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

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 437 (Substitute S-3)
Sponsor: Senator Jason E. Allen
Committee: Natural Resources and Environmental Affairs

Date Completed: 5-18-10

CONTENT

The bill would amend Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) to do the following:

-- Provide that a guideline, bulletin, interpretive statement, or written instruction of the Department of Natural Resources and Environment (DNRE) could not be given the force and effect of law.
-- Repeal a section requiring the DNRE to identify and categorize environmental contamination sites and maintain a list of the sites; and rescind related administrative rules.
-- Expand the responsibilities of the owner or operator of a facility where hazardous substances are present.
-- Require the State or a local unit of government to take certain actions regarding hazardous substances if it invited the public onto its property.
-- Refer to a "response activity plan" or "response activity plan containing a remedial action plan" rather than a "remedial action plan".
-- Require the owner or operator of a facility from which a hazardous substance emanated to notify the DNRE and the owners of property to which the substance migrated.
-- Allow a liable facility owner or operator to pursue response activities by conducting a self-implemented cleanup or obtaining DNRE approval of his or her response activities.
-- Require a person who pursued a self-implemented cleanup to submit to the DNRE a no further action report detailing completion of the response activities.
-- Create a Response Activity Review Panel that a person could petition for review of a DNRE decision on his or her response activity plan or no further action report, and prescribe a $3,500 petition fee.
-- Require the DNRE Director to adopt the Panel's recommendation unless he or she determined that it was arbitrary or capricious.
-- Prescribe factors that the DNRE would have to consider in selecting or approving a remedial action.
-- Revise the categories used in determining the appropriate remedial action.
-- Allow the DNRE to approve a response activity plan based on site-specific criteria under certain circumstances.
-- Prescribe methods by which a person proposing or implementing a response activity involving venting groundwater could demonstrate compliance with Part 201; and allow a person to file with the DNRE a technical impracticality waiver demonstrating that Part 201 criteria were unachievable.
-- Exempt from liability a person to whom the DNRE had issued a no further action letter for environmental contamination.
-- Repeal a section prescribing a process by which a person may

petition the DNRE for an exemption from liability after completion of a baseline environmental assessment (BEA).

-- Require the DNRE to compile data on and notify the Legislature of requests for approval of response activity plans and "no further action" reports and BEAs the Department received.

-- Rescind certain administrative rules pertaining to response activities.

-- Authorize the DNRE to renegotiate the terms of an outstanding loan from the Revitalization Revolving Loan Fund.

DNRE Authority

Part 201 requires the DNRE to coordinate all required activities and promulgate rules to provide for the performance of response activities; to provide for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release; and to implement the Department's powers and duties under Part 201, and as otherwise necessary to carry out the requirements of Part 201.

The bill would permit, rather than require, the DNRE to promulgate rules. The bill also would delete references to the specific purposes of the rules.

Under the bill, a guideline, bulletin, interpretive statement, operational memorandum, or written instruction under Part 201 could not be given the force and effect of law. The specified documents would not be legally binding on the public or the regulated community and could not be cited by the DNRE for compliance and enforcement purposes.

Site Identification & List

The bill would repeal Section 20125, which prescribes DNRE duties regarding environmental contamination. Under this section, upon discovering a site of environmental contamination, the Department must identify and evaluate it for the purpose of assigning to it a priority score for response activities. The Department must develop numerical risk assessment models for assessing the relative present and potential hazards posed to the public health, safety, or welfare, or to the environment by each site. Every four years, the Department must submit to the Legislature a list of the sites, categorized by response activity, ownership, and status. In addition, the Department must report to the Legislature and the Governor those sites that have been removed from the list and the source of the funds used to undertake response activities at each site, and perform other specified duties.

Under this section, a site must be removed from the list when a DNRE review shows that it does not meet criteria specified in Part 201 rules. A site may not be removed until any necessary response activity is complete. A person may request that a site be removed by petitioning the DNRE. If the Department intends to remove the site, it must provide public notice and accept public comment, and may hold a public hearing.

("Response activity" means evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or natural resources. The term also includes health assessments or health effect studies carried out under the supervision, or with the approval, of the Department of Community Health and enforcement actions related to any response activity. "Remedial action" includes cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.)

