

Legislative Analysis



RECLASSIFICATION OF CERTAIN CONSTRUCTION, MANUFACTURING, AND INDUSTRIAL BYPRODUCTS

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House Bill 5400 (Substitute H-1)
Sponsor: Rep. Wayne Schmidt

House Bill 5401 as introduced
Sponsor: Rep. Edward McBroom

House Bill 5402 (Substitute H-1)
Sponsor: Rep. Phil Potvin

Committee: Natural Resources
Complete to 4-16-14

A SUMMARY OF HOUSE BILL 5400 (Substitute H-1) & 5402 (Substitute H-1) AS ADOPTED BY COMMITTEE ON 3-25-14, AND HOUSE BILL 5401 AS INTRODUCED 3-11-14

These three bills would change how certain industrial byproducts are classified and revise the regulations pertaining to their reuse. The byproducts which are being classified as "beneficial use" in the proposed legislation are currently categorized as hazardous waste. While most of the provisions in the bills fall under the Department of Environmental Quality, some categories of use related to agriculture would fall under the the Department of Agriculture and Rural Development.

House Bill 5400 (H-1) would amend the Natural Resources and Environmental Protection Act (NREPA) to establish the new regulations for the recycling and reuse of these materials, and creates categories for reusable materials. Materials eligible for reuse are classified as *beneficial use 1, 2, 3, or 4*, or as *a beneficial use byproduct*, based on their intended use. The bill also contains definitions of those terms and others used in HB 5401 and HB 5402.

The bill also outlines how a person may petition the Department of Environmental Quality to approve a material, use, or material and use as a source-separated material, beneficial use byproduct, inert material, low-hazard industrial waste, or any other material, use or material and use that can be approved under this part.

House Bill 5401 would also amend NRPA; it would exempt individuals or businesses who store beneficial use byproducts or inert material from liability if they have followed certain regulations pertaining to transport and storage. Under current law, the byproducts which are being classified as "beneficial use" are currently categorized as hazardous waste. This bill would treat "beneficial use" materials in the same manner as other similarly classified materials.

House Bill 5402 (H-1) would make complementary amendments to Public Act 162 of 1955, which regulates agricultural liming material. It would require certain information (as listed in House Bill 5400) to be included in the information that must be filed with the

Department of Agriculture before liming material is sold or offered for sale. That information is described on Page 3 and 4 of this summary in the description of House Bill 5400.

A more detailed description of the terms and definitions included in House Bill 5400 follows.

House Bill 5400

"Beneficial use 1" means use as aggregate, road material, or building material that in ultimate use is or will be bonded or encapsulated by cement, limes, or asphalt.

"Beneficial use 2" means use as any of the following:

- Construction fill at eligible nonresidential property. An *eligible nonresidential property* means property not intended for use as a child care center, an elementary school, an elder care and assisted living center, a nursing home, or a single-family or multifamily dwelling unless the multifamily dwelling is part of a mixed-use development and all dwelling units and associated outdoor residential use areas are located above the ground floor.

Guidelines for using a beneficial use 2 material as construction fill are as follows. The material must:

- Be placed at least 4 feet above the seasonal groundwater table.
 - Not come into contact with a surface water body.
 - Be covered by concrete, asphalt pavement, or other material approved by the Department of Environmental Quality.
 - Not exceed four feet in thickness, except for areas where exceedances are incidental to variations in the existing topography. This excludes construction fill placed underneath a building or other structure.
- Road base or soil stabilizer that does not exceed four feet in thickness, except for areas where exceedances are incidental to variations in existing topography, is placed at least four feet above the seasonal groundwater table, does not come into contact with a surface water body, and is covered by concrete, asphalt pavement, or other material approved by the department.
 - Road shoulder material that does not exceed four feet in thickness except for areas where exceedances are incidental to variations in existing topography; is placed at least 4 feet above the seasonal groundwater table and does not come into contact with a surface water body; is sloped; and is covered by asphalt pavement, concrete, six inches of gravel, or other material approved by the Department of Environmental Quality.

