# Legislative Analysis

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**UNDERGROUND STORAGE TANK CLEANUP: CONTAMINATION UNDER PUBLIC HIGHWAYS**

**Senate Bill 717 as enacted**
**Public Act 381 0f 2016**
**Sponsor: Sen. Tom Casperson**
**Senate Committee: Natural Resources**
**House Committee: Natural Resources**
**Complete to 1-26-17**

**SUMMARY:**

Senate Bill 717, as enacted, amended five sections, and added one new section, within Part 213 of the Natural Resources and Environmental Protection Act (NREPA), the part of NREPA dealing with leaking underground storage tanks.

The bill makes revisions relating to the corrective actions required of owners and operators of contaminated property, including the use of alternative mechanisms to protect against exposure to regulated substances. The bill also establishes specific requirements when regulated substances are proposed to be left in place within a public highway owned by the Michigan Department of Transportation, a county road commission, or a local unit of government. The bill takes effect March 29, 2017. A more detailed summary follows.

**FISCAL IMPACT:**

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

**Department of Transportation**
Representatives of the Michigan Department of Transportation have indicated that the provisions of Senate Bill 717 effectively authorize what has been current practice and impose no new costs or liabilities on the department. As a result, the bill has no direct fiscal impact on MDOT. Similarly, the bill appears to have no direct fiscal impact on local road agencies.

**BACKGROUND DISCUSSION:**

Highway right-of-way owned by the Michigan Department of Transportation (MDOT) sometimes becomes contaminated. In some cases, a discharge from an adjacent property, such as an old service station, may migrate underground into the highway right of way causing contamination of the underlying highway property. In other cases, the department may acquire a contaminated property as part of a highway new-construction or widening project. Similar situations may occur to local road agencies, that is, county road commissions, cities, or villages, with respect to a road or street under local jurisdiction.

Some corrective actions—such as excavation and removal of contaminated soil—are impractical within an existing highway right-of-way. As a result, under current practice, a corrective action plan may provide for the contamination to remain in place within the highway right-of-way, effectively capped under the highway pavement.

Section 21310a of NREPA currently allows an owner or operator liable for contamination under Section 21323a to use "alternative mechanisms" to restrict exposure to regulated substances. Senate Bill 717, through amendment of Section 21310a, would specifically authorize as an "alternative mechanism" the use of a license or license agreement with MDOT if regulated substances are proposed to be left in place within the highway right of way. The bill would also provide specific alternative mechanism options if MDOT fails to enter into a license agreement within 120 days of submission of a request. These specific alternative mechanism provisions would also apply to local road agencies.

To be clear, the provisions described above concern corrective action plan requirements for owners or operators liable for the contamination—they do not directly impose requirements on MDOT or local road agencies when a highway property is contaminated by others, such as when contamination migrates from adjacent property or when a highway agency acquires contaminated property through right-of-way acquisition. Sec. 21323a of NREPA specifically exempts MDOT and local units of government from liability for contamination for property acquired pursuant to the Public Highways and Private Roads Act, 1909 PA 283, or for property used for a transportation or utility corridor, including sewers, pipes, and pipelines, or public rights-of-way.

The bill affirms that reliance on a public highway as an alternative mechanism does not affect an owner's or operator's liability under Section 21323a or impose liability for corrective action on either the MDOT or a local unit of government.

**DETAILED SUMMARY:**

***Definitions - Section 21303***

The bill would add the term "public highway," to mean a road or highway under the jurisdiction of the Michigan Department of Transportation (MDOT), a county road commission, or a local unit of government. ["Local unit of government" is already a defined term within Section 21302 where it is defined to mean a city, village, township, county, fire department, or local health department.]

***Corrective Action Requirements - Section 21304c***

Section 21304c of NREPA establishes various requirements for a person that owns or operates property known to be contaminated. These requirements, listed under Subsection 1, subdivisions (a) through (f), can be broadly described as *corrective action* requirements. Subsection 5 of the section exempts, under specific circumstances, the state and local units of government from some of corrective action requirements of Subsection 1.

