

SENATE BILL No. 717

January 21, 2016, Introduced by Senator CASPERSON and referred to the Committee on Natural Resources.

A bill to amend 1994 PA 451, entitled "Natural resources and environmental protection act," by amending sections 21304c, 21310a, 21323a, and 21325 (MCL 324.21304c, 324.21310a, 324.21323a, and 324.21325), sections 21304c, 21310a, and 21323a as amended by 2012 PA 446 and section 21325 as added by 2012 PA 108, and by adding section 21325a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 21304c. (1) A person that owns or operates property that
2 the person has knowledge is contaminated shall do all of the
3 following with respect to regulated substances at the property:

4 (a) Undertake measures as are necessary to prevent
5 exacerbation.

6 (b) Exercise due care by undertaking corrective action
7 necessary to mitigate unacceptable exposure to regulated
8 substances, mitigate fire and explosion hazards due to regulated

1 substances, and allow for the intended use of the property in a
2 manner that protects the public health and safety.

3 (c) Take reasonable precautions against the reasonably
4 foreseeable acts or omissions of a third party and the consequences
5 that foreseeably could result from those acts or omissions.

6 (d) Provide reasonable cooperation, assistance, and access to
7 the persons that are authorized to conduct corrective action
8 activities at the property, including the cooperation and access
9 necessary for the installation, integrity, operation, and
10 maintenance of any complete or partial corrective action activity
11 at the property. Nothing in this subdivision shall be interpreted
12 to provide any right of access not expressly authorized by law,
13 including access authorized pursuant to a warrant or a court order,
14 or to preclude access allowed pursuant to a voluntary agreement.

15 (e) Comply with any land use or resources use restrictions
16 established or relied on in connection with the corrective action
17 activities at the property.

18 (f) Not impede the effectiveness or integrity of any land use
19 or resource use restriction employed at the property in connection
20 with corrective action activities.

21 (2) A person's obligations under this section shall be based
22 upon the applicable RBSL or SSTL.

23 (3) A person that violates subsection (1) that is not
24 otherwise liable under this part for the release at the property is
25 liable for corrective action activity costs and natural resource
26 damages attributable to any exacerbation and any fines or penalties
27 imposed under this part resulting from the violation of subsection

1 (1) but is not liable for performance of additional corrective
2 action activities unless the person is otherwise liable under this
3 part for performance of additional corrective action activities.
4 The burden of proof in a dispute as to what constitutes
5 exacerbation shall be borne by the party seeking relief.

6 (4) Compliance with this section does not satisfy a person's
7 obligation to perform corrective action activities as otherwise
8 required under this part.

9 (5) Subsection (1) (a) to (c) does not apply to the state or to
10 a local unit of government that is not liable under section
11 21323a(3) (a), (b), (c), or (e) or to the state or local unit of
12 government that acquired property by purchase, gift, transfer, or
13 condemnation or to a person that is exempt from liability under
14 section 21323a(4) (b). However, if the state or local unit of
15 government, ~~other than those exempt from liability under section~~
16 ~~21323a(4) (b),~~ acting as the **OWNER OR** operator of a ~~parcel of~~
17 ~~property that the state or local unit of government has knowledge~~
18 ~~is contaminated by a release from an underground storage tank~~
19 ~~system,~~ offers access to ~~that parcel~~ **THE PROPERTY** on a regular or
20 continuous basis ~~pursuant to an express~~ **FOR A** public purpose and
21 invites the ~~general~~ public to use ~~that~~ **THE** property for the ~~express~~
22 public purpose, the state or local unit of government is subject to
23 this section but only with respect to that portion of the property
24 that is opened to and used by the ~~general~~ public for ~~that express~~
25 **THE PUBLIC** purpose, and not the entire property. ~~Express public~~
26 **PUBLIC** purpose includes, but is not limited to, activities such as
27 a ~~public~~ park, ~~municipal~~ office building, ~~or municipal~~ public works

1 operation, OR A PUBLIC HIGHWAY AS DESCRIBED IN SECTION 20 OF 1909
2 PA 283, MCL 221.20. ~~Express public~~ PUBLIC purpose does not include
3 activities surrounding the acquisition or compilation of parcels
4 for the purpose of future development.

