

Amendments to Part 201 of the Michigan Natural Resources and Environmental Protection Act

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The Michigan Legislature has approved a package of amendments to Part 201 of the Michigan Natural Resources and Environmental Protection Act. The following is a summary of the major changes contained in the newly passed amendments:

- Part 201 obligations: liability, cleanups and due care
 - Cleanup criteria: Under the amendments, there are only five cleanup criteria: residential, nonresidential, limited residential, limited nonresidential and site-specific upon approval.
 Nonresidential is the former industrial criteria until new nonresidential criteria are promulgated.
 The MDNRE must evaluate and revise the criteria within 2 years after the amendments.
 - In deriving cleanup criteria for groundwater in an aquifer, if the criteria differs from the state drinking water standard, the national secondary drinking water standard or the aesthetic standard, then the cleanup criterion must be the most stringent of those options unless the MDNRE determines that compliance with such a lower criterion is not necessary based on the provisions of a postclosure plan or a postclosure agreement. If the target detection limit or the background concentration for a hazardous substance is greater than a cleanup criterion, then the criterion shall be the target detection limit or background concentration, whichever is larger, for that hazardous substance in that category. If a person can document the basis for determining that relevant published target detection limits cannot be achieved in samples from a facility, then the MDNRE may approve a criterion to address the conditions that prevent the hazardous substance from being reliably measured at levels that are consistently achievable in samples from the facility.
 - The MDNRE may approve site-specific criteria that better reflect, in comparison to generic criteria, available information concerning toxicity or exposure risk posed by the hazardous substance or other factors. The site-specific criteria may: (i) use established or newly proposed algorithms; (ii) alter any value, parameter or assumption used to calculate generic criteria; (iii) take into consideration the depth below the ground surface of contamination, which may reduce the potential for exposure and serve and an exposure barrier; (iv) be based on information related to the specific facility or



information of general applicability, including peer-reviewed scientific literature; (v) use probabilistic methods of calculation; and (vi) use nonlinear-threshold-based calculations where scientifically justified.

- Facility definition: The proposed amendments exempt from the definition of "facility" areas where response actions have been completed to satisfy the cleanup criteria for unrestricted residential use. They also exempt areas where response actions have been completed to satisfy site-specific criteria and where (i) 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 or the environment, and (ii) hazardous substances at the area, place or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.
- Financial assurance: The amendments define "financial assurance" to mean a performance bond, escrow, cash, certificate of deposit, irrevocable letter of credit, corporate guarantee or other equivalent security or any combination thereof.
- Burden of proof: Under the amendments, there is no longer statutory burden shifting upon establishing a prima facie case. The amendments provide only that "the MDNRE bears the burden of proof."
- Scope of liability: Under the amendments, liable persons are jointly and severally liable not for necessary costs consistent with the rules but for costs reasonably incurred under the circumstances.
- Lessee exemption: Under the amendments it is clear that a lessee who uses a facility for retail, office or commercial purposes is not liable for contamination at the facility resulting from a release or threat of release (unless the person is responsible for an activity causing the release or threat of release) regardless of the level of the lessee's hazardous substance use.
- Baseline Environmental Assessments: The BEA process was streamlined with the intent of conforming it to the federal all-appropriate-inquiry 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.
 - An owner or operator who becomes an owner or operator after June 5, 1995, is not liable under section 20126 if the owner or operator (i) conducts a BEA prior to or within 45 days of the earlier of the date of purchase, occupancy or foreclosure and (ii) provides the BEA to the MDNRE and subsequent transferee within six months after the earlier of the date of purchase, occupancy or foreclosure.
 - The proposed amendments significantly redefine BEA. Fundamentally, the amendments remove the requirement to demonstrate at the time of completion of a BEA a way to



distinguish existing from future contamination. A BEA under the amendments is simply a written document that describes the results of all appropriate inquiry and describes sampling and analysis that confirm that the property is a facility. All appropriate inquiry means an evaluation of environmental conditions at a property at the time of purchase, occupancy or foreclosure that reasonably defines the existing conditions and circumstances at the property in conformance with 40 CFR 312.

