House
Legislative
Analysis
Section

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RESTRUCTURE "POLLUTER PAY"

House Bill 4596 (Substitute H-2)
Sponsor: Rep. Ken Sikemma

House Bill 4597 (Substitute H-1)
Sponsor: Rep. Tom Alley

House Bill 4598 (Substitute H-1)
Sponsor: Rep. Raymond Murphy

First Analysis (3-30-95)
Committee: Conservation, Environment and Great Lakes

THE APPARENT PROBLEM:

During the past few decades, the urban cores of Michigan's cities have been largely abandoned by the middle-class and by business interests in a flight to the suburbs. Left behind in this exodus are some of the state's poorest residents and its oldest buildings and infrastructures. This unhappy alliance has resulted in an abundance of neglected or abandoned buildings, poverty, a dearth of jobs, and disintegrating infrastructures. At the same time, the movement away from the cities has consumed the state's agricultural land and its natural resources. In addition, suburban growth demands that a city's sewers, water, roads, and utilities be expanded to meet the needs of new subdivisions, shopping centers, and other enterprises. Michigan's crumbling cities struggle against a declining tax structure to meet these needs. One of the most difficult problems encountered by cities that strive to rebuild their economic strength is the trail of contaminated soil and groundwater left behind after decades of industrial development. Environmental contamination has exacerbated the historical problems associated with redeveloping cities' urban areas, since few developers or investors will invest in an urban area with a potential contamination problem and attendant cleanup costs.

Various groups have deliberated this issue. In 1992, an environmental regulation task force that was created by the Southeast Council of Governments (SEMCOG) to study the problem defined urban sprawl as "sprawling, low-density growth at the suburban fringe, and concurrent disinvestment and abandonment of older/urbanized communities." Among the conclusions reached by the task force was the opinion that permanent cleanup of contaminated property sites may be unachievable because of the technological limitations and exorbitant costs involved. Also, in 1992, a citizens advisory group, consisting of representatives from business, labor, and environmental groups, and from the legal and academic professions, was appointed to examine the impact of state environmental laws and policies on urban sprawl and to review approaches for the reuse of contaminated urban properties. Many of the recommendations contained in the advisory group's 1993 report, "Revitalizing Our Michigan Cities" were incorporated into environmental laws in an attempt to address the growth patterns that had led to suburban sprawl, and $5 million was redirected from the Environmental Protection Bond Fund to communities whose economic stagnation was coupled with depressed property values.

In 1994, the mayors of the cities of Detroit, Grand Rapids, Ann Arbor, Battle Creek, Bay City, Flint, Jackson, Kalamazoo, Lansing, Muskegon, Pontiac, and Saginaw -- the "Urban Core Mayors" -- formed an "Act 307 Committee" to scrutinize the programs conducted under Michigan's environmental cleanup law (the Michigan Environmental Response Act, Public Act 307 of 1982, [MERA] generally referred to as "Act 307"). Specifically, the mayoral group focused on reducing the restrictions and costs of redeveloping contaminated property sites within urban areas. In December, 1994, the group released its Core City Revitalization Package. Although not yet approved by all member of the Urban Core Mayors group, the report outlines

proposals that would alter MERA's liability provisions; modify current cleanup standards; use tax credits to finance the "orphan" share of cleanup costs; replace the current "list" of environmentally contaminated sites with one that would list, in alphabetical order, only those sites receiving funds for response activities; extend the liability protection currently afforded to commercial lending institutions to those who loan money for the purchase or improvement of property sites; expand current Covenant Not to Sue (CNTS) provisions; replace the present Environmental Protection Bond Fund, and assure that priority is given under a new fund to allocations for urban sites. Also, in 1994, the House Conservation, Environment and Great Lakes Committee formed a "Public Act 307" subcommittee to study the various complaints being voiced over the "Polluter Pay" provisions of Public Act 307. The subcommittee has proposed legislation that would incorporate into the environmental statutes some of the recommendations contained in the Core City Revitalization Package and other provisions that would lessen the costs of redevelopment of urban areas.

THE CONTENT OF THE BILLS:

House Bill 4596 would amend Part 201 of Article I of the Natural Resources and Environmental Protection Act (MCL 324.20101 et al.) to replace current provisions concerning cleanup standards and remediation procedures. The bill would restate the legislative intent in providing for appropriate response activity in the cleanup of contaminated sites; define the term "hazardous substance" on a site-specific basis; establish cleanup standards on the basis of land use-based categories; redefine "lender" to include any person who loaned money for the purchase or improvement of real property; exclude lenders who acted as fiduciaries and who did not participate in the management of property sites from liability as operators or owners of the sites; and require the Department of Natural Resources (DNR) to compile an annual list of sites that receive public funding to conduct response activities.

The bill would also permit the DNR to select or approve a remedial action plan that did not attain the degree of control or cleanup of hazardous substances currently required under the provisions of the Administrative Code if it found that the action protected the public health, safety, and welfare, and the environment, provided that the release was not intentional or the result of negligence. Under the bill, the department could also approve a plan that did not meet current standards, if the adverse environmental impact of implementing a remedial action to satisfy the provisions of the code would exceed the environmental benefit of the remedial action.

Definitions. Under the act, a "hazardous substance" may be defined as hazardous waste or as petroleum, as defined in the act; or as a hazardous substance as defined under the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980. It may also mean a chemical or other material that may become injurious to the public health, safety or welfare, or to the environment. This would be redefined under the bill to mean any substance that the department had demonstrated, on a case by case basis, as posing an unacceptable risk to the public health, safety, or welfare, or to the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources. "Facility" would be redefined under the bill to mean any place where a hazardous substance existed that exceeded the standards established for a residential property site. A "facility" would not include an area that satisfied the cleanup criteria for the residential category after cleanup activities had been conducted. The bill would define "free product" to mean a hazardous substance, in a liquid phase equal to or greater than one-eighth of one inch of measurable thickness, that was not dissolved in water and that had been released into the environment.