5 (6) Subsection (1)(a) to (c) does not apply to a person that
6 is exempt from liability under section 21323a(3)(c) or (d) except
7 with regard to that person's activities at the property.

8 Sec. 21310a. (1) If the corrective action activities at a site
9 result in a final remedy that relies on a nonresidential RBSL or an
10 SSTL, institutional controls shall be implemented as provided in
11 this subsection. A notice of corrective action shall be recorded
12 with the register of deeds for the county in which the site is
13 located prior to submittal of a closure report under section
14 21312a. A notice shall be filed under this subsection only by the
15 person that owns the property or with the express written
16 permission of the person that owns the property. A notice of
17 corrective action recorded under this subsection shall state the
18 land use that was the basis of the corrective action. The notice
19 shall state that if there is a proposed change in the land use at
20 any time in the future, that change may necessitate further
21 evaluation of potential risks to the public health, safety, and
22 welfare and to the environment and that the department shall be
23 contacted regarding any proposed change in the land use. Additional
24 requirements for monitoring or operation and maintenance shall not
25 apply if contamination levels do not exceed the levels established
26 in the tier I evaluation.

27 (2) If corrective action activities at a site rely on

1 institutional controls other than as provided in subsection (1),
2 the institutional controls shall be implemented as provided in this
3 subsection. The restrictive covenant shall be recorded with the
4 register of deeds for the county in which the property is located
5 within 30 days from submittal of the final assessment report
6 pursuant to section 21311a, unless otherwise agreed to by the
7 department. The restrictive covenant shall be filed only by the
8 person that owns the property or with the express written
9 permission of the person that owns the property. The restrictions
10 shall run with the land and be binding on the owner's successors,
11 assigns, and lessees. The restrictions shall apply until regulated
12 substances no longer present an unacceptable risk to the public
13 health, safety, or welfare or to the environment. The restrictive
14 covenant shall include a survey and property description which
15 define the areas addressed by the corrective action plan and the
16 scope of any land use or resource use limitations. The form and
17 content of the restrictive covenant shall include provisions to
18 accomplish all of the following:

19 (a) Restrict activities at the site that may interfere with
20 corrective action, operation and maintenance, monitoring, or other
21 measures necessary to assure the effectiveness and integrity of the
22 corrective action.

23 (b) Restrict activities that may result in exposure to
24 regulated substances above levels established in the corrective
25 action plan.

26 (c) Prevent a conveyance of title, an easement, or other
27 interest in the property from being consummated by the person that

1 owns the property without adequate and complete provision for
2 compliance with the corrective action plan and prevention of
3 exposure to regulated substances described in subdivision (b).

4 (d) Grant to the department and its designated representatives
5 the right to enter the property at reasonable times for the purpose
6 of determining and monitoring compliance with the corrective action
7 plan, including but not limited to the right to take samples,
8 inspect the operation of the corrective action measures, and
9 inspect records.

10 (e) Allow the state to enforce restrictions set forth in the
11 covenant by legal action in a court of appropriate jurisdiction.

12 (f) Describe generally the uses of the property that are
13 consistent with the corrective action plan.

14 (3) If the owner or operator that is liable under section
15 21323a determines that exposure to regulated substances may be
16 ~~reliably~~ restricted by a means other than a restrictive covenant
17 ~~and that imposition of land use or resource use restrictions~~
18 ~~through restrictive covenants is impractical,~~ **IN A MANNER THAT**
19 **PROTECTS AGAINST EXPOSURE TO REGULATED SUBSTANCES AS DEFINED BY THE**
20 **RBSLS AND SSTLS,** the owner or operator that is liable under section
21 21323a may select a corrective action plan that relies on
22 alternative mechanisms. Mechanisms that may be considered under
23 this subsection include, but are not limited to ~~, an ordinance that~~
24 ~~prohibits the use of groundwater in a manner and to a degree that~~
25 ~~protects against unacceptable exposure to a regulated substance as~~
26 ~~defined by the RBSLS or SSTLS identified in the corrective action~~
27 ~~plan. An ordinance that serves as an exposure control under this~~

