Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

House Bills 4596 (Substitute H-2), 4597 (Substitute H-1), and 4598 (Substitute H-1)
Sponsor: Representative Ken Sikkema (H.B. 4596)
Representative Tom Alley (H.B. 4597)
Representative Raymond Murphy (H.B. 4598)
House Committee: Conservation, Environment, and Great Lakes
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 4-27-95

SUMMARY OF HOUSE BILLS 4596 (Substitute H-2), 4597 (Substitute H-1), and 4598 (Substitute H-1) as passed by the House:

The bills would amend the Natural Resources and Environmental Protection Act to replace current provisions concerning cleanup standards and remediation procedures. House Bill 4596 (H-2) 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 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 received public funding to conduct response activities.

House Bill 4596 (H-2) also would 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, and the release was not intentional or the result of negligence. The bill also would allow the DNR to 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.

House Bill 4597 (H-1) would permit mixing zones for discharges of venting groundwater, and House Bill 4598 provides that corrective actions would satisfy a person's environmental response and water resources protection obligations.

Following are more detailed explanations of the bills.

House Bill 4596 (H-2)

Definitions

One of the items under the definition of "hazardous substance" in the Act is a chemical or other material that is or could become injurious to the public health, safety or welfare, or to the environment. The bill would change this reference to any substance that the Department 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.

Currently, "facility" means any area, place, or property where a hazardous substance has been released, deposited, stored, disposed of, or otherwise come to be located. The bill would define "facility" as any area, place, or property where a hazardous substance had been released, deposited, disposed of, or otherwise come to be located in excess of the standards for residential property. A "facility" would not include an area that satisfied the cleanup criteria for the residential category after cleanup activities had been completed.

The bill would define "free product" as 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 make available to the public records 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. The bill would delete these provisions and instead require the DNR to submit a list of sites where State funds were being spent for response activities. The list would have to be arranged in alphabetical order, and the Department would have to submit it 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. 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 the DNR determined that such a method satisfied principles of scientific and economic validity and reliability, and rules for using them were subsequently promulgated. These provisions, however, would not apply to a judicial or administrative action or bankruptcy claim initiated on or before March 1, 1995.

Lender Liability

The bill 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 also would exempt from personal liability as an owner or operator of the property all of the following persons:

-- A lender or other person who had not participated in the management of property prior to assuming ownership or control of the property as a fiduciary as defined in the Revised Probate Code, or in a representative capacity for a disabled person and that was acting or had acted in a capacity permitted by the Revised Probate Code.
-- A lender that had not participated in the management of property prior to assuming ownership or control of the property in a fiduciary capacity, and under a fiduciary agreement entered into on or before August 1, 1990, owned or controlled the property in a fiduciary capacity that was authorized by the Banking Code or the National Bank Act.
-- A lender that had not participated in the management of property prior to assuming ownership or control of the property in a fiduciary capacity, and under a fiduciary agreement entered into after August 1, 1990, owned or controlled the property in a fiduciary capacity that was authorized by the National Bank Act, that had served only in an administrative, custodial, or financial capacity with respect to the property, and had not exercised sufficient involvement to control the owner's or operator's handling of a hazardous substance.

The bill specifies, however, that the exemptions would not relieve a fiduciary from any other personal liability it had assumed, or from negligence, gross negligence, or reckless, willful, or intentional misconduct. Nor would the exemptions 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. In addition, the exemptions would not 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

The bill would require a person who owned or operated a facility to exercise the following "due care" measures with regard to hazardous substances at the facility:

-- Undertake the measures necessary to prevent exacerbation of the existing

contamination.

-- Undertake 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.
-- Take reasonable precautions against reasonably 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's or operator's activity, with respect to existing contamination:

-- Contamination at levels above cleanup standards for residential property, that had migrated beyond the boundaries of the property, and that was the source of the release, unless the criteria were not relevant because resource use had already been reliably restricted under the provisions of the bill.
-- A change in facility conditions that increased response costs.

