Act No. 233
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STATE OF MICHIGAN
85TH LEGISLATURE
REGULAR SESSION OF 1990

Introduced by Reps. Alley, Bartnik, Stupak, Kosteva, Niederstadt, Hart, Brown, DeBeaussaert, Hickner and Gubow

Reps. Bandstra, Bender, Bennett, Berman, Bryant, Willis Bullard, Camp, Ciaramitaro, Crandall, DeMars, Dolan, Emmons, Giese, Gire, Gnodtke, Harrison, Hertel, Hillegonds, Hoekman, Hoffman, Hunter, Johnson, Jondahl, Jonker, Knight, Krause, Kulchitsky, Leland, Middaugh, Miller, Munsell, Murphy, Muxlow, Nye, Oxender, Palamara, Pitoniak, Profit, Rocca, Scott, Sikkema, Sofio, Strand, Webb, Allen, Barns, Clack, Gagliardi, Gilmer, Honigman, Keith, London, Martin, Ostling, Owen, Runco, Spaniola, Sparks, Stabenow, Stallworth and Wartner named co-sponsors

ENROLLED HOUSE BILL No. 5878

AN ACT to amend the title and section 10 of Act No. 307 of the Public Acts of 1982, entitled as amended "An act to provide for the identification, risk assessment, and priority evaluation of environmental contamination at certain sites in this state; to provide for response activity; to prescribe certain powers and duties of the governor and certain state agencies and officials; to provide for the promulgation of rules; to create an environmental response fund, a Michigan unclaimed bottle fund, and a long-term maintenance trust fund; to create a long-term maintenance trust fund board and to prescribe its powers and duties; and to provide certain remedies and penalties," being section 299.610 of the Michigan Compiled Laws; to add sections 10a, 10b, 10c, 10d, 10e, 10f, 11f, 11g, 12, 12a, 12b, 12c, 12d, 13, 16, 16a, 16b, and 18; and to repeal certain parts of the act on a specific date.

The People of the State of Michigan enact:

Section 1. The title and section 10 of Act No. 307 of the Public Acts of 1982, being section 299.610 of the Michigan Compiled Laws, are amended and sections 10a, 10b, 10c, 10d, 10e, 10f, 11f, 11g, 12, 12a, 12b, 12c, 12d, 13, 16, 16a, 16b, and 18 are added to read as follows:

TITLE

An act to provide for the identification, risk assessment, and priority evaluation of environmental contamination at certain sites in this state; to provide for response activity at certain facilities and sites; to prescribe the powers and duties of the governor, certain state agencies and officials, and other persons; to provide for the promulgation of rules; to require record notice regarding the status of certain facilities; to create certain funds and provide for their expenditure; to provide for public participation; to provide for methods of dispute resolution; to authorize grants, loans, and awards; to create certain boards, councils, and offices and to prescribe their powers and duties; to provide for judicial review; and to provide certain remedies and penalties.

Sec. 10. (1) Money required to pay for response activities recommended under this act and to reimburse state departments and agencies for expenditures for those purposes shall be appropriated from the fund and any other source the legislature considers necessary to carry out the requirements of this act.

(2) Money from the fund shall be appropriated only for response activities at facilities that have been subjected to the risk assessment process described in section 6.

(3) The fund may be used for match, operation, and maintenance purposes as required under the comprehensive environmental response, compensation, and liability act of 1980, Public Law 96-510, 94 Stat. 2767, and under subtitle I of the solid waste disposal act, title II of Public Law 89-272, 42 U.S.C. 6991 to 6991i.

(4) The governor shall recommend an annual appropriation for the fund in his or her annual budget recommendations to the legislature.

Sec. 10a. (1) Except as provided in subsection (3), an owner or operator of a facility who obtains information that there may be a release at that facility shall immediately take appropriate action, consistent with applicable laws and rules promulgated by the department, to do all of the following:

(a) Confirm the existence of the release.

(b) Determine the nature and extent of the release.

(c) Report the release to the department within 24 hours after obtaining knowledge of the release. The requirements of this subdivision shall apply to reportable quantities of hazardous substances established pursuant to 40 C.F.R. 302.4 (1989), unless the department establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment.

(d) Immediately stop or prevent the release at the source.

(e) Immediately identify and eliminate any threat of fire or explosion or any direct contact hazards.

(f) Immediately initiate removal of a hazardous substance that is in a liquid phase, that is not dissolved in water, and that has been released.

(2) Except as provided in subsection (3), a person that holds an easement interest in a portion of a property that has knowledge that there may be a release within that easement shall report the release to the department within 24 hours after obtaining knowledge of the release. Unless the department establishes through rules alternate or additional reportable quantities as necessary to protect the public health, safety, or welfare, or the environment, this subsection shall apply to reportable quantities of hazardous substances established pursuant to 40 C.F.R. 302.4 (1989).

(3) The requirements of subsections (1) and (2) do not apply to a permitted release or a release in compliance with applicable federal, state, and local air pollution control laws.

(4) An owner or operator of a facility or a person notified by the department as potentially liable pursuant to section 12, upon written request by the director, shall take the following additional actions:

(a) Provide a plan for and undertake interim response activities.

(b) Provide a plan for and undertake evaluation activities.

(c) Take any other response activity determined by the department to be technically sound and necessary to protect the public health, safety, welfare, or the environment.

(d) Submit to the department for approval a remedial action plan that, when implemented, will achieve the cleanup levels specified in rules promulgated under this act.

(e) Implement an approved remedial action plan in accordance with a schedule approved by the department pursuant to this act.

(5) Upon a determination by the department that a person has completed all response activity at a facility pursuant to an approved remedial action plan prepared and implemented in compliance with rules promulgated under this act, the department, upon request of a person, shall execute and present a document stating that all response activities required in the approved remedial action plan have been completed.

(6) A person in charge of a facility from which a hazardous substance is released that is determined to be reportable under subsection (1)(c), other than a permitted release, that fails to notify the department within 24 hours after obtaining knowledge of the release or that submits in such notification any information that the person knows to be false or misleading is subject to a civil fine of not more than $25,000.00 for each day in which the violation occurs or the failure to comply continues. A fine imposed under this subsection shall be based upon the seriousness of the violation and any good faith efforts by the violator to comply with this subsection.

(7) If a state or local unit of government obtains information that there is a release or threat of release on public property, and is requested by the department to undertake response activity, or takes emergency action that has been approved by the department, and the state or local unit of government incurs expenses in taking

the actions, the expenses of the state or local unit of government shall be reimbursed from the Michigan environmental assurance fund if enabling legislation creating the fund is enacted into law and if each of the following is established:

(a) The release or threat of release was not discovered or should not have been discovered pursuant to section 12a(2)(b)(*ii*).

(b) The state or local unit of government did not cause or contribute to the release or threat of release.

(c) The state or local unit of government is not liable under section 12 for the release or threat of release.

(8) This section shall not do either of the following:

(a) Limit the authority of the department to take or conduct response activities pursuant to this act.

(b) Limit the liability of a person that may be liable under section 12.

Sec. 10b. (1) The department, upon confirmation of a release or threat of release of a substance that is regulated by the department of agriculture, shall notify the department of agriculture. The department shall consult with the department of agriculture in the development of response activities if a release or threat of a release of a substance regulated by the department of agriculture occurs. The department of agriculture shall provide to the department information necessary to identify substances regulated by the department of agriculture. This information shall include but is not limited to the list of state registered pesticides.

(2) As used in this section, "substance regulated by the department of agriculture" means a fertilizer or soil conditioner as defined in the fertilizer act of 1975, Act No. 198 of the Public Acts of 1975, being sections 286.751 to 286.767 of the Michigan Compiled Laws, or a pesticide as defined in the pesticide control act, Act No. 171 of the Public Acts of 1976, being sections 286.551 to 286.581 of the Michigan Compiled Laws.

Sec. 10c. (1) A person that has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility at which there has been a release, in a quantity required to be reported pursuant to section 10a(1)(c), shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to whom the property is transferred that the real property is such a facility and discloses the general nature and extent of the release. The written notice provided by the transferor shall be a separate instrument and, if the instrument conveying the interest in real property is recorded, the written notice shall be recorded with the register of deeds in the same county.

(2) The owner of real property for which a notice required in subsection (1) has been recorded may, upon completion of all response activities for the facility as approved by the department, record with the register of deeds for the appropriate county a certification that all response activity required in an approved remedial action plan has been completed.

Sec. 10d. (1) To determine the need for response activity, or selecting or taking a response activity or otherwise enforcing this act or a rule promulgated under this act, the directors or their authorized representatives may upon reasonable notice require a person to furnish any information that the person may have relating to any of the following:

(a) The identification, nature, and quantity of materials that have been or are generated, treated, stored, handled, or disposed of at a facility or transported to a facility.