"Beneficial use 3" means applied to land as a fertilizer or soil conditioner under Part 85 (fertilizers) or a liming material under PA 162 of 1955, MCL 290.531 to 290.538, if all of the following requirements are met:

- The material is applied at an agronomic rate consistent with Generally Accepted Agricultural and Management Practices (GAAMP).
- The use, placement, or storage at the location of use does not do any of the following:
 - Violate Part 55 (air pollution control) or create a nuisance.
 - Cause groundwater to no longer be fit for one or more protected uses as defined in R 323.2202 of the Michigan Administrative Code. Under the code, protected uses include public health, safety, and welfare; domestic, commercial, industrial, agricultural, recreational, and other uses that are being made or may be made of groundwater; the value or utility of riparian lands; and livestock, wild animals, birds, fish, and aquatic life or plants or the growth or propagation of, and the value in, livestock, wild animals, birds, fish, and aquatic life or plants.
 - Violate a Part 31 surface water quality standard.
- The use, placement, or storage at the location of use is isolated laterally from any public water supply well and any domestic well at a minimum distance of 200 feet from a type I or type IIa water supply well, 75 feet from a type IIb or III water supply well, and 50 feet from any domestic well. The department may require a lesser or greater isolation distance in an individual case based on groundwater flow direction, volume, and constituents of contamination of the discharge; geological, surface, and other site conditions; and the degree of threat to the well or wells.
- For a discharge authorized by MCL 333.12701 to 333.12715 (which deals with well drilling and pump installing), the department may require a lesser or greater isolation distance in an individual case based on groundwater flow direction, volume, and constituents of contamination of the discharge; geological, surface, and other site conditions; and the degree of threat to the well or wells.
- Beneficial use 3 material offered for sale or use shall be annually registered with or licensed by the Department of Agriculture and Rural Development. In addition to the information required in MCL 290.531 to 290.538, the following shall be submitted to the department as part of the material registration or licensing:
 - A laboratory analysis that contains all the following:
 - Sampling that demonstrates the level of metals in the material does not pose harm to human health or the environment.

- For a fertilizer, a demonstration that the material contains the minimum percentage of each plant nutrient guaranteed or claimed to be present, as well as of the following to determine an agronomic rate consistent with the GAAMP:
 - Percentage of material's dry solids, nitrogen, ammonium nitrogen, phosphorus, and potassium.
 - Levels of calcium, magnesium, acidity, or basicity, measured by PH, sulfate, chromium, copper, silver, chlorine, boron, volatile organic compounds (as determined by U.S. EPA Method 8260), semi-volatile compounds (as determined by U.S. EPA Method 8270C), and dioxins (as determined by U.S. EPA method 1613B).
- For a soil conditioner or liming material, the following information is required:
 - Percentage of material's dry solids, nitrogen, ammonium nitrogen, phosphorus, and potassium.
 - Levels of calcium, magnesium, acidity, or basicity, measured by PH, sulfate, chromium, copper, silver, chlorine, boron, volatile organic compounds (as determined by U.S. EPA Method 8260), semi-volatile compounds (as determined by U.S. EPA Method 8270C), and dioxins (as determined by U.S. EPA method 1613B).
 - For soil conditioners, scientifically acceptable data that gives reasonable assurance that the material will improve the physical nature of the soil by altering the soil structure by making soil nutrients more available or otherwise enhancing the soil media resulting in beneficial crop response or other plant growth is also required.
 - For liming material, scientifically acceptable data demonstrating that the material will correct soil acidity.

When a beneficial use 3 material is registered or licensed, the laboratory analysis report and scientifically acceptable data submitted with a prior application may be resubmitted for a subsequent application unless the raw materials or processes used to generate the material changes in such a way that could be reasonably expected to materially affect the laboratory analysis report or scientifically acceptable data.

"Beneficial use 4" means any of the following uses:

- To stabilize, neutralize, solidify, or otherwise treat waste for ultimate disposal at a facility licensed under this part or Part 111 (hazardous waste management).
- To treat wastewater, wastewater treatment sludge, or wastewater sludge in compliance with Part 31 or the federal Water Pollution Control Act, 33 USC 1251 to 1387, at a private or publicly owned wastewater treatment plant.

- To stabilize, neutralize, solidify, cap, or otherwise remediate hazardous substances or contaminants as part of a response activity in compliance with Parts 201 or 213, or the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, or a corrective action in compliance with Part 111 or the federal Solid Waste Disposal Act, 42 USC 6901 to 6992k.
- As construction material at a landfill licensed under this part, including, but not limited to, liner material, leachate liner cover material, structural fill material, cover material, blended cap material, or road construction material.

