



Senate Fiscal Agency
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BILL ANALYSIS

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House Bill 4860 (Substitute S-2 as reported)
Sponsor: Representative Kevin Elsenheimer
House Committee: Natural Resources, Great Lakes, Land Use, and Environment
Senate Committee: Natural Resources and Environmental Affairs

Date Completed: 11-1-05

RATIONALE

There is some concern about municipalities' liability for unauthorized discharges from private sewer systems. New residential developments often use private systems if connection to a public sewer system is not feasible or when soil conditions are unsuitable for the construction of individual, on-site septic systems. Part 41 (Sewerage Systems) of the Natural Resources and Environmental Protection Act regulates the construction and operation of sewerage systems and empowers the Department of Environmental Quality (DEQ) to "exercise due care to see that sewerage systems are properly planned, constructed, and operated to prevent unlawful pollution of the streams, lakes, and other water resources of the state".

Under Part 41, the DEQ promulgated R 299.2933 (Rule 33), which provided in part that if the owner of a proposed sewerage system was not a governmental agency, the application for a construction permit had to include a resolution from the local government stating that it would assume responsibility for the effective and continued operation of the system should the actual owner fail to take responsibility. The Michigan Court of Appeals invalidated the rule in 2003, however, in *Lake Isabella Development, Inc. v Village of Lake Isabella* (259 Mich App 393), finding it to be inconsistent with legislative intent, as well as arbitrary and capricious.

Although local governments now may refuse to accept responsibility for a private failed treatment facility, under Part 31 (Water Resources Protection), they still may be penalized for an unauthorized discharge.

Some people believe that local governments should be exempt from liability for a private system, unless they have formally assumed responsibility.

CONTENT

The bill would amend Part 31 of the Natural Resources and Environmental Protection Act to exempt a municipality from liability for an unauthorized discharge from a sewerage system that was permitted under Part 31 and owned by another party, unless the municipality had accepted responsibility for the system.

Part 31 prohibits a person from discharging into the waters of the State a substance that is or may become injurious to the public health, safety, or welfare; domestic, commercial, industrial, agricultural, recreational, or other uses that are being or may be made of the waters; the value or utility of riparian land; livestock, wild animals, birds, fish, aquatic life, or plants; or the value of fish and game.

Further, the discharge of any raw human sewage into the waters of the State is prima facie evidence of a violation of Part 31 by the municipality in which the discharge originated, unless the discharge is permitted by an order or rule of the Department of Environmental Quality. (Prima facie evidence is evidence sufficient to establish a given fact unless it is rebutted or contradicted.) If the discharge is not the subject of a valid permit, a municipality responsible for the discharge may be subject to the remedies under Section 3115

(described below). If the discharge is the subject of a valid permit, and is in violation of it, a municipality responsible for the discharge is subject to the penalties provided in that section.

Under the bill, notwithstanding these provisions, a municipality would not be responsible for or subject to the remedies provided in Section 3115 for an unauthorized discharge from a sewerage system as defined in Section 4101 that was permitted under Part 31 and owned by a party other than the municipality, unless the municipality had accepted responsibility for the system in writing and, with respect to the civil fine and penalty under Section 3115, had been notified in writing by the DEQ of its responsibility for the system.

Under Section 4101, "sewerage system" means a system of pipes and structures including pipes, channels, conduits, manholes, pumping stations, sewage or waste treatment works, diversion and regulatory devices, outfall structures, and appurtenances, collectively or severally, actually used or intended for use by the public for the purpose of collecting, conveying, transporting, treating, or otherwise handling sanitary sewage or other industrial liquid wastes that are capable of adversely affecting the public health.

Under Section 3115, the DEQ may request the Attorney General to commence a civil action for appropriate relief for a violation of Part 31 or a provision of a permit or order issued or rule promulgated under Part 31. In addition to any other relief, the court must impose a civil fine of at least \$2,500 and may award reasonable attorney fees and costs to the prevailing party. The maximum fine the court may impose is \$25,000 per day of violation.

Additionally, a person who at the time of the violation knew or should have known that he or she discharged a substance contrary to Part 31, or contrary to a permit, order, or rule, is guilty of a felony and must be fined between \$2,500 and \$25,000 for each violation. The court may impose an additional fine of up to \$25,000 for each day the unlawful discharge occurred. For a subsequent conviction, the court must impose a fine of between \$25,000 and \$50,000 per day of violation. The court also may sentence the defendant to

imprisonment for up to two years or impose probation.

The court must impose an additional penalty if it finds that a defendant's actions pose or posed a substantial endangerment to the public health, safety, or welfare. In a civil action, the court must impose an additional fine of between \$500,000 and \$5.0 million. In a criminal case, the court must impose an additional fine of at least \$1.0 million and a sentence of five years' imprisonment.

MCL 324.3109

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Since the invalidation of Rule 33, the DEQ has relied on Section 3109(2) of the Act to impose liability for discharges from private sewerage systems on municipalities, even though the municipalities may not be responsible for a discharge. That section provides, "The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department." The DEQ's groundwater discharge permit application contains a requirement that a principal executive officer or ranking elected official from the local unit of government sign the application as a certification that the local unit is aware of its responsibilities under Section 3109. The application specifies that a local unit's refusal to sign does not reduce its liability under the statute.

The penalties under Section 3115 can be severely burdensome to local governments, especially during a time of revenue sharing cuts and other budgetary constraints. The bill would ensure that liability remained on the shoulders of the entity that built the system, rather than the municipality, unless the municipality formally had assumed responsibility.

Opposing Argument

The bill would not address the DEQ's inability to reject the construction of private

sewerage systems in the absence of a long-term plan to ensure that residents are not subjected to the ill effects of inappropriate operation or abandonment by developers.

Response: If a municipality did not assume responsibility for a system under the bill, the responsibility would lie with the entity that built the system. Furthermore, under the DEQ's current policy, if the owner of a proposed wastewater facility does not have a resolution from the local government that it will assume responsibility, the owner can obtain a permit by meeting other criteria, which include the establishment of a legal entity to own the proposed facility, and a perpetual operation and maintenance fund. Additionally, separate legislation (Senate Bills 356, 419, and 719) would give the Public Service Commission jurisdiction over private wastewater utilities, which would assume the responsibility for operating and managing private sewage treatment systems. Under those bills, which have been enrolled and are awaiting the Governor's signature, the State would have more oversight and could ensure that residents were not adversely affected if a system's owner failed to operate and maintain it properly.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill would have no fiscal impact on State government and no impact on local unit revenue. The bill would potentially reduce local unit expenditures to the extent that it would reduce the number of instances in which a local unit was held liable for an unauthorized discharge. To the extent that it would not affect a local unit's liability, the bill would not have any fiscal impact.

This estimate is preliminary and will be revised as new information becomes available.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.