House Legislative Analysis Section

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House Bill 5878 as enrolled
Sponsor: Rep. Tom Alley

Senate Bill 1020 as enrolled
Sponsor: Sen. Vernon J. Ehlers

Second Analysis (10-17-90)

House Committee: Conservation, Recreation & Environment
Senate Committee: Natural Resources & Environmental Affairs

THE APPARENT PROBLEM:

Environmental officials have identified up to 2,700 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 BILLS:

House Bill 5878 and Senate Bill 1020 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. The bills are tie-barred to each other and would take effect July 1, 1991.

Senate Bill 1020.

Legislative findings and declarations. The act lists certain legislative findings and declarations concerning response activities. The bill 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

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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 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,

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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 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.

House Bill 5878.

Determination of the need for response activity. The directors of the DNR, the Department of Public Health, the Department of Agriculture and the Department of State Police could require a person to furnish certain information in order to determine the need for response activity, or to select or take a response activity or other enforcement. The information would include the identity, nature and quantity of materials that were of concern, the nature or extent of a release or threat thereof at or from a facility, and the ability of the person to pay for or perform the response activity. If there was reasonable basis to believe that there could be a release or the threat of release, the directors or their designees could enter any public or private property at all reasonable times for purposes specified under the bill. Information obtained would be available to the public under the Freedom of Information Act. However, a person providing information could separately submit information felt to be trade secrets or of a personal nature. The attorney general's office could petition for warrants and commence civil actions in order to enforce the information gathering and entry authority provided for the department under the bill. If there was reasonable basis to believe there could be a release or the threat of release, the court would require

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compliance with the requests unless the defendant established that the request was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. The court could also assess a civil fine of up to $25,000 for each day of noncompliance in a civil action brought to compel compliance with a request for entry or information.

Administrative orders. If the department felt that the health, safety, or welfare of the public or the environment was imminently and substantially endangered, the department could issue administrative orders as necessary to protect the public and the environment. The department could also issue an order requiring a responsible party to perform response activity or any other action required by the bill. Within 30 days after issuance of an order, a person to whom the order was issued would indicate in writing whether he or she intended to comply. Violation of an order or failure to comply without sufficient cause would result in liability for a civil fine of up to $25,000 for each day of continued violation or failure to comply, or would result in liability for exemplary damages in an amount equal to three times the amount of any costs of response activity incurred by the state as a result of a failure to comply with an administrative order.

A person who complied with the terms of an order, but felt that the order was arbitrary and capricious or unlawful, could petition the department within 60 days after completing the action required under the order for reimbursement from the Environmental Response Fund for the costs of the action plus interest and for the costs incurred in seeking reimbursement. If the department refused reimbursement, the petitioner could file an action against the department within 30 days of refusal.

Remedial action and pilot projects. The department could take response activity or approve of response activity proposed by a person that was consistent with the act and rules promulgated under the act. The bill would establish the goals of remedial action taken under the bill. The department would encourage the use of innovative cleanup technologies and would establish three pilot projects before July 1, 1995 in order to demonstrate innovative cleanup technologies at facilities where money from the Environmental Response Fund was used.

Before the department granted approval of a proposed plan for remedial action that was not interim response activity at a facility included on the Environmental Response List that required the use of money from the fund, the department would meet public notification and review requirements established under the bill. In addition, at a facility where state funds would be spent to plan or implement a remedial action plan or where there was significant public interest, the local governmental unit or 25 citizens of the local unit could request a public meeting with the department and would meet with the department within 30 days of the request. However, the persons requesting the meeting would publicize and provide accommodations for the meeting.

Owner/operator responsibilities. An owner or operator who obtained information that there could be a release at a facility would immediately take appropriate action, consistent with applicable laws and rules to do the following:

- confirm the existence of the release;
- determine the nature and extent of the release;
- report the release to the department within 24 hours;
- immediately stop or prevent the release at the source;
- immediately identify and eliminate any threat of fire or explosion or any direct contact hazards;
- immediately initiate removal of a hazardous substance that was in a liquid phase, that was not dissolved in water, and that had been released.

A person holding an easement interest in a portion of a property, and who had knowledge that there may be a release within that easement, would report the release to the department within 24 hours after obtaining knowledge of the release. However, reporting requirements would not apply to a permitted release or a release in compliance with applicable federal, state, and local air pollution control laws.