(b) The nature or extent of a release or threatened release at or from a facility.

(2) Upon reasonable notice, a person required to furnish information pursuant to subsection (1) shall either:

(a) Grant the directors or their authorized representatives access at all reasonable times to any place, property, or location to inspect and copy the related information.

(b) Copy and furnish to the directors or their authorized representatives the related information.

(3) If there is a reasonable basis to believe that there may be a release or threat of release, the directors or their authorized representatives shall have the right to enter at all reasonable times any public or private property for any of the following purposes:

(a) Identifying a facility.

(b) Investigating the existence, origin, nature, or extent of a release or threatened release.

(c) Inspecting, testing, taking photographs or videotapes, or sampling of any of the following: soils, air, surface water, groundwater, suspected hazardous substances, or any containers or labels of suspected hazardous substances.

(d) Determining the need for or selecting any response activity.

(e) Taking or monitoring implementation of any response activity.

(4) A person who enters public or private property pursuant to subsection (3) shall present credentials; make a reasonable effort to contact the person in charge of the facility or that person's designee; describe the nature of the activities authorized under subsection (3) to be undertaken; and inform the person that is in charge of the facility that he or she is entitled to participate in the collection of split samples, and is entitled to a copy of the results of any analysis of samples and a copy of any photograph or videotape taken. The person in charge or his or her agent may accompany the directors or their authorized representatives during the activities authorized under subsection (3) that take place and may participate in the collection of any split samples on the property. The absence or unavailability of the person in charge or that person's agent shall not delay or limit the authority of the directors or their authorized representatives to enter the property or proceed with the activities authorized under subsection (3).

(5) If the directors or their authorized representatives obtain any samples, before leaving the property they shall give to the person in charge of the property from which the samples were obtained a receipt describing the sample. A copy of the results of any analysis of the samples shall upon request be furnished promptly to the person in charge. A copy of any photograph or videotape taken pursuant to subsection (3)(c) shall upon request be furnished promptly to the person in charge.

(6) All inspections and investigations undertaken by the directors or their authorized representatives under this section shall be completed with reasonable promptness.

(7) If refused entry or information under subsections (1) to (4), for the purposes of enforcing the information gathering and entry authority provided in this section, the attorney general, on behalf of the state, may do either of the following:

(a) Petition the court of appropriate jurisdiction for a warrant authorizing access to property or information pursuant to this section.

(b) Commence a civil action to compel compliance with a request for information or entry pursuant to this section, to authorize information gathering and entry provided for in this section, and to enjoin interference with the exercise of the authority provided in this section.

(8) In a civil action brought pursuant to subsection (7), if there is a reasonable basis to believe there may be a release or a threatened release, the court shall in the case of interference or noncompliance with information requests pursuant to subsection (1), or with entry or inspection requests pursuant to subsection (3), enjoin interference with and direct compliance with the requests unless the defendant establishes that, under the circumstances of the case, the request is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

(9) In a civil action brought pursuant to subsection (7), if there is a reasonable basis to believe there may be a release or a threatened release, the court may assess a civil fine not to exceed $25,000.00 for each day of noncompliance against a person who unreasonably fails to comply with the provisions of subsection (1), (2), or (3).

(10) Information obtained by the directors or their authorized representatives as authorized under subsection (1) or (2) shall be available to the public to the extent provided by the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws. A person that provides information pursuant to subsection (1) or (2), or the person in charge of a facility at which photographs or videotapes are taken pursuant to subsection (3), may designate the information that the person believes to be entitled to protection as if the information was exempt from disclosure as being either trade secrets or information of a personal nature under section 13(1)(a) or (g) of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws, and submit that specifically designated information separately from other information required to be provided under this section.

(11) Notwithstanding subsection (10), the following information obtained by the directors or their authorized representatives as required by this section shall be available to the public:

(a) The trade name, common name, or generic class or category of the hazardous substance.

(b) The physical properties of a hazardous substance, including its boiling point, melting point, flash point, specific gravity, vapor density, solubility in water, and vapor pressure at 20 degrees Celsius.

(c) The hazards to the public health, safety, or welfare, or the environment posed by a hazardous substance, including physical hazards, such as explosion, and potential acute and chronic health hazards.

(d) The potential routes of human exposure to the hazardous substance at the facility being investigated, entered, or inspected under this section.

(e) The location of disposal of any waste stream released or threatened to be released from the facility.

(f) Monitoring data or analysis of monitoring data pertaining to disposal activities related to the facility.

(g) Hydrogeologic data.

(h) Groundwater monitoring data.

(12) To collect information for the purpose of identifying persons that may be liable under section 12 or to otherwise enforce this act or a rule promulgated under this act, the attorney general may by administrative subpoena require the attendance and testimony of witnesses and production of papers, reports, documents, answers to questions, and other information the attorney general considers necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of this state. If a person fails or refuses to obey the administrative subpoena, the circuit court for the county of Ingham or for the county in which that person resides has jurisdiction to order that person to comply with the subpoena. A failure to obey the order of the court is punishable by the court as contempt.

(13) As used in this section, "information" includes, but is not limited to, documents, materials, records, photographs, and videotapes.

Sec. 10e. (1) The department may take response activity or approve of response activity proposed by a person that is consistent with any rules promulgated under this act relating to the selection and implementation of response activity that the department concludes is necessary and appropriate to protect the public health, safety, welfare, or the environment.

(2) Remedial action undertaken under subsection (1) shall at a minimum accomplish all of the following:

(a) Assure the protection of the public health, safety, welfare, or the environment.

(b) Attain a degree of cleanup and control of hazardous substances that complies with all applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards of state and federal environmental law.

(c) Be consistent with any cleanup standards incorporated in any rules promulgated under this act.

(3) The cost effectiveness of alternative means of complying with this section shall be considered by the department only in selecting among alternatives that meet all of the criteria of subsection (2).

(4) Remedial actions that permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances are to be preferred.

(5) The department shall encourage the use of innovative cleanup technologies. Before July 1, 1995, the department shall undertake 3 pilot projects to demonstrate innovative cleanup technologies at facilities where money from the fund is used.

(6) At a facility where state funds will be spent to plan or implement a remedial action plan or where the director determines there is a significant public interest, within 30 days after the completion of a remedial investigation for the facility, the department shall provide the county and the township, city, or village in which the facility is located a notice of the completion of the remedial investigation, a summary of the remedial investigation, and notice of an opportunity for the people in the local unit of government to meet with the department regarding the remedial investigation and any proposed feasibility study for the facility. Upon a request for a public meeting by the governing body of the local unit of government or by 25 citizens of the local unit of government, the department shall, within 30 days of the request, meet with persons in the local unit of government. The person or persons requesting the public meeting shall publicize and provide accommodations for the meeting. The meeting shall be held in the local unit of government in which the facility is located. The department shall provide copies of the notices and summary required in this subsection to the governing body of the local unit of government, to the known persons that may be liable under section 12, and to the main public library of the local unit of government in which the facility is located. The department shall send representatives to the meeting who are familiar with the facility and who are involved with determining the appropriate remedial actions to be taken at the facility. Persons that may be responsible under section 12 for the facility may send representatives to the meeting.

(7) Before approval of a proposed remedial action plan at a facility included on the list pursuant to section 6 that is not an interim response activity, if money from the fund is to be used or as specified in rules promulgated under this act, the department shall do all of the following:

(a) Publish a notice and brief summary of the proposed remedial action plan.

(b) Provide for public review and comment pertinent to documents relating to the proposed remedial action plan, including, if applicable, the feasibility study that outlines alternative remedial action measures considered.

(c) Provide an opportunity for a public meeting at or near the facility when any of the following occur:

(*i*) The department determines that there is a significant public interest or that for any other reason a public meeting is appropriate.

(*ii*) A city, township, or village in which the facility is located, by a majority vote of its governing body, requests a public meeting.

(*iii*) A local health department with jurisdiction in the area in which the facility is located requests a public meeting.

(d) Provide a document that summarizes the major issues raised by the public and how they are to be addressed by the final approved remedial action plan.

(8) For purposes of this section, publication shall include, at a minimum, publication in a major local newspaper of general circulation in this state. In addition, the administrative record shall be made available by the department for inspection by members of the public at or near the facility and in Lansing.

(9) The department shall prepare a summary document that explains the reasons for the selection or approval of a remedial action plan. In addition, the department shall compile an administrative record of the decision process that results in the selection of a remedial action plan. The administrative record shall contain all of the following:

(a) Remedial investigation data regarding the facility.

(b) If applicable, a feasibility study and potential remedial actions.