1 ~~subsection shall include both EITHER of the following:~~

2 ~~—— (a) A requirement that the local unit of government notify the~~
3 ~~department 30 days before adopting a modification to the ordinance~~
4 ~~or the lapsing or revocation of the ordinance.~~

5 ~~—— (b) A requirement that the ordinance be filed with the~~
6 ~~register of deeds as an ordinance affecting multiple properties.~~

7 (A) AN ORDINANCE, STATE LAW, OR REGULATION THAT LIMITS OR
8 PROHIBITS THE USE OF CONTAMINATED GROUNDWATER ABOVE THE RBSLS OR
9 SSTLS IDENTIFIED IN THE CORRECTIVE ACTION PLAN, PROHIBITS THE
10 RAISING OF LIVESTOCK, PROHIBITS DEVELOPMENT IN CERTAIN LOCATIONS,
11 OR RESTRICTS PROPERTY TO CERTAIN USES. AN ORDINANCE UNDER THIS
12 SUBDIVISION SHALL BE FILED WITH THE REGISTER OF DEEDS ON THE
13 AFFECTED PROPERTY OR SHALL BE FILED AS AN ORDINANCE AFFECTING
14 MULTIPLE PROPERTIES.

15 (B) THE EXISTENCE OF A PUBLIC HIGHWAY DESCRIBED IN SECTION 20
16 OF 1909 PA 283, MCL 221.20, IF THE OWNER OR OPERATOR THAT IS LIABLE
17 UNDER SECTION 21323A DOES ALL OF THE FOLLOWING:

18 (i) PROVIDES A COPY OF THE FINAL ASSESSMENT REPORT AND CLOSURE
19 REPORT TO THE OWNER AND OPERATOR OF THE PUBLIC HIGHWAY.

20 (ii) PERFORMS A TITLE SEARCH TO DETERMINE WHETHER THERE ARE
21 ANY OTHER POSSESSORY OR USE PROPERTY INTERESTS WITHIN THE PUBLIC
22 HIGHWAY AND PROVIDES THE OWNERS OF THE IDENTIFIED POSSESSORY OR USE
23 PROPERTY INTERESTS WITH A COPY OF THE FINAL ASSESSMENT REPORT AND
24 CLOSURE REPORT.

25 (iii) CONFIRMS THAT THERE ARE NO CURRENT PLANS TO RELOCATE,
26 VACATE, OR ABANDON THE PUBLIC HIGHWAY.

27 (4) RELIANCE ON A PUBLIC HIGHWAY AS AN ALTERNATIVE MECHANISM

1 UNDER SUBSECTION (3) (B) DOES NOT AFFECT AN OWNER'S OR OPERATOR'S
2 LIABILITY UNDER SECTION 21323A OR IMPOSE LIABILITY FOR CORRECTIVE
3 ACTION ON EITHER THE STATE TRANSPORTATION DEPARTMENT OR A LOCAL
4 UNIT OF GOVERNMENT.

5 (5) ~~(4)~~—Notwithstanding subsections (1), (2), and (3), if a
6 mechanism other than a notice of corrective action, an ordinance,
7 or a restrictive covenant is requested by an owner or operator that
8 is liable under section 21323a and the department determines that
9 the alternative mechanism is appropriate, the department may
10 approve of the alternate mechanism.

11 (6) ~~(5)~~—A person that implements corrective action activities
12 that relies on land use restrictions shall provide notice of the
13 land use restrictions that are part of the corrective action plan
14 to the local unit of government in which the site is located within
15 30 days of filing of the land use restrictions with the county
16 register of deeds.

17 Sec. 21323a. (1) Notwithstanding any other provision of this
18 act, and except as otherwise provided in this section and section
19 21323c, the following persons are liable under this part:

20 (a) The owner or operator if the owner or operator is
21 responsible for an activity causing a release or threat of release.