List of Contaminated Sites. Currently, the DNR must submit a list of all environmentally contaminated sites to the legislature each year. Among other requirements, the department must also make records available to the public regarding sites where remedial actions have been completed, submit the list for public hearings throughout the state, and report annually on the sites that have been removed from the list. These provisions would be deleted under House Bill 4596. Instead, the department would be required to submit a list of sites where public funds are being spent for response activities. The list would be arranged in

alphabetical order, and the department would submit the list to the legislature each year.

Claims for Damages. The bill would require that the DNR assess damages for injury to, destruction of, or loss of natural resources resulting from a release of hazardous substances. Under the bill, claims for natural resources damages could be pursued before rules were promulgated, but only in accordance with principles of scientific and economic validity and reliability. Contingent non-use valuation methods or similar non-use valuation methods could not be used, and damages could not be recovered for non-use values, unless, and until, rules were promulgated to establish an appropriate means of determining them. Additionally, contingent non-use valuation methods, or similar non-use valuation methods, could not be used for natural resource damage calculations unless a determination was made by the DNR that such a method satisfied principles of scientific and economic validity and reliability, and rules for using them were subsequently promulgated. However, these provisions would not apply to a judicial or administrative action or bankruptcy claim initiated on or before March 1, 1995.

Lender Liability. House Bill 4596 would extend current provisions, which exclude commercial institutions from personal liability for cleanup activities, to all persons who loan money to purchase or improve property. The bill would also add new provisions that would exclude certain persons who controlled a property in a fiduciary capacity from liability for cleanup activities. The provisions would apply to persons acting in a representative capacity for a disabled person, in a capacity permitted under the Revised Probate Code; to persons who owned or controlled the property in a fiduciary capacity in an agreement entered into prior to August 1, 1990, under the Banking Code; or to persons who entered into an agreement after August 1, 1990, under the National Bank Act. Under the bill, these persons would not be personally liable as the "owner" or "operator" of a property, provided that they did not manage the property site prior to assuming control of it. House Bill 4596 would specify that this provision would not relieve a fiduciary from any other personal liability he or she had assumed, or from negligence, gross negligence, or reckless, willful, or intentional misconduct. Nor would the provision prevent claims against the assets that were part of, or all of, the estate or trust that contained the facility, or any other estate or trust of the person whose estate or trust contained the facility that was managed by the fiduciary. Nor would it prevent claims against the assets of any other estate or trust of the person whose estate contained the facility. Such claims could be asserted against the fiduciary in its representative capacity, whether or not the fiduciary was personally liable.

"Due Care" Obligations. House Bill 4596 would impose new obligations on the owner or operator of a property site on which environmental contamination existed. Under the bill, a person who owned or operated a "facility" would be required to exercise the following "due care" measures with regard to any contamination that existed at the site: undertake the measures necessary to prevent exacerbation of the existing contamination; exercise due care on the property site, by undertaking any response activity necessary to mitigate any unacceptable exposure to hazardous substances and to allow the property to be used as intended and in a manner that protected the public health and safety; and take reasonable precautions against foreseeable acts or omissions of a third party and the consequences that foreseeably could result from them. Under this provision, "exacerbation" would mean the occurrence of either of the following, resulting from an owner or operator's activity, with respect to existing contamination:

a) Contamination at levels above cleanup standards for a residential property, which had migrated beyond the boundaries of the property, and which was the source of the release, unless the criteria was irrelevant because resource use had already been restricted under the provisions of the bill.

b) A change in facility conditions that increased response costs.

Compliance with these provisions would not satisfy a person's obligation to perform response activities that were otherwise required, and, notwithstanding any other provision of Part 201, a person who violated these provisions would be liable for any response and natural resource damages attributable to any exacerbation of existing environmental contamination, including fines and penalties. However, the person would not be liable for additional response activities unless required to perform them under other provisions of the act. In a dispute as to what constituted "exacerbation," the

burden of proof would be borne by the party seeking relief. However, the provisions would not apply to a local unit of government, a person who owned severed subsurface mineral rights or formations, the owner of property onto which contamination had migrated, or an entity such as a utility or railway, that would otherwise be exempt from liability under the provisions of the bill.

Owner/Operator Response Activities. Under the bill, a person could undertake a response activity without prior approval, unless the response activity was being done under an administrative order or agreement or judicial decree that required prior department approval. The action would not, however, relieve the person from liability for any further response activity that the DNR might require. In addition, the bill would require that the DNR review a response activity plan within six months after receiving it and either approve it or return it with recommended changes that would result in its approval. Also, current provisions providing for reimbursement from the Michigan Environmental Assurance Fund for response activities undertaken by a state or local unit of government would be deleted.

House Bill 4596 would also add to the response activities currently required from an owner or operator who had knowledge that a site was contaminated and who was liable for an activity that caused a release. In addition to current response activity requirements, the owner or operator of such a facility would be required to:

*Immediately implement source control or removal measures to remove or contain hazardous substances released after the effective date of the bill, provided that they were practicable and cost effective and provided protection to the environment. If the hazardous substances had not affected groundwater, but were likely to, the bill would require that the contamination should be prevented if it could be done by technically practicable, cost effective measures that protected the environment.

*Diligently pursue response activities necessary to achieve the cleanup criteria specified, and the rules promulgated under Part 201 of the act.

