

Living with Part 201 Updates

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A&WMA East & West Michigan Chapters
Michigan State Bar Environmental Law Section
Lansing Community College
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Overview of Brownfield & Cleanup Law Reforms

- Part 201 Establishes Michigan's cleanup program for contaminated sites
- Part 201 Amendments
 - Enacted December 14, 2010 through a 5 bill package
 - First major changes in 15 years
- Designed to address:
 - Disincentives to investment in remediation and redevelopment in Michigan
 - Lengthy project delays
 - Lack of Federal conformity

Part 201 Changes

- Major changes apply to:
 - BEA Process
 - Due Care
 - Response Activity Plan (“RAP”) review process
 - NFA determination
 - Technical Review Panel
 - Cleanup Criteria
 - GSI Criteria

Part 201 Changes – MDEQ “Dashboard”

DEQ - Remediation Division Actions on Response Action Plans, No Further Action Reports, and Bas - B&T's Internet Explorer

http://www.michigan.gov/deq/0,4561,7-135-3311_4109_4212-258736--,00.html

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DEQ - Remediation Division Actions on Respo...

Leaking Underground Storage Tanks Program
 Site Investigation and Cleanup
 State-Owned Sites Environmental Cleanup
 Superfund Program
 Land Redevelopment
 Sand Dunes
 Soil Erosion and Sedimentation Control
 Storage Tanks

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 Air
 Climate Change
 Key Topics
 News and Events
 Pollution Prevention
 Waste
 Water

Quarter 3: April 1 through June 30
 Quarter 4: July 1 through September 30

Notes:
 1. The amendments to [Part 201](#), Environmental Remediation of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, regarding Response Activity Plans and No Further Action Reports were not enacted until December 14, 2010, resulting in low numbers for the first quarter of Fiscal Year 2011.
 2. The term "Panel" means the Response Activity Review Panel that is called for under Section 20114b.
 3. Reports related to the Enbridge Oil Spill are not included because they are being reviewed under the terms of a consent agreement that calls for plans and reports in categories different from those in Part 201.

Guidance - October 2003
 Due Care Citizen's Guide (January 2004) [PDF](#)
 Instructions for Notice Regarding Abandoned or Discarded Containers
 Part 201 Citizen's Guide [PDF](#)
 Addresses for Submittals (DEQ/RRD Office Locations) [PDF](#)

Fiscal Year 2011

Response Activity Plans	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total
Received by the Department	1	26	40	31	98
Pending (the time period for review has not passed)	Current Total				21
Submitter Notified that Information was not Sufficient for Department to Make a Determination	0	4	5	7	16
Approved by the Department	0	4	13	13	30
Approved with Conditions	0	6	5	13	24
Denied by the Department	0	2	3	2	7
Recommended for Approval by the Panel	0	0	0	0	0
Recommended for Disapproval by the Panel	0	0	0	0	0
Approved by Operation of Law Under Section 20114b	0	0	0	0	0
No Further Action Reports	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total
Received by the Department	0	5	4	7	16
Pending (the time period for review has not passed)	Current Total				4
Submitter Notified that Information was not Sufficient for Department to Make a Determination	0	1	0	7	8
Approved by the Department	0	0	1	3	4
Approved with Conditions	0	0	0	0	0
Denied by the Department	0	0	0	0	0
Recommended for Approval by the Panel	0	0	0	0	0
Recommended for Disapproval by the Panel	0	0	0	0	0
Approved by Operation of Law Under Section 20114d	0	0	0	0	0
Baseline Environmental Assessments	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total
Number Received by the Department	251	258	277	231	1017

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Amended Part 201 – BEA Process

- Baseline Environmental Assessment (BEA) Process
 - Based on CERCLA “All Appropriate Inquiry” (“AAI”) rule and ASTM E-1527 Standard
 - Plus sufficient sampling to document “facility” status
 - Conduct BEA within 45 days; submit within 6 months
 - Make sure submittals are on new forms: www.michigan.gov/bea
 - New process will continue to provide liability protection for persons assuming control of property with historic releases
 - Amendments clarify that unless they caused contamination, parties who lease property for retail, office or commercial purposes are exempt from liability and not required to conduct environmental due diligence to qualify for exemption

Amended Part 201 – BEA Process

- Baseline Environmental Assessment (BEA) Process
- No “determination” by MDEQ; BEA now just describes results of AAI and sampling and confirms that site is “facility”
- According to MDEQ, there have been **1017 BEAs** submitted in FY 2011 (October 1, 2010 – September 30, 2011)
- Unresolved issue is whether this process has too much uncertainty for lenders, especially since obtaining a “determination” is no longer an option – but now substantially the same as the other 49 states

