Legislative Analysis

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ENVIRONMENTAL REMEDIATION CRITERIA

Senate Bill 1244 as passed by the Senate
Sponsor: Sen. Jim Stamas
House Committee: Natural Resources
Senate Committee: Natural Resources
Complete to 12-12-18

SUMMARY:

Senate Bill 1244 would amend Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) to modify the circumstances and requirements according to which the Department of Environmental Quality (DEQ) may carry out environmental remedial actions.

NFA Reports

Environmental remedial actions are actions conducted for the sake of mitigating, minimizing, or preventing a hazardous substance from harming public health or the environment. Currently, if a person is found liable for environmental contamination that requires remedial action to address, NREPA requires the person to complete the remedial actions that fulfill the requirements set in Part 201 before filing a No Further Action Report (NFA), signifying that the person has carried out all necessary action required for environmental remediation. The bill would allow a person to file a NFA report before completing the remedial actions as long as the person has documented the basis for concluding that these remedial actions are sufficient to address the threat to public health and the environment posed by the environmental contamination.

Disputes

Under NREPA, certain persons may appeal a decision made by the DEQ by submitting a petition to the director. If the dispute cannot be resolved through negotiation, the director may involve the Response Activity Review Panel created under Section 20114e to hear, and help resolve, the dispute. These provisions currently apply to technical or scientific disputes. The bill would add disagreements over an administrative issue. The bill would also add a person who has filed a remedial action plan or a person who has filed a postclosure plan to the list of those who are allowed to appeal a departmental decision, and would add disagreements over remedial action plans or postclosure plans to the definition of "dispute" for purposes of the above-described provisions.

Development of Cleanup Criteria

In developing and promulgating cleanup criteria under NREPA, the bill would require the DEQ to do all of the following:

- For each hazardous substance, use final toxicity values from the Integrated Risk Information System (IRIS) of the U.S. Environmental Protection Agency (EPA) if available. If the EPA had determined that there are not enough scientific data to decide on a toxicity value for a specific substance, the DEQ could not define a value

for that substance. If the EPA IRIS otherwise did not make a toxicity value available, the DEQ could use a value from the following sources, listed in order of precedence:

  - The best value from the U.S. Agency for Toxic Substances and Disease Registry (ATSDR), the EPA's provisional peer-reviewed toxicity values, or the EPA's Office of Pesticide Programs toxicity values for pesticides.
  - The best final value from the EPA's health effects assessment summary table or final values adopted by other states, the World Health Organization (WHO), Canada, or the European Union (EU).
  - A value developed by the department itself, using sufficient supporting data and peer-reviewed published scientific literature.

- Select chemical or physical data for the development of cleanup criteria from the best relevant experimentally measured data or, if those data are not available, the best relevant modeled or estimated data.
- In regard to the exposure of nonresidential workers to environmental contaminants, use a daily exposure time that is equal to the average number of hours that such workers would work during a five-day week (not exceeding 10 hours) according to government data.
- Treat pregnant women as "potential sensitive receptors" to address prenatal development effects when the EPA determines that that is warranted and establishes regional screening levels. The DEQ could establish a cleanup criterion for a particular substance based on a pregnant woman receptor only if the EPA such regional screening levels. The DEQ would have to use the same standards as those used by the EPA in establishing the regional screening levels.

Promulgation of Generic Cleanup Criteria

The bill would require the DEQ to promulgate all generic cleanup criteria and target detection limits, and any revisions or modifications to those criteria and limits, as rules. With some exceptions, these criteria and limits would not be considered legally enforceable until they had been promulgated as rules. The generic cleanup criteria and target detection limits would be subject to all of the following:

- The DEQ could periodically update and re-promulgate the generic cleanup criteria or target detection limits with new toxicity values and chemical or physical data as new knowledge and research became available.
- If the generic cleanup criteria were included in or relied upon as the basis for decisions made in a remedial action plan, or similar document, that was submitted prior to the effective date of a revised set of criteria, then the old criteria would continue to be used for those specific plans unless:
  - The person submitting the plan voluntarily elected to apply the revised cleanup criteria.
  - The DEQ made a site-specific demonstration that the prior cleanup criteria were no longer adequate in relation to the specific circumstances of the site. (This exception would not apply under circumstances specified in the bill.)