The bill specifies that compliance with the "due care" provisions would not satisfy a person's obligation to perform response activities that were otherwise required, and, notwithstanding any other provision of the environmental response section of the Act, a person who violated the due care provisions would be liable for any response and natural resource damages attributable to any exacerbation of existing environmental contamination, including fines and penalties. The person, however, 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 have to be borne by the party seeking relief. The due care provisions would not apply to a local unit of government that was exempted from liability; a local unit that acquired property by purchase, gift, transfer, or condemnation prior to the effective date of the provisions; a person who owned severed subsurface mineral rights, or an easement interest in a facility or a utility franchise and was exempted under the bill--except with regard to the person's activities at the facility; and an owner or operator of property onto which contamination had migrated and who was therefore exempt from liability.

Owner/Operator Response Activities

The Act requires an owner or operator of a facility that obtained information about a possible release at the facility immediately to take appropriate action, consistent with applicable laws and rules to confirm the existence of, and determine the nature and extent of the release, report the release to the DNR, immediately stop or prevent the release at the source and take other safety measures. The bill instead would require an owner or operator of property who had knowledge that the property was a facility and who was liable under the bill to determine the nature and extent of the release, report it to the DNR, and follow the safety measures prescribed in the Act. Further, the owner or operator would have 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 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 the environmental response provisions of the Act.

Under the bill, a person could undertake a response activity without prior approval, unless the response activity were 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 concerning reimbursement from the Michigan Environmental Assurance Fund for response activities undertaken by the State or a local unit of government would be deleted.

Transfer of Property Interests

Currently, 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. The bill would delete this recording requirement, and specifies further 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

The Act allows the DNR to 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 allow the DNR in addition to select or approve a remedial action plan that met the criteria established under the bill, but 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 was protective of the public health, safety, and welfare, and of the environment. The DNR, however, could not approve of such a plan if the release were 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.

The bill also would allow the DNR to select or approve a remedial action if it determined, based on the administrative record, that one or more of the following conditions were satisfied:

-- Compliance with the provisions of the Michigan Administrative Code was technically 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 1) 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, and 2) 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. Further, the intent of, and the basis for, the exercise of authority provided for would have to be made part of an analysis of the recommended alternatives if the Administrative Code required one. A plan approved by the DNR would have to include an analysis of source control measures already implemented or proposed, or both, and could include by reference an analysis of source control measures provided in a feasibility study.

Remedial Action Plans/Aquifer Cleanup

The bill specifies that:

-- The DNR's decisions under the remedial action provisions would not affect a person's liability, including liability for natural resources damages.
-- An aquifer monitoring plan would have to be part of all remedial action plans that addressed aquifer contamination.
-- The aquifer plan would have to include information addressed under the Administrative Code, and identify points of compliance to judge the remedial action's effectiveness, and points of compliance with land use-based cleanup categories. 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 categories: residential; commercial; recreational; industrial; and other land use-based

categories established bythe Department. The bill also would provide for "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 also could be accepted. The DNR would have to use only reasonable and relevant exposure pathways in determining the adequacy of site-specific criteria. In addition, the DNR could approve a remedial action plan, and consolidate remedial actions, for a designated area-wide zone that encompassed more than one facility.

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.

The criteria for the residential category would be the Type A and B criteria specified in the Administrative Code for aquifers, environmental media, soils, surface water, air quality, and groundwater; except as provided in the bill's provisions concerning zoning, soil remediation to protect aquifers, biologically based model criteria, Federal toxic substances regulations, and other cleanup for hazardous substances and uncontaminated mineral oil.

The bill provides that 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 could be granted only if the pertinent criteria were satisfied in the affected media. A notice of approved environmental remediation would have to be recorded by the property owner with the county register of deeds. The notice would have to include a survey and property description that defined the areas addressed by the plan, and 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 plan allowed for venting groundwater, the discharge would have to comply with the Act's requirements for water resources protection. A remedial action plan would have to provide response activity to meet the residential categorical criteria or provide for acceptable land use or resource use restrictions provided under the bill.