- o Liable person obligations: Section 20114 would be amended to require liable owners and operators of a facility to: (i) provide notification of a release of a reportable quantity of a hazardous substance (as determined under referenced federal regulations rather than MDNRE rules or additional reportable quantities) within 24 hours after obtaining knowledge of the release; (ii) notify the MDNRE and affected owners within 30 days (rather than 45 days under current rules) of obtaining knowledge that a release has migrated beyond the boundary of the property at a concentration in excess of cleanup criteria for unrestricted residential use; (iii) notify the MDNRE and surface owner within 30 days of obtaining knowledge of a release that is the result of an activity subject to Part 615 where the owner or operator is not the owner of the surface property and the release results in an exceedence of unrestricted residential criteria; (iv) diligently pursue self-implemented or MDNRE-approved response activities to achieve the Part 201 cleanup criteria; and (v) take actions required by the MDNRE, including providing and implementing a response activity plan and submitting a no further action report.
- O Due care: The amendments modify the "due care" obligations required to be undertaken by all owners and operators of facilities. Due care is amended to require owners and operators of a facility to: (i) provide reasonable cooperation, assistance and access to persons authorized to conduct response activities at the facility, including the cooperation and access necessary for the installation, integrity, operation and maintenance of any complete or partial response activity at the facility; (ii) comply with land use or resource use restrictions relied on in connection with response activities at the facility; and (iii) not impede the effectiveness or integrity of any land use or resource use restriction employed at the facility in connection with response activities.
- Voluntary cleanups: Except as otherwise provided, an owner or operator of a facility may voluntarily initiate a cleanup or may elect to proceed under a procedure to obtain advance MDNRE approval before conducting cleanup activities. As amended, section 20114a requires liable persons with knowledge of a release to pursue response activities without prior approval by the MDNRE or to proceed through a MDNRE-approved plan. Persons self-implementing response activities may still have additional obligations as required by the MDNRE.
 - All of the following must be considered (equally and on balance, with no single factor as the most important) when a person is selecting a remedial action or when the MDNRE is selecting or approving a remedial action: (i) effectiveness of alternatives in protecting the public health, safety and welfare and the environment; (ii) the long-term



uncertainties associated with the proposed remedial action; (iii) the persistence, toxicity, mobility and propensity to bioaccumulate of the hazardous substances; (iv) the short-and long-term potential for adverse health effects from human exposure; (v) the costs of remedial action, including long-term maintenance costs; (vi) reliability of the alternatives; (vii) potential future response activity costs if an alternative fails; (viii) potential threat to human health, safety and welfare and the environment associated with excavation, transportation and redisposal or containment; (ix) the ability to monitor remedial performance; and (x) for remedial actions requiring opportunity for public participation, the public's perspective about the extent to which the proposed remedial action effectively addresses Part 201 requirements.

- If a person completes response activities that satisfy the cleanup criteria under Part 201, then the person may submit a no further action report to the MDNRE.
- Response activity plan: Response activity plans may sometimes be required by the MDNRE, and persons undertaking voluntary response activities may also choose to submit a response activity plan to the MDNRE with a request for approval of one or more aspects of the response activity.
 - Within 150 days (or 180 days if public participation is required) of receipt of a response activity plan submitted for approval, the MDNRE may either approve the plan, approve the plan with conditions, deny the plan or notify the submitter that the plan does not contain sufficient information for the MDNRE to make a decision. If the MDNRE's response is a notification of insufficient information, then the MDNRE must identify the information required to make a decision. If the plan is approved with conditions, then the MDNRE must specify the conditions of approval. If the plan is denied, then the MDNRE must, to the extent practical, state with specificity all of the reasons for denial. Failure to timely respond means that "The response activity plan is considered approved."
 - The MDNRE's decision on scientific and technical issues is appealable to the review panel.
- No further action determinations: Upon completion of remedial actions that satisfy applicable criteria and all other requirements of Part 201 applicable to the remedial action, a person may submit a no further action report on a form to be developed by the MDNRE and made available on the MDNRE's web site.
 - The report must document the basis for concluding that the remedial actions have been completed, and the person submitting the report must include a signed affidavit attesting to the fact that the information upon which the no further action report is based is complete and true to the best of that person's knowledge. The no further action report



must also include a signed affidavit from an environmental consultant who meets the professional qualifications applicable to members of the review panel and who prepared the no further action report attesting to the fact that the remedial actions detailed in the no further action report comply with all applicable requirements and that the information upon which the no further action report is based is complete and true to the best of that person's knowledge. The consultant must also attach a certificate of insurance demonstrating compliance with minimum insurance requirements.