Transfer of Property Interests. Currently, under the act, a person who knows that his or her property site is contaminated may not transfer an interest in it without providing the purchaser with written notice of the problem. If the instrument conveying the interest is recorded, then the property owner must record the notice with the county register of deeds. House Bill 4596 would delete this latter requirement and would add to current provisions to specify that a person would be precluded from transferring an interest in real property unless he or she fully disclosed any land or resource use restrictions that applied to the property as a part of remedial action that had been implemented in compliance with the provisions of the act.

Remedial Action Plans. Currently, under the act, the DNR may initiate or approve response activities that attain a degree of cleanup and control of hazardous substances that are consistent with cleanup standards incorporated under state and federal environmental law, are consistent with those incorporated under administrative rules, and that assure the protection of the public health, safety, and welfare, and the environment. The bill would provide exceptions to current response activity requirements to permit the DNR to select or approve a remedial action plan that met the criteria established under the bill, but which did not attain the degree of control or cleanup of hazardous substances currently required under the provisions of the Administrative Code, if it found that the action was protective of the public health, safety, and welfare, and of the environment. However, the department could not approve of such a plan if the release was negligent, grossly negligent, or intentional, unless attaining that degree of control would be technically unfeasible, or the adverse environmental impact of implementing a remedial action to satisfy the rule would exceed the environmental benefit of that remedial action.

Under the bill, the department could also select or approve a remedial action plan that did not meet current standards if it determined, based on the administrative record, that one or more of the following conditions were satisfied:

*Compliance with the provisions of the Administrative Code was impracticable.

*The remedial action selected or approved would -- within a reasonable period of time -- attain a standard of performance that was equivalent to that required under the code.

*The adverse environmental impact of implementing a remedial action to satisfy the provisions of the code would exceed the environmental benefit of the remedial action.

*The remedial action provided for the reduction of hazardous substance concentrations in the aquifer through a naturally occurring process that was documented to occur at the facility and the following conditions were met:

--It had been demonstrated that there would be no adverse impact on the environment from the migration of the substances during the remedial action, except for that part of the aquifer specified in and approved by the DNR in the plan.

--The remedial action included enforceable land use restrictions or other institutional controls necessary to prevent unacceptable risk from exposure to the hazardous substances, as defined by the cleanup criteria approved as part of the plan.

A complete explanation of the basis of the DNR's decision to approve a plan would have to be included in the facility's administrative record, and the intent of, and the basis for, the exercise of authority provided for would be made part of an analysis of the recommended alternatives if the Administrative Code specifies that one is required. A plan approved by the DNR would have to include an analysis of source control measures already implemented or proposed, or both, and include by reference an analysis of source control measures provided in a feasibility study.

Remedial Action Plans/Aquifer Cleanup. The bill would also specify that the department's actions under the remedial action provisions would not affect a person's liability, including liability for natural resources damages; that an aquifer monitoring plan would be part of all remedial action plans that addressed aquifer contamination; that the aquifer plan would include information addressed under the Administrative Code, and would include identification of points of compliance to judge the remedial action's effectiveness, and points of compliance with land use-based cleanup categories (see below). In addition, the DNR could decide that a monitoring plan was not required if it were demonstrated that the extent of hazardous substance concentration in the aquifer would not significantly increase if the hazardous substances were not removed.

"Land Use" Cleanup Categories. Under the bill, the DNR could establish cleanup criteria or approve of remedial actions in the following "land use"-based categories: residential; commercial; recreational; industrial; and other land use-based categories established by the department. The bill would also provide for other "limited" residential, commercial, recreational, industrial, and other limited land use-based categories. The person proposing the remedial action would have the option of selecting a cleanup category, subject to DNR approval and taking into consideration the appropriateness of the categorical criteria to the facility. Cleanup criteria could be applied from one or more categories if all relevant requirements were satisfied. A remedial action plan based on site-specific standards could also be accepted. In addition, the DNR could approve a plan and consolidate remedial actions for a designated area-wide zone that encompassed more than one facility. These provisions would be subject to certain restrictions, as follows:

*If the DNR approved or selected a remedial action plan based on criteria for the residential category, land use restrictions or monitoring would not be required once appropriate standards had been achieved by remedial action. Otherwise, the criteria would be as specified under the Administrative Code.

*DNR approval of a remedial action plan based on one or more categorical standards for a residential, commercial, recreational, industrial, or other land use-based category would be granted only if the pertinent criteria was satisfied in the affected media. A notice of approved environmental remediation would be recorded by the property owner with the county register of deeds. The notice would include a survey and property description that defined the areas addressed by the plan, and would specify the DNR's determination as to which of the categories of land use was consistent with the environmental conditions at the property site, In addition, if a remedial action allowed for venting groundwater, the discharge would have to comply with the requirements of water resources protection. A remedial action plan would provide response activity to meet the residential categorical criteria or provide for acceptable land use or resource use restriction provided under the bill.

*If the DNR approved a remedial action plan that was based on criteria for recreational, industrial, other land use-based categories, or limited

residential categories, the property owner would have to record the department's notice of approved environmental remediation with the county register of deeds within 21 days after the department selected or approved the remedial action or within 21 days after construction, as appropriate. Any restrictions contained in the notice would be binding on the owner's successors. Additional requirements for financial assurance, monitoring, or operation and maintenance would not apply if a remedial action complied with the criteria provided under these categories, unless monitoring or operation and maintenance were required to assure compliance with criteria that applied outside the boundary of the property site that was the source of the release.