Persons who were notified by the department as being potentially liable under the bill would be required to take additional actions. Once the department determined that a person had completed response activity at a facility according to an approved remedial action plan prepared and implemented in compliance with rules promulgated under the bill, the department could (if requested) execute and present a document stating that all response activities required in the plan had been completed.

A person in charge of a facility from which a hazardous substance was released and was not reported, or who submitted false or misleading information in a report, would be subject to a civil fine of up to $25,000 for each day in which the violation occurred or failure to comply continued. If the state or a local unit was requested by the department to undertake response activity or emergency action due to a release or threat of a release on public property, and the state or local unit incurred expenses in taking the actions, the expenses of the state or local unit would be reimbursed from the Michigan Environmental Assurance Fund if legislation creating the fund was enacted into law and if other requirements detailed in the bill were met.

Liability. If a release or the threat of release resulted in response activity costs the following people would be liable:

- the owner or operator of the facility;
- a person who owned or operated the facility at the time of disposal of the hazardous substance;
- a person other than those named above who owned or operated the facility since the time of disposal of the substance;
- a person who arranged for disposal or treatment of the hazardous substance, or arranged for transport for disposal or treatment of a hazardous substance owned or possessed by the person or any other person, at the facility owned or operated by another person and containing the hazardous substance;
- a person who accepted any hazardous substance for transport to the facility.

A person would be liable for the costs of response activity incurred by the state and any other person that was consistent with the act's rules, including all costs of response activity incurred by the state or another person prior to the promulgation of rules regarding response activity, and damages for the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the injury, destruction or loss. Recoverable costs would include the costs of response activity reasonably incurred by the state prior to the development of rules relating to the selection and implementation of response activity under the bill, excepting the cases where cost recovery actions had been filed before July 11, 1990, and any other necessary costs of response activity reasonably

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incurred by any other person prior to the development of rules Persons challenging recovery of these costs would have the burden of establishing that the costs were not reasonably incurred under the circumstances that existed at the time A person would not be required to undertake response activity for a permitted release Recovery by any person for response activity costs or damages resulting from a permitted release would be according to other applicable law, in lieu of the bill The bill would require the department to bear the burden of proof in establishing liability under this provision

If the director of the DNR determined that there could be imminent and substantial endangerment to the public health or welfare or the environment because of a release or the threat of a release, the attorney general's office could bring an action against a person to secure the relief that could be necessary to abate the danger or threat

Division of liability If two or more persons (multiple parties) acting independently caused a release or the threat of a release that resulted in response activity costs, or damages for injury to, destruction of, or loss of natural resources, and there was a reasonable basis for division of harm, each person would be subject to liability for the portion of total harm that the person caused If multiple persons contributed to an indivisible harm that resulted in response activity costs, or damages for injury to, destruction of, or loss of natural resources, each person would be subject to liability for the entire harm A person could seek contribution from any other person who was or could be liable for a release during or following a civil action brought under the act However, a person participating in the allocation process would not be subject to a contribution action during the pendency of the process Nothing in the bill would diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under the act If the court determined that a part of a person's share of liability was uncollectible, the court could reallocate the uncollectible amount among the other persons who were liable

A person who resolved liability to the state in an administrative or judicially approved settlement would not be liable for claims for contribution regarding matters addressed in the settlement In addition, the person could seek contribution from any person not a party to the settlement However, if the state obtained less than complete relief from a person who had resolved liability to the state, the state could bring an action against any other person liable under the bill who had not resolved liabilities

Transfer of property, indemnification and hold harmless agreements An indemnification, hold harmless, or similar agreement or conveyance would not be effective to transfer liability from one person to another However, the bill would not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under the act

A person who knew that a parcel of property was contaminated could not transfer an interest in the property without providing written notice to the purchaser that the property was contaminated The written notice would be recorded with the register of deeds in the same county where the instrument conveying the interest in real property was recorded Upon completion of all response activities, the owner could record certification that all response activity required by the DNR in the approved remedial action plan had been completed

