

Effect of Part 201 Amendments on Real Estate Transactions and Brownfield Redevelopment

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FACILITY DEFINITION

- Proposed amendments exempt from the definition of “facility”:
 - Areas where response actions have been completed to satisfy the cleanup criteria for unrestricted residential use
 - Areas where response actions have been completed to satisfy site-specific criteria and the site-specific criteria do not depend on any land use or resource use restriction to ensure protection of the public health, safety or welfare of the environment.



COMMERCIAL LEASE EXEMPTION

- A party who leases property for retail, office or commercial purposes is exempt from liability (unless they caused the contamination) and is not required to conduct environmental due diligence (Phase I ESA and BEA) to qualify for the exemption
- The amendments clarify the exemption, stating that the exemption is available regardless of the amount of hazardous substance use by the tenant.



BASELINE ENVIRONMENTAL ASSESSMENTS

- BEA process streamlined with the intent of conforming it to the federal all-appropriate-inquiry (AAI) process under CERCLA. The exemption from Part 201 liability is still available for persons who timely conduct and submit a BEA, but a few important aspects have changed:



BASELINE ENVIRONMENTAL ASSESSMENTS

- Still must conduct the BEA prior to or within 45 days of the earlier of the date of purchase, occupancy or foreclosure.
- Now must provide the BEA to the DNRE within six months after the earlier of the date of purchase, occupancy or foreclosure, rather than eight months.



BASELINE ENVIRONMENTAL ASSESSMENTS

- The proposed amendments significantly redefine BEA.
 - They remove the requirement to demonstrate a way to distinguish existing from future contamination.
 - A BEA is simply a written document that describes the results of AAI and describes sampling and analysis that confirm that the property is a “facility.”
 - AAI means an evaluation of environmental conditions at a property at the time of purchase, occupancy or foreclosure that satisfies the requirements of an ASTM (2005) Phase I environmental site assessment




BASELINE ENVIRONMENTAL ASSESSMENTS

- May still be business reasons to do more Phase 2 testing
 - Evaluate Due Care
 - Establish baseline
- Submittal form available on DNRE website
- DNRE guidance on contents of BEA report also on website

BASELINE ENVIRONMENTAL ASSESSMENTS

<p style="text-align: center;">Completed/Purchased/Submitted Scenarios</p> <p>The scenarios below relate to property purchase/ownership. For BEAs being conducted by new operators, use the date when the person becomes the operator to determine the applicable requirements.</p>	<p style="text-align: center;">Old BEA Format</p>	<p style="text-align: center;">New BEA Format</p>
<p>BEA completed after December 14, 2010, regardless of when property was purchased</p>		<p>X</p>
<p>BEA completed and submitted before December 14, 2010, regardless of when property was purchased</p>	<p>X</p>	
<p>BEA for property purchased after December 14, 2010 (If the BEA was completed and submitted to the DNRE prior to December 14, 2010, then the old format is acceptable)</p>		<p>X</p>
<p>BEA completed and property purchased before December 14, 2010, BEA submitted after the amendments but within the time-frame allowed in the existing law <u>and</u> within the 6 month time-frame allowed in the new amendments.</p>	<p>X</p>	
<p>6 months after enactment date of the amendments, only BEAs in the new format accepted regardless of when BEA was completed or property purchased.</p>		<p>X</p>

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- For BEA reports already completed or substantially completed at the time of the amendments, the DNRE will accept a cover letter indicating the BEA report contains the required parts and is in compliance with the December 14, 2010 amendments to Part 201. The cover letter can also include the necessary parts to bring the BEA report into compliance. Refer to the 3rd page of the new BEA form for the required parts.