*If the DNR approved a remedial action plan that was based on criteria for limited categories or site-specific standards, then the same provisions that apply to other land use categories would be stipulated in a legally enforceable agreement with the department. If the department agreed that one or more of the requirements specified for the other land use categories was not necessary to protect the public health or the environment and to assure the effectiveness and integrity of the remedial action, then that element could be omitted from the agreement. If the department determined that the land use or resource use restrictions, monitoring, operation and maintenance, permanent markers describing restricted areas, or financial assurance provisions had lapsed or were not in compliance with the agreement or remedial action plan, then the department's approval of the plan would be void from the time of the lapse or violation.

*If a remedial action plan relied on cleanup criteria that had been approved for limited categories or site-specific standards, then a restrictive covenant would be drawn up -- and recorded with the county register of deeds within 21 days after the plan was approved or selected or within 21 days after the barrier or containment was constructed -- describing land use or resource use restrictions that assured the effectiveness of any containment, exposure barrier, or other land use or resource use restrictions. The aim of the covenant would be to restrict activities at the facility that might interfere with a remedial action or that might result in exposures above the levels established; require notice of the owner's intent to convey any interest in the facility; grant the department the right to enter the property; allow the state to enforce the restriction contained in the covenant by legal action; and describe the uses of the property that are consistent with the remedial action plan. The restrictions would run with the land and be binding on the owner's successors, assignees, and lessees until the DNR determined that the hazardous substances no longer presented an unacceptable risk to the public health, safety, or welfare, or the environment.

*The DNR could approve a remedial action plan based on criteria for limited categories or site-specific standards if it was determined that exposure to hazardous substances could be reliably restricted by an institutional control rather than a restrictive covenant, and that imposition of land use or resource use restrictions through restrictive covenants was impractical. An institutional control could include a local ordinance prohibiting the use of groundwater or an aquifer to protect against unacceptable exposures, as defined by the cleanup criteria approved as part of the remedial action plan.

A remedial action plan that relied on categorical cleanup criteria would also have to consider other factors necessary to protect the public health, safety, and welfare, and the environment, including the protection of surface water quality, and consideration of ecological risks, if pertinent to the facility, according to the provisions of the Administrative Code. Approval of a plan would not relieve a person of the responsibility of reporting and providing for response activities to address a subsequent release. In addition, the department could take action to require compliance against a person who undertook response activity without department approval; and the filing of a notice of approved environmental remediation indicating departmental approval would be prohibited unless the DNR had approved the filing. Within 30 days of the plan's approval, a person who executed an approved remedial action plan would be required to provide notice of the plan's land use restrictions to the local zoning authority.

Cleanup Standards The DNR would develop cleanup criteria for each category it had established, based on generic human health risk assessment assumptions. The department would utilize only reasonable and relevant exposure pathways in determining these assumptions to appropriately characterize patterns of human exposure associated with certain land uses. Each set of exposure assumptions created within a category would create

a subcategory. The DNR could also specify site characteristics to determine the applicability of the criteria derived for each category. The standard for cleanup criteria for hazardous substances that posed a carcinogenic risk or an adverse health affect on humans would be as follows:

*If a hazardous substance posed a carcinogenic risk to humans, the cleanup criteria derived for cancer risk would be the "95 percent upper bound on the calculated risk of one additional cancer above the background cancer rate per 100,000 individuals using the generic set of exposure assumptions established" for the appropriate category or subcategory. (Note: Under R 299.5709 of the Administrative Code, the DNR must clean up contaminated sites to attain Type A, Type B, or Type C degrees of cleanup, with Type A criteria being the strictest. Different exposure assumptions are used to calculate risk levels for various uses of property, such as residential, industrial, or commercial. The code also specifies that the allowable level of risk for a carcinogen occurs when the concentration of a hazardous substance represents an increased cancer risk of 1 in 1,000,000.)

*If a hazardous substance posed a risk of an adverse health effect other than cancer, cleanup criteria would be derived using appropriate human health risk assessment methods for that effect, and the generic set of exposure assumptions established by the DNR for the appropriate category.

*The intake would be assumed to be 100 percent of the protective level for the noncarcinogenic effects of a hazardous substance present in soil, unless compound and site-specific data were available to demonstrate that a different source contribution was appropriate.

*If a hazardous substance posed a risk of both cancer and an adverse health effect other than cancer, cleanup criteria would be derived in each category for cancer and each adverse health effect.

*If a cleanup criterion for groundwater in an aquifer differed from a) the state drinking water standard or b) criteria for adverse aesthetic characteristics derived under the Administrative Code, the cleanup criterion would be the more stringent of a) or b) unless the DNR determined that compliance was not necessary because the use of the aquifer would be reliably restricted accordingly to the provisions of the bill. The need for soil remediation to protect an aquifer for hazardous substances in soil would be determined under the Administrative Code, considering the vulnerability of the aquifer that would be affected if the soil remained. In addition, migration of hazardous substances in soil to an aquifer would be a pertinent pathway if appropriate, based on consideration of site-specific factors.

Other provisions of the bill would allow the DNR to establish cleanup criteria for a hazardous substance using a biologically-based model developed or approved by the U.S. Environmental Protection Agency (EPA) if the department determined that application of the model resulted in a more accurate criterion, data was available for a specified hazardous substance to allow the scientifically valid application of the model, and the department had determined that application of the model was appropriate. In addition, the department would be required to evaluate and revise the cleanup criteria annually and submit a detailed report to the legislature detailing the revisions made to cleanup criteria under these provisions.

Zoning of Property. The DNR would not approve a remedial action plan unless its proponent documented that the current zoning of the property was consistent with the categorical criteria being proposed, or the governing zoning authority intended to change the zoning designation so that the criteria was consistent with the new zoning designation, or the current property use was a legal nonconforming one. In addition, the DNR could not grant final approval for a plan that relied on a zoning designation change until a final determination of that change had been made. However, the DNR could approve of a remedial action plan that achieved categorical criteria based on greater exposure potential than the criteria applicable to current zoning. In addition, the plan would include documentation that the current property use was consistent with the current zoning, or was a legal nonconforming use. Abandoned or inactive property would be considered on the basis of zoning classifications.