(c) If applicable, a summary document that explains the reasons why a remedial investigation or feasibility study was not conducted.

(d) Applicable comments and information received from the public, if any.

(e) If applicable, a document that summarizes the significant concerns raised by the members of the public and how they are to be addressed.

(f) Other information appropriate to the facility.

(10) If comments or information are submitted for inclusion in the administrative record that are not included in the administrative record, a brief explanation of why the information was not considered relevant shall be sent to the party by the department and included in the record.

Sec. 10f. (1) In accordance with this section, if the department determines that there may be an imminent and substantial endangerment to the public health, safety, welfare, or the environment, because of a release or threatened release, the department may require persons that may be liable under section 12 to take such action as may be necessary to abate the danger or threat.

(2) The department may issue an administrative order to a person identified by the department as a person that may be liable under section 12 requiring that person to perform response activity relating to a facility for which that person may be liable, or to take any other action required by this act. An order issued under this section shall state with reasonable specificity the basis for issuance of the order and specify a reasonable time for compliance.

(3) Within 30 days after issuance of an administrative order under this section, a person to whom the order was issued shall indicate in writing whether the person intends to comply with the order.

(4) A person that, without sufficient cause, violates or fails to properly comply with an administrative order issued under this section shall be liable for either or both of the following:

(a) A civil fine of not more than $25,000.00 for each day in which the violation occurs or the failure to comply continues. A fine imposed under this subsection shall be based upon the seriousness of the violation and any good faith efforts by the violator to comply with the administrative order.

(b) For exemplary damages in an amount at least equal to the amount of any costs of response activity incurred by the state as a result of a failure to comply with an administrative order but not more than 3 times the amount of these costs.

(5) A person to whom an administrative order was issued under this section and who complied with the terms of the order who believes that the order was arbitrary and capricious or unlawful may petition the department, within 60 days after completion of the required action, for reimbursement from the fund for the reasonable costs of the action plus interest at the rate described in section 12(4) and other necessary costs incurred in seeking reimbursement under this subsection. If the department refuses to grant all or part of the petition, the petitioner may, within 30 days of receipt of the refusal, file an action against the department in the court of claims seeking this relief. A failure by the department either to grant or deny all or any part of a petition within 120 days of receipt shall constitute a denial of that part of the petition which shall be reviewable as final agency action in the court of claims. To obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that the petitioner is not liable under section 12 or that the action ordered was arbitrary and capricious or unlawful, and in either instance that costs for which the petitioner seeks reimbursement are reasonable in light of the action required by and undertaken pursuant to the relevant order.

Sec. 11f. (1) As used in this section:

(a) "Allocation process" means a voluntary system for determining the percentage share of response costs pursuant to this section of each person that may be liable under section 12 and the orphan share, if any.

(b) "Allocation review panel" or "panel" means the allocation review panel appointed by the orphan share administration.

(c) "Fund" means the Michigan environmental assurance fund created in the Michigan environmental assurance corporation act.

(d) "Orphan share" means the percentage share of response costs for a facility that the orphan share administration agrees or the allocation review panel determines is not reasonably allocable to any person that may be liable under section 12 using the criteria in subsection (10).

(e) "Orphan share administration" means a person appointed pursuant to the Michigan environmental assurance corporation act to pay for the orphan share.

(f) "Response costs" means all costs incurred in taking or conducting a response activity, enforcement costs, and all costs incurred by the orphan share administration for the services of the allocation review panel.

(2) This section only applies to a facility where 2 or more persons that may be liable under section 12 are identified by the department. However, if only 1 person that may be liable under section 12 is identified for a facility by the department, that person may submit a written request within 14 days after the department approves a remedial action plan, or a remedial action plan is considered approved under section 11c to the orphan share administration to commence the allocation process. A facility for which only 1 person that may be liable under section 12 is identified shall be considered by the allocation review panel as provided in this section in a manner and at a time that will not impede the allocation process for other facilities.

(3) After the department approves a remedial action plan, or a remedial action plan is considered approved under section 11c, for a facility pursuant to this act and any rules promulgated under this act, the department shall notify in writing each identified person that may be liable under section 12 for a facility and the orphan share administration of the approval of the remedial action plan for the facility. The department shall also send the orphan share administration a list of the names and addresses of all identified persons that may be liable under section 12, and if requested by the orphan share administration, the department shall at any time provide the orphan share administration with all information in the possession of the department that is related to the release. Upon the request of the orphan share administration, the allocation process may commence prior to the approval of the remedial action plan. A person that may be liable under section 12 may petition the orphan share administration to commence the allocation process prior to the approval of the remedial action plan or prior to the time the remedial action plan is considered approved under section 11c.

(4) Not later than 7 days after receipt of the notice of approval of a remedial action plan for the facility, the orphan share administration shall notify each of the persons that may be liable under section 12 in writing of the opportunity to participate in an allocation process. A person that may be liable under section 12 that intends to participate in the allocation process shall notify the orphan share administration in writing within 14 days of receiving notice from the orphan share administration.

(5) If, within the 14-day period during which a person that may be liable under section 12 may indicate the intention to participate in the allocation process, 1 or more of the persons that may be liable under section 12 identified in regard to a facility notify the orphan share administration that the person intends to participate in the allocation process, the orphan share administration shall develop a schedule and plan to facilitate negotiations to determine the percentage share of response costs of each person that may be liable under section 12 and any orphan share. The negotiations shall be completed within 21 days after the last day on which persons that may be liable under section 12 may notify the orphan share administration of the intent to participate, unless all of the participants agree to extend the negotiations. An extension of the negotiations shall not result in an extension of the time limitations provided in subsections (8) and (10).

(6) If, during the negotiation period provided in subsection (5), all of the persons that may be liable under section 12 participating in the allocation process and the orphan share administration agree in writing to a complete percentage allocation of response costs related to the facility, the orphan share administration shall, within 3 days of reaching the agreement, send a copy of the agreement to the director and the attorney general.

(7) The attorney general on behalf of the state may enter into a legally enforceable consent order with 1 or more of the participants in the allocation process providing for implementation of the remedial action plan, payment of response costs, and resolution of other potential liability under this act, including liability for damages and civil fines.

(8) If, within the negotiation period provided in subsection (5), all of the persons that may be liable under section 12 and the orphan share administration do not agree in writing to a complete percentage allocation of response costs related to the facility, the orphan share administration shall convene an allocation review panel to determine an allocation of the percentage share of response costs of each person that may be liable under section 12 including the orphan share, if any. Regardless of when the allocation process commences, the allocation review panel shall be convened no later than 50 days after notification of the persons that may be liable under section 12 of the approval of the remedial action plan for a facility. The allocation review panel shall consist of 3 members selected in the process established by the orphan share administration pursuant to

the Michigan environmental assurance corporation act. In selecting the members for an allocation review panel, the orphan share administration shall determine that a member selected for a panel does not have a personal or financial interest in the outcome of the allocation process.

(9) According to the procedures established by the orphan share administration as provided in the Michigan environmental assurance corporation act, each of the participating persons that may be liable under section 12 and the orphan share administration may submit to the panel documentation and other information as considered relevant by a person that may be liable under section 12 or the orphan share administration. In addition, the director may submit to the panel information related to the facility or allocation process that the director considers relevant.

(10) Not later than 90 days after notification of the persons that may be liable under section 12 of approval of the remedial action plan for a facility, the allocation review panel shall issue a written determination allocating the percentage share of response costs of each person that may be liable under section 12 and the orphan share, if any. In reaching a determination, the allocation review panel shall do all of the following:

(a) Consider each of the following as these items relate to each person that may be liable under section 12 and the orphan share, if any:

(*i*) The volume of hazardous substances transported to the facility. For purposes of determining volume, a shipment of a hazardous substance shall be counted 1 time when allocating a percentage share of response costs between a generator and a transporter of a hazardous substance.

(*ii*) The anticipated impact of the hazardous substance on the cost of response activity at the facility.

(*iii*) The degree of care exercised in the disposal or treatment, or both of the hazardous substance by each person that may be liable under section 12.

(*iv*) The manner in which the facility was operated and the degree of care exercised by the owner or operator.

(*v*) The degree of involvement in facility operations.

(*vi*) Whether all applicable permits and licenses required by law were obtained and complied with.

(*vii*) The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.

(*viii*) Any other aggravating or mitigating factor that the allocation review panel determines to be relevant.

(b) Consider the quality of documentation and other information submitted.

(c) If information gaps exist, make reasonable extrapolations from the available information as considered advisable by the allocation review panel.