Persons who would not be liable A person would not be liable for a release or threat of release if the person established that the release or threat was caused solely by an act of God or war, or an act or omission of a third party (other than an employee or agent of the defendant, or other than a person whose act or omission occurred in connection with a contractual relationship with the defendant) The bill specifies that a defendant would have to establish that due care was exercised with respect to the hazardous substance and that precautions were taken against foreseeable acts or omissions of a third party and their consequences when using a third party defense

The bill would define the term ' contractual relationship" to include land contracts, deeds, or other instruments transferring title or possession unless certain circumstances existed For example, if the property upon which the facility was located was acquired by the person after the disposal or placement of the hazardous substance at the property, or the person presented evidence that he or she had no reason to know that a hazardous substance was disposed on the property, such a case would not be considered to be a "contractual relationship" incurring liability When establishing that a defendant had no reason to know about a hazardous substance, the defendant would be required to show that he or she undertook all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability However, if a defendant obtained actual knowledge of a release or threat of release at a facility, when the defendant owned the real property upon which the facility was located, and then transferred ownership of the property without disclosing the knowledge, the defendant would be liable In addition, the defense of not knowing that a hazardous substance was subject to release would not be available to the defendant

The state, local governments, and lending institutions The state or a local government would not be liable for costs or damages as a result of actions taken in response to a release or threat of release generated by or from a facility A commercial lending institution that did not participate in the management of a facility and acquired the facility for the purpose of realizing a security interest would not be liable if the property was a residential or agricultural property or the commercial lending institution acquired ownership or control of the property involuntarily through a court order or other involuntary circumstance, or the institution would be liable only because it had once owned a facility but did not own the facility at the time of disposal of a hazardous material and had acquired ownership or control of the property prior to August 1, 1990

If a commercial lending institution performed a foreclosure environmental assessment and learned that there was a release or threat of release, the institution could not dispose of the property unless the institution provided the department with a complete copy of the results of the foreclosure environmental assessment, and the institution entered into an agreement with the department regarding disposition of the property If the department and the institution were unable to reach an agreement, the institution could only transfer the property to the state A lending institution that established that it had met the requirements of this provision would not be liable with respect to the property

Generally, an institution that had not participated in the management of a property prior to assuming ownership or control of property as a fiduciary under state or federal banking codes would not be liable as an owner or operator

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of the property, unless the institution exercised sufficient involvement to control the owner's or operator's handling of a hazardous substance or the institution, its agent, employee, or a person retained by the institution caused or contributed to the release or threat of release.

Penalties. In addition to other relief authorized under the bill, the attorney general's office could commence a civil action on behalf of the state seeking one or more of the following:

- temporary or permanent injunctive relief necessary to protect the public health, safety, or welfare, or the environment from the release or the threat of release of a hazardous substance;
- recovery of state response activity costs;
- damages for the full value of injury to, destruction of, or loss of natural resources resulting from a release or threat of release;
- a declaratory judgment on liability for future response costs and damages;
- a civil fine of up to $1,000 for each day of noncompliance with a written request of the department without sufficient cause (a fine imposed under this subdivision would be based on the seriousness of the violation and any good faith efforts of the person to comply with the request of the department);
- a civil fine of up to $10,000 for each day of violation of the act or a rule promulgated under the act;
- a civil fine of up to $25,000 for each day of violation of an administrative or judicial order;
- any other relief necessary for enforcement of the act.

A plaintiff would provide the attorney general's office with a copy of the complaint at the time of filing. State courts would not have jurisdiction to review challenges to response activity selected or approved by the department, or to review an administrative order in any action except under circumstances detailed in the bill.

Liability for each release or threat of release would not exceed the total of all the costs of response activities, fines, and exemplary damages, plus $50 million damages for injury to, destruction of, or loss of natural resources resulting from a release or threat of release. However, the liability of a person would be the full and total costs and damages when a release or threatened release of a hazardous substance was the result of willful misconduct or gross negligence of a defendant, or the primary cause of the release or threat of release was a knowing violation of applicable safety, construction, or operating standards or regulations.

The bill would establish felony penalty provisions for violations of the federal, state, or local law provisions in regards to permits or licenses. The penalties only apply to a release that occurred after the effective date of the bill. The bill would establish a series of fines for reckless behavior involving releases and would allow the DNR to establish an award of up to $10,000 for individuals providing information leading to an arrest and conviction of intentional violators of the bill.

