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House Legislative Analysis Section

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Senate Bill 1020 as passed by the Senate
First Analysis (9-26-90)

Sponsor: Sen. Vernon J. Ehlers
Senate Committee: Natural Resources & Environmental Affairs
House Committee: Conservation, Recreation, & Environment

THE APPARENT PROBLEM:

Environmental officials have identified up to 2700 sites in Michigan that are contaminated with hazardous substances. The Quality of Life Bond Proposal approved in 1988 includes $425 million devoted exclusively to toxic waste cleanup and reflects the commitment of the state's citizens to a cleaner environment. However, many feel that more should be done to make those who cause contamination demonstrate their commitment to the environment by taking responsibility for their actions and cleaning up their contaminated sites.

Currently, the Department of Natural Resources (DNR) has no direct, expedited means to order a polluter to clean up a site of contamination. The department has to rely on CERCLA (the Federal Comprehensive Environmental Response, Compensation, and Liability Act) and a patchwork of state laws to force a polluter to clean up a site. When a site of contamination is found, and the potentially responsible party refuses to clean up the site, the department has to file a complaint under the Water Resources Commission Act (or a similar law) in order to show that a resource is being contaminated and to force the polluter to start cleanup. While the department is in court trying to convince a federal judge to order the responsible party to clean up the site, contamination can spread. The damage to the environment from the additional spread of contamination may increase cleanup costs. Often a federal court order to clean up a site is required before a responsible party will begin cleanup at a contaminated site. Under CERCLA, the department may recoup the money which it has spent to clean up a site. However, it can take several years for the department to win a court battle to receive payment for cleanup of a site. Therefore, the department often enters into a consent agreement with the responsible party in which it shares some of the costs for cleanup in order to expedite cleanup of the site. Thus, it can take several years, even decades, for a site to be cleaned up, and the taxpayers of the state are often stuck with at least part of the cleanup costs for the sites.

One of the problems that both business and the state face is the exorbitant costs for cleanup. The costs of cleaning up all of Michigan's known sites is estimated to be between $3 and $8 billion. The costs for cleaning up one site can be millions of dollars. Many businesses refuse to undertake cleanup because the costs would drain away substantial amounts of money or force them into bankruptcy. Others refuse because either they did not cause the contamination but are held responsible because they own the land upon which the contamination occurred, or they are responsible for only a portion of the contamination but are held liable for the entire cost of cleanup. In addition, many businesses are wary of lending money to, or locating, businesses at sites where contamination may have occurred for fear of being held responsible for possible future cleanup costs. Because of this, areas which have been previous sites of industrial or manufacturing facilities are expected to experience less development.

Two bills, House Bill 5878 and Senate Bill 1020, have been introduced to expedite cleanup of sites of contamination by providing the DNR with enforcement tools necessary to compel compliance with the act and by providing penalties and positive incentives to encourage polluters to pay for, and promptly implement, cleanup.

THE CONTENT OF THE BILL:

Senate Bill 1020 and House Bill 5878 would amend the Environmental Response Act (MCL 299.601 et al.) to allow the DNR to issue administrative orders to require response activities, allow a person subject to such an order to petition for judicial review, establish an allocation process for attributing liability for cleanup of a site, allow the DNR to take or approve response activities and specify minimum goals for remedial actions and response activities, allow the DNR access to property and information and permit public access to information, and shift authority for coordination and enforcement of the act from the governor's office to the department. (For more information about the provisions of House Bill 5878, see the House Legislative Analysis Section analysis of House Bill 5878, dated 9-12-90.)

Legislative findings and declarations. The act lists certain legislative findings and declarations concerning response activities. Senate Bill 1020 would amend this section to add other findings and declarations, including that there is a need for additional administrative and judicial remedies to supplement existing statutory and common law remedies, that the responsibility for the cost of response activities pertaining to a release or threat of release of a hazardous substance and repairing injury, destruction, or loss to natural resources caused by that release should not be placed upon the public except under certain circumstances and that response activities should be undertaken by persons deemed liable for the activities under the act. In addition, the bill would specify that the act is intended to provide remedies for facilities posing any threat to the public health, safety, or welfare or to the environment, regardless of whether the release or threat of release of a hazardous substance occurred before or after the effective date of the act, and for this purpose the act would be given retroactive application. The bill would also specify that if the state or a local unit of government was liable for a release requiring response activity, the act would be enforced by the attorney general's office and the

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Department of Natural Resources in the same manner as it would be for anyone else.