(11) A copy of the written determination of the allocation review panel shall be forwarded by the panel to the director, the attorney general, and to each of the participants in the allocation process. Within 10 days of receipt of the determination of the allocation review panel, each participant shall notify the orphan share administration of the participant's acceptance or rejection of the panel's determination. The orphan share administration shall notify the allocation review panel, the director, and the attorney general of the participants' decision.

(12) The orphan share administration may reject the allocation review panel's determination if it believes that the percentage cost of response activity allocated to the orphan shares by the panel creates a substantial risk to the fiscal integrity of the fund. If the orphan share administration rejects the allocation review panel's determination it may negotiate with other participating persons that may be liable under section 12 to attempt to arrive at an alternative percentage allocation of response costs that is agreeable to all of the participants. The orphan share administration and the other participating persons that may be liable under section 12 have no more than 7 days to attempt to arrive at an alternative allocation.

(13) The attorney general on behalf of the state may enter into a legally enforceable consent order with 1 or more of the participants in the allocation process who are in agreement with the determination of the allocation review panel or who enter into a negotiated agreement pursuant to subsection (12) providing for implementation of the remedial action plan, payment of response costs, and resolution of other potential liability under this act, including liability for damages and civil fines.

(14) This section shall not be construed to limit the authority of the department or the attorney general at any time to enter into an agreement in the public interest to resolve in whole or in part the liability of a person under this act.

(15) Any allocation of percentage shares of response costs under this section shall not be admissible as evidence in any proceeding, except to prove, if disputed, the financial obligations under the terms of an allocation agreement pursuant to subsection (6) or (11) of a person who has limited its liability under subsection (16). A court shall not have jurisdiction to review an allocation or the procedures used to determine an

allocation. The allocation of percentage share of response costs or the procedures used to determine an allocation shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(16) The liability under this act of a person that may be liable under section 12 that accepts and pays its allocated share of response activity costs as determined through a voluntary allocation agreement pursuant to subsection (6) or by the allocation review panel pursuant to subsection (10), and who by consent order or administrative order pays its allocated share which results in implementation of a remedial action plan approved by the department, shall with respect to matters covered by the order be limited to that person's allocated share of response costs. The department may issue an administrative order pursuant to section 10f to require a person that may be liable under section 12 to implement the plan approved by the department. To be enforceable, the order described in this subsection shall not require that the department determine that there may be an imminent and substantial endangerment to the public health, safety, or welfare, or the environment prior to issuance of the order. In an action for reimbursement pursuant to section 10f(5), if the court upholds the order, the court shall assess against the petitioner the full costs of defending this proceeding, including attorney fees.

(17) If a person that may be liable under section 12 participates in the allocation process set forth in this subsection, the director and the attorney general shall not commence an action under section 10f or 16 against the participating person for a period of 120 days after the persons that may be liable under section 12 have been notified of the approval of a remedial action plan. If the director and the attorney general determine that the parties are bargaining in good faith and that an extension of this moratorium would facilitate an agreement with the persons that may be liable under section 12 for taking response activity, they may extend the moratorium for an additional period of up to 30 days.

(18) Notwithstanding subsection (17), this section shall not limit the department's authority to undertake response activity at any time or the attorney general's authority to undertake enforcement action against any person that may be liable under section 12 that does not participate in the allocation process.

(19) When the allocation process is completed, the orphan share administration shall contribute the percentage of costs assigned to the orphan share plus the percentage share assigned to identified persons that may be liable under section 12 that refuse to participate in the allocation process, or to take remedial action, or to pay on the basis of their allocated share. This subsection shall apply when the remedial action is performed by the persons that may be liable under section 12 pursuant to a consent order or administrative order. The attorney general may file an action under section 16 to recover all costs incurred by the orphan share administration from persons that refuse to participate in the allocation process or in the remedial action on the basis of their allocated share.

(20) The orphan share administration shall promulgate rules establishing a loan program to provide loans to small businesses that may be liable under section 12. A loan shall be provided to assist a small business in fulfilling any of its responsibilities in undertaking a response activity in compliance with this act and with the rules promulgated under this act, except if the small business is convicted of violating section 16b. A loan shall not be made under this section until rules are promulgated establishing the loan program described in this subsection. To be eligible for a loan under this section, a small business shall submit to the orphan share administration evidence that is satisfactory to the orphan share administration that the small business has taken or is taking action necessary to prevent future releases and to otherwise comply with this act and applicable state and federal environmental law. As used in this subsection, small business means a business concern incorporated or doing business in this state that has a net worth of less than $10,000,000.00, including the affiliates of the business concern that are independently owned and operated.

Sec. 11g. (1) As used in this section:

(a) "Allocation process" means a voluntary system for determining the percentage share of response costs pursuant to this section of each person that may be liable under section 12 and the orphan share, if any.

(b) "Allocation review panel" or "panel" means the allocation review panel appointed by the orphan share administration.

(c) "Orphan share" means the percentage share of response costs for a facility that the orphan share administration agrees or the allocation review panel determines is not reasonably allocable to any person that may be liable under section 12 using the criteria in subsection (10).

(d) "Orphan share administration" means the orphan share administration created in subsection (21).

(e) "Response costs" means all costs incurred in taking or conducting a response activity, enforcement costs, and all costs incurred by the orphan share administration for the services of the allocation review panel.

(2) This section only applies to a facility where 2 or more persons that may be liable under section 12 are identified by the department. However, if only 1 person that may be liable under section 12 is identified for a

facility by the department, that person may submit a written request within 14 days after the department approves a remedial action plan, or a remedial action plan is considered approved under section 11c to the orphan share administration to commence the allocation process. A facility for which only 1 person that may be liable under section 12 is identified shall be considered by the allocation review panel as provided in this section in a manner and at a time that will not impede the allocation process for other facilities.

(3) After the department approves a remedial action plan, or a remedial action plan is considered approved under section 11c, for a facility pursuant to this act and any rules promulgated under this act, the department shall notify in writing each identified person that may be liable under section 12 for a facility and the orphan share administration of the approval of the remedial action plan for the facility. The department shall also send the orphan share administration a list of the names and addresses of all identified persons that may be liable under section 12, and if requested by the orphan share administration, the department shall at any time provide the orphan share administration with all information in the possession of the department that is related to the release. Upon the request of the orphan share administration, the allocation process may commence prior to the approval of the remedial action plan. A person that may be liable under section 12 may petition the orphan share administration to commence the allocation process prior to the approval of the remedial action plan or the remedial action plan is considered approved under section 11c.

(4) Not later than 7 days after receipt of the notice of approval of a remedial action plan for the facility, the orphan share administration shall notify each of the persons that may be liable under section 12 in writing of the opportunity to participate in an allocation process. A person that may be liable under section 12 that intends to participate in the allocation process shall notify the orphan share administration in writing within 14 days of receiving notice from the orphan share administration.

(5) If, within the 14-day period during which a person that may be liable under section 12 may indicate their intention to participate in the allocation process, 1 or more of the persons that may be liable under section 12 identified in regard to a facility notify the orphan share administration that the person intends to participate in the allocation process, the orphan share administration shall develop a schedule and plan to facilitate negotiations to determine the percentage share of response costs of each person that may be liable under section 12 and any orphan share. The negotiations shall be completed within 21 days after the last day on which persons that may be liable under section 12 may notify the orphan share administration of the intent to participate, unless all of the participants agree to extend the negotiations. An extension of the negotiations shall not result in an extension of the time limitations provided in subsections (8) and (10).

(6) If, during the negotiation period provided in subsection (5), all of the persons that may be liable under section 12 participating in the allocation process and the orphan share administration agree in writing to a complete percentage allocation of response costs related to the facility, the orphan share administration shall, within 3 days of reaching the agreement, send a copy of the agreement to the director and the attorney general.

(7) The attorney general on behalf of the state may enter into a legally enforceable consent order with 1 or more of the participants in the allocation process providing for implementation of the remedial action plan, payment of response costs, and resolution of other potential liability under this act, including liability for damages and civil fines.

(8) If, within the negotiation period provided in subsection (5), all of the persons that may be liable under section 12 for a facility and the orphan share administration do not agree in writing to a complete percentage allocation of response costs related to the facility, the orphan share administration shall convene an allocation review panel to determine an allocation of the percentage share of response costs of each person that may be liable under section 12 including the orphan share, if any. Regardless of when the allocation process commences, the allocation review panel shall be convened no later than 50 days after notification of the persons that may be liable under section 12 of the approval of the remedial action plan for a facility. The allocation review panel shall consist of 3 members selected by the orphan share administration. In selecting the members for an allocation review panel, the orphan share administration shall determine that a member selected for a panel does not have a personal or financial interest in the outcome of the allocation process.

