



STATE OF MICHIGAN  
DEPARTMENT OF ENVIRONMENTAL QUALITY  
LANSING

JENNIFER M. GRANHOLM  
GOVERNOR

December 13, 2005

1. Bill Numbers and Sponsors:

Enrolled House Bill 4617  
Representative John R. Moolenaar et al.

2. Effect of Legislation:

This bill would amend Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Part 201), to:

- 1 Modify the requirements for residential cleanup criteria. Risks that will no longer be considered are: human contact with soil; protection of surface water from hazardous substances that enter surface water through groundwater; and special conditions such as food chain contamination.
- 2 Establish that a parcel of land where soil contamination is present qualifies for protections under the cleanup law (i.e., is considered a "facility"), only after parcel-specific testing to establish contamination levels, or, in the absence of testing, with the consent of the property owner.
  - A person who is liable for the contamination could contest a conclusion that property requires cleanup by conducting parcel-specific testing.
  - If testing conducted by a liable party fails to show contamination, the Department of Environmental Quality (DEQ) would be required to reimburse the liable party for the testing costs.
- 3 Exclude from the definition of "facility" properties where required response activity has been undertaken (defined in the bill as a "remediated site").
- 4 Require the use of certain types of information and risk assessment procedures if that information is "available and relevant."

A new term, "area of concern," is created in the amendments to describe a subset of locations where special requirements apply to determining whether property is a "facility." "Area of concern" is defined as an area identified by the DEQ that is:

- 1 Comprised of more than 50 parcels; and
- 2 Where response activity is required to address persistent, bioaccumulative and toxic pollutants, not including polychlorinated biphenyls (PCBs) and mercury; and
- 3 Where the predominant mechanisms of contaminant transport are air deposition and flooding.

The special requirements for parcel-specific testing apply to all areas of concern, regardless of when the determination of “facility” status is made. For contamination outside areas of concern, parcel-specific sampling is required when the determination of facility status is made after the effective date of the amendments.

3. How This Legislation Impacts Current Programs in the Department:

This bill would have significant negative impacts on DEQ programs. The principal impacts are:

- 1 The bill inappropriately limits the public health and environmental risks that must be considered in cleanups designed to allow unrestricted future use of the property (i.e., “generic residential” cleanups). The bill would prevent the DEQ, in the context of these cleanups, from:
  - Protecting against risks from contact with soil;
  - Protecting surface water;
  - Requiring that cleanups protect groundwater from the impacts of soil contamination; and
  - Protecting against certain special risks (e.g., food chain contamination).
- 2 The bill would slow the pace and increase the cost of cleanup and redevelopment activities undertaken by the DEQ, by liable parties responding to contamination they caused, and by non-labile parties who are voluntarily investing in cleanup work as part of redevelopment projects.
- 3 The bill would reduce the effectiveness of “due care” disclosure, and other important ‘safety net’ provisions of Part 201 that are designed to protect the public health, assure consumer protection, and facilitate brownfield redevelopment.
- 4 The bill would reduce the number of properties that are eligible for state and local financial incentives for redevelopment, or potentially increase the cost of qualifying for those incentives.
- 5 Already limited State funding for cleanup of contaminated properties would be squandered due to provisions of the bill that inappropriately require the DEQ to reimburse a liable party for the cost of determining the extent of contamination.

These principal impacts are subsequently discussed in greater detail, along with other important concerns.

4. Introduced at Agency Request:

No.

5. Agency Support:

The DEQ strongly opposes Enrolled House Bill 4617.

6. Justification for the Department's Position:

If enacted, the bill would have the following unacceptable consequences:

**1 Prevent the DEQ from requiring that routine residential cleanups protect people and resources.**

- This results from provisions in the amendments that narrow the scope of matters that have to be addressed by cleanup actions. This narrowing results from incomplete and incorrect references to the Part 201 administrative rules. Omission of one critical rule (R 299.5720) means that residential cleanups will no longer take into account contact with contaminated soil. This is a risk that currently drives many cleanup decisions. Another omission will affect protection of lakes, rivers, and wetlands from environmental contamination.

Specifically, on page 17, lines 23-25, the bill fails to reference rules 299.5712, 299.5716, 299.5720, 299.5728, and 299.5730 as requirements that have to be satisfied for a residential cleanup. Failure to include references to these rules means a cleanup to residential standards no longer needs to consider soil contact, protect surface water that may be impacted by the contamination, address contamination in sediment that lines state waterways, or deal with other special risks such as food chain contamination. On page 18, line 1, the bill fails to reference rules 299.5718 and 299.5722. This portion of the bill is meant to address the cleanup criteria that protects groundwater from soil contamination, however, failure to include the correct rules will result in soil cleanups being less protective of groundwater. It is important to remember that groundwater is the source of drinking water for half of Michigan's residents.

DEQ cited these problematic rules references as the bill moved through the legislative process; however the

problems were never addressed.

- 2 **Increase the cost and slow the pace of cleanup and redevelopment activity.** This is a consequence of:
  - Requirements for unnecessary testing. The requirement to test every parcel prevents reasonable scientific judgment to be used in defining the extent of contamination, based on patterns of contamination that can be seen in data from areas that have been tested according to standardized scientific methods. . That is, this requirement prevents DEQ and other scientists from using knowledge of conditions in sampled areas to draw reasonable, technically justified conclusions about other areas that are likely to be contaminated and have the same characteristics, but that have not been specifically sampled.
  - Ambiguity in testing and cleanup requirements. Provisions that are imprecise will, because of the resulting ambiguities, result in numerous disputes and the likelihood of litigation. These disputes consume financial and other resources. This will increase transaction costs, confuse property owners, and create opportunities for liable parties to avoid or delay complying with their cleanup obligations.
  