Environmental response lists. The act requires the governor's office to submit two listings to the legislature in November of each year, one identifying all known sites in order of relative risk that require further evaluation and any interim response activity and the other identifying sites in order of risk where response activities will be undertaken by the state. The act also requires the governor's office to annually identify sites for the purpose of assigning a priority score for cleanup and to develop a numerical risk assessment model for assessing the hazards presented by each site. The bill would transfer these responsibilities to the DNR. Upon discovery of a site (instead of annually) the department would assign a priority score for response activities. Sites would retain the same score assignment unless a substantial body of data was provided to the department indicating that a substantial change in the score was warranted and rescoring was requested during the annual public comment period following the publication of the list, or the department determined that rescoring was appropriate. The act requires development of a risk assessment model in order to assess the hazards presented by each site. Under the bill, at least one risk assessment model would be developed for assessing the hazards presented by each site and would be reviewed annually by the department to identify potential improvements in the model.

The bill would require the submission of one list to the legislature in November of each year. The list would include all sites and categorize the sites according to the response activity at the site at the time of listing, indicating whether the owner of a site was a governmental entity. The DNR would maintain and make available to the public upon request records regarding sites where remedial actions had been completed. The bill would require the department to report at least annually to the legislature and the governor those sites that had been removed from the list and the source of funds used to undertake the response activity at each of the sites. If the DNR had information identifying the owner of property that could be listed as a site after the effective date of the bill, the department would have to make reasonable efforts to notify the owner of the property in writing prior to including the site on the list.

A site would be removed from the list when the department's review of a site showed that it did not meet the criteria specified in the act's rules. However, a site could not be removed from the list until response activity under the act was complete. A person could request removal of a site from the list by submitting a petition to the department. A site could not be removed for the list until completion of response activity. Within 60 days after a determination that a petition was administratively complete, the department would notify the petitioner of its intent concerning removal of the site from the list. Removal would be conducted as part of the process described in rules under the act. However, if the department concluded that a site should be removed from the list, it would have to prepare a notice of intent and provide for public comment. The department would have to notify the person who requested removal of the site from the list of the decision within 45 days of the end of the public comment period provided for by the bill.

The Environmental Response Fund. Under the bill, the fund would include the interest and earnings of the fund and money collected by the attorney general's office in actions filed under the act, collected by the state under the act, or collected as a result of a civil action under the bill. The balance of the fund at the close of the fiscal year would be carried forward to the following year.

Schedules for remedial action. The DNR would develop a tentative schedule for submission of work plans for response activities. Each plan would include a schedule for submitting a proposed remedial action plan for a facility and a schedule for implementation of the plan. A person could submit a plan at any time in advance of the date required by the department. The department would either approve the plan or suggest changes that would result in approval of the plan. Upon resubmission of a plan with recommended changes and approval of the plan, the responsible party could implement the approved remedial action plan. If the responsible party rejected the department's suggested changes, the two parties could work out their disagreements or submit items of difference to the Science Advisory Council. If the two parties were unable to agree about the items of difference, the department would notify the Office of Environmental Cleanup Facilitation.

Office of Environmental Cleanup Facilitation. The office would be created in the Department of Management and Budget and would assist in the resolution of disputes over the development of remedial action plans. The office would contract with impartial, qualified facilitators or with an organization that could supply such individuals who were capable of assisting in dispute resolution concerning remedial action plans. The office would randomly assign a facilitator to prepare a detailed list of items of difference between the DNR and the responsible party. The facilitator would prepare the items of difference within 30 days after being assigned and would forward the list to the Science Advisory Council. The department and the party would each pay their costs associated with facilitation unless otherwise agreed upon.