"Beneficial use by-product" means the following materials if the materials are stored for beneficial use or are used beneficially as specified and the requirements of Section 11551(1) are met:

- Coal bottom or wood ash used for beneficial use 3, or coal or wood ash, except for flue gas desulfurization material, used for beneficial uses 1, 2, or 4.
- Pulp and paper mill ash used for beneficial uses 1, 2, 3, or 4.
- Mixed wood ash used for beneficial uses 1, 2, 3, or 4.
- Cement kiln dust used as a flue gas scrubbing reagent or for beneficial uses 1, 2, 3, or 4.
- Lime kiln dust used as a flue gas scrubbing reagent or for beneficial uses 1, 2, 3, or 4.
- Stamp sands used for beneficial uses 1 or 2.
- Foundry sand from ferrous or aluminum foundries used for beneficial uses 1, 2, 3, or 4.
- Pulp and paper mill material, other than scrap paper or rejects from screens, cleaners, and mills dispersion equipment that contain more than de minimis amounts of plastic, used for beneficial use 3.
- Spent media from sandblasting, with uncontaminated sand, newly manufactured, unpainted steel used for beneficial uses 1 or 2.
- Dewatered grinding sludge from public transportation agency road projects used for beneficial uses 1 or 2.
- Lime softening residuals from the treatment and conditioning of water for domestic use or from a community water supply used for beneficial use 3 or 4.
- Soil that is washed or otherwise removed from sugar beets that has not more than 35% moisture content used for beneficial uses 3.
- Flue gas desulfurization material used for beneficial uses 1 or 3.
- Other materials and uses approved by the department under Section 11553(3). Approval of other materials and uses by the department does not require the use of those materials by any governmental entity or any other person.

Under the bill, the definition of **inert material** is amended by adding specific examples of items that would be categorized as inert materials and adding standards regarding those materials.

An **inert material** is one of the following materials:

- Rocks or trees, stumps, and other similar land-clearing debris that is buried on the site of origin or another site, with the approval of the owner of the site, if all of the following conditions are met:
 - The debris is not buried in a wetland or floodplain.
 - The debris is placed at least three feet above the groundwater table as observed at the time of placement.
 - The placement of the debris does not violate federal, state, or local law or create a nuisance.
- Uncontaminated excavated soil or dredged sediment. Excavated soil or dredged sediment is considered uncontaminated if it does not contain more than de minimis amounts of solid waste and one of the following applies:
 - The soil or sediment is not contaminated by a hazardous substance as a result of human activity. Soil or sediment that naturally contains elevated levels of hazardous substances above unrestricted residential or any other Part 201 generic soil cleanup criteria is not considered contaminated for purposes of this subdivision. A soil or sediment analysis is not required under this requirement if, based on past land use, there is no reason to believe the soil or sediment is contaminated.
 - For any hazardous substance that could reasonably be expected to be present as a result of past land use and human activity, the soil or sediment does not exceed the background concentration, as that term is defined in Part 201.
 - For any hazardous substance that could reasonably be expected to be present as a result of past land use and human activity, the soil or sediment falls below Part 201 generic residential soil direct contact cleanup criteria and hazardous substances in leachate from the soil or sediment, using, at the option of the generator, EPA method 1311, 1312, or any other leaching protocol approved by the department, fall below Part 201 generic residential health based groundwater drinking water values or criteria, and the soil or sediment would not cause a violation of any surface water quality standard established under Part 31 at the area of placement, disposal, or use.
- Excavated soil from a site of environmental contamination, corrective action, or response activity if the soil is not a listed hazardous waste under Part 111, and if the hazardous substances in the soil do not exceed generic soil cleanup criteria for unrestricted residential use as defined in Part 201, or background concentration as defined in Part 201, as applicable.
- Construction brick, masonry, pavement, or broken concrete that is reused for fill, rip rap, slope stabilization, or other construction, if all of the following conditions are met:

- The use of the material does not violate Section 3108, Part 301, or Part 303.
 - The material is not materially contaminated. Typical surface oil staining on pavement and concrete from driveways, roadways, and parking lots is not material contamination. Material covered in whole or in part with lead-based paint is materially contaminated.
 - The material does not include exposed reinforcing bars.
- Portland cement clinker produced by a cement kiln using wood, fossil fuels, or solid waste as a fuel or feedstock, but not including cement kiln dust generated in the process.
 - Asphalt pavement or concrete pavement that meets all of the following requirements:
 - Has been removed from a public right-of-way.
 - Has been stockpiled or crushed for reuse as aggregate material.
 - Does not include exposed reinforcement bars.
 - Cuttings, drilling materials, and fluids used to drill or complete a well installed pursuant to Part 127 of the Public Health Code, and that are left on site.
 - Foundry sand blended with other inert materials or with compost and used to manufacture soil if representative testing of the foundry sand using either a totals analysis, a leachate analysis (using EPA method 1311, EPA method 1312, ASTM method 3987, or other leaching protocol approved by the department), or any combination of the two types of analyses demonstrates that a maximum concentration of certain compounds is not exceeded.
 - Any other material determined at any time by the Department of Environmental Quality in writing to be an inert material, either for general use or for a particular use under Section 11553(4).

Report to DEQ

Any generator or broker of material used as beneficial use byproducts for beneficial uses 1, 2, 3, and 4 would be required to file a report with the Department of Environmental Quality if they used more than 1,000 cubic yards of material during the prior October 1 to September 30 time period.

The report would include information such as the types and approximate amounts of beneficial use byproducts generated, brokered, and stored during that period; the approximate amount of beneficial use byproducts shipped off-site during that period; and the uses and conditions of use. The bill would allow this information to be designated as "confidential business information" by the generator or broker submitting this report.

FOIA Requests

If a Freedom of Information Act (FOIA) request is filed that would require that the information contained in a report designated as "confidential business information" be disclosed, then the Department of Environmental Quality would be required to take certain steps.

The first step would be to immediately notify the generator or broker whose report would fall under the scope of the FOIA request that a request has been made, and include the date the request was received by the department. The department would then issue a notice extending the period for the department to respond to the FOIA request for 10 business days.

The generator or broker who filed the report will have 12 business days from the date the department received the FOIA request to satisfactorily demonstrate to the department that the information contained in the report constitutes a trade secret or secret process, or that releasing the information would jeopardize the competitive position of the generator or broker.

If the generator or broker declines to satisfactorily demonstrate to the department that the information meets one of the above requirements, then the department shall grant the FOIA request.

If there is a dispute over the release of the information between the generator or broker and the person filing the FOIA request, then the director of the Department of Environment Quality shall grant or deny the request. The information requested shall not be released until two days have elapsed after the department notifies the generator or broker of the department's decision to grant the FOIA request.

MDARD Role

The bill specifically states that the Department of Agriculture and Rural Development, and not the Department of Environmental Quality, shall have regulatory control over materials, including beneficial use 3, registered or licensed under MCL 290.531 to 290.538 (agricultural liming material).

Petitions to DEQ for Use of Material

The bill also outlines how a person may petition the Department of Environmental Quality to approve a material, use, or material and use as a source-separated material, beneficial use byproduct, inert material, low-hazard industrial waste, or any other material, use or material and use that can be approved under this part.

For a material to be approved for a specified use as a beneficial byproduct, the following requirements must be met:

- The material is an industrial or commercial material that is, or has the potential to be, generated in high volumes.

- The proposed use serves a legitimate beneficial purpose other than providing a means to discard the material.
- A market exists for the material or there is a reasonable potential for the creation of a new market for the material if it is approved as a beneficial use byproduct.
- The material and use meet all federal and state consumer protection and product safety laws and regulations.

FISCAL IMPACT:

House Bill 5400 would increase administrative costs to the Department of Environmental Quality by an indeterminate amount. Any fiscal impact would be related to additional administrative responsibilities and costs resulting from the bill's provisions. This fiscal analysis will be updated as more information is made available by the Department.

House Bill 5400 would have a negative, but nominal, fiscal impact on the Department of Agriculture and Rural Development (DARD) to the extent that the expenses engendered by registration or licensure and laboratory analysis of "beneficial use 3 material" (e.g. registered or licenses under the Liming Material Act of 1955 (Act) required by HB 5400 are not sufficiently supported by revenue collected under the act. DARD anticipates that if expenses engendered under HB 5400 are greater than nominal and are not sufficiently supported with revenue collected under the act, it may seek additional appropriation from the General Fund to support these expenses.

According to DARD, the revenue generated under the act (\$20 per liming martial per year) is not sufficient to offset the department's current expenses to administer and implement the act. However, there are currently very few licenses issued under the act, and DARD anticipates that HB 5400 would not add significantly more, so the negative fiscal impact would likely be minimal.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.