STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STEVEN E. CHESTER
DIRECTOR

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1. Bill Numbers and Sponsors:

Senate Bill 390, Senator Mike Goschka et al.
Referred to Committee on Natural Resources and Environmental Affairs

House Bill 4617, Representative John R. Moolenaar et al.
Referred to Committee on Government Operations

2. Purpose:

The bills would amend Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Part 201), to achieve four primary purposes:

- Require that property be 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.
- Exclude from the definition of "facility" all properties where required response activity has been undertaken.
- Substantially restrict the right of entry currently granted by statute to state officials for the purpose of investigating and responding to environmental contamination if the property in question is a "homestead."
- Require the use of certain types of information and risk assessment procedures if the information is "available and relevant."

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

The bills would have a number of negative impacts on Department of Environmental Quality (DEQ) programs. The principal impacts are:

- The bills 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-liable parties who are voluntarily investing in cleanup work as part of redevelopment projects.
- The bills would reduce the number of properties that are eligible for state and local financial incentives for redevelopment.
- The bills would forbid the DEQ from obtaining access under Part 201 to homestead properties, even if a property owner was willing to consent to such access, unless there was a current, imminent, and substantial threat to public health or the environment.

4. Introduced at Agency Request:

No.

5. Agency Support:

No.

6. Justification for the Department's Position:

The bills would increase the cost of cleanup for both the state and other parties.

- Site characterization costs could be dramatically increased by the requirements of these bills that data be collected for every individual parcel within an area that is affected by contamination in order to consider that parcel part of a "facility." These costs will be incurred not just for the required soil or groundwater sampling, but also the associated cost of securing access to property, restoring property damage that can occur as a result of sampling work, and so forth. In many cases where contamination has migrated over large areas, gathering parcel-by-parcel information would not in any way improve the quality of the cleanup decision-making process or affect a decision to provide financial incentives. It is essential that decisions about the extent of contamination are allowed to be made using sound scientific principles to extrapolate from available data in order to avoid wasteful expenditures.

- Consider, for example, a groundwater contamination 'plume' that flows under a highly developed urban area. By the terms of these amendments, it would be necessary to define the area requiring cleanup or the area eligible for redevelopment financial assistance, by sampling every parcel, even though it can be entirely reasonable to infer that contamination that is present at points A and B is also present between points A and B. These points could be a few hundred feet apart, but that distance could encompass many parcels. Negotiation of and compensation for access, sampling, laboratory analysis, and site restoration for the parcels between points A and B could cost hundreds of thousands of dollars, but the information gained would not affect the outcome. This situation also applies to soil that has been contaminated as a result of migration of contamination from other areas (e.g., through erosion, air deposition, or flooding).

The bills would slow progress in cleaning up contaminated sites.

- The need to secure access to and gather data from a significantly larger number of parcels would inevitably slow the progress of cleanup work across the state.

The bills would prevent many properties from being eligible for state and local financial incentives that support redevelopment.

- Eligibility for redevelopment financial assistance and incentives, such as tax increment financing and Single Business Tax credits, depend on property being a "facility" as defined in Part 201. To require every parcel that is part of a proposed development to be individually documented to be a facility is inefficient and unnecessary (see discussion in item above regarding cost of cleanup).

- In addition, the bills would exclude properties that are "remediated sites" from the definition of "facility." Because a "remediated site" would not be a "facility," it would not be eligible for tax increment financing. Significant contamination remains at many sites where "remediation" has been undertaken -- the remediation depends on exposure barriers and other measures to prevent unacceptable exposure and risk from occurring. Eliminating "facility" status for these sites may create a false impression that they are suitable for unrestricted use. Developers often elect to undertake remediation activities above and beyond those required to make use of the property, relying on tax increment financing to pay for these costs. Because this element of the proposed amendments eliminates a valuable incentive for developers to invest in remediation activities, the DEQ opposes it.

The bills would prevent the state from undertaking investigation and cleanup actions on a "homestead" regardless of whether the homestead property owner wanted that work to be done.

- The bills impose a blanket prohibition on access by state officials to "homestead" property unless there is a current imminent and substantial danger. This provision is crafted in a manner that appears to prohibit access even if a property owner were willing to grant that access voluntarily. This prohibition would prevent DEQ staff from accessing homestead property to replace contaminated drinking water wells, or collecting samples to evaluate risks and assess the need for cleanup work. It also makes it impossible to gather data to document that the threshold condition (imminent and substantial danger) is met. Coupled with the other provisions of these bills that would prevent any inference that property is a facility based on known conditions on nearby property, this access prohibition would effectively prevent state action to address contamination on most residential properties.

