

RECLASSIFICATION OF CERTAIN CONSTRUCTION, MANUFACTURING, AND INDUSTRIAL BYPRODUCTS

House Bill 5400 (Substitute H-2)
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 5-14-14

A REVISED SUMMARY OF HOUSE BILL 5400-5402 AS REPORTED FROM COMMITTEE ON 4-17-14

These three bills would change how certain industrial byproducts are classified and revise the regulations pertaining to their reuse. 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 Department of Agriculture and Rural Development.

House Bill 5400 (H-2) 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, 4, or 5*, 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. 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 filed with the Department of Agriculture before liming material is sold or offered for sale. That information is described on Pages 3, 4 and 5 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 creates new categories for certain materials, and outlines what materials may be classified as such, as well as how they may be used. An overview of these terms follows.

"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.

Before a **beneficial use byproduct** could be used for beneficial use 2 construction fill at a construction site for the first time, the generator of the material would be required to submit written notice to the department if the amount used would exceed 5,000 cubic yards. If the generator transfers the material to a broker, then the broker would be required to submit the notice.

"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 under NREPA (MCL 324.3101 to 324.3133).
- 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 would be required to 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 would be submitted to the department as part of the material registration or licensing:
 - Directions for use to ensure that the material is applied at an agronomic rate that has been reviewed by a certified crop advisor.
 - A laboratory analysis report that contains all the following:

(1) Sampling that demonstrates that the material does not pose harm to human health or the environment. The sampling must comply with either:

--The levels established under the Association of American Plant Food Control Officials' statement of Uniform Interpretation and Policy #25.

--The Part 201 Generic Residential Soil Direct Contact Cleanup Criteria for Volatile Organic Compounds (as determined by U.S. EPA Method 8260), semivolatile organic compounds (EPA Method 8270C), and dioxins (EPA Method 1613B). Results for dioxins would be reported on a dry weight basis, and total dioxin equivalence would be calculated and reported utilizing the U.S. EPA Toxic Equivalency Factors (U.S. EPA/100R10/005).

(2) For a fertilizer, all of the following used by a certified crop advisor to determine an agronomic rate consistent with Generally Accepted Agricultural and Management Practices (GAAMPs): the percentage in the material of dry solids, nitrogen, ammonium nitrogen, nitrate nitrogen, phosphorus, and potassium; and the levels of calcium, magnesium, acidity or basicity, measured by PH, sulfate, chromium, copper, silver, chlorine, and boron.

(3) 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, if the laboratory analysis report and scientifically acceptable data were submitted with a prior application, the report and data may be resubmitted for a subsequent application unless the raw materials or processes used to generate the material was changed in such a way that it 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 5" means blended with inert materials or with compost and used to manufacture soil.

"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, 4, or 5.
- 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 [The definition of de minimis would be amended by the bill to read as follows "refers to a small amount of material or number of items, as applicable, commingled and incidentally comingled with inert material for beneficial use byproducts, or incidentally disposed of with other solid waste."]
- 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. The following items would be defined as an **inert material**:

- 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.
- 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).

Source Separated Material

A source separated material is defined as "any of the following materials if separated at the source of generation, reused for the indicated use, not speculatively accumulated, and included in an annual report to the department that includes the volume of the material collected and recycled" [Unlined materials indicate changes to existing law while *italics* indicate new subsections]:

- Glass, metal, wood, paper products, plastics, rubber, textiles, garbage, or any other material approved by the department that is used for conversion into raw materials or new products. For the purpose of this subdivision, raw materials or new products include, but are not limited to, compost, biogas from anaerobic digestion, synthetic gas from gasification or pyrolysis, or other fuel.

- *Scrap wood and railroad ties*
- *Chipped or whole tires used to fuel an industrial boiler, kiln, power plant, or furnace, subject to Part 55, or for other uses approved by the department. As used in this subdivision, "power plant" does not include a gasification facility as defined in Section 7 of the Clean, Renewable, and Efficient Energy Act (PA 295 of 2008, MCL 460.10070).*
- *Recovered paint solids*
- *Gypsum drywall generated from the production of wallboard used for stock returned to the production process or for other uses approved by the department.*
- *Flue gas desulfurization gypsum used for production of cement or wallboard or other uses approved by the department.*
- *Asphalt shingles that do not contain asbestos, rolled roofing, or tar paper used as a component in asphalt, or used to fuel an industrial boiler, kiln, power plant, or furnace, subject to Part 55, or for other uses approved by the department.*
- *Municipal solid waste incinerator ash that meets criteria specified by the department and that is used as daily cover at a disposal facility licensed pursuant to this part.*
- *Utility poles or pole segments reused as poles, posts, or similar uses approved by the department in writing.*
- *Railroad ties used in landscaping, embankments, or similar uses approved by the department in writing.*
- *Any materials determined by the department in writing prior to the effective date of the bill to be a source separated material.*

[Note: All materials are used to fuel an industrial boiler, kiln, power plant, or furnace, subject to Part 55, or for other uses approved by the department unless otherwise stated.]

Report to DEQ

Any generator or broker of beneficial use byproducts material used 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. A person that reuses source-separated material would be required to report annually the volume of material re-used.

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 the DEQ would be required to take would be to immediately notify the generator or broker whose report would fall under the scope of the FOIA request that such a request has been made. The DEQ also would be required to include the date that the request was received by the department. The department would then issue a notice to the FOIA requestor extending the period the department has to respond to the FOIA request for an additional 10 business days.

A generator or broker who filed the report objecting to the release of the information contained within the report would then have 12 business days, starting 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 would 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 would either grant or deny the request. The information requested would 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 Michigan Department of Agriculture and Rural Development (MDARD), and not the Department of Environmental Quality, would have regulatory control over materials, including beneficial use 3, registered or licensed under MCL 290.531 to 290.538 (agricultural liming material provisions).

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.

Low-hazard waste is defined as "industrial material that has a low potential for groundwater contamination when managed in accordance with this part." The following materials are defined as low-hazard industrial wastes:

- Coal ash or wood ash.
- Cement kiln dust.
- Pulp and paper mill material.
- Scrap wood.
- Sludge from the treatment and conditioning of water for domestic use.
- Residue from the thermal treatment of petroleum contaminated soil, media, or debris.

- Sludge from the treatment and conditioning of water from community water supply.
- Foundry sand.
- Mixed wood ash, scrap wood ash, pulp and paper mill ash.
- Street cleanings.
- Asphalt shingles.
- New construction or production scrap drywall.
- Chipped or shredded tires.
- Copper slag.
- Copper stamp sands.
- Dredge material from nonremedial activities.
- Flue gas desulfurization material.
- Dewatered grinding slurry generated from public transportation agency road projects.
- Any material determined by the department in writing to be a low-hazard industrial waste as provided in section 11553(6).

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: [Not updated for bills as reported]

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 MDARD 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. MDARD 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 MDARD, 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 MDARD 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.