

Changes to Michigan's Environmental Contamination Regulations

BACKGROUND

In December 2010, amendments to Michigan's environmental regulations (Part 201 of the Natural Resources and Environmental Protection Act of 1994) were signed into law. The amendments included in Public Acts 227-234 are an attempt to create a more flexible and efficient process to address many of Michigan's sites of environmental contamination.

NOTEWORTHY CHANGES

Part 201 Liability (P.A. 227)

Language was modified and added that addresses liability for environmental investigation and cleanup of contamination. Exemptions from liability include:

- Protection from liability for new owner/operators using a Baseline Environmental Assessment (see separate BEA discussion).
- Parties leasing a property for a retail, office or commercial purpose "regardless of the level of the lessee's hazardous substance use," unless they are responsible for an activity causing that release.
- Operators of wind energy conversion systems, unless they are responsible for an activity causing that release.
- Persons with an approved No Further Action report. This exemption is for contamination addressed in NFA report only.

To establish environmental liability, the burden of proof is now entirely on the State. Previously the MDEQ only had to successfully make prima facie case and then the alleged liable party bore the burden of demonstrating that they were not liable.

Baseline Environmental Assessment (P.A. 227)

BEAs have been used since 1994 to protect new owners and operators from liability associated with pre-existing contamination. The BEA process is now based on the federal All Appropriate Inquiry (AAI) standard. The previous three categories of BEA (N, D, S) have been eliminated. The level of investigation for a BEA is now discretionary. The old standard was to have sufficient data to distinguish old contamination from new.

The new investigation standard requires only sufficient data to document the existence of contamination.

The timeline for completing a BEA is the same: prior to or within 45 days of purchase, occupancy or foreclosure. BEAs must be submitted to MDEQ within six months. Petitioning for MDEQ review and determination of a BEA's adequacy has been eliminated.



Due Care (P.A. 233)

Part 201 Due Care provisions (a.k.a. Section 7a) require that owners/operators of a contaminated property do not exacerbate contamination and prevent unacceptable human exposures. These provisions have been expanded to now include a requirement for cooperation, assistance and access to persons authorized to conduct response activities. Compliance with land use or resource use restrictions in connection with response activities is also required.



Local governments are now subject to Due Care requirements where property will be used, or allow public use of contaminated property owned by the local government.

Cleanup Criteria (P.A. 228)

The number of cleanup criteria categories has been reduced from six to two: Residential and Non-Residential. Until new criteria are developed by the MDEQ, the former industrial cleanup criteria will be used for Non-Residential. The property owner still has the ability to develop site-specific criteria.

Response Actions (P.A. 228)

Investigation and cleanups under Part 201 can be self-implemented. MDEQ approval can be sought, if desired. The former Remedial Action Plan process has been modified and is now known as the Response Action Plan (RAP). If self directed, the plan can be submitted for MDEQ approval. Plans can still be requested by the MDEQ. The MDEQ response time has been reduced to 150 days (180 days if public participation is required), otherwise the plan is approved by default. Owner/Operators can appeal the MDEQ decision via the newly created Response Activity Review Panel. Selection of remedial actions can now include cost as a recognized factor.



Closures – No Further Action (P.A. 228)

Closures are now obtained via No Further Action (NFA) reports. An owner/operator who pursues a self-implemented cleanup may submit a NFA report to the MDEQ detailing completion of response activities. The MDEQ has 150 days to review (180 days if public comment). The NFA is approved if the MDEQ response is not timely. Owner/Operators can appeal the MDEQ decision via the Response Activity Review Panel. Properties that have an approved NFA report are no longer considered a facility.

Statute and Rules v. Guidance Documents (P.A. 229)

In an important step toward regulatory clarity, guidelines, bulletins, interpretive statements, or operational memorandums provided by the MDEQ shall not be given the force and effect of law and are not legally binding on any person.

Groundwater / Surface Water Interface (P.A. 228)

MDEQ has published cleanup criteria specific to area where groundwater and surface water mix (the groundwater / surface water interface or GSI). Demonstrating compliance with GSI criteria has on certain occasions been controversial since many of the MDEQ's preferred methods were published in guidance documents which have limited legal standing (see Statute and Rules v. Guidance Documents). Consideration of numerous GSI issues is now specified via statute instead of guidance documents. GSI compliance can also be obtained by use of site-specific criteria.

Tracking Statistics

The MDEQ must inventory of number of residential closures separate from the list of known facilities. It must also track the number of RAPs and NFA reports that are received, approved, disapproved, sent to the review panel, and the panel results.

CONCLUSIONS

These changes impact the environmental assessment process for property transactions, how to obtain protection from liabilities, how certain investigations and cleanups may be conducted, and how to obtain site closure. If you have any questions or want to know how these changes may affect you, please contact Don Conway at Gosling Czubak for more information (800) 962-1062.

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