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BILL ANALYSIS

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Senate Bill 717 (as enacted) **PUBLIC ACT 381 of 2016**
Sponsor: Senator Tom Casperson
Senate Committee: Natural Resources
House Committee: Natural Resources

Date Completed: 2-8-17

RATIONALE

Over the last decade, several pieces of legislation have been enacted to facilitate the cleanup of contaminated property, including gas stations where leaking underground storage tanks (LUSTs) have released potentially harmful substances, i.e., "regulated substances", into the ground. Part 213 (Leaking Underground Storage Tanks) of the Natural Resources and Environmental Protection Act assigns liability for the release of a regulated substance and requires the liable party, generally a facility owner or operator, to formulate a plan and take corrective action to remediate the site to prescribed standards based on the proposed use of the property. After the necessary corrective action has been completed, the owner or operator must submit documentation to the Department of Environmental Quality (DEQ) in the form of a closure report. If the DEQ accepts the report, the owner or operator is said to have achieved closure at the site. Since Part 213 was amended in 2012, the number of closures has increased significantly, surpassing 400 annually in recent years.

Owners and operators of LUST facilities may achieve closure through corrective action by removing the regulated substance, or by leaving it in the ground and limiting exposure to it through the use of an "institutional control", such as a restrictive covenant that imposes land or resource use restrictions on the property, or an "alternative institutional control" (AIC), such as an ordinance that restricts the use of groundwater so as to prevent an unacceptable level of exposure to the substance. Reportedly, however, some owners and operators have faced barriers in obtaining AIC approval, particularly in situations in which the substance has migrated beneath a public road right-of-way under the jurisdiction of the State or a local unit of government. An owner or operator who proposes to leave a regulated substance under a State-controlled right-of-way must enter into an environmental license agreement with the Michigan Department of Transportation (MDOT). The agreement prescribes the conditions under which the contamination may remain in place. Reportedly, however, in some cases involving county or local roads, the applicable road agency is reluctant to approve a proposal to leave a regulated substance under the right-of-way. To address this situation, it was suggested that Part 213 should explicitly identify the existence of a public highway as an allowed AIC, if certain conditions are met, while specifying that liability for the release will remain with the facility owner or operator and not be transferred to the governmental entity with jurisdiction over the right-of-way. In a related matter, some people believe that certain conditions a liable owner or operator must meet in order to use an AIC are subjective, and should be eliminated.

Some people also expressed concerns over provisions regarding the deadline by which an owner or operator who acquires property must submit a baseline environmental assessment (BEA) to the DEQ. Parts 213 and 201 (Environmental Remediation, which governs the cleanup of contaminated facilities other than LUST sites) both exempt an owner or operator from liability for a release upon submission of a BEA documenting that the release was present when the owner or operator acquired the property. Several years ago, legislation amended Part 201 to allow an owner or operator who misses the BEA submission deadline to retain the liability exemption by applying to the DEQ for a determination that the failure to comply with the prescribed time frame was inconsequential. It was suggested that a similar provision should be added to Part 213.

In another matter, there were concerns that some private consultants performing services at LUST sites, as well as relevant DEQ staff, were not properly trained and qualified with regard to the Risk-Based Corrective Action (RBCA) approach to remediation. Developed by the American Society for Testing and Materials, the RBCA approach is a process to guide the evaluation of risk, selection of the most suitable corrective action measures, and identification of the appropriate level of oversight needed at a particular site. The 2012 amendments to Part 213 established RBCA as the basis of the State's LUST remediation program. Thus, it was suggested that appropriate RBCA training and experience should be required of all consultants and DEQ staff who deal with LUST sites.

CONTENT

The bill amends Part 213 (Leaking Underground Storage Tanks) of the Natural Resources and Environmental Protection Act to do the following with regard to property contaminated by a release from an underground storage tank (UST) system:

- **Provide that an owner or operator who is liable with respect to regulated substances present within a public highway above applicable standards is subject to requirements for a property owner or operator to take certain actions in response to contamination.**
- **Eliminate a requirement that imposition of land or resource use restrictions be impractical in order for a property owner or operator who is liable for a release to choose an alternative mechanism to restrict exposure to the contamination.**
- **Expand the scope of an ordinance that may be used as an alternative mechanism to restrict exposure.**
- **Include among the alternative mechanisms a license or license agreement with the Michigan Department of Transportation, if regulated substances are proposed to be left in place within a public highway under MDOT's jurisdiction.**
- **Permit a license or license agreement with MDOT to include a financial mechanism in an amount calculated to reflect the increased cost of anticipated activity that has the potential to disturb or expose the environmental contamination left in place.**
- **Provide that the alternative mechanisms may include reliance on the existence of a public highway, if MDOT does not grant a request for a license agreement or if the highway is owned or controlled by a county road commission or local unit of government.**
- **Eliminate a provision regarding the approval of alternative mechanisms by the Department of Environmental Quality.**
- **Provide that, if a closure report relies on an alternate mechanism and the conditions of that mechanism are changed in the future, the owner or operator will be liable for additional corrective action activities necessary to address any increased risk of exposure to contamination.**
- **Exclude a public highway as a "public purpose" in relation to the responsibilities of the State or a local unit of government as the owner or operator of contaminated property that is open to the public for a public purpose.**
- **Include a county road commission in provisions that exempt the State or a local unit of government from liability under Part 213.**
- **Excuse a property owner or operator from compliance with deadlines for conducting a baseline environmental assessment, required for an exemption from liability for a release, if the DEQ determines that the failure to comply was inconsequential.**
- **Require a qualified UST consultant to have experience with the American Society for Testing and Materials Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites.**
- **Require DEQ employees who are responsible for the oversight of corrective action or audits of final assessment and closure reports to be formally trained and demonstrate proficiency in RBCA.**

The bill will take effect on March 29, 2017.

Owner/Operator Responsibilities

Part 213 prescribes liability for contamination resulting from a release or threat of release from an UST system, as well as procedures for addressing the contamination. ("Release" means any spilling, leaking, emitting, discharging, escaping, or leaching from an UST system into groundwater, surface water, or subsurface soils. "Contamination" means the presence of a regulated substance in soil, surface water, or groundwater or air that has been released from an UST system at a concentration exceeding the level set forth in the RBCA tier 1 screening levels established by the DEQ for the residential and nonresidential cleanup categories. "Regulated substance" means a substance defined as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act; petroleum; or a substance listed as a pollutant under the Clean Air Act.)

Under Part 213, a person who owns or operates property that the person knows is contaminated must take certain actions, including all of the following, with respect to regulated substances at the property:

-- Undertake measures necessary to prevent exacerbation.
-- 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.
-- Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from them.
-- Provide reasonable cooperation, assistance, and access to people who are authorized to conduct corrective action activities at the property.
-- Comply with any land or resource use restrictions established or relied on in connection with the corrective action activities at the property.
-- Not impede the effectiveness or integrity of any land or resource use restriction (or corrective action, under the bill) employed at the property in connection with corrective action activities.

The bill adds a provision stating that these requirements apply to an owner or operator who is liable with respect to regulated substances present within a public highway above applicable risk-based screening levels (RBSLs) or site-specific target levels (SSTLs). The bill defines "public highway" as a road or highway under the jurisdiction of MDOT, a county road commission, or a local unit of government. ("Risk-based screening level" means the unrestricted residential and nonresidential generic cleanup criteria developed by the DEQ. "Site-specific target level" means an RBCA risk-based remedial action target level for contamination developed for a site under RBCA tier II and tier III evaluations. "Corrective action" means the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment from an UST system that is necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources.)

Currently, the requirement to take the first three actions listed above does not apply to the State or a local unit of government if it acquired ownership or control of the property under circumstances in which it is not liable under Part 213 (described below) or to the State or a local unit if it acquired property by purchase, gift, transfer, or condemnation. Under the bill, the requirement to take the first three actions, and not to impede the effectiveness or integrity of any corrective action or land or resource use restriction employed at the property, does not apply to the State, a county road commission, or a local unit of government, under the same circumstances.

Under Part 213, if the State or a local unit of government, acting as the operator of property that the State or local unit knows is contaminated by a release from an UST system, offers access to it on a regular or continuous basis for a public purpose and invites the public to use the property for that purpose, the State or local unit is subject to all of the owner/operator requirements with respect to the portion of the property that is opened to and used by the public for the public purpose. Under the bill, this applies if the State or a local unit is acting as the operator *or owner*

of property and offers access to it for a public purpose, as currently provided. The bill specifies that "public purpose" does not include a public highway.

Institutional Controls/Alternative Mechanisms

If the corrective action activities at a contaminated site result in a final remedy that relies on a nonresidential RBSL or an SSTL, institutional controls must be implemented according to requirements for recording a notice of corrective action. The notice must contain statements specified in Part 213, and must be recorded with the county register of deeds before a closure report is submitted.