Corrective action requirements under Section 21304c (1), subdivisions (a)–(f), are as follows:

a. Undertake measures as are necessary to prevent exacerbation.
b. Exercise due care by undertaking corrective action necessary to mitigate unacceptable exposure to regulated substances, mitigate fire and explosion hazards due to regulated substances, and allow for the intended use of the property in a manner that protects the public health and safety.
c. Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.
d. Provide reasonable cooperation, assistance, and access to the persons that are authorized to conduct corrective action activities at the property, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial corrective action activity at the property.
e. Comply with any land use or resources use restrictions established or relied on in connection with the corrective action activities at the property.
f. Not impede the effectiveness or integrity of any land use or resource use restriction employed at the property in connection with corrective action activities.

Senate Bill 717 would amend subdivision (f) to add the term "corrective action." The amended subdivision would read: "Not impede the effectiveness or integrity of any *corrective action or* land use or resource use restriction employed at the property in connection with corrective action activities." [Note that "corrective action" is a defined term in Section 21302 of the act.]

*Governmental Exceptions*

Subsection 5 within the Section 21304c currently exempts the state and local units of governments, under specific circumstances, from the some of the corrective action requirements of Subsection 1 – specifically subdivisions (a)–(c). This exemption applies to the state of Michigan or a local unit of government if:

1) The state or a local unit of government is not liable for contamination under Section 21323a (3), subdivisions (a), (b), (c), and (e); or

2) The state or local unit of government acquired ownership of the property purchase, gift, transfer, or condemnation.

Subsection 5 also indicates that the corrective action requirements of Subsection 1, subdivisions (a)–(c), do not apply to a person exempt from liability under Section 21323a(4)(b).

(Section 21323a establishes liability for contamination and identifies exemptions from liability. Subsection 4, Subdivision (b) specifically exempts from liability a person that owns or operates property onto which contamination has migrated unless that person was responsible for the activity causing the release and contamination. Section 21323a is described further below.)

Senate Bill 717 would amend Subsection 5 of Section 21304c to explicitly include *county road commissions* in the exemptions that currently apply to the state and local units of government. The bill would also add subdivision (f) to the corrective action exemptions.

As a result, under the bill, the state, a local unit of government, and a county road commission, meeting the other specific requirements of Subsection 5, would be exempt from the corrective action requirements of Subsection (1), subdivisions (a), (b), (c), and (f).

*Public Purpose/Public Highway*

As described above, Subsection 5 of Section 21304c establishes certain exemptions for the state and local units of government from some of the corrective action requirements of Subsection 1. Under current law, the state or local unit of government, unless exempt from liability under Section 21323a(4)b, would still have to comply with the various corrective action requirements if they act as the owner or operator of a property known to be contaminated, and offer access to that property on a regular and continuous basis for a public purpose and invite the public to use the property for the public purpose—but only with respect to the part of the property open to and used by the public and necessarily the entire property.

Senate Bill 717 would amend Subsection 5 of Section 21304c to indicate that a public purpose does not include a public highway. As a result, the owner of a public highway with known contamination would not have to comply with the various corrective action requirements of the Subsection 1. However, the bill adds a new subsection 7 to indicate that all of the corrective action requirements of Section 21304c, Subsection (1) subdivisions (a) to (f), would apply to an owner or operator of a contaminated property who is liable under Section 21323a "with respect to regulated substances present within a public highway above applicable risk-based screening levels (RBSL) or site-specific target levels (SSTLs)."

***Institutional Controls - Section 21310a***

Section 21310a currently requires the implementation of *institutional controls* when corrective action activities at a contaminated site result in a final remedy that relies on a nonresidential RBSL or an SSTL. The section identifies two specific institutional controls:

- The filing of a notice of corrective action with the register of deeds in the county in which the site is located, or

- A restrictive covenant recorded with register of deeds in the county in which the site is located.

These institutional controls are intended to provide for evaluation of potential risks to public health, safety, and welfare, and to the environment when there is a change in the use of land use. Among other things, restricted covenants are intended to restrict activities at the site that interfere with corrective actions, and restrict activities that might result in exposure to regulated substances.