(9) According to the procedures established by the orphan share administration, each of the participating persons that may be liable under section 12 and the orphan share administration may submit to the panel documentation and other information as considered relevant by a person that may be liable under section 12 or the orphan share administration. In addition, the director may submit to the panel information related to the facility or allocation process that the director considers relevant.

(10) Not later than 90 days after notification of the persons that may be liable under section 12 of approval of the remedial action plan for a facility, the allocation review panel shall issue a written determination allocating the percentage share of response costs of each person that may be liable under section 12 and the orphan share, if any. In reaching a determination, the allocation review panel shall do all of the following:

(a) Consider each of the following as these items relate to each person that may be liable under section 12 and the orphan share, if any:

(*i*) The volume of hazardous substances transported to the facility. For purposes of determining volume, a shipment of a hazardous substance shall be counted 1 time when allocating a percentage share of response costs between a generator and a transporter of a hazardous substance.

(*ii*) The anticipated impact of the hazardous substance on the cost of response activity at the facility.

(*iii*) The degree of care exercised in the disposal or treatment, or both of the hazardous substance by each person that may be liable under section 12.

(*iv*) The manner in which the facility was operated and the degree of care exercised by the owner or operator.

(*v*) The degree of involvement in facility operations.

(*vi*) Whether all applicable permits and licenses required by law were obtained and complied with.

(*vii*) The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.

(*viii*) Any other aggravating or mitigating factor that the allocation review panel determines to be relevant.

(b) Consider the quality of documentation and other information submitted.

(c) If information gaps exist, make reasonable extrapolations from the available information as considered advisable by the allocation review panel.

(11) A copy of the written determination of the allocation review panel shall be forwarded by the panel to the director, the attorney general, and to each of the participants in the allocation process. Within 10 days of receipt of the determination of the allocation review panel, each participant shall notify the orphan share administration of the participant's acceptance or rejection of the panel's determination. The orphan share administration shall notify the allocation review panel, the director, and the attorney general of the participants' decision.

(12) Upon completion of the allocation process under this section, the percentage allocated to the orphan share and the portion allocated to a person that is uncollectible for a facility, if any, shall be funded in full by the other persons that may be liable under section 12 for that facility in proportion to the percentage that each person was assigned pursuant to the allocation process.

(13) The attorney general on behalf of the state may enter into a legally enforceable consent order with 1 or more of the participants in the allocation process who are 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 potential liability under this act, including liability for damages and civil fines.

(14) This section shall not be construed to limit the authority of the department or the attorney general at any time to enter into an agreement in the public interest to resolve in whole or in part the liability of a person under this act.

(15) Any allocation of percentage shares of response costs under this section shall not be admissible as evidence in any proceeding, except to prove, if disputed, the financial obligations under the terms of an allocation agreement pursuant to subsection (6) or (11) of a person who has limited its liability under subsection (16). A court shall not have jurisdiction to review an allocation or the procedures used to determine an allocation. The allocation of percentage share of response costs or the procedures used to determine an allocation shall not constitute an apportionment or other statement on the divisibility of harm or causation.

(16) The liability under this act of a person that may be liable under section 12, that accepts and pays its allocated share of response activity costs as determined through a voluntary allocation agreement pursuant to subsection (6) or by the allocation review panel pursuant to subsection (10), and who by consent order or administrative order pays its portion of the orphan share and the uncollectible portion pursuant to subsection (12) which results in implementation of an approved remedial action plan shall with respect to matters covered by the order be limited to that person's allocated share of response costs. The department may issue an administrative order pursuant to section 10f to require a person that may be liable under section 12 to implement the plan approved by the department. To be enforceable, the order described in this subsection shall not require that the department determine that there may be an imminent and substantial endangerment to the public health, safety, or welfare, or the environment prior to issuance of the order. In an action for reimbursement pursuant to section 10f(5), if the court upholds the order, the court shall assess against the petitioner the full costs of defending this proceeding, including attorney fees.

(17) If a person that may be liable under section 12 participates in the allocation process set forth in this subsection, the director and the attorney general shall not commence an action under section 10f or 16 against the participating person for a period of 120 days after the persons that may be liable under section 12 have been notified of the approval of a remedial action plan. If the director and the attorney general determine that the parties are bargaining in good faith and that an extension of this moratorium would facilitate an agreement

with the persons that may be liable under section 12 for taking response activity, they may extend the moratorium for an additional period of up to 30 days.

(18) Notwithstanding subsection (17), this section shall not limit the department's authority to undertake response activity at any time or the attorney general's authority to undertake enforcement action against any person that may be liable under section 12 that does not participate in the allocation process.

(19) The attorney general may file an action under section 16 to recover all costs incurred by the orphan share administration from persons that refuse to participate in the allocation process or in the remedial action on the basis of their allocated share.

(20) The orphan share administration shall promulgate rules establishing a loan program to provide loans to small businesses that may be liable under section 12. A loan shall be provided to assist a small business in fulfilling any of its responsibilities in undertaking a response activity in compliance with this act and the rules promulgated under this act, except if the small business is convicted of violating section 16b. A loan shall not be made under this section until rules are promulgated establishing the loan program described in this subsection. To be eligible for a loan under this section, a small business shall submit to the orphan share administration evidence that is satisfactory to the orphan share administration that the small business has taken or is taking action necessary to prevent future releases and to otherwise comply with this act and applicable state and federal environmental law. As used in this subsection, small business means a business concern incorporated or doing business in this state that has a net worth of less than $10,000,000.00, including the affiliates of the business concern that are independently owned and operated.

(21) The orphan share administration is created within the department of management and budget. The orphan share administration shall administer the allocation process as provided in this section. The department of management and budget shall provide the orphan share administration with sufficient staff and services to allow it to carry out its responsibilities under this section.

Sec. 12. (1) Notwithstanding any other provision or rule of law and subject only to the defenses set forth in sections 12a and 12b, if there is a release or threatened release from a facility that causes the incurrence of response activity costs, the following persons shall be liable under this section:

(a) The owner or operator of the facility.

(b) The owner or operator of the facility at the time of disposal of a hazardous substance.

(c) The owner or operator of the facility since the time of disposal of a hazardous substance not included in subdivision (a) or (b).

(d) A person that by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of a hazardous substance owned or possessed by the person, by any other person, at the facility owned or operated by another person and containing the hazardous substance.

(e) A person that accepts or accepted any hazardous substance for transport to the facility selected by that person.

(2) A person described in subsection (1) shall be liable for all of the following:

(a) All costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity under this act.

(b) Any other necessary costs of response activity incurred by any other person consistent with rules relating to the selection and implementation of response activity promulgated under this act.

(c) 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 resulting from the release.

(3) The costs of response activity recoverable under subsection (2) shall also include:

(a) All costs of response activity reasonably incurred by the state prior to the promulgation of rules relating to the selection and implementation of response activity under this act, excepting those cases where cost recovery actions have been filed before July 11, 1990. A person challenging the recovery of costs under this subdivision shall have the burden of establishing that the costs were not reasonably incurred under the circumstances that existed at the time the costs were incurred. Recoverable costs include costs incurred reasonably consistent with the rules relating to the selection and implementation of response activity in effect on July 11, 1990.

(b) Any other necessary costs of response activity reasonably incurred by any other person prior to the promulgation of rules relating to the selection and implementation of response activity under this act. A person seeking recovery of these costs has the burden of establishing that the costs were reasonably incurred under the circumstances that existed at the time the costs were incurred.

(4) The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subsections (2) and (3). This interest shall accrue from the date payment is demanded in writing, or the date of the expenditure or damage, whichever is later. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified in section 6013(5) of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.6013 of the Michigan Compiled Laws.

(5) A person shall not be required under this act to undertake response activity for a permitted release. Recovery by any person for response activity costs or damages resulting from a permitted release shall be pursuant to other applicable law, in lieu of this act. This subsection shall not affect or modify in any way the obligations or liability of any person under any other state law, including common law, for damages, injury, or loss resulting from a release of a hazardous substance or for response activity or the costs of response activity.

(6) If the director determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release from a facility, the attorney general may bring an action against any person described in subsection (1) or any other appropriate person to secure the relief that may be necessary to abate the danger or threat. The court has jurisdiction to grant such relief as the public interest and the equities of the case may require.

(7) In establishing liability under this section, the department shall bear the burden of proof. If the department proves a prima facie case against a person, the person shall bear the burden of showing by a preponderance of the evidence that they are not liable under this section.

Sec. 12a. (1) A person shall not be liable under section 12 if that person establishes by a preponderance of the evidence that the release or threat of release was caused solely by:

(a) An act of God.

(b) An act of war.