If the DNR approved a remedial action plan that was based on criteria for commercial, recreational, industrial, or other land use-based categories, the property owner would have to record the DNR's notice of approved environmental remediation with the county register of deeds within 21 days after the DNR 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 provisions applicable to other land use categories would have to be stipulated in a legally enforceable agreement with the DNR. If the DNR agreed that one or more of the requirements specified for the other land use categories were not necessary to protect the public health or the environment and to assure the effectiveness and integrity of the remedial action, that element or elements could be omitted from the agreement. If the DNR 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, the DNR'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 have to describe land use or resource use restrictions that assured the effectiveness of any containment, exposure barrier, or other land use or resource use restrictions. The restrictive covenant would have to include provisions that would restrict activities at the facility that could interfere with a remedial action or that could result in exposures above the levels established; require notice of the owner's intent to convey any interest in the facility; grant the DNR 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 were consistent with the remedial action plan. The restrictions would run with the land and be binding on the owner's successors, assigns, 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 restrictive covenant would have to be 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.

The DNR could approve a remedial action plan based on criteria for limited categories or site-specific standards if it 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 also would 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 or threat of release. In addition, the DNR could take action to require compliance against a person who undertook response activity without DNR approval; and the filing of a notice of approved environmental remediation indicating DNR 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 have to develop cleanup criteria for each category it had established, based on generic human health risk assessment assumptions. The DNR would have to use only reasonable and relevant exposure pathways in determining these assumptions. Each set of exposure assumptions created within a category would create a subcategory. The DNR also would have to specify site characteristics to determine the applicability of the criteria derived for each category. (Currently, 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 one in 1,000,000.)

The bill specifies that if a hazardous substance posed a carcinogenic risk to humans, the cleanup criteria derived for cancer risk would be the "95% 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. If a hazardous substance posed a risk of an adverse health effect other than cancer, cleanup criteria would have to 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% 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 have to be derived for cancer and the most sensitive adverse health effect other than cancer.

If a cleanup criterion for groundwater in an aquifer differed from either a) the State drinking water standard or b) criteria for adverse aesthetic characteristics derived under the Administrative Code, the cleanup criterion would have to be the more stringent of those standards unless the DNR determined that compliance was not necessary because the use of the aquifer would be reliably restricted under the bill. The need for soil remediation to protect an aquifer for hazardous substances in soil would have to 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.

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 DNR determined that application of the model resulted in a criterion that more accurately reflected the risk posed, data were available for a specified hazardous substance to allow the scientifically valid application of the model, and the EPA had determined that application of the model was appropriate. In addition, the DNR 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 could 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 were 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. The DNR, however, 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 have to 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

The bill would prohibit an owner or operator from removing, or allowing the removal of, soil from a facility to an off-site location unless the person owned the off-site location and 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 (the hazardous waste provisions) of the Act.

The bill specifies that 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. If, however, the soil were to be removed from the facility for disposal or treatment, the appropriate regulatory standards for removal or treatment would have to 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 were 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, if 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

The Act specifies that if there is a release or threatened release from a facility that causes response activity costs to be incurred, the following persons are among those that are liable: the owner or operator of the facility, the owner or operator of the facility at the time of disposal of a hazardous substance, and the owner or operator of the facility since the time the hazardous substance was disposed of who is not included in those categories. The bill would generally replace current provisions to eliminate liability for owners and operators who did not cause contamination at a facility. The bill would hold the following persons liable: the owner or operator of a facility, if that person were 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 were 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 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. “Baseline environmental assessment” would mean an evaluation of environmental conditions that existed at a facility at the time of purchase, occupancy, or foreclosure, that reasonably defined 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 was 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.
-- The owner or operator disclosed the results of a BEA to the DNR and to a subsequent purchaser or transferee if the BEA confirmed that the property was a contaminated facility.

Subject to the "due care" provisions of the bill, an owner or operator who complied with the BEA 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 were responsible for an activity that caused the existing contamination at the facility. These provisions, however, would not alter a person's liability regarding a subsequent release or threat of release at a facility if the person were responsible for that activity.

The bill specifies that in the case of injury to, destruction of, or loss of natural resources, liability would be to the State for natural resources belonging to, managed by, controlled by, or held in trust by the State or a local unit of government. Sums recovered by the State under the environmental response provisions of the Act for natural resource damages would be retained by the DNR and could be used only to restore, repair, replace, or acquire the equivalent of the natural resources injured, or to acquire substitute or alternative resources. The bill would prohibit double recovery for damages, including the costs of damage assessment or restoration, rehabilitation, replacement, or acquisition, for the same release and natural resources.