Section 21310a currently states that if a liable owner or operator determines that exposure to the regulated substances may be reliably restricted by means other than a restrictive covenant, and that the imposition of land use or resource use restrictions through restrictive covenants is impractical, then that owner/operator may select a corrective action plan that relies on alternate mechanisms.

Senate Bill 717 would eliminate the underlined language above. Instead, the provision would say that if a liable owner or operator determines that exposure to the regulated substances may be restricted by means other than a restrictive covenant, in a manner that protects against exposure to regulated substances as defined by the RBSLs and SSTLs, the liable owner/operator may select a corrective plan that relies on *alternative mechanisms*.

*Alternative Mechanisms*

Presently, the alternate mechanisms include, but are not limited to, compliance with an ordinance that prohibits the use of groundwater in a manner and to a degree that protects against unacceptable exposure to a regulated substance as defined by the RBSLs or SSTLs identified in the corrective action plan. Section 21310a currently provides that such an ordinance that serves as an exposure control must include both of the following:

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

Senate Bill 717 would strike current language defining ordinance requirements and would insert new language indicating that alternative mechanisms include, but are not limited to any of the following:

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

- A license or license agreement with the Michigan Department of Transportation (MDOT) if regulated substances are proposed to be left in place within a public highway owned or controlled by MDOT. The bill indicates that a license or license agreements may include a financial mechanism in an amount calculated to reflect the reasonably-estimated increased cost of any activity anticipated to be performed as described in the most recently adopted state five-year program that has the potential to disturb or expose the environmental contamination left in place within the public highway. Such financial mechanisms could include one of the following:
    - A bond executed by a surety authorized to do business in this state.
    - Insurance coverage, as evidenced by a proof of insurance.
    - Eligibility under the Underground Storage Tank Cleanup Fund
    - A letter of credit.
    - A corporate guarantee.
    - Self-insurance meeting a financial test approved by MDOT.

- Reliance on the existence of a public highway, in certain circumstances. Specifically, this would apply if the state transportation department fails or refuses to grant a license or to enter into a license agreement within 120 days after being requested to do so. This provision would also apply to a public highway that is owned or controlled by a county road commission or a local unit of government. If relying on the existence of a public highway as an alternative mechanism, a liable owner or operator would have to do all of the following:

    - Provide the DEQ and the person that owns or operates the public highway with the following information related to the release and site:
        - The site name, address, and facility identification number, and the name and contact information of the person relying on the alternative mechanism.
        - Identification of the DEQ district office with jurisdiction over the site.
        - The name of the affected public highway and the nearest intersection.
        - Identification of known or suspected contaminants.
        - A statement that residual or mobile NAPL is or is not present at the affected public highway.
        - The media affected, including depth of contaminated soil, depth of groundwater, and predominate groundwater flow direction.
        - A scale drawing of the portion of the public highway subject to the alternate mechanism that depicts the area impacted by regulated substances and the location of utilities in the impacted area, including storm water systems and municipal separate storm water systems.
        - Identification of all ownership and possessory or use property interests related to the public highway and whether they are affected by the contamination and whether they have received notification of

the existing conditions as part of a corrective action plan or pursuant to the due care requirements under Section 21304c.

- Identification of exposure risks from drinking water, direct contact, groundwater, soil excavation, or relocation.

- Confirm that there are no current plans to relocate, vacate, or abandon the public highway.

- Either (1) provide a certification to the person that owns or operates the public highway that any contamination present as a result of the release from the underground storage tank system does not enter a storm sewer system or (2) provide all information necessary to clearly identify the nature and extent of the contamination that enters or has the potential to enter the storm sewer system.

The bill indicates that a person that applies for a permit issued by a county road commission or a local unit of government to excavate, bore, drill, or perform any other intrusive activity within a public highway or right-of-way of a public highway must identify whether the proposed work will take place within an area being relied upon as an alternative institutional control.

The bill also indicates that reliance on a public highway as an alternative mechanism under a license or license agreement with MDOT does not affect an owner's or operator's liability under Section 21323a, and does not impose liability for corrective action or any other obligation on MDOT, a county road commission, or a local unit of government.