(c) An act or omission of a third party other than an employee or agent of the person that may be liable under section 12, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the person that may be liable under section 12 if the person that may be liable under section 12 establishes by a preponderance of the evidence both of the following:

(*i*) That he or she exercised due care with respect to the hazardous substance, taking into consideration the characteristics of the hazardous substance, in light of all relevant facts and circumstances.

(*ii*) That he or she took reasonable precautions against reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.

(d) Any combination of subdivision (a), (b), or (c).

(2) The term contractual relationship, as used in subsection (1)(c), includes, but is not limited to, land contracts, deeds, or other instruments transferring title or possession, unless both of the following are established:

(a) The real property on which the facility is located was acquired by the person that may be liable under section 12 after the disposal or placement of the hazardous substance on, in, or at the property.

(b) The person that may be liable under section 12 by a preponderance of the evidence proves 1 or more of the following:

(*i*) At the time the person that may be liable under section 12 acquired the property, that person did not know and had no reason to know that a hazardous substance that is the subject of the release or threat of a release was disposed of on, in, or at the facility.

(*ii*) The person that may be liable under section 12 is a state or local unit of government that acquired the property by purchase, gift, transfer, dedication, or condemnation, and, for property acquired after the effective date of this section, the state or local unit of government does all of the following:

(A) Conducts or causes to be conducted a visual inspection of the property and a review of the ownership and use history of the property to determine whether a probability exists that the property is a facility. If the visual inspection or the ownership and use history, or both, show that there may be a release or threat of release, the state or local unit of government shall conduct, or cause to be conducted, an environmental assessment of the property that includes an on-site evaluation of the nature and extent, if any, of the release or threat of release, and an inspection of all permanent structures on the property for the presence of a hazardous substance.

(B) Prior to final acquisition, if the environmental assessment required in subparagraph (*ii*)(A) discloses a release or threat of release, the state or local unit of government shall do all of the following:

(I) Provide a report of the findings and conclusions of the environmental assessment to the governing body of the unit of government.

(II) Provide a public notice of the availability of the report of the findings and conclusions of the environmental assessment.

(III) Submit the report and the environmental assessment to the department.

(C) After final acquisition, if the environmental assessment required in subparagraph (*ii*)(A) disclosed a release or threat of release, the state or local unit of government shall provide the department with a right of entry to the property at all reasonable times for any of the purposes listed in section 10d(3)(a) through (e).

(D) After final acquisition, unless waived by the director through the exercise of his or her discretion, if the environmental assessment required in subparagraph (*ii*)(A) disclosed a release or threat of release, the state or local unit of government shall not transfer any legal interest, or any equitable or possessory interest that relinquishes control over that property for more than 45 days, unless the state or local unit of government does all of the following:

(I) Provide any transferee with a copy of the environmental assessment required in subparagraph (*ii*)(A) prior to the transfer of the property.

(II) Include in any contract for transfer of the property a statement that, absent a covenant not to sue from the state as provided by section 14a, the transferee will be a person that may be liable under section 12 of this act.

(III) Include as a condition to the transfer in any contract for the transfer of the property that the transferee agrees to provide the department with a right of entry to the property at all reasonable times for any of the purposes listed in section 10d(3)(a) through (e) related to a release or threat of release disclosed in the environmental assessment required in subparagraph (*ii*)(A).

(IV) Provide the department with a copy of the contract for transfer of the property and a description of the intended use of the property by the transferee within 14 days of the execution of the transfer.

(*iii*) The person that may be liable under section 12 acquired the property by inheritance.

(3) In addition to establishing 1 or more of the circumstances described in subsection (2)(b)(*i*), (*ii*), or (*iii*), the person that may be liable under section 12 shall establish that he or she has satisfied the requirements of subsection (1)(c)(*i*) and (*ii*).

(4) To establish that the person that may be liable under section 12 had no reason to know, as required under subsection (2)(b)(*i*), the person that may be liable under section 12 shall have undertaken, at the time of acquisition, 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. For purposes of the preceding sentence, the court shall take into account any specialized knowledge or experience on the part of the person that may be liable under section 12, the relationship of the purchase price to the value of the property if uncontaminated by a hazardous substance, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of a release or threat of release at the property, and the ability to detect a release or threat of release by appropriate inspection.

(5) This section shall not diminish the liability of a previous owner or operator of a facility that would otherwise be liable under this act. Notwithstanding this section, if the person that may be liable under section 12 obtained actual knowledge of the release or threat of release at the facility when that person owned the real property and then transferred ownership of the property to another person without disclosing this knowledge, the person shall be liable under section 12 and a defense under this section shall not be available to that person. Nothing in this section shall affect the liability under this act of a person that may be liable under section 12 that, by an act or omission, caused or contributed to the release or threat of release that is the subject of a response activity at the facility.

(6) The state or a local unit of government shall not be liable under this act for costs or damages as a result of response activity taken in response to a release or threat of release. This subsection shall not preclude liability for costs or damages as a result of gross negligence, including reckless, willful, or wanton misconduct, or intentional misconduct by the state or local unit of government.

(7) A commercial lending institution that has not participated in the management of a facility prior to taking title acquires a property that is a facility through foreclosure or through acceptance of a deed in lieu of foreclosure for the sole purpose of realizing on a security interest shall not be liable under this act, if 1 or more of the following are true:

(a) The property is a residential property.

(b) The property is an agricultural property.

(c) The commercial lending institution acquired ownership or control of the property involuntarily through a court order or other involuntary circumstance.

(d) The commercial lending institution would otherwise be liable solely under section 12(1)(c) and the commercial lending institution acquired ownership or control of the property prior to August 1, 1990.

(8) If a commercial lending institution that has not participated in the management of a facility prior to taking title, other than those properties described in subsection (7)(a) or (b), conducts, within 180 days before or after taking title to the property, a valid foreclosure environmental assessment prior to disposition of that property, and that foreclosure environmental assessment does not indicate that there was a release or threat of release on the property, there is a rebuttable presumption that the commercial lending institution has satisfied the criteria specified in subsection (1)(c) with respect to that property. The defense to liability in this subsection does not apply to a release that started after the date on which the commercial lending institution acquired title to the property and during the time the commercial lending institution held title to the property.

(9) If a commercial lending institution that prior to taking title of a property through foreclosure or through acceptance of a deed in lieu of foreclosure has not participated in the management of property, other than a property described in subsection (7)(a) or (b), performs a foreclosure environmental assessment on the property within 180 days before or after taking title to the property, and that foreclosure environmental assessment indicates that there is a release or threat of release on that property, the commercial lending institution shall not dispose of that property unless the commercial lending institution provides the department with a complete copy of the results of the foreclosure environmental assessment, and the commercial lending institution enters into an agreement with the department regarding disposition of the property. If a commercial lending institution submits a proposal to the department regarding disposition of the property, the department shall, within 6 months, review the proposal and either approve the proposal or submit changes to the commercial lending institution that would result in approval of the proposal. However, if the commercial lending institution and the department are unable to reach an agreement pertaining to disposition of the property, the commercial lending institution shall not transfer the property, other than to the state. A commercial lending institution that establishes that it has met the requirements of this subsection shall not be liable under section 12 with respect to that property.

(10) A commercial lending institution or other person that has not participated in the management of a property prior to assuming ownership or control of the property as a fiduciary, as defined by section 5 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.5 of the Michigan Compiled Laws, and that is acting or has acted in a capacity permitted by the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.1 to 700.993 of the Michigan Compiled Laws, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, or negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution or other person; or any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(11) A commercial lending institution that has not participated in the management of a property prior to assuming ownership or control of the property in a fiduciary capacity, and pursuant to a fiduciary agreement entered into on or before August 1, 1990 owns or controls the property in a fiduciary capacity that is not regulated by Act No. 642 of the Public Acts of 1978 but is authorized by the banking code of 1969, Act No. 319 of the Public Acts of 1969, being sections 487.301 to 487.598 of the Michigan Compiled Laws, or the national bank act, chapter 106, 13 Stat. 99, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution; or any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(12) A commercial lending institution that has not participated in the management of a property prior to assuming ownership or control of the property in a fiduciary capacity, and pursuant to a fiduciary agreement entered into after August 1, 1990 owns or controls the property in a fiduciary capacity that is not regulated by Act No. 642 of the Public Acts of 1978 but is authorized by the banking code of 1969, Act No. 319 of the Public Acts of 1969, being sections 487.301 to 487.598 of the Michigan Compiled Laws, or the national bank act, chapter 106, 13 Stat. 99, that has served only in an administrative, custodial, or financial capacity with respect to the property, and has not exercised sufficient involvement to control the owner's or operator's handling of a hazardous substance, shall not be personally liable as an owner or operator of the property under this act. This subsection shall not do either of the following:

(a) Relieve the fiduciary from personal liability as the result of the fiduciary's assumption of personal liability, negligence, gross negligence, or reckless, willful, or intentional misconduct.