“Facility” Transfers: the Courts Weigh in

- *1031 Lapeer L.L.C. v. Rice*, 2010 Mich. App. LEXIS 1511 (Aug. 5, 2010 – unpublished)
 - Parties entered into lease for gas station that Landlord knew was a “facility” under Part 201 but did not disclose to plaintiffs; Disclosure to transferee required under Section 16 of Part 201
 - Court held lease was void
- *A.D. Transport Express, et al. v. Michigan Materials & Aggregates, et al.*, Nos. 290236 & 290250 (Sep. 30, 2010 – unpublished)
 - Court of Appeals reversed granting of summary disposition because question of fact as to who knew what when
- *Alfieri v. Bertorelli*, No. 07-056919 (Mich. App., October 17, 2011, unpublished)
 - Not based on Part 201, but silent fraud and misrepresentation; Court of Appeals upheld trial court’s rulings denying the sales agent defendants’ defenses they did not breach any legal duty by failing to disclose to potential condo buyers that site was contaminated
- Takeaway: if you have “facility” you must notify property transferee or transfer may be void

Amended Part 201 – Due Care Expansion

- Due Care Provisions Expansion
 - Align with federal Bona Fide Prospective Purchaser (“BFPP”) status (access, cleanup cooperation, deed restrictions)
 - Eliminate exemption for local governments that use/invite public to use contaminated property owned by them
 - “Compliance Analysis” under former BEA process no longer exists
 - A Due Care Plan can be submitted as a Response Activity Plan (discussed below)

Due Care Expansion – “Continuing Obligations” under CERCLA

- After purchasing a property, to maintain BFPP status, landowners must comply with “continuing obligations” under CERCLA §101(40)
 - compliance with land use restrictions and not impede effectiveness or integrity of any institutional control;
 - take reasonable steps with respect to hazardous substance on the affected property;
 - provide cooperation, assistance, and access;
 - comply with request for information or administrative subpoenas;
 - provide legally required notices.
- Continuing Obligations are listed in “common elements” document:
 - <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>

Due Care Expansion - New ASTM Guide

- New ASTM Guidance document on “continuing obligations” (ASTM E 2790-11)
 - Guidance document, not a standard or regulation
 - Outlines a 4-step approach
 - Step 1 – Review knowledge about the presence of hazardous substances at the property
 - Step 2 – Detailed review of any past cleanup activities
 - Step 3 – Identify and implement “initial” continuing obligations (e.g. remove leaking drums or installing engineered barrier)
 - Step 4 – Identify and implement “ongoing” continuing obligations (e.g. site inspections or evaluations of any land use changes)

Due Care Expansion - New ASTM Guide

- New ASTM Guidance E 2790-11 (continued)
- Documentation not required, but may be a good idea for:
 - Finding of No Continuing Obligations
 - Continuing Obligations Plan (COP)
 - O&M/Inspection Reports
 - Any other documentation related to site work that can help support no exacerbation
- *Saline River Properties, LLC v. Johnson Controls, Inc.*, 2011 U.S. Dist. LEXIS 119516 (E.D. Mich., October 17, 2011)
 - Developer could not support BFPP defense (under either CERCLA or NREPA) because could not show that it did not exacerbate conditions

Amended Part 201 – RAP Review

- Response Activity Plan (“RAP”) Review
 - Self-implemented cleanup efforts allowed & encouraged
 - Except for site-specific criteria/waivers
 - Submit proposed cleanup plans to MDEQ
 - Failure of MDEQ to review cleanup plans or requests in timely manner (150 days, 180 days if public participation required) means automatic approval
 - If denied by MDEQ, can request review by technical panel, but not liability assessments

Amended Part 201 – RAP Review

- Response Activity Plan (“RAP”) Review
 - According to MDEQ, for FY 2011 (October 1, 2010 – September 30, 2011):
 - 98 received
 - 16 insufficient info to make determination
 - 30 approved
 - 24 approved with conditions
 - 7 denied
 - 21 still pending
 - 0 recommended for approval or disapproval by panel, and none automatically approved for failure of MDEQ to review with statutory timeframes

Amended Part 201 – NFA Determination

- No Further Action (“NFA”) Reports
 - Submit NFA “upon completion of remedial actions that satisfy applicable cleanup criteria” (MCL 324.20114d)
 - If remedial actions are to cleanup criteria other than residential and/or if there are continuing requirements, then the NFA needs to include:
 - Post-Closure Agreement providing for monitoring, O&M and oversight to assure effectiveness of remedial action
 - Financial assurance mechanism
 - MDEQ review within 150 or 180 days; denial appeal to technical panel
 - Provides for “reopeners” for unknown conditions or remedy failure; change in criteria?
 - New liability protection (Section 26) for party holding NFA determination