The bill also states that information provided under Section 21310a (3) or (4) as detailed above would not create an estoppel, obligation, or liability on the person that owns or operates the public highway. The use of a public highway as an alternative mechanism would not limit or restrict any right or duty of MDOT, a county road commission, or a local unit of government to operate, maintain, repair, reconstruct, enlarge, relocate, abandon, vacate, or otherwise exercise its jurisdiction over any public highway or public highway right-of-way, or any part thereof, or to permit any utilities or others to use any public highway, public highway right of way, or any part thereof.

***Liability for Owners or Operators - Section 21323a***

*Persons Liable Under Part 213 (Section 21323a, Subsection 1)*
Section 21323a establishes standards of liability under Part 213 of NREPA. The section lists conditions under which an owner or operator of an underground storage tank system is liable for a release.

As part of the criteria to determine if a person is liable under Part 213, an owner or operator who becomes an owner or operator on or after March 6, 1996, is liable, unless the owner or operator conducts and provides to the DEQ a baseline environmental assessment within certain time periods.

Senate Bill 717 would allow an owner or operator who fails to meet those deadlines to be considered exempt from liability if they request and receive a determination from the DEQ that the failure to comply with the time frames was inconsequential.

*Persons Not Liable Under Part 213, (Section 21323a, Subsection 3*
Section 21323a, Subsection 3, establishes standards under which persons are not liable under Part 213 with respect to contamination at property on which an underground storage tank is located. Among the several provisions of the subsection, three—subdivisions (a), (b), and (e)—are specific to the state and local units of government. These provisions indicate that neither the state of Michigan nor a local unit of government is liable under the following conditions:

- The state or a local unit of government acquired ownership or control of the property involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a lender or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function or as provided in this part, a local unit of government to which ownership or control of property is transferred by the state or by another local unit of government that is not liable as provided elsewhere in the act, or the state or a local unit of government that acquired ownership or control of property by seizure, receivership, or forfeiture pursuant to the operation of law or by court order. [Subdivision (a)]

- The state or local unit of government that holds or acquires an easement interest in property, holds or acquires an interest in property by dedication in a plat, or by dedication pursuant to the Public highways and Private Roads Act (PA 283 of 1909), or otherwise holds or acquires an interest in property for a transportation or utility corridor, including sewers, pipes, and pipelines, or public rights-of-way. [Subdivision (b)]

- The state or a local unit of government that leases property to a person if the state or the local unit of government is not liable under this part for environmental contamination at the property. [Subdivision (9e)]

Senate Bill 717 would amend these three subdivisions to include "a county road commission" within the specific liability exemptions for governmental entities.

*Additional Liability Exemptions (Section 21323a, Subsection 4)*
Section 21323a, Subsection 4, currently establishes additional criteria for excluding persons from liability under Part 213. Included among these criteria is the provision that excludes from liability any person for environmental contamination addressed in a closure report approved by the DEQ. However, notwithstanding this exemption, a person could still be liable for a subsequent release not addressed in the closure report or for environmental contamination not addressed in the closure report. In addition, if the closure report relies on land use or resource use restrictions, and a person desires to change those restrictions, that person is responsible for any corrective action necessary to comply with

Part 213 for any land use or resource use other than the land use or resource use that was the basis for the closure report.

Senate Bill 717 would add language to the provision regarding a closure report that relies on land use or resource use restrictions. The bill indicates that if the closure report relies on an alternate mechanism as provided for in Section 21310a, and the ordinance, state law, or rule is modified, lapses, or is revoked, or the public highway is relocated, vacated, or abandoned, the owner or operator that is liable under Section 21323a for the environmental contamination addressed in the closure report shall notify the DEQ 30 days before any of those events. In such cases, the owner or operator would be liable for additional corrective action activities necessary to address any increased risk of exposure to the environmental contamination.

***Qualified Underground Storage Tank Consultant - Section 21325***

Senate Bill 717 would amend Section 21325, to require that to be considered a qualified underground storage tank consultant a person would have to be experienced in risk-based corrective action (RBCA), in addition to current requirements. The bill would also add a new section, Section 21325a, to require that DEQ employees who are responsible for the oversight of corrective action or the audits conducted under Section 21315 be formally trained and demonstrate proficiency in RBCA.

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