22 (b) An owner or operator who became an owner or operator on or
23 after March 6, 1996, unless the owner or operator complies with
24 both of the following:

25 (i) A baseline environmental assessment is conducted prior to
26 or within 45 days after the earlier of the date of purchase,
27 occupancy, or foreclosure. **HOWEVER, COMPLIANCE WITH THE 45-DAY TIME**

1 PERIOD UNDER THIS SUBPARAGRAPH IS NOT NECESSARY IF THE OWNER OR
2 OPERATOR REQUESTS AND RECEIVES FROM THE DEPARTMENT A WRITTEN
3 DETERMINATION THAT ITS FAILURE TO COMPLY WITH THE TIME FRAME WAS
4 INCONSEQUENTIAL. For purposes of this section, assessing property
5 to conduct a baseline environmental assessment does not constitute
6 occupancy.

7 (ii) The owner or operator provides a baseline environmental
8 assessment to the department and subsequent purchaser or transferee
9 within 6 months after the earlier of the date of purchase,
10 occupancy, or foreclosure.

11 (c) The estate or trust of a person described in subdivisions
12 (a) and (b).

13 (2) Subject to section 21304c, an owner or operator who
14 complies with subsection (1)(b) is not liable for contamination
15 existing at the property on which an underground storage tank
16 system is located at the earlier of the date of purchase,
17 occupancy, or foreclosure, unless the person is responsible for an
18 activity causing the contamination. Subsection (1)(b) does not
19 alter a person's liability with regard to a subsequent release or
20 threat of release from an underground storage tank system if the
21 person is responsible for an activity causing the subsequent
22 release or threat of release.

23 (3) Notwithstanding subsection (1), the following persons are
24 not liable under this part with respect to contamination at
25 property on which an underground storage tank system is located
26 resulting from a release or threat of release unless the person is
27 responsible for an activity causing that release or threat of

1 release:

2 (a) The state or a local unit of government that acquired
3 ownership or control of the property involuntarily through
4 bankruptcy, tax delinquency, abandonment, a transfer from a lender
5 or other circumstances in which the government involuntarily
6 acquires title or control by virtue of its governmental function or
7 as provided in this part, a local unit of government to which
8 ownership or control of property is transferred by the state or by
9 another local unit of government that is not liable under
10 subsection (1), or the state or a local unit of government that
11 acquired ownership or control of property by seizure, receivership,
12 or forfeiture pursuant to the operation of law or by court order.

13 (b) A state or local unit of government that holds or acquires
14 an easement interest in property, holds or acquires an interest in
15 property by dedication in a plat, or by dedication pursuant to the
16 public highways and private roads act, 1909 PA 283, MCL 220.1 to
17 239.6, or otherwise holds or acquires an interest in property for a
18 transportation or utility corridor, including sewers, pipes, and
19 pipelines, or public rights-of-way.

20 (c) A person that holds an easement interest in property or
21 holds a utility franchise to provide service, for the purpose of
22 conveying or providing goods or services, including, but not
23 limited to, utilities, sewers, roads, railways, and pipelines; or a
24 person that acquires access through an easement.

25 (d) A person that owns severed subsurface mineral rights or
26 severed subsurface formations or who leases subsurface mineral
27 rights or formations.

1 (e) The state or a local unit of government that leases
2 property to a person if the state or the local unit of government
3 is not liable under this part for environmental contamination at
4 the property.

5 (f) A person that acquires property as a result of the death
6 of the prior owner or operator of the property, whether by
7 inheritance, devise, or transfer from an inter vivos or
8 testamentary trust.

9 (g) A person that did not know and had no reason to know that
10 the property was contaminated. To establish that the person did not
11 know and did not have a reason to know that the property was
12 contaminated, the person shall have undertaken at the time of
13 acquisition all appropriate inquiry into the previous ownership and
14 uses of the property consistent with good commercial or customary
15 practice. A determination of liability under this section shall
16 take into account any specialized knowledge or experience on the
17 part of the person, the relationship of the purchase price to the
18 value of the property if uncontaminated by a regulated substance,
19 commonly known or reasonable ascertainable information about the
20 property, the obviousness of the presence or likely presence of a
21 release or threat of release at the property, and the ability to
22 detect a release or threat of release by appropriate inspection.