Within six months after the bill goes into effect, the DEQ would have to recalculate its generic cleanup criteria to use all toxicity values from the EPA IRIS that are final on the

effective date of the bill. The DEQ would have to publish the revised criteria on its website, at which point they would become legally enforceable as described in NREPA. The DEQ could not make any other revisions or updates to the criteria, unless the revisions or updates were promulgated as rules. The updates and revisions to the rules not already made final by the bill on its effective date would then be promulgated as rules.

If the DEQ determined a substance to be hazardous that did not already have generic cleanup criteria, the DEQ could calculate them using toxicity values and chemical and physical data as outlined in **Development of Cleanup Criteria**, above, and publish the criteria on its website. Within the next 30 days, the DEQ would have to initiate rulemaking to promulgate the rules for the new criteria by filing a rule-making request under the Administrative Procedures Act. If the DEQ did so, the criteria would have legal effect when published.

Changes to the generic criteria for a hazardous substance would not invalidate site-specific criteria for that substance that the DEQ had previously approved.

Calculation of Toxic Equivalency Quotients

When the DEQ calculates toxic equivalency quotients—which are used to define toxicity levels—the bill would establish the following requirements:

- The toxic equivalency factors must only be those adopted by the WHO.
- When two or more people acting independently contributed to the hazardous substances measured by the quotients, the harm is considered divisible and liability is subject to apportionment as laid out in the NREPA.
- To assess human health risks, the toxic equivalency quotient must be compared to generic or site-specific criteria for the reference hazardous substance.

Polychlorinated Dibenzodioxin and Dibenzofuran Congeners

The bill would further state that polychlorinated dibenzodioxin and dibenzofuran congeners—pollutants created as a byproduct of some industrial processes, forest fires, and volcanic activity—are not likely to leach from soil to groundwater or volatize from soil or groundwater into the air. Therefore, assessments of groundwater or drinking water exposure pathways would not be considered applicable or relevant when assessing polychlorinated dibenzodioxin and dibenzofuran congeners unless the DEQ demonstrated that those congeners were leaching through co-solvation, and vapor inhalation exposure pathways would not be considered applicable or relevant at all.

Indoor Air Inhalation Exposure

The bill would allow a person to handle a potential contamination of the quality of indoor air by a hazardous substance using any of the following methods:

- The cleanup methods outlined in Section 20120a(18) of NREPA.
- In cases dealing with air pollution from petroleum, the process outlined in the Interstate Technology Regulatory Council Petroleum Vapor Intrusion Guidance Document.[1]

[1] https://www.itrcweb.org/Guidance/ListDocuments?topicID=13&subTopicID=48

- An approach, using multiple lines of evidence, demonstrating that the potential contamination does not pose a serious health risk, as consistent with standards outlined further in the bill.
- Indoor air sampling that demonstrates compliance with the applicable generic cleanup criteria if the sampling accounts for actual site conditions.
- A method or model allowed in a promulgated rule.
- An alternative method or model that utilizes only site-specific variables or a combination of site-specific or building-specific variables, as long as the method or model is scientifically sound and supported by adequate site information.

Under the bill, an indoor air inhalation pathway—meaning a pathway through which air can enter an indoor space and thus be inhaled by an individual—would not be considered a reasonable and relevant pathway in need of remedial action if there were no occupied building or planned occupied building within 30 feet of petroleum contamination or within 100 feet of any other volatile hazardous substance contamination. If there were an occupied building or planned occupied building within these distances of volatile hazards, further evaluation would be conducted by the DEQ to establish if the claim of an environmental hazard was reasonable and relevant.

FISCAL IMPACT:

Senate Bill 1244 would require the DEQ to promulgate administrative rules in accordance with certain procedures, including the use of certain EPA standards, which may increase rulemaking-related costs for the department. The DEQ already has processes in place for rule promulgation, and it is difficult to determine whether these additional rulemaking requirements would significantly increase the administrative costs already inherent in this process. The bill is unlikely to affect departmental revenues or local government costs or revenues.

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