Liens. All unpaid costs and damages for which a person was liable would constitute a lien in favor of the state upon a facility owned by the person. In addition, upon order of a court, all unpaid costs and damages for which a person was liable could constitute a lien in favor of the state on any other real or personal property owned by the person. However, assets of a pension plan or individual retirement account would not be subject to a lien. Nor would assets held expressly for the purpose of financing a dependent's college education, or an amount up to $500,000 in nonbusiness real or personal property or access thereto with not more than $25,000 of this amount in cash or securities. A lien under this section of the bill would have priority over all other liens and encumbrances except those recorded before the date the lien under the bill was recorded. If the state incurred costs for response activity that increased the market value of a site of release or threat of release, the increased value caused by the state funded response activity would constitute a lien in favor of the state upon the property. Liens would continue until the liability for the costs and damages was satisfied or resolved or became unenforceable through operation of the statute of limitations. The department would file a notice of release of lien upon satisfaction of the liability secured by the lien.

Response activity contractors. A response activity contractor would not be liable to any person for injuries, costs, damages, expenses, or other liability. This exemption would not apply if a release or threatened release was caused by conduct of the response activity contractor that was negligent, grossly negligent, or that constituted intentional misconduct. In addition, the bill would not affect the liability of a person under a federal, state or common law warranty. Nor would the bill affect the liability of a response activity contractor employer to an employee. A state or local government employee who provided services relating to a response activity would have the same exemption from liability as provided to the response activity contractor.

Orphan shares. This section would apply only to a facility where two or more persons that could be liable for response activity were identified by the DNR. However, if only one responsible party was identified for a facility, the person could submit a written request within fourteen days after a remedial action plan was approved to the orphan share administration to commence the allocation process.

After a remedial action plan had been approved for a facility, the department would notify each person that could be liable for the response activity and the Orphan Share Administration (established in Senate Bill 981) of the approval of the remedial action plan for the facility. The department would also send the administration a list of the names and addresses of all identified persons that could be liable for response activities, and if requested, the department would provide the administration with all information in the possession of the department that was related to the release. A responsible party could petition the Orphan Share Administration to commence the allocation process prior to the approval of the remedial action plan. Within seven days after receipt of the notice of approval of a remedial action plan for the facility, the Orphan Share Administration would notify each of the potential responsible parties of the opportunity to participate in the allocation process. A person intending to participate in the process would have to notify the administration within 14 days of receipt of the notice from the administration. Negotiations to determine the percentage share of response costs of each person would be completed within 21 days after the administration received the last notice of intent to participate, unless all of the participants agreed to extend the negotiations. An extension of the negotiations would not extend the time limits for allocating response activity costs. Once an agreement was reached, a copy of it would be sent to the director of the DNR and the attorney general's office. The attorney general's office could enter into a consent judgment with one or more of the participants in the

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allocation process providing for implementation of the remedial action plan, payment of response costs, and resolution of other potential liability under the bill, including liability for damages and civil fines.

Allocation review panels. If the responsible parties and the Orphan Share Administration did not agree within the negotiation period to a complete percentage allocation of response costs in writing, the Orphan Share Administration would convene an allocation review panel to determine an allocation of the percentage share of response costs of each person. Regardless of when the allocation process commenced, the allocation review panel would be convened no later than 50 days after notification of the approval of the remedial action plan was sent to the parties. Members of the panel could not have a personal or financial interest in the outcome of the allocation process. Within 90 days after notification, the allocation review panel would determine the allocation of the percentage share of response costs of the "orphan share" and the costs of each person that could be held liable for the release. A copy of the determination would be forwarded to the director of the DNR, the attorney general's office, and each participant in the process. Within ten days of receipt of the allocation determination, each participant would notify the Orphan Share Administration of acceptance or rejection of the panel's determination. The administration could reject the panel's determination if it believed that it created a substantial risk to the fiscal integrity of the Michigan Environmental Assurance Fund (created in House Bill 5808). If the administration rejected the allocation review panel's determination it could negotiate with other participating persons to attempt to arrive at an alternative percentage allocation of response costs that was agreeable to all of the participants.