The bill also specifies that any costs that were recovered under the Act’s environmental response provisions 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 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 relating to the granting of access, enjoin interference with the response activities, or grant any other appropriate relief. Further, the owner or operator to which access was granted would not be liable for a release caused bythe response activities for which access was granted, unless the owner or operator were 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. The bill would prohibit such a lien from being placed against the owner of a facility if that owner were liable for recovery costs under the liability provisions of the bill.

Liability Exemptions

The Act currently specifies that the terms "operator" and "owner" do not include the State or local unit of government that acquired ownership or control of the facility involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a commercial lending institution or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function or as provided in the Act; a local unit of government to which ownership or control of the facility is transferred by the State; or the State or a local unit of government that acquired ownership or control of the facility by seizure, receivership, or forfeiture. In the case of an acquisition by the State or a local governmental unit, "operator" means a person who was in control of, or responsible for, operation of the facility immediately before the State or local unit of government acquired ownership or control.

"Operator" and "owner" also do not include the operator or owner of an underground storage tank system from which there is a release or threat of release if the following conditions are met:

-- The operator or owner reported the release or threat of release to the Department of State Police, Fire Marshal Division, within 24 hours after confirmation of the release or threat of release.
-- The release or threat of release at the facility is solely the result of a release or threat of release of a regulated substance from an underground storage tank system.
-- The operator or owner is in compliance with the requirements of Part 213 (leaking underground storage tanks), and any promulgated rules or any order, agreement, or judgment issued or entered into under that part.

Further, "operator" and "owner" do not include:

-- A State or local unit of government that holds or acquires an easement interest in a facility, holds or acquires an interest in a facility by dedication in a plat, or by dedication under Public Act 283 of 1909, which provides for the establishment and maintenance of public highways and private roads.
-- A person who holds an easement interest in a facility for the purpose of conveying or providing goods or services, including, but not limited to, utilities, sewers, roads, railways, and pipelines or a person that acquires access through an easement.
-- A person if 1) the release was caused solely by a third party who is not an employee or agent of the person or whose action was not associated with a contractual relationship with the person, 2) the hazardous substance was not deposited, stored, or disposed of on the property upon which the person operates, and 3) the person at the time of transfer of the property, or the right to operate on the property, discloses any knowledge or information concerning the general nature and extent of the release as required by the Act.

The term "owner" also does not include a person who holds only subsurface mineral rights to the property, and who has not caused or contributed to a release on the property.

These exclusions do not apply to the State, local unit, or person that caused or contributed to the release or threat of a release from the facility, or if equipment owned or operated by the State, local unit, or person caused or contributed to the release or threat of release.

The bill would delete these provisions from the definitions of "owner" and "operator" and instead, specifically would exempt the following persons from liability unless they were responsible for an activity that caused a release at the facility: the State or a 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 circumstances; the State or a 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 franchise to provide service; a person who owned severed subsurface mineral rights or formations or leased subsurface mineral rights or formations; the State or a local unit of government that leased property to a person, if the entity were not liable for environmental contamination at the site; a person who owned or occupied residential real property, if hazardous substance use at the property were 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 a third party other than an employee; a person who 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 (although 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 from which there was a release or threat of release, if the release were solely from an underground storage tank system and were subject to corrective action; the owner or operator of a hazardous waste treatment, storage, or disposal facility regulated under the Act, from which there was a release that was subject to corrective action; a lender that engaged in or conducted a lawful marshaling or liquidation of personal property if the lender did not cause or contribute to the environmental contamination; the owner or operator of property onto which contamination had migrated, unless that person were responsible for an activity causing the release that was the source of the contamination; and the State or a local unit of government or a lender who had not participated in the management of the facility. For a lender, this last exemption would apply to response activity undertaken prior to foreclosure. The last exemption also 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.

