Sen. Tom Casperson
Senate Committee: Natural Resources

House Bill 5599 (as introduced)
Sponsor: Rep. Andrea LaFontaine
House Committee: Natural Resources

Complete to 5-2-16

SUMMARY:

Senate Bill 717 would amend several sections of Part 213 of the Natural Resources and Environmental Protection Act (NREPA). That part deals with leaking underground storage tanks, and the bill would make revisions relating to the responsibilities of owners and operators of contaminated land, as well as to restrictive covenants, among other changes.

House Bill 5599 would amend several sections of Part 215. That part addresses funding for corrective actions due to releases from underground storage tank, and the bill amends provisions related to claims process for underground storage tank cleanup. Both bills would take effect 90 days after being enacted into law. A more detailed summary of each bill follows.

Senate Bill 717

Public highways as public purpose
SB 717 would include public highways as a "public purpose" in provisions that make the state or local unit of government subject to requirements imposed on other owners and operators of property contaminated by a release from an underground storage tank when the government offers access to the property on a regular or continuous basis for a public purpose. The term "public highway" would mean "a road or highway under the jurisdiction of the state transportation department, the road commission of a county, or a local unit of government."

Responsibilities of an owner/operator of contaminated land
Section 21304c of NREPA lists actions that a person who owns or operates property known to be contaminated must take. The bill would amend this list by adding that an owner/operator could not "impede the effectiveness or integrity of any corrective action or land use or resource use restriction employed at the property in connection with corrective action activities." [Underlined language added by the bill.]

Not all of the requirements in the section currently apply to the state or a local unit of government when they are also the owners/operators of contaminated property. Under the

bill, when the state is acting as the owner [underlined indicates new language added by SB 717] or operator of a contaminated property, and that property is accessed by the public on a regular or continuous basis for a public purpose, then the state or local unit would be subject to all of the requirements relating to actions regarding a contaminated property.

SB 717 would add language stating that required activities undertaken by the owner/operator of a contaminated property also apply to a liable owner/operator with respect to regulated substances with levels above applicable risk-based screening levels (RBSL) or site-specific target levels (SSTLs) within a public highway.

Restrictive covenants & alternative mechanisms

Section 21310a currently specifies that if corrective action activities at a site rely on institutional controls rather than on a final remedy that relies on a nonresidential RBSL or an SSTL, a restrictive covenant is implemented. Now, if a liable owner/operator determines exposure to the regulated substances can be reliably restricted by means other than a restrictive covenant, and that the imposition of land use or resource use restrictions through restrictive covenants is impractical, then that owner/operator may select a corrective action plan that relies on alternate mechanisms.

The bill would eliminate the underlined language above. Instead, the provision would say that the liable owner/operator could select a corrective plan that relies on alternative mechanisms if they determine that exposure to regulated substances could be restricted by means other than a restrictive covenant "in a manner that protects against exposure to regulated substances as defined by the RBSLs and SSTLs."

Presently, the alternate mechanisms that may be considered include, but are not limited to, compliance with an ordinance that prohibits the use of groundwater in a manner and to a degree that protects against unacceptable exposure to a regulated substance as defined by the RBSLs or SSTLs identified in the corrective action plan.

Such an ordinance that serves as an exposure control must include both of the following:

- A requirement that the local unit of government notify the department 30 days before adopting a modification to the ordinance or the lapsing or revocation of the ordinance.
- A requirement that the ordinance be filed with the register of deeds as an ordinance affecting multiple properties.

SB 717 would amend these provisions by allowing any of the following to be considered as alternate mechanisms, though other options would not be limited by the bill:

- Compliance with an ordinance, state law, or rule that limits or prohibits the use of contaminated groundwater above the RBSLs or SSTLs identified in the corrective action plan, prohibits the raising of livestock, prohibits development in certain locations, or restricts property to certain uses. An ordinance under this subdivision would have to be filed with the register of deeds on the affected property or be filed as an ordinance affecting multiple properties. An ordinance adopted after the effective date of SB 717 must include a requirement that the local unit of government notify the department 30 days before adopting a modification to the ordinance or the lapsing or revocation of the ordinance.