If corrective action activities rely on institutional controls other than nonresidential RBSL or an SSTL, a restrictive covenant must be recorded with the county register of deeds within 30 days of submittal of a final assessment report to the DEQ, unless otherwise agreed to by the Department. The restrictions run with the land and apply until regulated substances no longer present an unacceptable risk to the public health, safety, or welfare or to the environment.

If a liable owner or operator determines that exposure to regulated substances may be reliably restricted by a means other than a restrictive covenant, and that imposition of land or resource use restrictions through a restrictive covenant is impractical, the owner or operator may select a corrective action plan that relies on alternative mechanisms. The bill eliminates the condition that imposition of land or resource use restrictions through a restrictive covenant be impractical. Instead, the owner or operator may select a corrective action plan that relies on alternative mechanisms if the owner or operator determines that exposure can be restricted in a manner that protects against exposure as defined by the RBSLs and SSTLs.

Currently, alternative mechanisms that may be considered include 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. Such an ordinance must include both of the following:

-- A requirement that the local unit of government notify the DEQ within 30 days before modifying or revoking the ordinance or before it lapses.
-- A requirement that the ordinance be filed with the register of deeds as an ordinance affecting multiple properties.

The bill deletes these provisions. Instead, the alternative mechanisms may include either 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.
-- A license or license agreement with MDOT, if regulated substances are proposed to be left in place within a public highway owner or controlled by MDOT.

An ordinance must be filed with the register of deeds on the affected property or be filed as an ordinance affecting multiple properties. As currently required, an ordinance adopted after the bill's effective date must include a requirement that the local unit of government notify the DEQ at least 30 days before the ordinance is modified, lapses, or is revoked.

A license or license agreement with MDOT 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, including one of the following:

-- A bond executed by a surety authorized to do business in the State.
-- Insurance coverage.
-- Eligibility under the Underground Storage Tank Cleanup Fund.
-- A letter of credit.
-- A corporate guarantee.
-- Self-insurance meeting a financial test approved by MDOT.

If MDOT fails or refuses to grant a license or enter into a license agreement within 120 days after a request is submitted, and for public highways owned or controlled by a county road commission or a local unit of government, the alternative mechanisms may include reliance on the existence of a public highway, if the liable owner or operator does all of the following:

-- Gives MDOT and the owner or operator of the highway certain information (listed below) related to the release and site.
-- Confirms that there are no current plans to relocate, vacate, or abandon the highway.
-- Either gives to the highway owner or operator a certification that any contamination present as a result of the release from the UST system does not enter a storm sewer system, or provides all information necessary to identify clearly the nature and extent of the contamination that enters or has the potential to enter the storm sewer system.

The information related to the release and site that must be given to MDOT and to the highway owner or operator includes the following:

-- The site name, address, and facility identification number, as well as the name and contact information of the person relying on the alternative mechanism.
-- Identification of the DEQ district office with jurisdiction over the site.
-- Identification of known or suspected contaminants.
-- A statement that residual or mobile nonaqueous-phase liquid is or is not present at the affected 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 highway subject to the alternative mechanism that depicts the area affected by the regulated substances and the location of utilities in that area.
-- Identification of all ownership and possessory or use property interests related to the highway and whether they are affected by the contamination and have received notification of the existing conditions as part of a corrective action plan or pursuant to the due care requirements of Part 213.
-- Identification of exposure risks from drinking water, direct contact, groundwater, soil excavation, or relocation.

A person who 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 risk will take place within an area being relied upon as an alternative institutional control.

The bill specifies that reliance on a public highway as an alternative mechanism does not affect an owner's or operator's liability or impose liability for corrective action or any other obligation on MDOT, a county road commission, or a local unit of government.

The bill further specifies that information provided to the owner or operator of a public highway under these provisions does not create an estoppel, obligation, or liability on the owner or operator. The use of a public highway as an alternative mechanism does 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, or over any part of, a public highway or public highway right-of-way, or to permit any utilities or others to use any public highway or public highway right-of-way, or any part of it.

Currently, if a liable owner or operator requests a mechanism other than a notice of corrective action, an ordinance, or a restrictive covenant and the DEQ determines that the alternative mechanism is appropriate, the Department may approve of the alternate mechanism. The bill deletes this provision.