The bill also would exclude the following persons from liability for cleanup costs: persons who arranged the lawful transport or disposal of any product or container commonly used in a residential household, in a quantity commonly used there; and 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 had 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.

Transfer of Liability

The bill specifies that a lender who was not responsible for an activity that caused a release at a facility immediately could transfer the property on which there had been a release to the State if the lender had conducted a BEA in accordance with the bill, and 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 dealt 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 DNR, if one were issued.
-- 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 liability exemption requirements and a determination that the proposed use of the facility satisfied the person's responsibility to undertake measures to prevent exacerbation of the contamination. The petition would have to be accompanied by a $500 fee. A written determination by the DNR, affirming that the person requesting 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 Comprehensive Environmental Response Compensation and Liability Act. 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 (the Michigan Environmental Protection Act) or Part 31 (water resources protection) of the Act or under common law resulting from the contamination identified in the petition. This liability protection, however, 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 requires that the CNTS contain 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. The bill would delete these provisions.

Penalties

Currently, 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 $2,500 but not more than $25,000 for each violation. The bill would add the crime of misrepresentation of one's qualifications in a document relating to liability for cleanup costs.

The bill also specifies that a person who was 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. The bill would 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

Currently, the Act requires the DNR to submit annually to the Legislature a list, derived from the numerical risk assessment model or models that the DNR is required to develop, that categorizes all the sites according to the response activity at the site at the time of the listing and indicates whether the owner of a site is the Federal government, the State, or a local unit of government. The bill would require this list to be provided every fourth year, instead of annually, and would require the list, in addition, to indicate any change in the status of a site since the last previously prepared list. The bill also specifies that if the DNR provided the information required to be on the list on a computer data base that was accessible through public access computer terminals in each county in the State, the DNR would not have to prepare a printed copy of the list.

The Act also requires the DNR to report at least annually to the Legislature and the Governor those sites that have been removed from the list and the source of the funds used to undertake the response activity at each of the sites. The bill would delete the requirement that the report be made at least annually.

The Act also requires the DNR to publish a notice annually in the Michigan Register of the availability of, and submit to the standing committees of the Senate and House of Representatives that primarily consider issues pertaining to the protection of natural resources and the environment, a report describing the response activity that is undertaken at each site where response activity is or has occurred during the reporting year, and the nature of the contamination that resulted int he necessity for that response activity. The bill would require the notice to be published, and the report to be submitted, each fourth year.

In addition, the bill specifies that within two years after it took effect, and biennially thereafter, the DNR would have to report to the Legislature on the effectiveness of the bill in restoring the economic value of environmentally contaminated sites. The report would have to include, but would 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 have to consult the chairpersons of the Senate and House of Representatives standing committees with jurisdiction over natural resources and environmental issues.

Enforcement of Former Acts

The bill specifies that the provisions of Public Act 307 of 1982 (the Environmental Response Act) would be incorporated by reference. The bill also specifies that any judicial or administrative action, bankruptcy claim, or any enforceable agreement with the State initiated prior to March 1, 1995, under Public Act 307 of 1982, would be governed by the provisions of that Act that were in effect as of March 1, 1995. Upon request of a person implementing response activity, however, the DNR would have to approve changes in a response activity plan to be consistent with the cleanup standards required under the Natural Resources and Environmental Protection Act.

Further, the bill would repeal provisions requiring the Department of Management and Budget by December 27, 1989, to contract for a study to analyze public and private costs for cleanup; establishing the Office of Environmental Cleanup Facilitation, and the Science Advisory Council and a citizens review board; requiring the DNR to develop a proposed schedule for submittal of work plans for undertaking necessary response activity for certain sites; specifying procedures for resolving disputes over the development of remedial action plans; providing for the establishment of a grant program for individuals to obtain expert advice and technical assistance; allowing the transfer of liability exempt status to new facility owners; and establishing an allocation process for sharing response activity costs.