- A license or license agreement with the state transportation department if regulated substances are proposed to be left in place within a public highway owned or controlled by the state transportation department.
- Reliance on the existence of a public highway, in certain circumstances. Specifically, this would apply if the state transportation department fails or refuses to grant a license or to enter into a license agreement within 120 days after being requested to do so, and the public highway is owned or controlled by a county road commission or a local unit of government. In that case the owner or operator that is liable under section 21323a must do all of the following:

    - Provide the person that owns or operates the public highway with the following information related to the release and site:
        - The site name, address, and facility identification number, and the name and contact information of the person relying on the alternative mechanism.
        - Identification of the department district office with jurisdiction over the site.
        - The name of the affected public highway and the nearest intersection.
        - Identification of known or suspected contaminants.
        - A statement that residual or mobile NAPL is or is not present at the affected public highway.
        - The media affected, including depth of contaminated soil, depth of groundwater, and predominate groundwater flow direction.
        - A scale drawing of the portion of the public highway subject to the alternate mechanism that depicts the area impacted by regulated substances and the location of utilities in the impacted area, including storm water systems and municipal separate storm water systems.
        - Identification of all ownership and possessory or use property interests related to the public highway and whether they are affected by the contamination and whether they have received notification of the existing conditions as part of a corrective action plan or pursuant to the due care requirements under Section 21304c.
        - Identification of exposure risks from drinking water, direct contact, groundwater, soil excavation, or relocation.
    - Confirm that there are no current plans to relocate, vacate, or abandon the public highway.
    - Either (1) provide a certification to the person that owns or operates the public highway that any contamination present as a result of the release from the underground storage tank system does not enter a storm sewer system or (2) provide all information necessary to clearly identify the nature and extent of the contamination that enters or has the potential to enter the storm sewer system.

The bill also would require an owner/operator of a public highway being used as an alternative mechanism to notify the liable owner or operator that is relying on an alternate mechanism under this section at least 30 days before any activity is performed that has the

potential to disturb or expose the environmental contamination left in place within the public highway.

Reliance on a public highway as an alternative mechanism in cases where a license or license agreement with the state transportation department is being used would not affect an owner's or operator's liability nor would it impose liability for corrective action on either the state transportation department or a local unit of government.

Determination of liability/deadlines
As part of the criteria to determine if a person is liable under Section 21323a, an owner or operator who becomes an owner or operator on or after March 6, 1996, is liable, unless they comply with certain timelines for conducting an assessment and submitting that assessment to the Department of Environmental Quality. The bill would allow an owner or operator who fails to meet those deadlines to be considered exempt from liability if they request and receive a determination from the department that the failure to meet the time frames was inconsequential.

Under the act currently, if the closure report relies on land use restrictions or resource use restrictions, a person who desires to change those restrictions may be liable, and is responsible for any corrective action necessary to comply with this part for any land use or resource use other than the land use or resource use that was the basis for the closure report.

The bill would add language to the above provision that states if the closure report relies on an alternate mechanism as provided for in Section 21310a, and the ordinance, state law, or rule is modified, lapses, or is revoked, or the public highway is relocated, vacated, or abandoned, the owner or operator that is liable under Section 21323a for the environmental contamination addressed in the closure report shall notify the DEQ 30 days before any of those events. In such cases, the owner or operator would be liable for additional corrective action activities necessary to address any increased risk of exposure to the environmental contamination.

Qualified underground storage tank consultant
The bill would add that to be considered a qualified underground storage tank consultant a person would have to be experienced in risk-based corrective action (RBCA), in addition to current requirements. The bill also would add a new Section 21325A to require that department employees who are responsible for the oversight of corrective action or the audits conducted under Section 21315 must be formally trained and demonstrate proficiency in RBCA.

House Bill 5599

Definitions
HB 5599 would amend the definition of the term claims limit. The current definition defines claims limit to mean "$1 million for all claims of owners or operators and their affiliates during a claim period for owners and operators of 1 to 100 refined petroleum underground storage tanks or $2 million for all claims of owners or operators and their affiliates during a claim period for owners or operators of more than 100 refined petroleum underground storage tanks."

The bill would change the definition to $1 million per release, and would say that "two or more claims arising out of the same, interrelated, associated, repeated, or continuous releases or a series of related releases shall be subject to one claims limit. Any claim that takes place over two or more claim periods shall be subject to one claims limit."

The bill would add the term claim period aggregate limit, which would mean "the following aggregate claims limit for all releases discovered during a claim period:

- For owners, operators, and affiliates of 1 to 100 refined petroleum underground storage tanks, $1 million.
- For owners, operators, and affiliates of more than 100 refined petroleum underground storage tanks, $2 million."

The term deductible amount would be amended by striking out language stating that the deductible must be paid before the owner or operator is eligible to submit a claim under Part 215. The bill would make other complementary changes regarding prepayment of the deductible prior to being eligible to receive money from the Underground Storage Tank Authority (USTA).

Also added by HB 5599 is the term "work invoice," which would mean "a list of goods or services for costs of corrective action related to a claim, including a statement of the amount due."

Precollection of fees

The act imposes an environmental protection regulatory fee on all refined petroleum products sold for resale or for consumption. The Department of Treasury must precollect these fees from refiners or importers of refined petroleum. The act says the department must collect regulatory fees that can be collected at the same time as the sales tax. The bill would strike the underlined language.