(b) Prevent claims against the assets that are part of or all of the estate or trust that contains the facility; any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility that is administered by the commercial lending institution; or any other estate or trust of the decedent, grantor, ward, or other person whose estate or trust contains the facility. Such claims may be asserted against the fiduciary in its representative capacity, whether or not the fiduciary is personally liable.

(13) The defenses to liability under section 12 in subsections (7) to (12) in regard to a facility do not apply when a commercial lending institution, or its agent, employee, or a person retained by the commercial lending institution, caused or contributed to a release or threat of release.

(14) As used in subsections (8) and (9), "foreclosure environmental assessment" means to conduct, or cause to be conducted, a visual inspection of property and a review of the ownership and use history of the property to determine whether there is a release or threat of release. If a visual inspection or the ownership and use history, or both, show that there may be a release or threat of release, a site specific on-site evaluation of the nature and extent, if any, of the release or threat of release shall be conducted, and an inspection of all permanent structures on the property to determine the presence of a hazardous substance shall be conducted.

Sec. 12b. (1) A person that is a response activity contractor for any release or threatened release is not liable to any person for injuries, costs, damages, expenses, or other liability, including, but not limited to, claims for indemnification or contribution and claims by third parties for death, personal injuries, illness, or loss of or damages to property or economic loss that result from the release or threatened release. This subsection shall not apply if a release or threatened release is caused by conduct of the response activity contractor that is negligent, grossly negligent, or that constitutes intentional misconduct.

(2) This section shall not affect the liability of a person under any warranty under federal, state, or common law. This subsection shall not affect the liability of an employer who is a response activity contractor to any employee of the employer under law, including any provision of law relating to worker's compensation.

(3) An employee of this state or a local unit of government who provides services relating to a response activity while acting within the scope of his or her authority as a governmental employee shall have the same exemption from liability as is provided to the response activity contractor under this section.

(4) The defense provided by section 12a(1)(c) is not available to any person that may be liable under section 12 with respect to any costs or damages caused by any act or omission of a response activity contractor. Except as provided in this section, this section shall not affect the liability under this act or under any other federal or state law of any person.

(5) This section shall not affect the plaintiff's burden of establishing liability under this act.

(6) As used in this section:

(a) "Response activity contract" means a written contract or agreement entered into by a response activity contractor with 1 or more of the following:

(*i*) The department.

(*ii*) The department of public health.

(*iii*) A person that may be liable under section 12 that is carrying out an agreement to undertake a response activity under this act.

(b) "Response activity contractor" means 1 or both of the following:

(*i*) A person that enters into a response activity contract with respect to a release or threatened release and is carrying out the terms of a contract.

(*ii*) A person that is retained or hired by a person described in subparagraph (*i*) to provide any service relating to a response activity.

Sec. 12c. (1) If 2 or more persons acting independently cause a release or threat of release that results in response activity costs, or damages for injury to, destruction of, or loss of natural resources, and there is a reasonable basis for division of harm according to contribution of each person, each person is subject to liability under section 12 only for the portion of the total harm that the person caused. However, a person seeking to limit its liability on the ground that the entire harm is capable of division shall have the burden of proof as to the divisibility of the harm and as to the apportionment of liability.

(2) If 2 or more persons cause or contribute to an indivisible harm that results in response activity costs, or damages for injury to, destruction of, or loss of natural resources, each person is subject to liability under section 12 for the entire harm.

(3) A person may seek contribution from any other person who is liable or may be liable under section 12 during or following a civil action brought under this act. However, a person that is participating in the allocation process described in section 11f or 11g shall not be subject to a contribution action during the pendency of that allocation process. This subsection shall not diminish the right of a person to bring an action for contribution in the absence of a civil action by the state under this act. The court shall consider all of the following factors in allocating response activity costs and damages among liable persons:

(a) Each person's relative degree of responsibility in causing the release or threat of release.

(b) The principles of equity pertaining to contribution.

(c) The degree of involvement of and care exercised by the person with regard to the hazardous substance.

(d) The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.

(e) Whether equity requires that the liability of some of the persons should constitute a single share.

(4) If, in an action for contribution under subsection (3), the court determines that all or part of a person's share of liability is uncollectible from that person, then the court may reallocate any uncollectible amount among the other persons according to the factors listed in subsection (3). A person whose share is determined to be uncollectible shall continue to be subject to contribution and to any continuing liability to the state.

(5) A person that has resolved its liability to the state in an administrative or judicially approved consent order shall not be liable for claims for contribution regarding matters addressed in the consent order. The consent order does not discharge any of the other persons liable under section 12 unless the terms of the consent order provide for this discharge, but the potential liability of the other persons is reduced by the amount of the consent order.

(6) If the state obtains less than complete relief from a person that has resolved its liability to the state in an administrative or judicially approved consent order under this act, the state may bring an action against any other person liable under section 12 that has not resolved its liabilities.

(7) A person that has resolved its liability to the state for some or all of a response activity in an administrative or judicially approved consent order may seek contribution from any person that is not a party to the consent order described in subsection (5).

(8) In an action for contribution under this section, the rights of any person that has resolved its liability to the state shall be subordinate to the rights of the state, if the state files an action under this act.

Sec. 12d. (1) An indemnification, hold harmless, or similar agreement or conveyance is not effective to transfer from a person that may be liable under section 12 to the state for evaluation or response activity costs or damages for a release or threat of release to any other person the liability imposed under this act. This section shall not bar an agreement to insure, hold harmless, or indemnify a party to the agreement for liability under this act.

(2) This act does not bar a cause of action that a person subject to liability under this act, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

Sec. 13. (1) Except as provided in subsection (2), the liability under this act for each release or threat of release shall not exceed the total of all the costs of response activities, fines, and exemplary damages, plus $50,000,000.00 damages for injury to, destruction of, or loss of natural resources resulting from the release or threat of release, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release or threat of release.

(2) Notwithstanding the limitations in subsection (1), the liability of a person under this act shall be the full and total costs and damages listed in subsection (1), in either of the following circumstances:

(a) The release or threatened release of a hazardous substance was the result of willful misconduct or gross negligence of the party.

(b) The primary cause of the release or threat of release was a knowing violation of applicable safety, construction, or operating standards or regulations.

Sec. 16. (1) In addition to other relief authorized by law, the attorney general may, on behalf of the state, commence a civil action seeking 1 or more of the following:

(a) Temporary or permanent injunctive relief necessary to protect the public health, safety, or welfare, or the environment from the release or threat of release.

(b) Recovery of state response activity costs pursuant to section 12.

(c) Damages for the full value of injury to, destruction of, or loss of natural resources resulting from the release or threat of release, including the reasonable costs of assessing the injury, destruction, or loss resulting from the release or threat of release.

(d) A declaratory judgment on liability for future response costs and damages.

(e) A civil fine of not more than $1,000.00 for each day of noncompliance without sufficient cause with a written request of the director pursuant to section 10a(4). A fine imposed under this subdivision shall be based on the seriousness of the violation and any good faith efforts of the person to comply with the request of the director.

(f) A civil fine of not more than $10,000.00 for each day of violation of this act or a rule promulgated under this act. A fine imposed under this subdivision shall be based upon the seriousness of the violation and any good faith efforts of the person to comply with this act or a rule promulgated under this act.

(g) A civil fine of not more than $25,000.00 for each day of violation of a judicial order or an administrative order issued pursuant to section 10f, including exemplary damages pursuant to section 10f.

(h) Enforcement of an administrative order issued pursuant to section 10f.

(i) Enforcement of information gathering and entry authority pursuant to section 10d.

(j) Enforcement of the reporting requirements under section 10a(2) and (6).

(k) Any other relief necessary for the enforcement of this act.

(2) If an action is brought under this act by a plaintiff other than the attorney general, the plaintiff shall, at the time of filing, provide a copy of the complaint to the attorney general.

(3) Except as otherwise provided in this act, an action brought under this act may be brought in the circuit court for the county of Ingham, in the county in which the defendant resides, has a place of business, or in which the registered office of a defendant corporation is located, or in the county where the release occurred.

(4) A state court shall not have jurisdiction to review challenges to a response activity selected or approved by the department under this act, or to review an administrative order issued under this act in any action except an action that is 1 of the following:

(a) An action to recover response costs, damages, or for contribution.

(b) An action by the state to enforce an administrative order under this act or by any other person under section 15(1)(b) to enforce an administrative order or to recover a fine for violation of an order.

(c) An action pursuant to section 10f(5) for review of a decision by the department denying or limiting reimbursement.