House Bill 4597 (H-1)

The bill would amend Part 31 of Article II of the Natural Resources and Environmental Protection Act, pertaining to water resources protection, to require the Department of Natural Resources to permit a mixing zone for discharges of venting groundwater in the same manner as the DNR provided for a mixing zone for point source discharges. A permit would not be required for a discharge of venting groundwater that complied with the water quality standards provided for under the Act, and the rules promulgated under the Act, and that was provided for in a remedial action plan that had been approved according to the provisions of House Bill 4596. The bill specifies further that a remedial action plan that met the environmental response requirements of Part 201 of the Act would satisfy any remedial obligations required under the bill. "Mixing zone" would mean that portion of a water body where a point source discharge or venting groundwater was mixed with receiving water. "Venting groundwater" would mean groundwater that was entering a surface water of the State from a facility.

House Bill 4598

The bill would amend Part 111 of Article II of the Natural Resources and Environmental Protection Act, 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.

MCL 324.20101 et al. (H.B. 4596)
Proposed MCL 324.3109a & 324.3109b (H.B. 4597)
Proposed MCL 324.1115b (H.B. 4598)

Legislative Analyst: L. Burghardt

FISCAL IMPACT

The bills would result in an indeterminate increase in costs to State government, potentially from $350 million to $500 million over current estimated State cost liability for contamination sites of between $1.6 billion and $2.3 billion. The amount of cost increases would be dependent on cleanup costs per site, the number of sites where liability would be redirected to the State, and any savings due to reduced cleanup standards. The bills would result in an indeterminate reduction in revenues, dependent on the impact of liability changes on cost recovery settlements. The bills would have an indeterminate fiscal impact on local government, depending on the number and type of contaminated properties within local government jurisdiction.

The estimated cost to clean up all 2,812 contamination sites in the State is between $3 billion and $4.3 billion, with an estimated cost per site of between $1 million and $1.5 million. The Department of Natural Resources recently announced an estimate of $1 billion to clean up known contamination sites, but this is a partial estimate of only targeted sites. **Table 1** summarizes two estimates available at this time,

an historic Department of Natural Resources estimate and the Department's average estimated cost per site for environmental bond appropriation requests that include final cleanup actions.

Table 1	Avg. Cost per Cleanup Site	Total Est. Cost for Entire State
Historic DNR Estimate	1,066,900	3,000,000,000
DNR Cleanup Requests	1,540,600	4,332,167,200

The estimated increase in State liability due to changing to a causation standard could be as high as $1.4 billion to $2 billion, depending on the degree of future private sector cleanup actions. There are no estimates available regarding the amount of liability that could be shifted to the State; therefore the current estimated State liability will be compared to a potential 100% State liability in the future. This provides the maximum cost impact, and any private sector actions will reduce the amount. According to the Department of Natural Resources, responsible parties have provided $59.7 million in private cleanup actions and $42 million in cash settlements. Therefore, the approximately $160 million in State-funded cleanups have represented 54% of overall cleanup actions. **Table 2** summarizes estimated liability for the total costs to clean up the State.

Table 2	**Liability for Total Costs**	
	State (54%)	Private (46%)
Historic DNR Estimate	1,611,300,000	1,388,700,000
DNR Cleanup Requests	2,326,807,000	2,005,360,200

According to the Department of Natural Resources, cleanup costs could be reduced 30% to 40% by proposed revisions in cleanup standards. **Table 3** reflects these potential reductions in State and private costs, using the above liability status.

Table 3	**35% Cost Savings**	
	State (54%)	Private (46%)
Historic DNR Estimate	(563,955,000)	(486,045,000)
DNR Cleanup Requests	(814,382,500)	(701,876,100)

Table 4 summarizes the net estimated increase in costs to the State, which includes a shift in liability from private parties to the State and a 35% decrease in cleanup costs. The cost of the total program also is noted.

Table 4	Net Increase in State Costs	Potential Total State Costs
Historic DNR Estimate	338,700,000	1,950,000,000
DNR Cleanup Requests	489,101,700	2,815,908,700

In 1988, the State authorized the issuance of $425 million in bonds for environmental cleanup purposes. At present, approximately $235 million remains unspent and would be applied to the total cost.

Changes in liability standards could decrease potential State revenues from cost recovery actions. The Attorney General's office has estimated that $106 million in cost recovery settlements would not have been received with proposed changes in liability to a causation standard.

Fiscal Analyst: G. Cutler

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