The attorney general's office could enter into a legally enforceable consent judgment with a responsible party providing for implementation of the remedial action plan, payment of response costs, and resolution of other potential liability. However, this provision would not limit the authority of the department or the attorney general's office to enter into an agreement in the public interest to resolve the liability of a person. Allocation of percentage shares of response costs would not be admissible as evidence in a proceeding except to prove the financial obligations under the terms of an allocation agreement of a person who had limited his or her liability, and a court would not have jurisdiction to review an allocation or the procedures used to determine an allocation. In addition, the allocation or the procedures used to determine an allocation would not constitute an apportionment or other statement on the divisibility of harm or causation. The liability of a person who accepted and paid the allocated share of response activity costs and who paid the allocated share according to a consent order or an administrative order which resulted in implementation of a remedial action plan approved by the department would with respect to matters covered by the order be limited to that person's allocated share of response costs. If a court found that an administrative order was not arbitrary and capricious, the court would assess against the petitioner the full costs of defending this proceeding, including attorney fees. If a responsible party participated in the allocation process, the director and the attorney general's office could not commence an action to order interim response or penalty provisions for 120 days after the party had been notified of the approval of a remedial action plan. Extensions of the moratorium could be provided for an additional 30 days. When the allocation process was completed, the administration would contribute the percentage of costs assigned to the orphan share plus the percentage share assigned to persons who were liable but refused to participate in the allocation process or remedial action, or to pay on the basis of their allocated share. The attorney general's office could file an action to recover all costs incurred by the orphan share administration from parties who refused to participate in the allocation process or in the remedial action on the basis of their allocated share.

If legislation creating the Michigan Environmental Assurance Fund was not enacted the allocation process would be the same except as follows. The Orphan Share Administration would be created within the Department of Management and Budget to administer the allocation process. Upon completion of the allocation process, the percentage allocated to the orphan share and the portion allocated to a person that was uncollectible for a facility would be funded in full by the other responsible parties in proportion to the percentage that each person was assigned according to the allocation process. The attorney general's office could enter into a consent order with one or more of the participants in the allocation process who were in agreement with the determination of the allocation review panel providing for implementation of the remedial action plan, payment of response costs, and resolution of other liability under the act. Under this provision, the liability of a party who accepted and paid the allocated share or response activity costs as determined through a voluntary agreement, and who by consent order or administrative order paid the portion of the orphan share and the uncollectible portion which resulted in implementation of an approved remedial action plan, with respect to matters covered by the order would be limited to the person's allocated share of response costs. The attorney general could file an action to recover all costs incurred by the orphan share administration from persons who refused to participate in the allocation process or in the remedial action on the basis of their allocated share. This provision would be repealed upon the effective date of the section which assumed creation of the fund.

Loans to small businesses. The administration could establish a loan program to provide loans to small businesses that were potentially responsible parties. A loan would be provided to assist a small business in fulfilling its responsibilities in undertaking a response activity in compliance with the bill, the act and its rules, unless the person knowingly caused the release. The bill would define the term "small business" to mean a business concern incorporated or doing business in the state that had a net worth of less than $10 million, including the affiliates of the business concern that were independently owned and operated.

Citizens Review Board. Within two years after the effective date of the bill, a citizens review board would be established to submit to the standing committees of the Senate and the House responsible for environmental issues a review of the bill and recommendations for amendments. The board would consist of six members of the public and the director of the Legislative Service Bureau Office of Science and Technology, who would serve as the nonvoting chairperson. Three members of the board would represent the environmental community and three would represent business interests or local governmental units, or both. Two members would be appointed by the governor, two by the Speaker of the House of Representatives and two by the Senate Majority Leader. The board would issue its report within six months after its creation and would disband.

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Funding for the board would be provided from the Environmental Response Division and could not exceed $100,000.

Effective dates and repeals. Sections regarding the Orphan Share Administration, allocation review panels, and loans to small businesses that assumed the creation of the Michigan Environmental Assurance Fund would only take effect when the Michigan Environmental Assurance Act (Senate Bill 981) and its funding mechanism (House Bill 5808) were enacted and the Michigan Environmental Assurance Corporation filed a certification with the secretary of state's office that the corporation was funded and prepared to take on its responsibilities.

Sections regarding the Orphan Share Administration, allocation review panels, and loans to small businesses that did not assume creation of the Michigan Environmental Assurance Corporation would be in effect until the section that assumed creation of the corporation became effective.