- 3 **Create opportunities for liable parties to avoid or delay taking action to cleanup contamination. Unless samples have been taken on a particular parcel to confirm contamination, or the owner of that property agrees to it being part of a facility in the absence of sampling, a liable party would not have an obligation to address contamination on that property.** This situation occurs because a liable party's obligations are to address the entire "facility" – if property is not part of a "facility," there is no obligation for a liable party to address the contamination. The bill places an undue burden on property owners to evaluate complex technical and legal issues in order to decide if they should agree to facility status or insist on sampling to trigger a liable party's obligations. It also inappropriately allows a liable party to avoid or delay responsibility for cleaning up contamination by refusing to sample the property and challenging the determination that property is a "facility" without that sampling. Provisions of the bill that allow a liable party to challenge facility status are vague and present opportunities for further delay by the liable party.
  
- 4 **Interfere with application of the 'safety net' and consumer protection provisions of Part 201.** Without the ability for DEQ or other scientists to exercise professional judgment based on available, scientifically derived test results, it will be more difficult to identify property as a "facility." This is critical because "facility"

status triggers certain 'safety net' and consumer protection requirements of Part 201. Part 201 currently requires owners to exercise due care when they know their property is contaminated above residential criteria. It also requires property owners to notify potential new owners about existing contamination. Often, a "remediated site" will still have contamination above residential criteria that is managed through exposure controls. The change in the definition of "facility" to remove remediated sites from the definition will result in owners no longer being required to exercise due care or notify new owners or tenants of the existing contamination even if substantial contamination remains on the property. This may result in more exposures risks and public health concerns. The due care provisions are designed to facilitate redevelopment of brownfield sites and assure that users and occupants of contaminated properties are protected from risks posed by contamination. If the integrity of the due care provisions is compromised for "remediated sites," investments in brownfield redevelopment are likely to decline.

**This is not a “homeowners fairness bill” as it has been labeled by its sponsors.** In truth, the bill would prevent homeowners, renters, and others from getting crucial information about contamination. Any potential benefits to property owners who are concerned about the impacts on property value resulting from status as a “facility” are illusory. If there is any stigma, it is attributable to the presence of contamination, not to the fact that the property is referred to as a “facility.”

7. State Revenue/Budgetary Implications:

The costs of cleanup and redevelopment projects undertaken by the state would increase by an unknown but certainly substantial amount. The increase is likely tens of millions of dollars over the next five years. At a time when the cleanup program has nearly exhausted available funding sources, the bill would further reduce the amount of risk reduction that the DEQ can accomplish – therefore reducing the protection of human health and the environment. Work on some projects would have to be stopped in order to shift resources to cover unnecessary testing costs at other sites. The cost increases would result from the need to characterize contamination on every property that is part of a large soil contamination facility where the DEQ is assessing the need for response activity, or where the DEQ is documenting facility conditions to support actions that recover cleanup costs from liable parties.

8. Implications to Local Units of Government:

The bill would have two primary impacts on local units of government:

- 1 Local units of government’s ability to offer financial incentives for redevelopment would be limited, since status as a “facility” is a condition of eligibility for those incentives. Many properties that are eligible for local tax increment financing are “remediated sites” within the definition established by this bill. Those sites would lose eligibility for financial incentives when they are no longer a “facility.”
- 2 The costs of cleanup work undertaken by local units of government when they are liable parties would increase. Cleanup expenses are already a significant issue for many communities that are responding to historical landfills, contamination at publicly-owned garages, parks, and similar properties. Any actions that increase these costs have budget impacts for local units of government comparable to those of other liable parties.

9. Administrative Rules Implications:

None.

10. Other Pertinent Information:

**Some of the new language added to Section 20120a(2) by the bill is unnecessary. Other new language added to this section may not achieve the apparent objective.**

- 1 Language added to Section 20120a(2) could be read to require that every cleanup undertaken in an “area of concern” be based on site-specific cleanup criteria, taking away the option of the person doing the cleanup to rely on existing “generic” criteria (i.e., pre-established criteria set forth in the Part 201 rules). Development of site-specific cleanup criteria can be time consuming and costly. This is another way in which the bill would raise the cost and slow the pace of cleanups without improving the quality of cleanup decisions.
- 2 A portion of the language added to this section calls for use of data from exposure studies in the development of cleanup criteria provided the data is “available and relevant.” While the effect of this language is neutral on its face, it creates a false impression that such data would necessarily be relevant in the criteria-setting process. The data are not likely to be relevant because human exposure studies are designed to document whether chemical exposure has occurred within a particular study population and/or establish activity patterns in study populations. The DEQ does not foresee that information from an exposure study would provide relevant input to the calculation of cleanup criteria. Exposure studies are not designed to establish safe levels of a contaminant in soil or groundwater. Because individual exposure studies are not designed to produce information about how chemicals cause health effects, how much soil a person ingests, or other appropriate factors necessary to calculate cleanup criteria, the studies do not provide relevant information for developing cleanup criteria.

In the specific case of exposure studies being undertaken in the Midland area, the confidentiality of information provided by study participants, and the fact that children are not included in the study group, inherently limit the utility of the study results for regulatory purposes related to generating cleanup criteria. The DEQ opposes the proposed change in Section 20120a(2) related to exposure studies because the reference is misleading regarding the probable relevance of exposure study data in the criteria-setting process. The DEQ, however does not oppose the study in and of itself, and believes that it may provide affected citizens with useful information regarding the routes of potential and likely exposure to dioxin.

Finally, it should be noted that the Senate defeated the motion to provide

the bill with immediate effect.

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