Liability

Except as otherwise provided, the following people are liable under Part 213:

-- A property owner or operator who is responsible for an activity causing a release or threat of release.
-- An owner or operator who became an owner or operator on or after March 6, 1996, unless the owner or operator conducts a baseline environmental assessment before or within 45 days after the date of purchase, occupancy, or foreclosure, whichever is earliest; and gives a BEA to the DEQ and subsequent purchaser or transferee within six months after the earliest of the date of purchase, occupancy, or foreclosure.
-- The estate or trust of a person described above.

Under the bill, compliance with the 45-day and six-month deadlines related to the BEA will not be required if the owner or operator requests and receives from the DEQ a written determination that failure to comply with the time frame was inconsequential.

Part 213 provides that a person is not liable for environmental contamination addressed in an approved closure report (a report submitted to the DEQ upon completion of corrective action), but if the report relies on land or resource use restrictions, a person who desires to change them is responsible for any corrective action necessary to comply with Part 213 for any land or resource use other than the use that was the basis for the closure report. Under the bill, however, if the closure report relies on an alternate mechanism 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 for the environmental contamination addressed in the report must notify the DEQ 30 days before the ordinance, law, or rule is modified, lapses, or is revoked or the highway is relocated, vacated, or abandoned. In either case, the owner or operator will be liable for additional corrective action activities necessary to address any increased risk of exposure to the contamination.

Currently, unless the State or a local unit of government is responsible for an activity causing a release or threat of release, the State or local unit is not liable under Part 213 for contamination at property where an UST system is located if the State or local unit acquired ownership or control of the property involuntarily through bankruptcy, tax delinquency, abandonment, a transfer from a lender or other circumstances in which it involuntarily acquires title or control by virtue of its government function or as provided in Part 213; if it acquired ownership or control by seizure, receivership, or forfeiture pursuant to the operation of law or by court order; if holds or acquires an easement interest in property, holds or acquires an interest in property by dedication in a plat, or by dedication under the Public Highways and Private Roads Act, or otherwise acquires or holds an interest in property for a transportation or utility corridor; or if it leases property to a person and is not liable under Part 213 for environmental contamination at the property. Under the bill, these provisions apply to a county road commission, as well as the State or a local unit of government.

Qualified UST Consultant

Part 213 prescribes the conditions a person must meet in order to be considered a qualified UST consultant. The criteria include experience in all phases of UST tank work, including tank removal oversight, site assessment, soil removal, feasibility, design, remedial system installation, remediation management activities, and site closure. Under the bill, the required experience also includes RCBA experience.

MCL 324.21303 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Reportedly, there are more than 200 contaminated sites where owners and operators have been denied approval of an AIC, even though approval arguably would be appropriate. In some cases, governmental entities have been hesitant to sign off on an AIC when a regulated substance has migrated to a road right-of-way under their jurisdiction. The bill makes it explicit that the existence of a public highway is a valid AIC, while specifying that the State or local unit retains its exemption from due care obligations and that liability for corrective action remains with the facility owner or operator. Additionally, the bill enhances protection for the public by requiring notice to be given before a change in control measures or activity that might result in the risk of exposure.

Currently, in order to employ an AIC, an owner or operator must demonstrate that the use of a restrictive covenant is "impractical" and that the proposed AIC will "reliably" restrict exposure to regulated substances. These standards are somewhat subjective and have prevented a number of owners and operators from achieving closure. Furthermore, if an AIC is determined to be as effective as a restrictive covenant in protecting against exposure, an owner or operator should be able to use it regardless of the practicality of a restrictive covenant. By eliminating these subjective and unnecessary standards, the bill will facilitate resolution at sites that have fulfilled the remaining criteria for closure.

In addition, the bill will help ensure that all private UST consultants and DEQ staff who oversee corrective action are qualified to perform the duties involved in the RBCA process. Exposure to contamination presents a serious risk to public health. Thus, it is essential that consultants and regulatory personnel have achieved certain standards of training and experience.

Together, these changes will help liable LUST owners and operators to achieve closure, facilitating the return of contaminated property to productive use while maintaining protection of the environment and public health.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill will have an indeterminate impact on State and local government.

Some DEQ employees will have to undergo Risk Based Corrective Action training at a cost of $700 to $1,500 per person, not including potential travel costs. The DEQ currently has 45 FTE positions under its hazardous waste management program; assuming that all of those positions are filled and all of those employees must undergo training, the initial cost of this requirement will be at least $31,500 to $67,500.

The bill codifies current practice between the Department of Transportation and local units of government. The bill will not affect revenue or costs to MDOT or local units.

Fiscal Analyst: Josh Sefton
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