The bills would prevent prospective purchasers and lessees of contaminated property from getting important information about the contamination through disclosure provisions of Part 201.

- Part 201 requires the owner of property that is a "facility" to notify any person to whom interest in that property will be transferred of the fact that the property is a "facility" and, if any restrictions have been imposed on the property to prevent

unacceptable risks, to disclose information about those restrictions. The exclusion of "remediated sites" from the definition of "facility" would effectively undo the requirement to disclose information about land and resource use restrictions. Understanding these restrictions is essential knowledge for a prospective property owner or lessee. A property owner's obligation to make disclosure under this provision of Part 201 should be based on the information available to him or her at the time of the potential transfer. Such disclosure is good public policy, reduces the potential for purchasers to unknowingly buy property with environmental problems, and can protect both parties to a transaction from difficult entanglements.

- In addition, other laws (including the Seller's Disclosure Act, MCL 565.951 *et seq.*) require disclosure about environmental contamination in conjunction with the sale of real property. Any changes in the disclosure requirement under Part 201 would not affect disclosure obligations under other statutes. If one of the purposes of the bills is to change or eliminate disclosure obligations related to environmental contamination, the bills would not accomplish that objective.

"Due Care" obligations would no longer include compliance with land or resource use restrictions that were imposed on a property as part of a cleanup.

- Such restrictions are an important element of a land use based approach to cleanup (e.g., preventing residential or child care activities on property that has been cleaned up to industrial standards). Under Part 201, a person who owns or occupies property that is a "facility" is obligated to take steps to prevent unacceptable exposure and not exacerbate contamination. These requirements, referred to as "Due Care" obligations, are triggered by the owner's knowledge that his or her property is a "facility." Under these bills, a "remediated site" (e.g., one where land use restrictions were imposed) is no longer a "facility." Consequently, "Due Care" obligations no longer apply to that property, and a future owner could be compelled to comply with the restrictions only through enforcement of the restrictive covenant, and not as a matter of "Due Care" compliance. This undermines the "Due Care" provisions of Part 201, which were enacted in 1995 as a safety net to assure protective use of contaminated property when the liability scheme was changed to eliminate strict liability for all owners of contaminated property. It is important to consider that significant contamination remains at many sites where "remediation" has been undertaken – the remediation depends on exposure barriers and other measures to prevent unacceptable exposure and risk from occurring.

Unless samples had been taken on a particular property to confirm contamination, or the owner of that property agreed 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 can occur 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. This situation requires that individual property owners be objectively informed of the choice between allowing access for sampling and consenting to "facility" status based on other available information. They would also need to be informed that, if they decline to have their property sampled and decline to accept an inference that their property is a facility, the person responsible for contaminating their property would not be obligated under Part 201 to remediate the contamination. This appears to place an undue burden on property owners to evaluate complex technical and legal issues in order to trigger a liable party's obligations.

- The proposed amendments to Part 201 would have unacceptable negative impacts on public health and the environment by slowing the progress of cleanup and redevelopment projects, preventing cleanup activities by the state on "homestead" properties, and as a result of the other problems outlined in item 6. Any potential benefit to property owners who are concerned about the impacts on property value resulting from status as a "facility" are illusory. This 'stigma' is attributable to the presence of contamination, not from the fact that the property is referred to as a "facility." Under Part 201, once a property is cleaned up such that there are no restrictions or limitations on its future use, then the property is not contaminated and, by definition, is not a "facility." In addition, the bills would unreasonably increase the data-gathering burden to establish that property is a facility and prevent the use of reasonable scientific judgment and inference assessing whether property is a facility.

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

- Any change in Section 20120a(2) that is intended to affect cleanup plans currently under development may be ineffective because it is premature to assume that the cleanup plans will be proposed or approved under that section. One of the additions proposed in the bills relates to probabilistic risk assessment. The current statute already allows for probabilistic risk assessment to be used to develop site-specific criteria. No legislative change is required to address this.

- Another portion of the added language 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 be relevant in the criteria-setting process.