Soil Cleanup. House Bill 4596 would prohibit the removal of soil from a facility to an off-site location unless the person owning the off-site location determined that the soil could be lawfully relocated without posing a threat to the public health, safety, or welfare, or the environment. The determination would have to take into consideration whether the

soil was subject to regulation under Part 111 of the act. In addition the bill would specify the following restrictions:

-- Soil would be considered a threat to the public health, safety, or welfare, or the environment if concentrations of hazardous substances in the soil exceeded the applicable cleanup standards, established under the bill, for the location to which the soil would be moved or relocated; however, if the soil were to be removed from the facility for disposal or treatment, then the appropriate regulatory standards for removal or treatment would be satisfied.

-- Any land use restrictions that would be required for land use-based or site-specific categories would have to be in place at the location to which the soil would be moved.

-- Soil could be relocated only to another facility that was similarly contaminated, considering the nature, concentration, and mobility of hazardous substances present at the location to which the contaminated soil would be moved.

-- Contaminated soil could not be moved to a location that was not a (contaminated) facility unless it was taken there for treatment or disposal in conformance with applicable laws and regulations.

-- The bill would prohibit the relocation of soil within a site of environmental contamination where a remedial action plan had been approved, without assurance that the same degree of control required for land use-based or site-specific categories would be provided. (This prohibition would not apply to soils that were being temporarily relocated for the purpose of implementing response activity or utility construction, provided that these activities were completed in a timely fashion and the short-term hazards were appropriately controlled.)

-- Prior DNR approval would be necessary in order to move or relocate soil to a site where a remedial action plan based on limited land use-based categories or site-specific categories had been approved; otherwise, the owner or operator of the facility from which soil was being moved would be required to provide notice to the DNR within 14 days after the soil was moved. Further, if the soil were subject to the land use restrictions for land use-based categories when it was relocated, the notice would have to include documentation that those restrictions were in place.

-- The determination made when moving or relocating soil would be based on the knowledge of the person undertaking or approving the move, or on "characterization" of the soil in order to comply with these provisions.

Persons Liable for Response Activity Costs. House Bill 4596 would generally replace current provisions to eliminate liability for owners and operators who did not cause contamination at a facility. Under the bill, the following persons would be liable for response activity costs incurred as a result of a release: the owner or operator of a facility, if that person was responsible for an activity causing a release, or threat of release; the person who owned or operated a facility at the time of the disposal of a hazardous substance if that person was responsible for an activity causing a release or threat of release; and a person who became an owner or operator of contaminated property after March 1, 1995, unless that person complied with the following requirements:

a) A Baseline Environmental Assessment (BEA) was conducted prior to, or within 45 days after, the earlier of the date of purchase, occupancy, or foreclosure. As used in this provision, "accessing property to conduct a baseline environmental assessment" would not constitute occupancy. (A BEA is defined under the bill to mean an evaluation of environmental conditions which exist at a facility at the time of purchase, occupancy, or foreclosure, that reasonably define the existing conditions and circumstances at the facility so that, in the event of a subsequent release caused by the new owner or operator, there is a means of distinguishing the new release from existing contamination.) The DNR would be required to establish minimum technical standards for BEAs in guidelines according to the provisions of the Administrative Procedures Act.

b) The owner or operator disclosed the results of a BEA to the department and to a subsequent purchaser or transferee if the baseline environmental assessment confirmed that the property was a (contaminated) facility.

Subject to the "due care" provisions of the bill, an owner or operator who complied with these provisions would not be liable for contamination existing at the facility at the earlier of the date of

purchase, occupancy, or foreclosure, unless the person was responsible for an activity that caused the existing contamination at the facility. However, these provisions would not alter a person's liability regarding a subsequent release or threat of release at a facility if the person was responsible for that activity.

Liability Costs/Liens. House Bill 4596 would specify the costs of response activity that would be recoverable and that could be assessed against a person held liable for response activity costs under the bill. The person would be held jointly and severally liable for all of the following: all costs of response activity lawfully incurred by the state; any other necessary costs of response activity incurred by any other person; and damages for injury to, destruction of, or loss of natural resources, including costs for assessing the injury. The person held liable could also be held responsible for costs incurred by the state, except for cases where cost recovery actions had been filed before July 12, 1990. A person challenging the recovery would have the burden of establishing that the costs were not incurred. The person held liable could also be required to pay other costs incurred by another person prior to the promulgation of rules relating to the selection and implementation of response activity under Part 201 of the act. The person seeking recovery of these costs would have the burden of establishing that the costs were incurred. The amounts recoverable in an action under this provision would include interest on the amounts recoverable. Additionally, in the case of injury, destruction, or loss of natural resources, liability would be to the state for natural resources belonging to, managed by, controlled by, or held in trust by the state. A person would not be required to undertake response activity for a permitted release; recovery by any person for response activity costs or damages resulting from a permitted release would occur under other applicable law. If the DNR 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, the attorney general could bring an action against any person who was liable to secure the relief necessary to abate the danger. The court would have jurisdiction to grant such relief as the public interest required. However, the costs recoverable under this provision could be recovered in an action brought by the state or any other person.

A person held liable, or a lender with a security interest in a facility, could file a petition in the county circuit court seeking access to the facility in order to conduct response activities approved by the DNR. If the court granted access to the property, it could provide compensation to the property owner or operator for damages, enjoin interference with the response activities, or grant any other appropriate relief as determined. Further, the owner or operator to which access was granted would not be liable for a release caused by the response activities for which access was granted, unless the owner or operator was otherwise liable, or for conditions associated with the response activity that could present a threat to public health or safety.