- A submitted no further action report may include a request that, upon approval, the facility be designated a residential closure.
- If the remedial action satisfies unrestricted residential criteria, then land use or resource use restrictions, monitoring and a postclosure plan and postclosure agreement are not required. If the remedial action requires land use or resource use restrictions and financial assurance is not required or is de minimis, then a postclosure plan but not a postclosure agreement is required. For all other remedial actions seeking a no further action determination, the submitted no further action report must include both a postclosure plan and a postclosure agreement.
 - A postclosure plan must generally include (i) a restrictive covenant describing the land use and resource use restrictions necessary to assure the effectiveness and integrity of any containment, exposure barrier or other land use or resource use restrictions, and (ii) permanent markers to describe restricted areas of the facility and the nature of any restrictions.
 - A proposed postclosure agreement must include the following: (i) provisions for monitoring, operation and maintenance and oversight necessary to assure the effectiveness and integrity of the remedial action; (ii) financial assurance to pay for monitoring, operation and maintenance, oversight and other costs determined by the MDNRE to be necessary to assure the effectiveness and integrity of the remedial action; and (iii) a provision requiring notice to the MDNRE of the owner's intent to convey an interest in the facility 14 days prior to consummating the conveyance. If the no further action report requires a postclosure agreement, then the MDNRE may negotiate alternative terms from those in the proposed postclosure agreement.
- Within 150 days (or 180 days if public comment is necessary) of receipt of a no further action report, the MDNRE must approve, deny or notify the submitter that the report does not contain sufficient information to make a decision. If the MDNRE's response is that the report does not include sufficient information, then the MDNRE must identify the information that is required to make a decision. If the report is denied, then the



MDNRE's denial must, to the extent practical, state with specificity all of the reasons for the denial. If the report, including any required postclosure plan and postclosure agreement, is approved, then the MDNRE must provide the person submitting the report with a no further action letter. If the MDNRE does not respond in a timely manner, then the no further action report is considered approved.

- A person is not liable under Part 201 for environmental contamination addressed in a no further action report approved or considered approved by the MDNRE. These persons are still liable for subsequent releases not addressed in the no further action report if the person is otherwise liable for that release; they are still liable for environmental contamination that is not addressed in the no further action report and for which the person is otherwise liable; they are still liable for any response activities necessary to comply with Part 201 if relied-upon land use or resource-use restrictions change; they are still liable if the no further action report relies on monitoring necessary to assure the effectiveness and integrity of the remedial action and that monitoring shows a need for response activities to address potential exposure to environmental contamination in excess of the levels relied on in the no further action report; and they are still liable if the remedial actions that were the basis for the no further action report fail to meet performance objectives identified in the no further action report.
- A person may appeal the MDNRE's decision on technical or scientific issues in the no further action report to the review panel.
- The person submitting a no further action report must maintain all documents and data prepared, acquired or relied upon in connection with the no further action report for at least 10 years after the later of the date on which the MDNRE approves the no further action report or the date on which no further monitoring, operation or maintenance is required to be undertaken as a part of the remedial action covered by the report. These documents must be made available to the MDNRE upon request.

• New MDNRE obligations

- Facility and closure inventory: The amendments eliminate the old site-listing requirement, but they establish a new obligation to create and update an inventory of residential closures and known facilities.
- Quarterly data gathering: The MDNRE must compile data on the number of response activity
 plans, no further action reports and BEAs received, approved, disapproved, recommended for
 approval by the response activity review panel, recommended for disapproval by the panel and
 approved by operation of law.