The bill also would rescind administrative rules R 299.5209 through R 299.5219, which do the following:

-- Require the DNRE to notify certain people and entities of sites proposed to be added to the list.
-- Prescribe procedures for a person who wishes to dispute the inclusion of a site on the list.
-- Prescribe criteria that a site must meet in order for the DNRE to consider it for inclusion on the list.
-- Require the list to include the status of response activity implemented or completed at each site.

-- Require the DNRE to review site information on an ongoing basis and revise it as needed.
-- Require the DNRE to rescore listed sites using a specific site assessment model.

Facility: Hazardous Substances

Under Part 201, a person who owns or operates property that he or she knows is a facility must take certain actions with regard to hazardous substances at the facility. Under the bill, the actions would include the following:

-- Providing full cooperation, assistance, and access to the people authorized to conduct response activities at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility.
-- Complying with any land use restrictions established or relied on in conjunction with the response activities at the facility.
-- Not impeding the effectiveness or integrity of any institutional control employed at the facility in connection with a response activity.

Part 201 defines "facility" as any area, place, or property where a hazardous substance in excess of the concentrations satisfying requirements specified in that part or the cleanup criteria for unrestricted residential use under Part 213 (Leaking Underground Storage Tanks) has been released, deposited, or disposed of, or otherwise comes to be located. The term does not include any area, place, or property at which response activities that satisfy the residential category cleanup criteria in Part 201 have been completed, or at which corrective action under Part 213 that satisfies cleanup criteria for unrestricted residential use has been completed. The bill also would exclude from the definition of "facility" any area, place, or property where site-specific criteria approved by the DNRE for application at that location are satisfied and both of the following conditions are met:

-- The site-specific criteria do not depend on any land or resource use restriction to assure protection of the public health, safety, or welfare or the environment.
-- Hazardous substances at the area, place, or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.

Under the bill, if a no further action letter had been issued for the property and cleanup criteria that were the basis for the issuance of the letter changed, the owner's or operator's due care obligations would be based upon the revised cleanup criteria. ("No further action letter" would mean a written response provided by the DNRE confirming that response activities documented in a no further action report complied with Part 201. "No further action report" would mean a report detailing the completion of response activities. Both the letter and the report are described below.)

Liability: Exacerbation of Existing Contamination

Under Part 201, a person who does not take the required actions with regard to hazardous substances at a facility is liable for response activity costs and natural resource damages attributable to any exacerbation of existing contamination and any fines or penalties imposed under Part 201 resulting from the violation, but is not liable for the performance of additional response activities unless the person is otherwise liable under Part 201. Under the bill, this provision would apply to a person who was not otherwise liable under Part 201 for a release at the facility.

The actions a person is required to take regarding hazardous substances at a facility include the following:

-- Undertaking measures as necessary to prevent exacerbation of the existing contamination.
-- Exercising due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.
-- Take responsible precautions against the reasonably foreseeable acts or omissions

of a third party and the consequences that could foreseeably result.

These requirements do not apply to the State or a local unit of government that is not liable under certain circumstances or to a local unit that acquired property before June 5, 1985, or to a person who is exempt from liability for contamination that has migrated onto his or her property. Under the bill, however, if the State or a local unit specifically invited members of the general public onto property under its control for an express purpose, these requirements would apply.

Notification of Release; Pursuit of Response Activities

Under Part 201, an owner or operator who has knowledge that the property is a facility and who is liable must determine the nature and extent of a release at the facility, and report it to the DNRE within 24 hours after obtaining knowledge of it. The reporting requirement applies to reportable quantities of hazardous materials under specific Federal regulations, unless the DNRE establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment. The bill would eliminate the reference to the DNRE's establishment of rules.

In addition, if the owner or operator had reason to believe that one or more hazardous substances were emanating or had emanated from and were present beyond the boundary of his or her property at a concentration in excess of cleanup criteria for unrestricted residential use, he or she would have to notify the DNRE and those property owners in which the substances were present within 30 days after obtaining knowledge that the release had migrated. This provision would not apply to a release that was a permitted release (i.e., a release in compliance with an applicable, legally enforceable permit issued under State law, a lawful and authorized discharge into a permitted waste treatment facility, and/or a federally permitted release as defined in the Comprehensive Environmental Response, Compensation, and Liability Act).

If the release were a result of an activity that was subject to permitting under Part 615 (Supervisor of Wells) and the owner or operator did not own the surface property, he or she would have to notify the DNRE and the surface owner within 30 days after obtaining knowledge of the release.