FISCAL IMPLICATIONS:

Fiscal information is not available. (10-17-90)

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 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.

Against:

The package does not provide the funding mechanisms needed to make it functional. For example, there are no guarantees that local units will be reimbursed for undertaking response activities requested by the DNR. Thus, many local units could be stuck with exorbitant cleanup bills that would take a substantial amount of money out of their budgets. In addition, there is no funding source for the small business loans provided for by the package. Further, the package establishes numerous responsibilities for the DNR but does not provide for an increase to the department's budget to meet the costs of performing these duties. According to the department, it is allowed to use six percent of the Environmental Response Fund for carrying out its responsibilities under the act. However, the six percent cap is usually reached annually due to the duties that the department currently performs. Finally, without establishment of the Michigan Environmental Assurance Fund, potentially responsible parties will have to pay their share of cleanup costs plus orphan shares. Many businesses feel that this would be unfair (although it is the current procedure used to enforce cleanup provisions).

Against:

The costs of doing business in the state will increase due to provisions in the package. Many financial institutions believe that the package will result in liability for cleanup of contamination that they did not cause at sites they obtain through mortgage foreclosure. Therefore, financial institutions are becoming very wary of lending money for development of a site that may have been contaminated or of lending money to businesses that are more liable to cause pollution, such as gas stations, chemical corporations, dry cleaners and launderers. Thus, fewer businesses are being provided loans, and loans that are provided include the costs of environmental assessments and other procedures required of the financial institution by the bill and federal laws to ensure that contamination at a site is cleaned up. In addition, although business representatives agree that the package will exempt a business from liability for contamination at a site that a business intends to purchase, they believe that the burden for cleanup of "orphan" sites will eventually be born by potential purchasers of sites for redevelopment and that the DNR will try to cut deals for cleanup by trading exemption from future liability for prompt cleanup of a site.

Response: The package is designed to spur redevelopment by facilitating expeditious cleanup of contaminated sites. Liability for cleanup by financial institutions is limited to those institutions who managed sites or influenced management decisions regarding the handling of hazardous substances. In addition, financial institutions are prohibited from "redlining" (discriminating against certain types of people or geographical locations when making loans). Therefore, concerns about increased costs should be unwarranted, and if increased costs do

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occur, businesses should understand that the environment must be cleaned up and should view the increased costs as a reflection of the true costs of operating a responsible business. Further, the package expressly states that businesses that purchase sites for redevelopment could be liable for future contamination so the department could not cut a deal guaranteeing exemption from liability to a business for future contamination.

Reply: If increased costs for environmental assessments and other requirements are passed from financial institutions to businesses, the costs of loans will increase, and the price of several products in Michigan will increase. In addition, there may be fewer businesses to offer certain products due to the scarcity of loans. Therefore, the public will still bear the burden of the costs for the requirements.

Against:

The package does not address situations in which a small business truly cannot afford to pay for cleanup. Many small businesses gross less than $500,000 per year. Cleanup at a site can easily cost millions of dollars. In addition, the package does not address situations in which a business that has been in existence for 15-20 years engaged in a process that was legal 15 years ago (and resulted in contamination) but is illegal now. Society gains nothing by imposing strict cleanup costs upon the business, thereby forcing it to close. In fact, upon the filing of bankruptcy by the business, society loses the taxes that the business paid, forces unemployment upon the people that worked for the business, and still does not receive payment for cleanup. The state needs a better solution. Pollution is a societal problem, not strictly a business or taxpayer problem. Anyone who has ever enjoyed the benefits of businesses that have caused contamination or the threat of contamination from standard business procedures is just as guilty of the contamination as the business. Therefore, society should develop a solution to the problem which includes monetary contributions from everyone.

Response: In many ways society may be fortunate to close down businesses that cause contamination. For example, the state probably loses more money in cleanup costs than it gains in taxes paid by a business that pollutes, and since workers can be exposed to contamination at businesses that pollute, closure of a business that pollutes may protect workers in some instances. In addition, citizens of the state of Michigan did develop a solution to the problem of the cleanup of contaminated sites: the Quality of Life Environmental Bond Proposal. Now it's time for businesses to take responsibility for their actions and contribute their fair share of the burden of the costs for cleanup.