The Science Advisory Council. The council would be created under the office to provide recommendations for resolving the differences between the department and the responsible party. Both the department and the party could submit to the council written statements of up to 20 pages for each item of difference. Interested members of the public could also submit written statements of up to 20 pages for each item of difference. The council would forward its recommendations on the items within 90 days of receiving the written statements to the department, the facilitator and the party. The recommendations would become part of the administrative record concerning the site. The council would only make recommendations on the scientific and technical issues in dispute. Upon receipt of the recommendations, the facilitator would attempt to facilitate an agreement between the department and responsible party regarding the contents of the remedial action plan. If the department and the party continued to disagree, the department could approve a remedial action plan that included the recommendations of the council, unless the department prepared an alternative remedial action plan. If the department did not approve a remedial action plan, the party could implement a plan that included all of the recommendations of the council and was otherwise in compliance with the bill and the act. The plan would be considered an approved plan. If a responsible party refused to implement a plan that included the recommendations endorsed by a majority of the council, then the person would not participate in the allocation process. In addition, if a court later upheld the contents of the approved remedial action plan, the court would assess

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the full costs of facilitation and enforcement costs. However, if the DNR approved a plan that did not contain the recommendations endorsed by the council and a court did not uphold the contents of the plan, the department would pay the full costs of facilitation, court costs and the reasonable attorney fees for the responsible parties. Further, if the action was for cost recovery of response activities at a facility in which remedial action had been completed, the court would only assess against the responsible party the cost of remedial action that should have been undertaken. There would be a rebuttable presumption in any court proceeding that the recommendations of the council on the items of difference were supported by a preponderance of scientific evidence.

The council would consist of seven individuals appointed by the governor with the advice and consent of the Senate, who had experience in the areas of toxicology, environmental engineering, biology, environmental chemistry, hydrogeology, soil science, and statistics. For six months after serving on the council, an individual could not be employed by the department, a responsible party, or a consulting firm associated with the department or a party. Members who made recommendations regarding the contents of a plan could not have any present or past personal, contractual, financial, business, or employment interest in matters related to the persons that had disputes before the council.

Grant programs. The department could develop rules to establish a program to provide grants to individuals who could be adversely affected by a hazardous substance from a site on the Environmental Response List and who lived within two miles of the site. The grants would be provided to enable recipients to obtain expert advice and technical assistance regarding response activities at sites that affect them. Grants would be provided subject to availability of appropriations from the general fund.

Consent agreements. The director of the DNR and the attorney general could enter into a consent agreement with a person held liable under the act if the director and the attorney general determined that the person would properly implement response activity and the agreement would be in the public interest, would expedite effective response activity, and would minimize litigation.

Civil actions. A person whose health or enjoyment of the environment was adversely affected by a release or threat of release, by a violation of the act or its rules, or by the failure of the directors of the Departments of Natural Resources, Public Health, Agriculture or State Police to perform a nondiscretionary act or duty, could commence a civil action against a person who was potentially liable for a release or who was alleged to be in violation, or against one or more of the directors. The bill would require notification of intent to sue to the potential defendants, the department and the attorney general's office. The bill would also establish a limitation period for filing actions under the bill.

Evaluation. Within three years after the effective date of the bill, the DNR would report to the legislature on the effectiveness of the dispute resolution process.

Covenant not to sue. The state could provide a person with a covenant not to sue concerning any liability to the state, including future liability, resulting from a release or threatened release because of a remedial action, under certain circumstances. A covenant not to sue concerning future liability to the state would not take effect until the department certified that remedial action had been completed at the facility that was the subject of a covenant. The covenant would be subject to the satisfactory performance by a person of the obligations under the agreement. However, covenants could include an exception that allowed the state to sue under certain circumstances concerning future liability if the liability arose out of conditions that were unknown at the time the department certified that remedial action had been completed.