Also, under Part 201, an owner or operator who knows that the property is a facility and who is liable must diligently pursue response activities necessary to achieve the cleanup criteria specified in Part 201 and rules promulgated under it. Under the bill, except as otherwise provided, in pursuing response activities, the owner or operator could follow the bill's procedures either to conduct a self-implemented cleanup or to obtain DNRE approval of one or more aspects of planning or implementing response activities.

Under Part 201, an owner or operator of a facility also must take the following actions, upon written request by the DNRE:

-- Provide a plan for and undertake interim response activities.
-- Provide a plan for and undertake evaluation activities.
-- Take any other response activity determined by the DNRE to be technically sound and necessary to protect the public health, safety, welfare, or the environment.
-- Submit to the DNRE for approval a remedial action plan that, when implemented, will achieve the cleanup criteria specified in Part 201 and rules.
-- Implement an approved remedial action plan in accordance with a schedule approved by the DNRE.

The bill would refer to a response activity plan containing a plan for undertaking interim response activities and evaluation activities, and a response activity plan containing a remedial action plan. In addition, the bill would require a person to pursue response activities under a self-implemented cleanup and, upon completion, submit a no further action report.

("Interim response activity" means the cleanup or removal or a released hazardous substance or the taking of other actions, before the implementation of a remedial action, as necessary to prevent, minimize, or mitigate injury to the public health, safety, and welfare or the environment. "Evaluation" means activities including investigation, studies, sampling, analysis,

development of feasibility studies, and administrative efforts necessary to determine the nature, extent, and impact of a release or threat of release and necessary response activities.

Under the bill, "response activity plan" would mean a submittal to the DNRE containing a plan for undertaking response activities. A plan could include a plan to undertake interim response activities, a plan for evaluation activities, a feasibility study, and/or a remedial action plan.)

Part 201 allows a person to undertake response activity without prior DNRE approval unless it is being done pursuant to an administrative order or agreement or judicial decree that requires prior approval. Such action does not relieve the person of liability for further response activity as the DNRE may require. The bill would delete these provisions.

Instead, all of the requirements imposed on an owner or operator would not preclude a person from simultaneously undertaking one or more aspects of planning or implementing response activities at a facility under the bill's self-implemented cleanup provisions and other applicable law without the prior approval of the Department, unless one or more response activities were being conducted pursuant to an administrative order or judicial decree that required prior approval, and submitting a response activity plan to the DNRE as provided in the bill.

Currently, upon a DNRE determination that a person has completed all response activity at a facility under an approved remedial action plan, the Department, upon a person's request, must execute and present a document stating that all required response activities have been completed. The bill would delete this provision.

The bill also would delete provisions setting a timetable for the DNRE to grant or deny any request for approval of a plan, and specifying that a request is considered approved if the Department does not act within that time period.

Response Activity: Self-Implemented

Under the bill, subject to applicable NREPA requirements and other applicable law, a person could undertake response activities without prior approval by the DNRE unless they were being conducted under an administrative order or agreement or judicial decree that required prior Department approval. Except as otherwise provided, conducting response activities would not relieve any person who was liable under Part 201 from the obligation to conduct further response activities as required by the DNRE under Part 201 or other applicable law.

Upon completion of response activities that satisfied the cleanup criteria established under Part 201 and the rules promulgated under it, a person undertaking the activities could submit to the DNRE a no further action report.

Response Activity: DNRE Approval

Under the bill, upon the DNRE's request, a person undertaking response activity could submit to the Department a response activity plan that included a request for approval of one or more aspects of response activity. If the person were not subject to an administrative order or agreement or judicial decree that required prior Department approval, the person would have to submit a plan review request form with the response activity plan. The DNRE would have to specify the required content of the request form and make it available on the Department's website.

Upon receiving a response activity plan submitted for approval, the DNRE would have to approve, approve with conditions, or deny the plan, or notify the submitter that it did not contain sufficient information for the Department to make a decision. The DNRE would have to provide its determination within 150 days after the plan was submitted, unless it required public participation. In that case, the DNRE would have to respond within 180 days. If the Department responded that the plan did not include sufficient information, the DNRE would have to identify the information required for it to make a decision. If a plan were approved with conditions, the approval would have to specify the conditions. If the plan were denied, the denial would have to specify the reasons.

If the DNRE failed to provide a written response within the required time frame, the response activity plan would be considered approved. If the Department denied a plan,

a person could revise it and resubmit it for approval. Any time frame established by the bill could be extended by mutual agreement of the DNRE and a person submitting a plan.