- Human exposure studies are designed to document whether chemical exposure has occurred within a particular study population and/or establishing activity patterns in study populations. Data from exposure studies can be useful in helping individuals make behavioral choices that reduce future exposures. Data from exposure studies may also provide information that is useful to the DEQ, Department of Agriculture, and the Department of Community Health when evaluating the concerns of individual residents who share their confidential data

with state officials. Some exposure study results may be useful for the DEQ and other agencies when preparing educational and informational materials about existing exposures. However, 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 in soil or groundwater. In contrast, the criteria-setting process identifies chemical concentrations in soil and water that will prevent negative impacts in exposed populations. Food chain pathways (e.g., consumption of contaminated meat and fish) are likely to be important in making these decisions. Cleanup criteria are calculated using mathematical equations -- they are not derived from observations of harm in human populations. Examples of input to criteria calculations include the cancer slope factor (a measure of the power of a substance to cause cancer) and the amount of soil ingested by children and adults each time they are exposed to contaminated soil. Because individual exposure studies are not designed to produce information about cancer slope factors, ingested soil, or other specific inputs to criteria calculation, 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 no children are included in the study group, inherently limit the utility of the study results for regulatory purposes. The DEQ opposes the proposed change in Section 20120a(2) related to exposure studies because it will be misleading about the probable relevance of exposure study data in the criteria-setting process.

7. State Revenue/Budgetary Implications:

The costs of cleanup and redevelopment projects undertaken by the state would increase by an unknown but potentially substantial amount (likely to be millions of dollars over the next five years). These cost increases would result from the need to characterize contamination on every property that is part of a large facility where the DEQ is assessing the need for response activity or documenting facility conditions to support actions that recover cleanup costs from liable parties. The bills could also have significant impacts on the costs associated with cleanups conducted by state agencies that are responding to contamination problems for which they are liable (state-owned facilities).

8. Implications to Local Units of Government:

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

- 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 these bills.

- 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:

None.

Steven E. Chester, Director
Department of Environmental Quality

RRD

DEQ

Department of Environmental Quality
Supplemental Advisory
Regarding Part 201 Requirements Applicable to Property Contaminated by Dioxin

All locations where dioxin concentrations exceed the residential cleanup requirements of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, PA 451 of 1994, as amended (NREPA), are a "facility" that is regulated under Part 201. Based on currently available data, the Department of Environmental Quality (DEQ) believes that it is appropriate to conclude that all property within the 100-year flood plain downstream of the City of Midland, that is frequently flooded by the Tittabawassee River, is a facility. Some important requirements of Part 201 that apply to owners and operators of property that is a facility are described below.

Disclosure that property is a facility: Section 20116 of the NREPA requires that a person who has knowledge or information that his or her property is a facility must disclose to any person acquiring an interest in the property the general nature and extent of contamination. Data documenting dioxin contamination above residential cleanup requirements are not available for all properties in the Tittabawassee River flood plain. However, the data from sampling conducted to date by the DEQ show contamination above residential criteria on virtually all properties within the 100-year flood plain that are frequently flooded. As a result, owners and operators of all properties that are frequently flooded are expected to disclose available information about dioxin contamination in the area in order to comply with Section 20116 of the NREPA, and to assure all potential owners learn about the existence of dioxin contamination. This will help reduce health and environmental risks that would otherwise result from the actions of uninformed property owners and operators. A person who has more specific information about his or her property must include that information in their disclosure. Property owners and operators may choose to conduct sampling on their property to supplement available data and information, and refine their disclosure obligations. There is a possibility that property at higher elevations within the general outline of the 100-year flood plain may not be a facility. However, in making a decision about whether higher areas are likely to be contaminated, the owner or operator must consider whether soil from lower areas in the flood plain has been relocated onto the higher elevation area, such that contamination is now present. If you need assistance in determining how the disclosure requirements apply to your property, contact the DEQ (see below for contact information).

"Due Care" responsibilities: Section 20107a of the NREPA imposes certain responsibilities on persons who own or operate contaminated property in order to assure that the use of that property occurs in a manner that protects public health and safety. The legal obligations for "Due Care" are limited when the contamination results from migration, as is the case with dioxin contamination on land in the Tittabawassee River flood plain. However, even if contamination is present as a result of migration, the landowner, business owner, or other person who has "Due Care" obligations must not exacerbate the existing contamination. In general, this means following the cautions and directives in the DEQ Soil Movement Advisory.

Restrictions on relocation of contaminated soil: See DEQ Soil Movement Advisory for details on these regulatory requirements.

For more information

Michigan Department of Environmental Quality
Remediation and Redevelopment Division
Saginaw-Bay District Office
503 North Euclid Avenue, Suite 9
Bay City, MI 48706
989-686-8025