Currently, when it is determined that a lien provided to cover unpaid costs and damages for which a person is liable is insufficient to protect the state's interest in recovering response costs, the attorney general may petition the circuit court to have the lien take precedence over all other liens. House Bill 4596 would prohibit such a lien from being placed against the owner of a facility if that owner was not liable for recovery costs under the new liability provisions of the bill.

Persons Excluded from Liability. The bill would exclude the following persons from liability for cleanup costs: persons who arranged the sale or transport of a secondary material, such as scrap metal, paper, plastic, glass, textiles, or rubber, for use in producing a new product, provided that the material has been separated or removed from the solid waste stream for reuse or recycling, and substantial amounts of the material were consistently used in the manufacture of products that might otherwise be produced from a raw or virgin material; and people arranging the lawful transport or disposal of any product or container commonly used in a residential household, in a quantity commonly used there.

The following persons would also be exempt from liability unless responsible for an activity that caused a release at the facility: a state or local unit of government that acquired ownership involuntarily, or to which ownership or control was transferred by the state, or that acquired ownership by seizure or other circumstance; a state or local unit of government that held or acquired an easement interest, or acquired an interest by plat dedication; a person who held an easement interest or a utility

such as a railway that held a franchise to provide service; a person who owned severed subsurface mineral rights or formations; the state or local unit of government that leased property to a person, if the entity was not liable under this part of the act for environmental contamination at the site; a person who owned or occupied residential real property, if hazardous substance use at the property was consistent with residential use; a person who acquired a facility as a result of the death of the prior owner or operator; a person who owned or operated a facility in 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 the third party other than an employee; a person who the department had determined did not know that the property was a (contaminated) facility; a utility performing normal construction, maintenance, and repair activities in the normal course of its utility service business (this provision would not apply to property owned by the utility); and a person who leased property for a retail, office, or commercial use.

Also exempt from liability would be an owner or operator of an underground storage tank system, or the property on which an underground storage tank system was located, as defined in Part 213 of the act, from which there was a release or threat of release if the release was solely from an underground storage tank system and was subject to corrective action; the owner or operator of a hazardous waste treatment, storage, or disposal facility regulated under Part 111 of the act, from which there was a release and the release was subject to corrective action; a lender that engaged in or conducted a lawful marshalling 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 that person was responsible for an activity causing the release that was the source of the contamination; and a local unit of government or a lender who had not participated in the management of the facility prior to foreclosure (although this provision would not preclude liability for costs or damages resulting from gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the state or local unit of government).

Transfer of Liability. A lender who was not responsible for an activity causing a release at a facility could immediately transfer the property on which there had been a release to the state if the lender established that it had acquired the property prior to March 1, 1995, it had conducted a BEA in accordance with the provisions of the bill, and the lender had complied with all of the following:

-- Within nine months following foreclosure and for a period of at least 120 days, the lender either listed the facility with a broker, dealer, or agent who deals with that type of property, or advertised the property as being for sale or disposition on at least a monthly basis.

-- The lender provided all environmental information related to the facility to the DNR.

-- The lender had taken reasonable care in maintaining and preserving the real estate and permanent fixtures.

-- The lender had complied with an administrative order issued by the department.

-- The lender had undertaken appropriate response activities to abate a threat, if conditions on the property posed a threat of fire or explosion or presented an imminent hazard through direct contact with hazardous substances.

A person could petition the DNR within six months after a BEA had been completed for a determination that the person met the exemption requirements from liability and a determination that the proposed use of the facility satisfied the person's responsibility to undertake measures to prevent exacerbation of the contamination. A written determination by the DNR, affirming that the person requesting the petition for the determination met the criteria for an exemption and satisfied the person's obligations for the proposed use of the facility, would constitute a settlement with that person for the purposes of establishing liability under the federal CERCLA Act of 1980. The person receiving the determination would not be liable for a claim for response activity costs, fines, or penalties, natural resources damages, or equitable relief under Part 17 or Part 31 of the act or under common law resulting from the contamination identified in the petition. However, this liability protection would not extend to a violation of any permit issued under state law, and would not alter a person's liability for a violation under the act for a use or "activity" of property that was inconsistent with the determination.

Covenant Not to Sue. Currently, if certain provisions are met, the state may provide a person who proposes to redevelop or reuse a facility with a covenant not to sue (CNTS) concerning liability. Among other provisions, the act requires that the person requesting the CNTS demonstrate that the redevelopment will not result in a release. The act also specifies that the right of the state to assert all other claims against the person who proposes to redevelop or reuse the facility, including claims arising from exacerbation or contribution of the existing release, and failure to exercise due care with respect to any release or threat of release at the facility, be contained in the CNTS. House Bill 4596 would delete these provisions.

Penalties. Currently, under the penalty provisions of the act, a person who knowingly causes a release, intentionally makes a false representation, or renders a monitoring device inaccurate is guilty of a felony and subject to a fine of at least $25,000. House Bill 4596 would amend the act to include under these felony provision the crime of misrepresentation of one's qualifications in a document relating to liability for cleanup costs.

The bill would also specify that a person who is exempt from liability for cleanup costs would not be subject to a claim in law or equity for the performance of response activities under Part 17 or Part 31 of the act, or under common law. This provision would not bar tort claims unrelated to performance of response activities, tort claims for damages that resulted from response activities, and tort claims related to the exercise or failure to exercise responsibilities under the act.

Legislative Intent. The act lists certain legislative findings and declarations concerning response activities. House Bill 4596 would amend this section to add the following findings and declarations:

**That liability for response activities to address environmental contamination should be imposed upon those persons who are responsible for the environmental contamination.