Eligibility for receiving Underground Storage Tank Authority funds

HB 5599 would make several amendments to the criteria that must be met by a person prior to receiving money from USTA. The act says the owner/operator of the underground refined petroleum storage tank from which the release occurred must be, at the time of the discovery of the release, in compliance with registration and fee requirements of Part 211 and rules promulgated under that part. The bill would remove the underlined language. Also removed is a requirement that the owner or operator have paid the deductible amount.

Claim deductibles

Section 21510a contains two deductible amounts. If the owner or operator or its affiliate owns or operates fewer than 8 refined petroleum underground storage tanks and pays an annual $500 fee, then the deductible is $15,000 per claim. Otherwise, it is $50,000 per claim.

The bill would add language specifying that for the $15,000 deductible to apply, the owner or operator must have paid the annual fee per refined petroleum tank prior to the discovery and reporting of the release for which any subsequent claim is filed.

Reasons for non-approval of claim
Section 21510c of NREPA describes when a claim cannot be approved by USTA. The bill would add that a claim cannot be approved for:

- Costs that have been or will be submitted to, or that have been paid pursuant to an insurance policy or policies.
- Costs arising from corrective actions performed in excess of the corrective actions required to obtain a restricted closure based on then current land use.

Intent to use fund for financial responsibility requirements
The bill would create a new Section 21510D, which would add language stating that if an owner or operator intends to rely on the Underground Storage Tank Cleanup Fund to meet financial responsibility requirements, then that owner or operator must submit a request to the authority for a determination that they would be eligible for funding under Part 215 in the event of a release from a refined petroleum underground storage tank system.

Upon receipt of such a request, the authority would be required to make a determination and provide notice of that determination, in writing, to the owner or operator. The notice may contain conditions for maintenance of that eligibility. A determination under this section would be based upon a demonstration of all of the following:

- The owner or operator is not ineligible for funding, for reasons cited in the bill.
- The refined petroleum underground storage tank or tanks are presently in compliance with the registration and fee requirements of Part 211.
- The owner or operator is not the United States government.
- The owner or operator has financial responsibility for the deductible amount.

Receiving money from USTA
The bill would modify the process for receiving money from the authority by requiring an owner or operator who has received notice from the administrator that its claim has been approved to submit work invoices to the administrator containing required information. Within 45 days of receipt of the work invoices, the administrator would then make determinations relating to the claim. As part of the administrator's determinations, the bill would require that the cost of the corrective work be based on a competitive bidding process as established by USTA. Work invoices related to a claim could be submitted only after the initial approval and if the aggregate amount of work invoices in the submission is $5,000 or more. However, this limit would not apply to the final work invoice submission related to the approved claim.

The bill would modify the payout of monies by making it a joint payment to both the owner or operator <u>and</u> the contractor that performed the work listed in the approved work notice. The joint payment would have to be made within 45 days after the date of the administrator's approval if sufficient money exists in the fund. Currently, payment is made to the owner or operator within 30 days.

Board of directors
The bill would strike language that authorizes the board of directors of the authority to invest money of the authority at the board of directors' discretion, in instruments, obligations, securities, or property determined proper by the board of directors, and to name and use depositories for its money.

FISCAL IMPACT:

Senate Bill 717 would not affect costs or revenues for the Department of Environmental Quality (DEQ). The department's remediation and redevelopment division would continue to administer environmental cleanups according to Part 213 of NREPA. This bill would require DEQ employees engaged in remediation efforts authorized under this part to be trained in risk-based corrective action (RBCA), as defined by the American Society for Testing and Materials. All departmental employees presently managing these cleanups are trained in RBCA. Any new employees of the remediation and redevelopment division who manage cleanups would be required to undergo RBCA training as well, which could represent a potential future cost.

House Bill 5599 would not affect costs or revenues for the Department of Environmental Quality (DEQ). The environmental protection regulatory fee charged on the sale of refined petroleum product in Michigan generates approximately $50.0 million in annual revenue. The first $20.0 million of this annual revenue is deposited into the underground storage tank cleanup fund (USTCF), and the remaining revenue (approximately $30.0 million) is deposited into the refined petroleum fund; this annual revenue is unlikely to be affected by HB 5599.

Both of these funds support the remediation of leaking underground storage tanks. The USTCF is used to reimburse underground storage tank owners and operators for qualifying cleanup actions; this bill would adjust the reimbursement application process. The bill specifies that each individual claim by an owner or operator is subject to a $1.0 million reimbursement limit minus the corresponding deductible. The bill also specifies a claim period aggregate limit in which all claims of an owner or operator discovered during a claim period are subject to a $1.0 million (for 1 to 100 underground storage tanks) or $2.0 million (for more than 100 underground storage tanks) aggregate limit. The department does not anticipate that the process changes included in HB 5599 will result in an increase in the number of claims nor an increase in costs to the fund.

Neither bill would affect costs or revenues for local units of government.

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