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## BILL ANALYSIS



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Senate Bill 717 (as introduced 1-21-16)  
Sponsor: Senator Tom Casperson  
Committee: Natural Resources

Date Completed: 1-27-16

### **CONTENT**

**The bill would amend 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:**

- **Include a public highway as a "public purpose" in relation to the State's or a local unit of government's responsibilities as the owner or operator of contaminated property that is open to the public for a public purpose.**
- **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, and include the existence of a public highway among the alternative mechanisms.**
- **Excuse a property owner or operator from compliance with a 45-day deadline for conducting a baseline environmental assessment, required for an exemption from liability for a release, if the Department of Environmental Quality (DEQ) determined that the failure to comply was inconsequential.**
- **Provide that, if a closure report relied on an alternate mechanism and the conditions of that mechanism were changed in the future, the owner or operator would be liable for additional corrective action activities necessary to address any increased risk of exposure to contamination.**
- **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 ("RBCA").**
- **Require DEQ employees who were 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 would take effect 90 days after enactment.

#### Owner/Operator Responsibilities

Part 213 prescribes liability for contamination resulting from a release or threat of release from a UST system, as well as procedures for addressing the contamination. ("Release" means any spilling, leaking, emitting, discharging, escaping, or leaching from a 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 a 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 third party and the consequences that foreseeably could result from them.

The requirement to take those three actions does not apply to certain owners or operators who are exempt from liability under Part 213 (although they must comply with other requirements). These owners or operators include the State or a local unit of government if it acquired ownership or control of the property under certain circumstances, involuntarily through bankruptcy, tax delinquency, abandonment, or a transfer from a lender, or if the State or local unit of government holds or acquires an easement interest in property under certain circumstances, or acquires an interest in property for a transportation or utility corridor, including public rights-of-way.

However, if the State or local unit, acting as the operator of property, offers access to it on a regular or continuous basis for an express 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 express public purpose. The bill would refer to the State or a local unit acting as an owner or operator, and would refer to a public purpose rather than an express public purpose. The bill provides that "public purpose" would include a public highway as described in Section 20 of Public Act 283 of 1909. That Act governs public highways and private roads. Under Section 20, all highways regularly established pursuant to existing laws, all roads that have been used as roads for at least 10 years (whether or not any record or other proof that they were ever established as highways exists), and all roads that have been or may be laid out in the future and not recorded, and that have been used for at least eight years, are deemed public highways.)

Currently, the State's or a local unit's responsibility as the owner or operator of property that is open to the public for a public purpose, does not apply to property onto which contamination has migrated. The bill would delete this exception.

#### Exposure Restriction

If the corrective action activities at a contaminated site result in a final remedy that relies on a nonresidential risk-based screening level (RBSL) or a site-specific target level (SSTL), institutional controls must be implemented by the recording of a notice of corrective action with the county register of deeds before a closure report is submitted. ("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 a UST

system that is necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources.)

If corrective action activities rely on other institutional controls, the controls must be implemented through a restrictive covenant 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 DEQ. The restrictions run with the land and are binding on the owner's successors, assigns, and lessees. The restrictions 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 would eliminate the condition that imposition of land or resource use restrictions through a restrictive covenant be impractical. Instead, the owner or operator could select a corrective action plan that relied on alternative mechanisms if the owner or operator determined that exposure could be restricted in a manner that protected 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 adopting a modification to the ordinance or before the ordinance lapses or is revoked.
- A requirement that the ordinance be filed with the register of deeds as an ordinance affecting multiple properties.

The bill would delete these provisions. Instead, the alternative mechanisms could include either of the following:

- An ordinance, State law, or regulation that limited or prohibited the use of contaminated groundwater above the RBSLs or SSTLs identified in the corrective action plan; prohibited the raising of livestock; prohibited development in certain locations; or restricted property to certain uses.
- The existence of a public highway, if the liable owner or operator gave a copy of the final assessment report and closure report to the owner and operator of the highway; performed a title search to determine whether there were any other possessory or use property interests within the highway and gave any identified owners a copy of the final assessment report and closure report; and confirmed that there were no current plans to relocate, vacate, or abandon the highway.

An ordinance would have to be filed with the register of deeds on the affected property or be filed as an ordinance affecting multiple properties.

The bill provides that reliance on a public highway as an alternative mechanism would not affect an owner's or operator's liability or impose liability for corrective action on either the Michigan Department of Transportation or a local unit of government.

### 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 (BEA) 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 deadline for conducting a BEA would not be required if the owner or operator requested and received 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, if the closure report relied on an alternate mechanism and the ordinance, State law, or regulation were modified, lapsed, or were revoked or the public highway were relocated, vacated, or abandoned, the owner or operator that was liable for the environmental contamination addressed in the report would be liable for additional corrective action activities necessary to address any increased risk of exposure to the contamination.

#### Qualified UST Consultant

Part 213 prescribes the conditions a person must meet in order to be considered a qualified UST consultant. Among other criteria, the requirements 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 would have to include RCBA experience.

MCL 324.21304c et al.

Legislative Analyst: Julie Cassidy

#### **FISCAL IMPACT**

The bill would have an indeterminate impact on the State and local units of government. It would result in increased administrative costs and liability exposure at the State and local levels.

Some DEQ employees would 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 would have to undergo training, the initial cost of this requirement would be at least \$31,500 to \$67,500.

According to the Department of Transportation and the DEQ, the bill could result in increased liability to the State and local governments to the extent that leaking underground storage tanks caused hazardous substances to contaminate other properties. However, the increased liability exposure is indeterminate since 1) the statute is unclear as to the share of the State's liability in such a scenario, and 2) it is not possible to predict whether or how much hazardous contamination would have occurred under current law compared to under the bill. The State and local governments also would see increased administration costs under the bill's additional due care obligations for State and local governments regarding road rights-of-way.

The Department of Transportation and local governments currently may require bonding, permit, and licensing fees for leaving contamination in place within road rights-of-way. To the extent that the bill would not require government approval for corrective action to leave contamination in a right-of-way, this revenue source would be eliminated.

Fiscal Analyst: Glenn Steffens

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.