**That the legislative purpose of providing for appropriate response activity is to eliminate unacceptable risks to public health, safety, or welfare, or to the environment, from environmental contamination at facilities, rather than to eliminate the environmental contamination caused by the presence of hazardous substances at these sites.

**That it is the intent of the legislature, in implementing this provision of the act, that the department act reasonably in its exercise of professional judgment.

Reports to the Legislature. Within two years after the bill took effect, and biennially thereafter, the department would report to the legislature on the effectiveness of the provisions of the bill in restoring the economic value of environmentally contaminated sites. The report would include, but not be limited to, an examination of the effectiveness of the categorical cleanup criteria and liability provisions in encouraging the redevelopment of sites of environmental contamination. In preparing the report, the DNR would consult the chairpersons of the Senate and House of Representatives standing committees with jurisdiction over natural resources' and environmental issues.

Enforcement of Former Acts. House Bill 4596 would specify that amendments, litigation, or enforceable agreements entered into before March 1, 1995, under the provisions of Public Act 307 of 1982 (the Michigan Environmental Response Act, or MERA) would be governed by the provisions of that act that were still in effect on March 1, 1995. In addition, the provisions of Public Act 307 of 1982 would be incorporated by reference. The bill would also specify that any judicial or administrative action, bankruptcy claim, or any enforceable agreement with the state initiated prior to March 1, 1995, under former Public Act 307 of 1982, would be governed by the provisions of that act that were in effect as of March 1, 1995. However, upon request, the DNR could approve changes in a response activity plan in order to be consistent with the cleanup standards required under the act.

Repealers. The bill would delete current requirements regarding legislative appropriations and disbursements for response activities from the Environmental Protection Bond Fund, and requirements that the department, prior to spending money on remedial action, must ascertain that sufficient financial resources are available for response activities from a private or public fund until the site meets or exceeds established standards for that site, among other provisions.

House Bill 4597 would amend Part 31 of Article II of the Natural Resources and Environmental Protection Act (MCL 324.3109a and 324.3109b), pertaining to water resources protection, to allow a

mixing zone to be considered when judging the impact of contaminated groundwater that is venting to groundwater. Under the bill, the Department of Natural Resources (DNR) could permit a mixing zone (defined under the bill to mean a portion of a body of water where a point source discharge or venting groundwater -- water that is entering a surface water of the state from a (contaminated) facility -- is mixed with receiving water) for discharges of venting groundwater in the same manner as the department provides for a mixing zone for point source discharges. The provision would have precedence over any other provision or rule promulgated under the act. In addition, a permit would not be required for a discharge of venting groundwater that complied with the water quality standards provided for under the act, the rules promulgated under the act, and a discharge that was provided for in an approved remedial action plan that had been approved according to the provisions of House Bill 4596. House Bill 4597 would further specify that a remedial action that met the environmental response requirements of Part 201 of the act would satisfy any remedial obligations required under the bill.

House Bill 4598 would amend Part 111 of Article II of the Natural Resources and Environmental Protection Act (MCL 324.1115b), which relates to hazardous waste management, to specify that corrective actions conducted for a release, or threat of release, under the hazardous waste management provisions of the act would satisfy a person's environmental response obligations under Part 201, and also the remedial obligations relating to water resources protection required under Part 31.

FISCAL IMPLICATIONS:

According to the Department of Natural Resources (DNR), anticipated cleanup costs for all sites on its official list of contaminated sites are estimated at approximately $1 billion. The provisions of the bills would result in a savings to the state of 35 to 40 percent of these cleanup costs. This would amount to a potential savings of $500 million over a seven- to ten-year period.

The DNR also estimates that the provisions that provide for a "causation" standard for cleanup liability would result in a shift to the taxpayers of some of the cleanup costs, since contamination at some sites is so old that it is impossible to prove who caused the release. However, the lower cleanup standards provided under the bill would result in some contaminated sites being removed from the DNR List of Contaminated Sites, and the savings realized from this provision would balance the additional costs. (3-28-95)

ARGUMENTS:

For:

House Bill 4596 would, to some extent, adopt many of the recommendations proposed in the Core City Revitalization Package issued by the Urban Core Mayors -- a group consisting of the mayors of the cities of Detroit, Grand Rapids, Ann Arbor, Battle Creek, Bay City, Flint, Jackson, Kalamazoo, Lansing, Muskegon, Pontiac, and Saginaw -- which formed a committee to study the programs conducted under the "Polluter Pay" provisions of MERA. Specifically, the bill would address the following proposals recommended in the Revitalization Package:

**The Revitalization Package recommends that the retroactive liability provisions of the act be altered so that a person who was an owner or operator prior to the enactment of MERA in 1982 would not be considered liable unless the person was responsible for the contamination.* The bill would eliminate liability for the owners and operators of sites (the location of environmental contamination) who did not cause the contamination. This change to a "causation" standard of liability would apply to a person who acquired the property before March 1, 1995, unless the person was responsible for the contamination. Persons who purchased property after March 1, 1995, would also be exempt from liability for existing contamination if they conducted a Baseline Environmental Assessment (BEA), or evaluation of the existing environmental conditions at a facility. A BEA would assess the existing conditions so that there would be a means of distinguishing a new release from existing contamination. The provisions of the bill would reduce the risk of potential developers being turned away by enormous cleanup costs, and the current time-consuming and expensive process of researching who may be liable for contamination on a property.