A person requesting approval of a plan could appeal the DNRE's decision by petitioning to convene the proposed Response Activity Review Panel, if applicable.

Remedial Action

Part 201 provides for a remedial action plan to be implemented in the cleanup of environmental contamination. A remedial action plan must include certain elements, such as land use and resource use restrictions if necessary to protect human health, safety, and welfare, or the environment and to assure the effectiveness and integrity of a remedial action. Under certain circumstances, the restrictions must be described in a restrictive covenant. A remedial action may rely on an institutional control in lieu of a restrictive covenant, if exposure to hazardous substances can be restricted reliably that way.

The bill would delete all of the provisions pertaining to a remedial action plan, but would reenact similar provisions, referring instead to a postclosure plan. ("Remedial action plan" means a work plan for performing remedial action under Part 201. Under the bill, "postclosure plan" would mean a plan to conduct monitoring, operation, and maintenance activities at a property upon completion of response activities. If appropriate, a postclosure plan could include land use restrictions, a financial assurance mechanism to ensure the implementation of the activities described in the plan, and/or a legally enforceable agreement with the DNRE if necessary to provide for any aspect of required response activity.)

If remedial action were based on limited residential, limited nonresidential, or site-specific criteria, the postclosure plan would have to include land use or resource use restrictions; and financial assurance, in a mechanism acceptable to the DNRE to pay for monitoring, operation and maintenance, oversight, and other costs determined to be necessary to assure the effectiveness and integrity of the remedial action. Additionally, the postclosure plan would have to include permanent markers to describe restricted areas of the facility and the nature of the restrictions. A permanent marker would not be required if the only applicable land or resource use restrictions related to one or more of the following:

-- Use of groundwater.
-- Construction requirements or limitations for structures that could be built in the future.
-- Protecting the integrity of exposure controls, composed solely of asphalt, concrete, or landscaping materials, that prevented direct contact with soil.

The provision regarding the exposure controls would not apply if the hazardous substances that the barrier addressed exceeded a cleanup criterion based on acute toxic effects, reactivity, corrosivity, ignitability, explosivity, or flammability, or if any of the hazardous substances were present at a concentration of more than 10 times the applicable soil direct contact cleanup criterion.

(Current language that would be deleted includes a provision that if any required land or resource use restrictions, monitoring, operation and maintenance, permanent markers, or financial assurance lapse or are not complied with, the DNRE's approval of the remedial action plan is null and void from the time of the lapse or violation, unless it is corrected to the Department's satisfaction.)

No Further Action Report

Under the bill, upon completion of response activities that satisfied applicable cleanup criteria and all other requirements under Part 201 applicable to remedial action, a person could submit to the DNRE a no further action report. The report would have to document the basis for concluding that the response activities had been completed. A report would have to be submitted on a form developed by the DNRE, which would have to make the form available on its website.

If the report included ongoing monitoring, operation, or maintenance activities, including the need for compliance with land and resource use restrictions, the person submitting it would have to include a postclosure plan.

The person submitting a no further action report would have to include a signed affidavit attesting to the fact that the information upon which the report was based was complete and true to the best of that person's knowledge. The report also would have to include a signed affidavit from an environmental consultant who prepared the report, attesting to the fact that the response activities detailed in it complied with all applicable requirements and that the information was true and complete to the best of that person's knowledge.

A person submitting a no further action report would have to maintain all documents and data prepared, acquired, or relied upon in connection with the report for at least 10 years after the DNRE approved the report, or the date on which no further monitoring, operation, or maintenance was required to be undertaken, whichever was later. All of the documents and data would have to be made available to the DRNE upon request.

A person would have to submit the no further action report to the DNRE if he or she sought the Department's concurrence with it. Upon receiving a report submitted for approval, the Department would have to approve or deny it, or notify the submitter that it did not contain sufficient information for the Department to make a decision. The Department would have to provide its determination within 150 days after the report was submitted unless it required public participation. In that case, the Department would have to respond within 180 days. If the Department responded that the report did not include sufficient information, the DNRE would have to identify the information it required. If the report were denied, the denial would have to specify the reasons. If the report were approved, the Department would have to give the person who submitted it a no further action letter.

If the DNRE failed to provide a written response within the required time frame, the no further action report would be considered approved.