A covenant not to sue could be provided to a person who proposed to redevelop or reuse a facility if the covenant was in the public interest, would yield new resources to facilitate implementation of response activity, and would expedite response activity; if the redevelopment of the property would not exacerbate current problems or present other health risks; and if the proposal had economic development potential. A person attempting to redevelop a site would have to demonstrate financial capability to carry out the project, and that there was not affiliation with a responsible party at the facility, and that redevelopment would not result in later releases. A covenant not to sue under this provision would only address past releases, and would provide for an irrevocable right of entry to the department, its contractors, or other persons performing response activity related to a release or a threatened release.

Effective dates and repeals. Sections of the bill regarding the schedule for submitting work plans for response activities and remedial action plans, the establishment of the Office of Environmental Cleanup Facilitation, and the Science Advisory Council and its duties would be repealed five years after the effective date of the bill.

Senate Bill 1020 is tie-barred to House Bill 5878 and would take effect July 1, 1991.

MCL 299.601 et al.

FISCAL IMPLICATIONS:

Fiscal information is not available. (9-26-90)

ARGUMENTS:

For:

Cleanup of contaminated sites is one of the most important environmental issues facing the state and the nation. Businesses have to understand that if they make a mess of the environment, they have to clean it up, and that the burden for cleaning up business' mistakes will not rest on the taxpayers shoulders any longer. Senate Bill 1020 and House Bill 5878 will address this issue by shifting the burden for the costs of cleanup to polluters, by establishing deadlines in order to expedite the cleanup process, and by establishing allocation and mediation procedures to help businesses and the state avoid lengthy litigation. The package is a balanced measure which includes both positive incentives for polluters to clean up and penalties for polluters who do not voluntarily take responsibility for their mistakes. The package provides positive incentives in the form of the allocation and mediation processes, loans to small businesses, limitation of liability for commercial lending institutions and exemption from liability for innocent victims who end up with a contaminated site. Penalties include the possibility of assigning liability on a strict, joint and several basis for parties who are potentially responsible for contamination — one person could be held responsible for the entire costs of cleanup even if the person was not entirely responsible for the pollution. Other

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measures include provisions allowing the DNR to order cleanup, establishing stiff fines and penalties for those who refuse to pay for cleanup, and providing for liens against contaminated property where the state has done the cleanup. In addition, the package establishes review procedures by creating a Citizens Review Board and by deliberately repealing the mediation process so that each aspect of the package will be evaluated for effectiveness and the legislature can address provisions that do not work as intended.

The package will also address several problems that currently exist regarding cleanup of contaminated sites. For example, many feel that current laws regarding the cleanup of contaminated sites are not applied equitably between governmental entities and private entities. The package will require equal application of cleanup laws. Another problem involves the lack of DNR access to suspected sites of contamination. Some feel that businesses often have advance warning of DNR visits and take the opportunity to cover up illegal activity. The package will help provide easier site access to the department without advance notice to businesses. In addition, many citizens feel that they have no access to information about contamination that may affect them. The package provides citizens with greater access to records on contaminated sites and allows them to file a civil suit if there is a threat to their health or enjoyment of the environment.

POSITIONS:

The following organizations took positions on House Bill 5878 as it was reported from the House Committee on *Conservation, Recreation and Environment* on 9-11-90. (The House committee version of House Bill 5878 was virtually identical to the Senate-passed versions of Senate Bill 1020 and House Bill 5878.)

Clean Water Action supports the bill. (9-11-90)

The Michigan Environmental Council supports the bill. (9-11-90)

The Michigan Municipal League supports the bill. (9-11-90)

The Public Interest Research Group in Michigan (PIRGIM) supports the bill. (9-11-90)

The Sierra Club—Mackinac Chapter supports the bill. (9-11-90)

The Michigan Association of Counties supports the bill but strongly urges the legislature to adopt the funding mechanisms for the bill. (9-11-90)

The Greater Detroit Chamber of Commerce does not oppose the bill. (9-11-90)

The Michigan Bankers Association does not oppose the bill. (9-11-90)

The National Federation of Independent Business does not oppose the bill. (9-11-90)

The Michigan Association of Home Builders does not support or oppose the bill. (9-11-90)

The Small Business Association of Michigan does not support or oppose the bill. (9-11-90)

The Michigan Institute of Laundering and Drycleaning takes no position on the bill. (9-11-90)