(d) An action pursuant to section 15 challenging a response activity selected or approved by the department, if such action is filed after the completion of the response activity.

(e) An action by the state pursuant to section 12(6) to compel response activity.

(5) In any judicial action under this act, judicial review of any issues concerning the selection or adequacy of a response activity taken, ordered, or agreed to by the state shall be limited to the administrative record. If the court finds that the record is incomplete or inadequate, the court may consider supplemental material in the action. In considering objections raised in a judicial action under this act, the court shall uphold the state's decision in selecting a response activity unless the objecting party can demonstrate based on the administrative record that the decision was arbitrary and capricious or otherwise not in accordance with law. In reviewing alleged procedural errors, the court may disallow costs or damages only to the extent the errors were so serious and related to matters of such central importance that the activity would have been significantly changed had the errors not been made.

(6) In an action commenced under this act, any person may intervene as a matter of right if that person claims an interest relating to the subject matter of the action and is situated so that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the court finds the person's interest is adequately represented by an existing party.

Sec. 16a. (1) All unpaid costs and damages for which a person is liable under section 12 shall constitute a lien in favor of the state upon a facility that has been the subject of response activity by the state and is owned by that person. A lien under this subsection shall have priority over all other liens and encumbrances except liens and encumbrances recorded before the date the lien under this subsection is recorded. A lien under this subsection arises when the state first incurs costs for response activity at the facility for which the person is responsible.

(2) If the attorney general determines that the lien provided in subsection (1) is insufficient to protect the interest of the state in recovering response costs at a facility, the attorney general may file a petition in the circuit court of the county in which the facility is located seeking either or both of the following:

(a) A lien upon the facility subject to response activity that takes priority over all other liens and encumbrances that are or have been recorded on the facility.

(b) A lien upon real or personal property or rights to real or personal property, other than the facility, owned by the person described in subsection (1), having priority over all other liens and encumbrances except liens and encumbrances recorded prior to the date the lien under this subsection is recorded. However, the following are not subject to the lien provided for in this subdivision:

(*i*) Assets of a qualified pension plan or individual retirement account under the internal revenue code.

(*ii*) Assets held expressly for the purpose of financing a dependent's college education.

(*iii*) Up to $500,000.00 in nonbusiness real or personal property or rights to nonbusiness real or personal property, except that not more than $25,000.00 of this amount may be cash or securities.

(3) A petition submitted pursuant to subsection (2) shall set forth with as much specificity as possible the type of lien sought, the property that would be affected, and the reasons the attorney general believes the lien is necessary. Upon receipt of a petition under subsection (2), the court shall promptly schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the attorney general, the property owner, and any persons holding liens or perfected security interests in the real property subject to response activity.

(4) In addition to the lien provided in subsections (1) and (2), if the state incurs costs for response activity that increases the market value of real property that is the location of a release or threatened release, the increase in value caused by the state funded response activity, to the extent the state incurred unpaid costs and damages, shall constitute a lien in favor of the state upon the real property. This lien shall have priority over all other liens or encumbrances that are or have been recorded upon the property.

(5) A lien provided in subsection (1), (2), or (4) is perfected against real property when a notice of lien is filed by the department with the register of deeds in the county in which the real property is located. A lien upon personal property provided in subsection (2) is perfected when a notice of lien is filed by the department in accordance with applicable law and regulation for the perfection of a lien on that type of personal property. In addition, the department shall, at the time of the filing of the notice of lien, provide a copy of the notice of lien to the owner of that property by certified mail.

(6) A lien under this section shall continue until the liability for the costs and damages is satisfied or resolved or becomes unenforceable through the operation of the statute of limitations provided in section 17.

(7) Upon satisfaction of the liability secured by the lien, the department shall file a notice of release of lien in the same manner as provided in subsection (5).

(8) If the department, at or prior to the time of filing the notice of release of lien pursuant to subsection (7), has made a determination that the person liable under section 12 has completed all of the response activity at the real property pursuant to the approved remedial action plan, the department shall execute and file with the notice of release of lien a document stating that all response activities required in the approved remedial action plan have been completed.

Sec. 16b. (1) The penalties provided in this section only apply to a release that occurs after the effective date of this section.

(2) A person that knowingly releases or causes the release of a hazardous substance contrary to applicable federal, state, or local requirements or contrary to any permit or license held by that person, and that knew or should have known that the release could cause personal injury or property damage, or that intentionally makes a false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this act and rules promulgated under this act, or that intentionally renders inaccurate any monitoring device or record required to be maintained under this act or a rule promulgated under this act, is guilty of a felony and shall be fined not less than $2,500.00 or more than $25,000.00 for each violation. The court may impose an additional fine of not more than $25,000.00 for each day during which the release occurred. If the conviction is for a violation committed after a first conviction of the person under this subsection, the court shall impose a fine of not less than $25,000.00 and not more than $50,000.00 per day of violation. Upon conviction, in addition to a fine, the court in its discretion may sentence the defendant to imprisonment for not more than 2 years or impose probation upon a person for a violation of this act. With the exception of the issuance of criminal complaints, issuance of warrants, and the holding of an arraignment, the circuit court for the county in which the violation occurred has exclusive jurisdiction.

(3) Upon a finding by the court that the action of a criminal defendant poses or posed a substantial endangerment to public health, safety, or welfare, the court shall impose, in addition to the penalties set forth in subsection (2), a fine of not less than $1,000,000.00 and, in addition to a fine, a sentence of 5 years' imprisonment.

(4) To find a defendant criminally liable for substantial endangerment under subsection (3), the court shall determine that the defendant knowingly or recklessly acted in such a manner as to cause a danger of death or serious bodily injury and that either of the following has occurred:

(a) The defendant had an actual awareness, or belief, or understanding, that his or her conduct would cause a substantial danger of death or serious bodily injury.

(b) The defendant acted in gross disregard of the standard of care that any reasonable person would observe in similar circumstances.

(5) Knowledge possessed by a person other than the defendant under subsection (4) may be attributable to the defendant if the defendant took affirmative steps to shield himself or herself from the relevant information.

(6) The department may pay an award of up to $10,000.00 to an individual who provides information leading to the arrest and conviction of a person for a violation of this section. The department shall promulgate rules that prescribe criteria for granting awards under this section. An award shall not be made under this section until rules are promulgated prescribing the criteria for making awards. Awards under this subsection may be paid from the Michigan environmental assurance fund if enabling legislation creating the fund is enacted into law.

(7) "Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Sec. 18. (1) Two years after the effective date of this section, a citizens review board shall be established. The review board shall consist of 6 members of the general public and the director of the legislative service bureau division of science and technology who shall serve as the nonvoting chairperson. The public members of the review board shall reflect a cross section of small business, large corporate business, local units of government, and environmental organizations. Specifically, the review board shall have 3 members representative of the environmental community and 3 members representative of business interests or local units of government, or both.

(2) Two members of the review board shall be appointed by the governor, 2 members shall be appointed by the speaker of the house of representatives, and 2 members shall be appointed by the senate majority leader.

(3) The review board shall submit to the standing committees of the senate and the house of representatives that address legislation pertaining to the environment and the natural resources of this state a report that contains a full review of the operation of the amendatory act that added this section. The report shall include a summary of the effectiveness of the amendatory act that added this section, recommendations for amendments to this act, and other information that the legislative committees described in this subsection may request at the time of the establishment of the review board.

(4) The department shall provide the review board with both of the following:

(a) The department's recommendations regarding amendments to this act that the department concludes would improve this act.

(b) The department's evaluation of the effectiveness of this act.

(5) Within 6 months after the establishment of the review board, the review board shall issue its report as provided in this section and the review board shall be disbanded. Funding for the review board shall be provided from the fund and shall not exceed $100,000.00. Members of the review board shall receive as compensation a per diem allotment equal to the per diem received by the commission of natural resources and shall receive actual and necessary expenses incurred by review board members in carrying out their responsibilities under this section.

Section 2. Section 11f of Act No. 307 of the Public Acts of 1982, as added by this amendatory act, shall take effect when the Michigan environmental assurance corporation act, Senate Bill No. 981, and its funding mechanism, House Bill No. 5808, are enacted into law and the Michigan environmental assurance corporation files with the secretary of state a certification that the Michigan environmental assurance corporation is funded and prepared to undertake its responsibilities under section 11f.

Section 3. Section 11g of Act No. 307 of the Public Acts of 1982, as added by this amendatory act, is repealed on the effective date of section 11f.

Section 4. This amendatory act shall take effect July 1, 1991.

Section 5. This amendatory act shall not take effect unless Senate Bill No. 1020 of the 85th Legislature is enacted into law.

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Clerk of the House of Representatives.

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Secretary of the Senate.

Approved.....

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Governor.