A person who requested approval of a report could appeal the DNRE's decision by submitting a petition to convene the proposed Response Activity Review Panel.

Any time frame established by the bill could be extended by mutual written agreement of the DNRE and a person submitting a no further action report.

Response Activity Review Panel

The bill would require the DNRE Director to establish a Response Activity Review Panel to advise him or her on technical or scientific disputes, including those regarding assessment of risk, in response activity plans and no further action reports. The Panel would have to consist of 15 people appointed by the Director. Each member would have to meet one or more of the following:

-- Hold a current professional engineer's or professional geologist's license or registration from a state, tribe, U.S. territory, or Puerto Rico, and have the equivalent of six years of full-time relevant experience.
-- Have a baccalaureate from an accredited institution of higher education in a discipline of engineering or science and the equivalent of 10 years of full-time relevant experience.
-- Have a master's degree from an accredited institution of higher education in a discipline of engineering or science and the equivalent of eight years of full-time relevant experience.

In addition, each member would have to remain current in his or her field through participation in continuing education or other activities.

("Relevant experience" would mean active participation in the preparation, design, implementation, and assessment of remedial investigations, feasibility studies, interim response activities, and remedial actions under Part 201. This experience would have to demonstrate the exercise of sound professional judgment and knowledge of the requirements of Part 201 and the rules promulgated under it.)

An individual would not be eligible to be a Panel member if any of the following were true:

-- The person was a current employee of any office, department, or agency of the State.

-- The person was a party to one or more contracts with the DNRE and the compensation paid under those contracts represented more than 5% of his or her annual income in any of the preceding five years.
-- The person was employed by an entity that was a party to one or more contracts with the DNRE and the compensation paid to his or her employer under those contracts represented more than 5% of the employer's annual income in any of the preceding five years.
-- The person was employed by the DNRE within the previous year.

An individual appointed to the Panel would serve for a term of two years and could be reappointed for one additional two-year term. After serving two consecutive terms, he or she could not be a member for at least two years before being eligible to be appointed again. The first members would serve staggered terms so that not more than five vacancies were scheduled to occur in a single year. Panel members would serve without compensation, but could be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

The Panel would be subject to the Open Meetings Act and the Freedom of Information Act.

A person could appeal a decision made by the DNRE regarding a technical or scientific dispute, including a dispute regarding risk assessment, in a response activity plan or a no further action report by submitting a petition to the Director to convene the Panel. The petition would have to include the issues in dispute, the relevant facts upon which the dispute was based, factual data, analysis, opinion, and supporting documentation for the petitioner's position. In addition, the petitioner would have to submit a fee of $3,500. If the DNRE Director believed that the dispute could be resolved without convening the Panel, he or she could contact the petitioner regarding the issues in dispute and negotiate a resolution. The negotiation period could not exceed 60 days. If the dispute were resolved without the Panel's convening, any fee submitted with the petition would have to be returned.

If a dispute were not resolved through negotiation, the DNRE Director would have to convene the Panel by notifying the members and forwarding the petition and all supporting documentation. The Director would have to forward the fee to the State Treasurer for deposit into the Cleanup and Redevelopment Fund.

Upon receiving notice from the Director, the Panel would have to schedule a meeting of five members, selected on the basis of their expertise, within 60 days. Any action by the selected members would require a majority of the votes cast. At a meeting scheduled to hear that dispute, representatives of the petitioner and the DNRE each would be afforded an opportunity to present their positions to the Panel.

Within five days after hearing the dispute, the participating Panel members would have to make a recommendation regarding the petition and give written notice to the DNRE Director and the petitioner. The written recommendation would have to include the specific scientific or technical rationale for it. The recommendation could be to adopt, modify, or reverse, in whole or in part, the DNRE's decision.

Within 10 days after receiving the written notice, the DNRE Director would have to issue a final decision, in writing, regarding the petition. If the Director agreed with the Panel's recommendation, the DNRE would have to incorporate it into its response to the response activity plan or the no further action report. If the Director rejected the Panel's recommendation, he or she would have to issue to the petitioner a written decision with a specific rationale. The Director would have to adopt the Panel's recommendation as the final decision unless he or she determined that it was arbitrary or capricious. The final decision would be subject to review by the circuit court.

Upon the Director's request, the Panel would have to make a recommendation to the DNRE on whether a member should be removed. Before making this recommendation, the Panel could convene a peer review panel to evaluate the member's conduct with regard to compliance with Part 201.