23 (h) A utility performing normal construction, maintenance, and
24 repair activities in the normal course of its utility service
25 business. This subdivision does not apply to property owned by the
26 utility.

27 (i) A lessee who uses the leased property for a retail,

1 office, or commercial purpose regardless of the level of the
2 lessee's regulated substance use unless the lessee is otherwise
3 liable under this section.

4 (4) Notwithstanding subsection (1), the following persons are
5 not liable under this part:

6 (a) A lender that engages in or conducts a lawful marshaling
7 or liquidation of personal property if the lender does not cause or
8 contribute to the environmental contamination. This includes
9 holding a sale of personal property on a portion of the property.

10 (b) A person that owns or operates property onto which
11 contamination has migrated unless that person is responsible for an
12 activity causing the release that is the source of the
13 contamination.

14 (c) A person that owns or operates property on which the
15 release or threat of release was caused solely by 1 or more of the
16 following:

17 (i) An act of God.

18 (ii) An act of war.

19 (iii) An act or omission of a third party other than an
20 employee or agent of the person or a person in a contractual
21 relationship existing either directly or indirectly with a person
22 that is liable under this section.

23 (d) Any person for environmental contamination addressed in a
24 closure report that is approved by the department or is considered
25 approved under section 21315(4). Notwithstanding this subdivision,
26 a person may be liable under this part for the following:

27 (i) A subsequent release not addressed in the closure report

1 if the person is otherwise liable under this part for that release.

2 (ii) Environmental contamination that is not addressed in the
3 closure report and for which the person is otherwise liable under
4 this part.

5 (iii) If the closure report relies on land use or resource use
6 restrictions, a person who desires to change those restrictions is
7 responsible for any corrective action necessary to comply with this
8 part for any land use or resource use other than the land use or
9 resource use that was the basis for the closure report. **HOWEVER, IF**
10 **THE CLOSURE REPORT RELIES ON AN ALTERNATE MECHANISM AS PROVIDED FOR**
11 **IN SECTION 21310A AND THE ORDINANCE, STATE LAW, OR REGULATION IS**
12 **MODIFIED, LAPSES, OR IS REVOKED OR THE PUBLIC HIGHWAY IS RELOCATED,**
13 **VACATED, OR ABANDONED, THE OWNER OR OPERATOR THAT IS LIABLE UNDER**
14 **SECTION 21323A FOR THE ENVIRONMENTAL CONTAMINATION ADDRESSED IN THE**
15 **CLOSURE REPORT IS LIABLE UNDER THIS PART FOR ADDITIONAL CORRECTIVE**
16 **ACTION ACTIVITIES NECESSARY TO ADDRESS ANY INCREASED RISK OF**
17 **EXPOSURE TO THE ENVIRONMENTAL CONTAMINATION.**

18 (iv) If the closure report relies on monitoring necessary to
19 assure the effectiveness and integrity of the corrective action, an
20 owner or operator that is liable under section 21323a for
21 environmental contamination addressed in a closure report is liable
22 under this part for additional corrective action activities
23 necessary to address any potential exposure to the environmental
24 contamination demonstrated by the monitoring in excess of the
25 levels relied on in the closure report.

26 (v) If the corrective actions that were the basis for the
27 closure report fail to meet performance objectives that are

1 identified in the closure report or section 21304a, an owner or
2 operator that is liable under section 21323a for environmental
3 contamination addressed in the closure report is liable under this
4 part for corrective action necessary to satisfy the performance
5 objectives or otherwise comply with this part.

6 (5) Notwithstanding any other provision of this part, the
7 state or a local unit of government or a lender who has not
8 participated in the management of the property is not liable under
9 this part for costs or damages as a result of corrective action
10 taken in response to a release or threat of release. For a lender,
11 this subsection applies only to corrective action undertaken prior
12 to foreclosure. This subsection does not preclude liability for
13 costs or damages as a result of gross negligence, including
14 reckless, willful, or wanton misconduct, or intentional misconduct
15 by the state or local unit of government.