**The Revitalization Package proposes that cleanup costs could be reduced by adopting a land use-based standard for cleanup criteria, and by lowering, from one-in-one million to one-in-one thousand, the current level of acceptable risk for substances that*

pose a carcinogenic risk. Under the bill, the DNR would be required to establish cleanup criteria in land use-based categories that would allow the future use of the property to be taken into consideration. For example, the bill provides lower cleanup standards for property that is to be developed as industrial. The property's use, once it is cleaned up to industrial standards, would be limited to industrial operations. The bill would also reduce the level of acceptable risk for carcinogens to one-in-one thousand. The lower cleanup standards provided under the bill would decrease the cost of environmental cleanups. At the same time, the proposed standards would still embody an appropriate level of protection of the public health and the environment, since they remain within current Environmental Protection Agency (EPA) standards.

**The Revitalization Package proposes that a municipality acting as a lessor, an intervening owner or operator who simply conducts a business on contaminated property, a homeowner, or any other person who may only have used a property for a short time, should not be held liable for cleanup costs if they were not responsible for the contamination.* By eliminating liability for the owners and operators of sites who did not cause the contamination, House Bill 4596 would address all these concerns.

**The Revitalization Package proposes that the stigma attached to previously developed properties could be eliminated if the DNR process for listing contaminated sites were revised to include only those sites that receive public funds, listed alphabetically, and if the current list of contaminated sites were, instead, maintained on a computerized data base.* House Bill 4596 would address the former concern by requiring that the DNR annually prepare a list of sites where public funds are being spent for response activities, arranged in alphabetical order.

**The Revitalization Package proposes that the current definition of "commercial lending institution" be expanded to include other individuals who lend money; that the state be barred from filing a "super lien" in a situation where a property owner can assert a defense against liability; and that lenders be allowed to exert a liability defense on residential or agricultural property.* The bill would address these concerns by expanding the current definition of "commercial lending institution" to include any person who loaned money for the purchase or improvement of property. The bill would also amend the act to specify that a lien could not be served against the owner of a facility if that owner was exempt from liability.

These provisions of the bill would foster urban redevelopment and help curb urban sprawl, which needlessly consumes limited natural resources and encourages further deterioration of the quality of life and economic viability of the state's older urbanized areas.

Against:

Urban cities face many economic, environmental, and social problems. While it is possible that the provisions of the bills would ease redevelopment procedures in urban areas, it is doubtful that the environmental changes proposed under the bills would solve the larger issues that created this predicament. First, the bill does not address the issue most often emphasized in the proposals suggested in the Revitalization Package -- that of funding. The Revitalization Package suggests that the strict joint and several liability provisions of the act could be modified to provide a more effective "allocation" process that would furnish an effective method of allocating response activity costs fairly among potentially responsible parties (PRPs) at a facility. To be effective, this proposal would operate in combination with adequate funding for orphan shares and a mechanism that would allocate percentage shares of liability among PRPs. Although the proposed amendments to the liability provisions of the act would probably reduce the need for these other proposals, changes to the allocation process cannot be effectively addressed until orphan share funding is provided. Second, the problems that plague urban core areas are not limited to environmental issues. The urban areas of the nation's large cities have deteriorated since the dawning of the Industrial Era, when wealthy white property owners fled from contact with city smoke stacks, immigrants, and crime. In fact, urban historians trace the problems of inner cities to the flight of those who can afford high property taxes, and the abandonment of those who cannot. Many argue that racism, a lack of skilled workers, and crime are the major causes of companies avoiding urban core areas.

Moreover, as pointed out by environmental groups and others in testimony before the House Conservation, Environment and Great Lakes Committee, Michigan's Polluter Pay laws have resulted in the successful cleanup of over 1,000

contaminated sites. Environmental groups also point out that the bill's provision that eliminates retroactive liability for cleanup sites from private companies would saddle taxpayers with new funding burdens and relieve polluters of their obligations. Other provisions that would reduce cleanup standards could lead to high levels of contamination for both past and future releases. Still other provisions to end publication of the DNR's list of contaminated sites would close the door on the public's right to know about contamination. Those who oppose the bill claim that there is little evidence to suggest that environmental toxins are benign. In fact, it is pointed out that the standards used to assess toxic risks are measured against adult males, while the impact of minute amounts of toxic substances on developing fetuses could result in a different assessment.

POSITIONS:

Representatives of the following groups testified or submitted testimony in support of the bill (3-28-95):

The Executive Office.

The Department of Natural Resources.

The City of Detroit.

The mayor of the City of Grand Rapids.

The Greater Detroit Chamber of Commerce.

The National Bank of Detroit (NBD).

The board of directors of Detroit Renaissance.

The Michigan Chamber of Commerce.

The Grand Rapids Area Chamber of Commerce.

The National Federation of Independent Business (NFIB).

The Michigan Bankers Association.

The Michigan Chemical Council.

The Michigan Manufacturers Association (MMA).

The Michigan Municipal League.

The Small Business Association of Michigan (SBA).

The Michigan Institute for Scrap Recycling Industries.

The Michigan Association of Realtors.

In testimony submitted to the committee, the Southeast Michigan Council of Governments (SEMCOG) expressed support of some provisions of the bill. (3-28-95)

The mayor of the City of Lansing contends that the bill goes beyond the proposals submitted by the mayors' group, although it does capture the key elements of those proposals. The mayor also has concerns that the bill's liability provisions would release polluters from any responsibility; and that provisions that would permit a developer to challenge the department on certain issues could undermine the DNR's role. (3-29-95)

Representatives of the following groups testified or submitted testimony in opposition to the bill (3-28-95):

The Department of the Attorney General.

The Michigan Environmental Council.

The Michigan United Conservation Clubs (MUCC).

The Sierra Club of Michigan.

The Kalamazoo River Protection Association.

The Public Interest Research Group in Michigan (PIRGIM)