A Panel member could not participate in the dispute resolution process if he or she had a

conflict of interest. A member could be selected to replace a member who had a conflict of interest. For these purposes, a member would have a conflict of interest if a petitioner had hired him or her, or his or her employer, on any environmental matter within the preceding year.

Remedial Action Approval

Under the bill, when the DNRE was selecting or approving a remedial action, or when another person was selecting a remedial action, all of the following would have to be considered:

-- The effectiveness of alternatives in protecting the public health, safety, and welfare and the environment.
-- The long-term uncertainties associated with the proposed remedial action.
-- The persistence, toxicity, mobility, and propensity to bioaccumulate of the hazardous substances.
-- The short- and long-term potential for adverse health effects from human exposure.
-- Reliability of the alternatives.
-- The potential for future remedial action costs if an alternative failed.
-- The potential threat to human health, safety, and welfare and the environment associated with excavation, transportation, and redisposal or containment.
-- The ability to monitor remedial performance.
-- The public's perspective about the extent to which the proposed remedial action effectively addressed requirements specified in Part 201 and rules, for remedial actions that required the opportunity for public comment.
-- Costs of remedial action, including long-term maintenance costs.

The cost of a remedial action, however, would have to be a factor in choosing only among alternatives that adequately protected the public health, safety, and welfare and the environment, consistent with the requirements of Part 201 pertaining to cleanup criteria.

Evaluation of the prescribed factors would have to consider all factors in balance with one another as necessary to achieve the objectives of Part 201 and rules promulgated under it. No single factor could be considered the most important.

Cleanup Criteria Categories

Part 201 authorizes the DNRE to establish cleanup criteria and approve of remedial actions in prescribed categories. The proposed category is the option of the person proposing the remedial action, subject to DNRE approval, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:

-- Residential.
-- Commercial.
-- Recreational.
-- Industrial.
-- Other land use-based categories established by the DNRE.
-- Limited residential.
-- Limited commercial.
-- Limited recreational.
-- Limited industrial.
-- Other limited categories established by the DNRE.

Under the bill, the categories would be residential, limited residential, nonresidential, and limited nonresidential.

Part 201 prescribes methods for the derivation of cleanup criteria for hazardous substances that pose a carcinogenic risk and/or a risk of an adverse health effect other than cancer. If a cleanup criterion derived under those provisions for groundwater in an aquifer differs from either the State drinking water standard established under the Safe Drinking Water Act or criteria for adverse aesthetic characteristics derived under the Michigan Administrative Code, the cleanup criterion must be the more stringent of the two unless the DNRE determines that compliance with the requirement is not necessary because the use of the aquifer is reliably restricted under Part 201. The bill would delete the reference to the criteria under the Michigan Administrative Code, and require the cleanup criterion to be the most stringent of the State drinking water standard; the national secondary drinking water regulations established under the Federal Safe Drinking Water Act; or, if there were no national secondary drinking water regulation for a contaminant, the concentration determined by the DNRE according to methods approved by the U.S.

Environmental Protection Agency below which taste, odor, appearance, or other aesthetic characteristics were not adversely affected.

Currently, the DNRE may not approve of a remedial action plan in certain categories unless the person documents that the current zoning of the property is consistent with the categorical criteria being proposed, or that the governing zoning authority intends to change the zoning designation so that the proposed criteria are consistent with the new zoning designation, or the current property use is a legal nonconforming use. The DNRE may not grant final approval for a remedial action plan that relies on a change in zoning designation until the local unit has made a final determination of that change. The DNRE may approve of a remedial action plan that achieves categorical criteria that are based on greater exposure potential than the criteria applicable to current zoning. The bill would refer to a response activity plan rather than a remedial action plan in these provisions.

Under Part 201, response activities must meet the residential categorical cleanup criteria or provide for acceptable land use or resource use restrictions. Under the bill, response activities would have to meet the cleanup criteria for unrestricted residential use or provide for acceptable land or resource use restrictions.