- **Groundwater issues:** Under the amendments, if a discharge of venting groundwater complies with Part 201, then a permit for the discharge is not required
 - A person may demonstrate compliance with Part 201 for a response activity providing for venting groundwater by meeting any of the following: (i) generic groundwater-surface water interface criteria, which are the water quality standards for surface waters developed by the MDNRE under Part 31; (ii) mixing zone-based groundwater-surface water interface criteria established under Part 201; or (iii) site-specific criteria, which may include mixing zones.
 - With respect to venting groundwater, a person may undertake the following response activities: (i) a person may undertake evaluation activities associated with a response activity providing for venting groundwater using groundwater-surface water interface monitoring wells or alternative monitoring points; (ii) a person may undertake response activities that rely on monitoring from groundwater-surface water interface monitoring wells to demonstrate compliance; and (iii) except for certain specified circumstances, a person may undertake response activities that rely on monitoring from alternative monitoring points to demonstrate compliance with generic groundwater-surface water interface criteria if the person submits to the MDNRE a notice of alternative monitoring points at least 30 days prior to relying on those alternative monitoring points that contains substantiating evidence that the alternative monitoring points comply with Part 201.
 - A person must undertake response activities that rely on monitoring from alternative monitoring points if one or more conditions apply to the venting groundwater: (i) an applicable criterion is based on acute toxicity endpoints; (ii) the venting groundwater contains a bioaccumulative chemical of concern as identified in the water quality standards for surface waters developed pursuant to Part 31 and for which the person is liable under this part; (iii) the venting groundwater is entering a surface water body protected for coldwater fisheries identified in a publication listed in the amendments, (iv) or the venting groundwater is entering a surface water body designated as an outstanding state resource water or outstanding international resource water as identified in the water quality standards for surface waters developed pursuant to Part 31.
 - Alternative monitoring points may be used to demonstrate compliance for venting groundwater if the points meet all of the following standards: (i) the locations where venting groundwater enters surface water have been sufficiently identified to allow monitoring for the evaluation of compliance with criteria; (ii) the alternative monitoring points allow for venting groundwater to be sampled at a point before mixing with surface water (this does not preclude location of alternative monitoring points in a floodplain); (iii) the alternative monitoring points allow for reliable, representative monitoring of groundwater quality at the groundwater-surface water interface; (iv) the potential fate and transport mechanisms for groundwater contaminants, including any chemical, physical or biological processes that result in the reduction of hazardous



substance concentrations between the monitoring wells and the alternative monitoring points are identified; and (v) sentinel monitoring points are used in conjunction with the alternative monitoring points to assure that any potential exceedence of an applicable water quality standard can be identified with sufficient notice to allow additional response activity, if needed, to be implemented that will prevent the exceedence.

- o If a person intends to utilize mixing zone-based groundwater-surface water interface criteria or site-specific criteria in combination with alternative monitoring points, the person must submit a response activity plan, which is subject to a 30-day public comment period. If the MDNRE denies a request for alternative monitoring points, it must state the reasons for the denial, including the scientific and technical basis for the denial. A person may appeal a scientific or technical aspect of the decision to the review panel.
- Rules: After the amendments, most of the current rules under Part 201 may no longer be implemented
 or enforced. The amendments also explicitly state that guidelines, bulletins, interpretive statements and
 operational memorandums provided by the MDNRE may not be given the force and effect of law.
- Response activity review panel: Under the amendments, the director of the MDNRE will establish a
 response activity review panel. The purpose of the panel is to advise the director on technical or
 scientific disputes, which include disputes regarding assessment of risk concerning response activity
 plans and no further action reports.
 - The panel will consist of 15 individuals appointed for three-year terms by the director. They will serve without compensation except for reimbursement for their actual and necessary expenses incurred in performing their duties and they must meet statutory qualifications governing education, minimum relevant experience, continuing education and potential conflicts of interest posed by association with the MDNRE or the party seeking review.
 - The panel's business will be conducted under the Open Meetings Act.
 - Persons who submit response activity plans or no further action reports to the MDNRE will generally be able to appeal the MDNRE's decision on technical or scientific issues to the panel by filing a petition with the director. The petition for appeal must include a \$3,500.00 fee as well as a statement of the issues in dispute, the relevant facts upon which the dispute is based and factual data, analysis, opinion and supporting documentation for the petitioner's position.
 - Within 45 days of the filing of the petition, the Director may negotiate a resolution of the dispute with the petitioner without convening the panel.
 - o If the dispute is not resolved within 45 days of the filing of the petition, then the director must schedule a meeting of five members of the panel.



- Within 45 days of affording the petitioner and MDNRE an opportunity to present their positions to the panel, the panel will make a recommendation to the director to adopt, modify or reverse, in whole or in part, the MDNRE's decision. Failure to submit the recommendation in a timely manner means that "the decision of the MDNRE is the final decision of the director."
- Within 60 days of receipt of the panel's written recommendation, the director must issue a final decision in writing. The director may agree with the recommendation and incorporate it in the response activity plan or no further action report, reject the recommendation and issue a written decision with specific rationale for the rejection or fail to decide the recommendation in a timely manner, in which case the recommendation will be considered the final decision of the director.
- The final decision of the director is subject to judicial review under section 631 of the Revised Judicature Act.

Note:

¹This does not prove right of access not expressly authorized by law or preclude access by voluntary agreement