Amended Part 201 – NFA Determination

- No Further Action (“NFA”) Reports
 - According to MDEQ, for FY 2011 (October 1, 2010 – September 30, 2011):
 - 16 received
 - 8 insufficient info to make determination
 - 4 approved
 - 4 still pending
 - 0 approved with conditions, denied, recommended for approval or disapproval by panel, or automatically approved for failure of MDEQ to review with statutory timeframes

Amended Part 201 – Technical Review Panel

- Response Activity Review Panel
 - Established to address technical issues from RAP or NFA denials
 - Panel members appointed by MDEQ Director
 - 15 members; 5 members for each case; Panel members must have relevant scientific or technical credentials and relevant experience
 - Makes recommendations to Director after Petitioner's presentation; may affirm, reverse or modify
 - Petition process to request review with \$3,500 fee
 - MDEQ Director final decision subject to Court appeal
 - No solicitation for panel membership has been sent, and no party has requested a panel review

Amended Part 201 – Clean-Up Criteria

- Clean-up Criteria

- Simplified to:
 - Residential
 - Non-residential (former industrial, but includes commercial sites)
 - Site-specific
- Criteria updated annually by rulemaking (including VI); Operational Memoranda are not law
- The criteria tables were revised to reflect residential/non-residential on 3/25/11
- Request for Rule-making for Part 7, Clean-up Criteria, filed with ORR: 8/10/2011, and approved on 8/15/2011

Amended Part 201 – GSI Criteria

- Groundwater/Surface Water Interface (“GSI”) Pathway
 - Compliance demonstrated by meeting generic criteria in Part 31 (water quality standards), mixing zone criteria, or site-specific criteria (revisions to criteria published on 2/17/11)
 - Propose “site-specific approach” with alternative compliance points and use of monitoring wells
 - Do not need pre-approval for alternative point but 30 day notice required before can rely on alternative point for response activities
 - Alternative compliance points must be more representative than previous monitoring wells
 - Surface water does not include enclosed sewers or utility lines
 - GSI pathway still controversial

MDEQ Part 201 – ORR Issues

- ORR has approximately 113 issues it is working on across 5 subcommittees:
 - Air (31 issues)
 - Remediation (23 issues)
 - Source Management (22 issues)
 - Water (28 issues)
 - General (9 issues)

MDEQ Part 201 – Outstanding Issues

- Areas with unresolved issues to be addressed by future MDEQ stakeholder meetings:
 - 201 Rules
 - Due Care/ASTM standard
 - Cleanup Criteria
 - Source removal/ C_{sat} /Free Product Recovery
 - Brownfields incentives process (MEDC/MDEQ)
 - Vapor Intrusion Criteria (including soil gas)
 - GSI

MDEQ Part 201 – Outstanding Issues

- **Brownfields Funding Legislation**
 - Brownfield and historic preservation tax credits will no longer be available when recent changes to income and business taxes take effect on January 1, 2012
 - New source of funding could come from SB0566, SB0567, and SB0568, which, taken together, would create a new Community Revitalization Program within the Michigan Strategic Fund to provide incentives for certain investments in the state through grants, loans, and other economic assistance
 - SB0644 would then amend the Michigan Trust Fund Act to require the State Treasurer to transfer and disburse money from the 21st Century Jobs Trust Fund for the proposed Michigan Community Revitalization Program
 - Package of bills overwhelmingly passed in the Senate on 9/20/11. It is now making its way through the House; referred for second reading on 11/2/11.

MDEQ Part 201 – Outstanding Issues

- Efforts to align Part 201 and Part 213:
 - SBs 528 through 533 were introduced on June 28, 2011 and referred to committee (tie-barred). These bills would make many changes to Part 213 and Part 215, including (among many others):
 - Establish a 90-day window for MDEQ to audit a required submission
 - Provide that an owner or operator that was responsible for a release or threat of release would be liable under Part 213, and that a person who became an owner or operator on or after June 5, 1995, would be liable under Part 213 unless the person conducted a baseline environmental assessment
 - Provide that the DEQ would bear burden of proof in establishing liability under Part 213
 - Establish joint and several liability for a liable person, provide for the apportionment of liability in the case of two or more liable people acting independently, and allow a person to seek contribution from any other liable person during or after a civil action
 - Revise Part 215 to delete provisions pertaining to the Michigan Underground Storage Tank Financial Assurance Policy Board, and create the Michigan Underground Storage Tank Policy Board that would be required to hear petitions to resolve disputes between the DEQ and owners, operators, and underground storage tank professionals and consultants.
 - Committee on Natural Resources, Environment and Great Lakes Committee holding hearings on 11/10/11

Questions?

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