Response Activity Plan: Site-Specific Criteria

Part 201 authorizes the DNRE to approve a remedial action plan based on site-specific criteria that satisfy applicable requirements and rules. Under the bill, the DNRE would have to approve a response activity plan containing site-specific criteria if such criteria, in comparison to generic criteria, better reflected best available information concerning the toxicity or exposure risk posed by the hazardous substance and, for nonnumeric criteria, provided protection equivalent to, or better than, the risk and hazard levels set forth in Part 201. The DNRE would have to approve unconditionally, approve conditionally, or deny a response activity plan requesting site-specific criteria within 90 days of receiving the proposal. If denied, the Department would have to provide the specific reasons. If approved conditionally, the Department would have to provide the necessary modifications to the proposal. If the Department rejected a plan containing a proposal for site-specific criteria, the person submitting the plan could appeal the decision to the Panel.

Site-specific criteria could do the following, as appropriate:

-- Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.
-- Alter any default value established by rule so long as that value was not expressly determined by Part 201.
-- Consider the depth below the ground surface of contamination, which could reduce the potential for exposure.
-- Be based on information related to the specific facility or information of general applicability, including peer-reviewed scientific literature.
-- Use probabilistic methods of calculation.
-- Use nonlinear-threshold-based calculations where scientifically justified.
-- Take into account any actual exposure data, including data related to blood serum biomonitoring, water quality, and air quality.

Nonnumeric site-specific criteria could be used in place of numeric criteria. Nonnumeric criteria could include presumptive remedies, exposure controls, use restrictions, removal actions, or other response activities that provided protection equivalent to meeting the risk and hazard levels set forth in Part 201.

Venting Groundwater

Under Part 201, if a remedial action plan allows for venting groundwater, the discharge must comply with Part 31 (Water Resources Protection) and the rules promulgated under it or an alternative method established by rule. The bill would delete this provision.

Currently, if the discharge of venting groundwater is provided for in a remedial action plan that is approved by the DNRE, a permit for the discharge is not required. Under the bill, a permit would not be required if the discharge were provided for in a response activity approved by the DNRE or were otherwise consistent with Section 20120e.

The bill would add that section to allow a person proposing or implementing a response activity that involved venting groundwater to choose to demonstrate compliance with Part 201 according to any of the following methods:

-- A demonstration that groundwater-surface water interface (GSI) criteria were not exceeded at the GSI or at a GSI compliance monitoring well.
-- A demonstration that mixing-zone-based GSI criteria were not exceeded at the GSI or at a GSI compliance monitoring well.
-- A demonstration that the designated uses of the surface water had not been nor would likely be impaired by the hazardous substances present in groundwater venting from the facility.

With regard to the second method, unless prohibited by Part 31, the DNRE would have to approve the use of a mixing zone to demonstrate compliance with chronic or acute endpoints as part of a response activity. Mixing zones would have to be established in accordance with Part 31. Compliance with mixing-zone-based GSI criteria that were based on chronic toxicity endpoints could be established by a statistical evaluation of the data. Compliance with mixing-zone-based GSI criteria that were based on acute toxicity would have to be demonstrated on a point-by-point basis.

Regarding the third method, if an impairment from the hazardous substance in the groundwater released at the facility had not occurred and likely would not occur, response activities would not be required with respect to such venting groundwater except to the extent necessary to perform monitoring. A person could meet this demonstration requirement as described in the bill.

If a person had controlled the source of groundwater contamination and demonstrated that compliance with GSI criteria developed under Part 201 was unachievable, he or she could file a technical impracticality waiver with the DNRE. The waiver would have to document the reasons why compliance was unachievable. The DNRE would have to respond to a waiver within 60 days with an approval, a request for additional information, or a detailed denial.

Part 201 Liability

People who are liable under Part 201 include a person who became an owner or operator of a facility after June 5, 1995, unless a baseline environmental assessment (BEA) is conducted before or within 45 days after the earliest of the date of purchase, occupancy, or foreclosure; and the owner or operator gives a BEA to the DNRE and subsequent purchase or transferee, if the BEA confirms that the property is a facility. Under the bill, the owner or operator would have to give the BEA to the subsequent purchaser or transferee within six months after the earliest date of purchase, occupancy, or foreclosure.

Currently, certain people are not liable with respect to contamination resulting from a release unless they are responsible for an activity causing it. These people include a lessee who uses the leased property for a retail, office, or commercial purpose. Under the bill, this exemption would apply regardless of the lessee's level of hazardous substance use. The bill also would add to the people exempt from liability an owner or operator who acquired a facility from a transferor, if the transferor and the owner or operator were members of an affiliated group, and the transferor had conducted and disclosed a BEA for the facility or were otherwise not liable for contamination at the facility. ("Affiliated group" would mean one or more corporations or limited liability companies connected by ownership to a common parent corporation or limited liability company.)