16 (6) In establishing liability under this section, the
17 department bears the burden of proof.

18 (7) An owner or operator who was in compliance with subsection
19 (1)(b) prior to May 1, 2012 is considered to be in compliance with
20 subsection (1)(b).

21 Sec. 21325. A person shall be considered a qualified
22 underground storage tank consultant if the person meets all of the
23 following requirements:

24 (a) ~~Experience~~ **HAS EXPERIENCE** in all phases of underground
25 storage tank work, including **RBCA**, tank removal oversight, site
26 assessment, soil removal, feasibility, design, remedial system
27 installation, remediation management activities, and site closure

1 and possesses or employs at least 1 of the following:

2 (i) A professional engineer license with 3 or more years of
3 relevant corrective action experience, preferably involving
4 underground storage tanks.

5 (ii) A professional geologist certification or a similar
6 approved designation such as a professional hydrologist or a
7 certified groundwater professional, with 3 or more years of
8 relevant corrective action experience, preferably involving
9 underground storage tanks.

10 (iii) A person with a master's degree from an accredited
11 institution of higher education in a discipline of engineering or
12 science and 8 years of full-time relevant experience or a person
13 with a baccalaureate degree from an accredited institution of
14 higher education in a discipline of engineering or science and 10
15 years of full-time relevant experience. This experience shall be
16 documented with professional and personal references, past
17 employment references and histories, and documentation that all
18 requirements of the occupational safety and health act of 1970,
19 Public Law 91-596, 84 Stat. ~~STAT~~ 1590, and regulations promulgated
20 under that act, and the Michigan occupational safety and health
21 act, 1974 PA 154, MCL 408.1001 to 408.1094, and rules promulgated
22 under that act have been met.

23 (iv) A person that was certified by the department as an
24 underground storage tank professional pursuant to section 21543 ~~at~~
25 ~~the time of the effective date of the amendatory act that added~~
26 ~~this subparagraph.~~ **ON MAY 1, 2012.**

27 (b) ~~The person has~~ **HAS** all of the following insurance policies

1 written by carriers authorized to write such business, or approved
2 as an eligible surplus lines insurer, by the state and which are
3 placed with an insurer listed in a.m. best's with a rating of no
4 less than B+ VII:

5 (i) Worker's compensation insurance.

6 (ii) Professional liability errors and omissions insurance.

7 This policy may not exclude bodily injury, property damage, or
8 claims arising out of pollution for environmental work and shall be
9 issued with a limit of not less than \$1,000,000.00 per occurrence.

10 (iii) Contractor pollution liability insurance with limits of
11 not less than \$1,000,000.00 per occurrence, if not included under
12 the professional liability errors and omissions insurance required
13 under subparagraph (ii). The insurance requirement under this
14 subparagraph is not required for consultants who do not perform
15 contracting functions.

16 (iv) Commercial general liability insurance with limits of not
17 less than \$1,000,000.00 per occurrence and \$2,000,000.00 aggregate.

18 (v) Automobile liability insurance with limits of not less
19 than \$1,000,000.00 per occurrence.

20 (c) Has demonstrated compliance with the occupational safety
21 and health act of 1970, Public Law 91-596, 84 Stat.—**STAT** 1590, and
22 the regulations promulgated under that act, and the Michigan
23 occupational safety and health act, 1974 PA 154, MCL 408.1001 to
24 408.1094, and the rules promulgated under that act, and is able to
25 demonstrate that all such rules and regulations have been complied
26 with during the person's previous corrective action activity.

27 **SEC. 21325A. DEPARTMENT EMPLOYEES WHO ARE RESPONSIBLE FOR THE**

1 OVERSIGHT OF CORRECTIVE ACTION OR THE AUDITS CONDUCTED UNDER
2 SECTION 21315 SHALL BE FORMALLY TRAINED AND DEMONSTRATE PROFICIENCY
3 IN RBCA.

4 Enacting section 1. This amendatory act takes effect 90 days
5 after the date it is enacted into law.