Legislative Analysis

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

REVISE REQUIREMENTS FOR BRINGING A CITIZEN SUIT UNDER PART 201 OF NREPA

House Bill 5819 (Substitute H-1)
Sponsor: Rep. Mark Meadows
Committee: Judiciary

Revised First Analysis (8-19-10)

BRIEF SUMMARY: The bill would amend the provision that bars citizen lawsuits over environmental hazards under the Natural Resources and Environmental Protection Act in certain circumstances. Currently the bar applies if the state has begun and is diligently prosecuting an action (meaning a judicial action) for injunctive relief or to require compliance with NREPA. The bill would also make the bar apply if the state was diligently enforcing an administrative order or other legally enforceable agreement concerning the cleanup of a polluted area, place, or property.

FISCAL IMPACT: House Bill 5819 would have no significant fiscal impact on the Department of Natural Resources and Environment. Under the provisions of the bill, any local governments that are the owner or operator of a polluted site would be given protection from a lawsuit and the accompanying expenses if the State had commenced a judicial or administrative action, or a legally enforceable agreement, concerning the polluted site.

THE APPARENT PROBLEM:

Each year, the Michigan Law Revision Commission, after reviewing common law, statutes, and judicial decisions, releases a report to the Legislature identifying problem areas of law that are antiquated or inequitable, and, if appropriate, includes recommendations for possible "fixes." In its 41st Annual Report (2008), the Commission recommended the Legislature amend a certain section of the Natural Resources and Environmental Protection Act (NREPA) that was the subject of a lawsuit (see ***Background Information*** below for more information).

The provision in question allows a citizen whose health or enjoyment of the environment is or may be adversely threatened by the unlawful release or threat of release of pollutants to bring a lawsuit against the owner or operator of the facility or property creating the hazard. In brief, property owners whose homes were adjacent to an old landfill sued a local government for monetary damages and an injunction to compel the city to comply with the requirements set forth in Part 201 of the NREPA regarding cleanup of the site. At the time the lawsuit was filed, the city was already voluntarily complying with recommendations made by the Department of Environmental Quality (DEQ). Since the statute says that a citizen cannot file a lawsuit if an action by the state has already started, the city felt that the lawsuit should be dismissed. The trial court agreed, but the homeowners appealed. The Court of Appeals subsequently ruled that only an action that

was "legal" in nature (i.e., a court case), as opposed to one that was "administrative" (i.e., an agency case) would act as a bar to a citizen's lawsuit.

The court conceded that its interpretation, since it could discourage voluntary compliance on the part of an owner or operator of a facility or property, may have been an unintended consequence and so encouraged the Legislature to examine the language as currently written. Legislation is now being offered to address the concerns raised by the court and the Law Revision Commission.

THE CONTENT OF THE BILL:

In certain situations, a private party or a local unit of government (on behalf of its citizens) may bring a civil action to enforce Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) to obtain an injunction or to compel compliance with Part 201 (or a rule or order issued under Part 201). This type of action is sometimes called a citizen suit.

Unless the following requirements are met, a citizen suit may not be brought:

- The plaintiff must give no fewer than 60 days' notice in writing of the plaintiff's intent to sue, the basis for the suit, and the requested relief to the DNRE, the Attorney General, and the proposed defendants. (MCL 324.20135(3)(a))
- The state has not commenced and is not diligently prosecuting "an action" under Part 201 or under other appropriate legal authority to obtain injunctive relief concerning the facility or to require compliance with Part 201 or a rule or an order issued under Part 201.

In other words, a private cause of action is barred if the plaintiff has not given the required notice or if the state has commenced and is diligently prosecuting "an action," which has been interpreted to mean a court case.

Under House Bill 5819, the second condition would be revised to read that the state "has not commenced *or* is not diligently prosecuting ***a judicial action*** under this part or under other appropriate legal authority…." and *the state has not entered into or is not diligently enforcing an administrative order or other legally enforceable agreement under Part 201 concerning the facility*. [Emphasis added.] This change would appear to bar a citizen suit in two situations: (1) the state has commenced, and is diligently prosecuting, a court case, or (2) if the state has not filed a court case, it has entered into an administrative order or other legally enforceable agreement under Part 201, and is diligently enforcing it.

MCL 324.20135

BACKGROUND INFORMATION:

In *Cairns v. City of East Lansing*, 275 Mich. App. 102 (2007), the Michigan Court of Appeals, reversing the trial court, allowed a citizen suit to proceed against the City of East Lansing in its capacity of owner or operator of a landfill that later became Burcham Park. Although the city had argued that the suit was barred because it was voluntarily cooperating with the Department of Environmental Quality in complying with Part 201 at this site, the court found that its voluntary compliance activities did not qualify as an "action" that would bar the citizen suit. Analyzing the word "action" in context, the court held that only judicial proceedings bar private civil causes of action under this provision. The court found it questionable whether the Legislature, if it had considered the issue, would have intended this result, indicating that the Legislature would "not have wished to encourage violators to insist that the state commence a formal judicial action to operate as a bar to third-party civil actions, thereby discouraging voluntary compliance efforts. Therefore, we encourage the Legislature to fully examine the language of MCL 324.20135(3)(b) and the policy considerations of the statute as it is currently written."

In its 41st Annual Report (2008), the Michigan Law Revision Commission reviewed this court decision and recommended that the Legislature amend MCL 324.20135(3)(b), characterizing voluntary efforts as "a cost-effective and less time consuming alternative to formal court action." See:

http://council.legislature.mi.gov/files/mlrc/2008-09/mlrc_41annual_2008.pdf

ARGUMENTS:

For:

The decision in *Cairns* identified a defect in law that unfairly subjects owners or operators of polluted sites to civil suits even if those individuals are voluntarily cooperating with the Department of Natural Resources and Environment to remediate the property. In the case concerning the City of East Lansing, the City spent three years and at least $86,000 to defend against the lawsuit – money that could have been spent on remediation efforts. Plus, since the City was already engaged in cleanup efforts, the suit did nothing in moving the remediation work forward.

The Supreme Court and the Michigan Law Revision Commission properly identified the problematic language in the current law that lead to the *Cairns* case. House Bill 5819, as substituted, addresses the concerns raised by those bodies by clarifying the types of actions on the part of the state that would bar a lawsuit from going forward. Under the bill, a judicial action, an administrative order, or other legally enforceable agreement concerning the remediation of a polluted site would act as a bar to a citizen suit. In doing so, the amended language would provide strong encouragement to owners or operators of polluted sites to do the right thing and voluntarily clean up their properties once they become aware of the pollution rather than waiting for a judicial or administrative order to do so. Encouraging voluntary compliance could also save money for the state by reducing the need for the more costly judicial or administrative proceedings. Yet,

environmental groups would still have the assurance and protection that a legally enforceable order or agreement was in place to ensure appropriate remediation.

POSITIONS:

Representatives of the City of East Lansing testified in support of the bill. (3-10-10)

A representative of the Department of Natural Resources and Environment testified in support of the bill as amended. (3-10-10)

The Michigan Environmental Council indicated support for the bill as amended. (3-10-10)

The Michigan Municipal League indicated support for the bill. (3-17-10)

The Michigan Townships Association indicated support for the bill. (3-17-10)

Legislative Analyst: Susan Stutzky
Shannan Kane
Fiscal Analyst: Viola Bay Wild

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