Under Part 201, certain people are not subject to any liability. Under this exemption, the bill would include any person for environmental contamination addressed in a no further action report for which the DNRE had issued a no further action letter. Such a person, however, could be liable for either of the following:

-- A subsequent release not addressed in the no further action report if the person were otherwise liable under Part 201 for that release.
-- Environmental contamination not addressed in the no further action report

and for which the person was otherwise liable under Part 201.

In addition, if the no further action report relied on land or resource use restrictions, an owner or operator who desired to change the restrictions would be responsible for any response activities necessary to comply with Part 201 for the desired land or resource use that was not relied on in the report. If the report relied on contaminants, barriers, or other engineering controls necessary to assure the effectiveness and integrity of the response activity, an owner or operator who failed to maintain those controls would be liable for response activities to the extent necessary to address any exacerbation of environmental contamination resulting from that failure. If the report relied on monitoring necessary to assure the effectiveness and integrity of the response activity, an owner or operator who was otherwise liable for environmental contamination addressed in a report would be liable under Part 201 for response activities to the extent necessary to address any potential exposure to the environmental contamination demonstrated by the monitoring and resulting from the exacerbation or migration of the contamination.

DNRE Data Compilation

The bill would require the DNRE to compile the data of all of the following:

-- The number of requests for approval of response activity plans received by the Department and approved or disapproved by the DNRE or the proposed Response Activity Review Panel.
-- The number of requests for approval of no further action reports received by the Department and approved or disapproved by the DNRE or the Panel.
-- The number of baseline environmental assessments received by the Department.

The DNRE would have to post this information on its website monthly as the submissions and requests were made and acted upon, and would have to give notice of the posting to the chairpersons of the standing committees of the Legislature with primary jurisdiction over environmental issues.

Petition for Exemption from Liability

The bill would repeal Section 20129a, which prescribes the process by which a person may petition the DNRE for a determination that the person meets the requirements for an exemption from liability. The person must submit the petition, along with a fee of $750, to the DNRE within six months after completion of a BEA. The DNRE must deposit the fees into the Cleanup and Redevelopment Fund.

A person who is provided an affirmative determination under these provisions is not liable for a claim for response activity costs, fine or penalties, natural resources damages, or equitable relief under Part 17 (Michigan Environmental Protection Act), Part 31, or common law resulting from the contamination identified in the petition or existing on the property when the person took ownership or control.

Revolving Loan Program

Under Part 201, the DNRE administers the Revitalization Revolving Loan Fund to make loans to local units of government for eligible activities at certain properties in order to promote economic development. Part 201 prescribes the interest rate and repayment requirements.

Under the bill, upon request of a loan recipient and a showing of financial hardship, the DNRE could renegotiate the terms of any outstanding loan, including the length, interest rate, repayment terms, and whether the loan could be converted into a grant.

Report

The bill would delete a requirement that the DNRE submit to the Legislature a biennial report on the effectiveness of Part 201 in restoring the economic value of sites of environmental contamination.

Rescinded Administrative Rules

The bill would rescind the administrative rules described below.

R 299.5520 to R 299.5542. These rules pertain to remedial action plans and also prescribe requirements in selecting and

conducting appropriate response activity, as well as factors that must be considered in an evaluation of whether response activity was diligently pursued. Under certain circumstances, the rules require operation and maintenance, as well as environmental monitoring, to be implemented as part of a response activity. In addition, the rules regulate the relocation of soil from a facility.

R 299.5601 to R 299.5607. These rules do the following:

-- Require remedial actions to achieve a degree of cleanup that is protective of the public health, safety, and welfare, and the environment; and to meet applicable State and Federal requirements.
-- Prescribe factors that must be considered when a remedial action is selected or approved; and provide that no single factor should be considered the most important.
-- Require the DNRE to compile an administrative record of the decision process leading to the selection or approval of any remedial action.

R 299.5801 to R 299.5823. These rules prescribe the site assessment model and scoring procedure for the inclusion of sites on the DNRE's environmental contamination list, and prescribe categories for the designation of sites based on their scores.

R 299.5901 to R 299.5919. These rules prescribe requirements for a BEA that describes the condition of property that is being transferred and pertain to a person petitioning the DNRE for an exemption from liability under Part 201.

MCL 324.20101 et al.

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

S0910\s437sb