

Attorney General Comments On Proposed Part 201 Rules

In an unusual move, the Michigan Department of Attorney General (AG) submitted a memorandum detailing several concerns it has with the Michigan Department of Environmental Quality's (MDEQ) proposed Administrative Rules for Part 201 of the Natural Resources and Environmental Protection Act (Part 201). Part 201 addresses cleanups of contaminated properties. The memorandum was submitted as the AG's formal comments on the proposed regulations.

Completeness Rules

The AG raised several issues concerning the proposed definition of the term "Complete," which is relevant for determining when a party has satisfied its obligations under Part 201, extinguishing that party's liability under Part 201.

The AG contended that "[u]nder the proposed definition...a response activity will be complete when there may still be numerous obligations that the liable party must undertake. These include continuing operation and maintenance, monitoring, maintaining deed restrictions, and financial assurance mechanisms as required by Section 20120b." Thus, the AG argued the definition could result in a liable party escaping some of its statutory obligations.

The AG also specifically criticized proposed Rule 101(f)(ii), using the same type of reasoning:

Subsection 101(f)(ii)(A) states that the response activity is complete when "construction of all physical components of the response activity is finished." Thus, if one is undertaking active remediation,...the response activity could be considered complete even though there may be years of operation of the system and monitoring compliance. This is beyond the statutory authority of DEQ.

Based on discussions in which I participated between MDEQ and interested parties before the release of the proposed rules, it was clear that the underlying objective of this provision was to define when the remedy elements have been agreed upon and implemented subject to any ongoing requirements. There was no intent to create a clever exemption to ongoing operation and maintenance activities that may be associated with a remedy, but rather the intent was to address the issue of when is there an agreement on the elements of the remedy and when has finality been achieved.

Moreover, the AG appears to have overlooked proposed Rule 101(f)(ii)(C) and (E). Under subsection (C), a response activity is not complete until a restrictive covenant meeting the requirements of Section 20120b(4) is in place; under subsection (E), the restrictions of Section 20120b(3)(a)-(e) must be in place, which include: “(a) Land use or resource use restrictions. (b) Monitoring. (c) Operation and maintenance. (d) Permanent markers to describe restricted areas of the site and the nature of any restrictions. (e) Financial assurance...” Additionally, proposed Rule 520(13), which is addressed later in this article, provides that a finding of “completeness” is nullified if such restrictions are not maintained. Thus, it is clear that the definition of “complete” in this context *does* incorporate the very obligations the AG claimed were lacking.

The next targets of the AG’s concern were proposed Rules 520(13) and (14), which describe circumstances in which a previous conclusion that a response activity was “complete” may be nullified and other circumstances in which nullification of a previous completeness determination is not appropriate.

The AG opposed Rule 520(13) by reiterating its opposition to the definition of “complete”: “it makes no sense and conflicts with the statute to have a finding of ‘completion,’ when in fact response activities are not complete, and then to nullify the conclusion that

something was complete because the liable party failed to fulfill its ongoing obligations to undertake response activities.”

Another potential problem was noted with the effect of the definition of “complete” on the statute of limitations in §20140(1)(b), which provides that the limitation period “[f]or 1 or more subsequent actions for recovery of response activity costs pursuant to Section 20126 ... [is] not later than [three] years after the date of completion of all response activity at the facility.” The problem, according to the AG, would be that “the state’s claims for costs will begin to run on a date that the state has no knowledge of.” It is unclear why it is that the State would not have this knowledge.

Continuing Liability of Former Owners

The AG next criticized proposed Rule 520(3), which provides that:

A person’s responsibility to comply with the Act and these rules exists independent of the Department’s knowledge of a facility or of its approval of any response activity proposed or taken at a facility. An owner or operator who has knowledge that his or her property is a facility has an affirmative obligation to comply with Section 20114(1) of the Act, if he or she is liable, and with Section 20107a of the Act. A former owner or operator of property that is a facility continues to have the affirmative obligation under Section 20114(1)(g) of the Act if all of the following conditions apply:

- (a) he or she owned or operated the property on or after June 5, 1995.
- (b) he or she had knowledge at that time that the property was a facility.
- (c) he or she is liable.
- (d) the subsequent owner or operator obtains an affirmative determination on a baseline environmental assessment from the Department under Section 20129 of the Act.

The AG objected to the “dramatic change” that Rule 520(3) would make, claiming that the “last clause of Rule 520(3) suggests that a statutorily liable party who transfers ownership or operation of the facility to a third party...will no longer have Section 14 obligations if a new

owner has not done a BEA or has not obtained an affirmative determination of the BEA from the DEQ....DEQ cannot through promulgation of administrative rules change the liability scheme of the statute.”

This argument seems overly broad, as the explicit language of the rule only applies to “due care” responsibilities under §20107a. In this respect, the rule is actually in accordance with the statute, as §20107a only applies to owners or operators of facilities. The AG appears to have misread the rule to apply to all liability rather than §20107a due care responsibilities.

Administrative Orders, Administrative Agreements and Judicial Decrees

The AG also objected to proposed Rule 520(4), which provides that:

If a person is subject to an administrative order or agreement or judicial decree and new or modified language in these amendatory rules, including defined terms, significantly changes the interpretation of that document, then the terms of the administrative order or agreement or judicial decree shall control, unless that document is modified with the consent of the Department and, if required, the court.

The AG believed that the rule would lead to “disagreement and litigation” over the meaning of the term “complete” as it is used in existing agreements or decrees, and that the term “significantly changes” is “vague, undefined, and open to substantial interpretation.”

The AG also contended that Rule 520(4) exceeds MDEQ’s authority because it could potentially “alter a covenant not to sue” that was entered into by the AG. M.C.L. §324.20132(3) provides that a covenant not to sue (CNTS) takes effect only after remedial action has been “completed.” MDEQ’s proposed definition of “completed” could be different from the meaning contemplated in a CNTS entered into by the AG. The effect of Rule 520(4), if such change in meaning was seen as “insignificant,” would be to impute the new definition of “completed” to the existing CNTS, which could alter the covenant’s effect. Because the “authority to grant a

CNTS is vested in the AG and DEQ, not the DEQ alone,” MDEQ would in effect be unilaterally modifying the effect of an AG CNTS, beyond its authority. To avoid this problem, the AG suggested that the proposed definition of “complete” should expressly not apply for the purpose of determining when a CNTS takes effect under M.C.L. §324.20132(3).

The AG’s comments overlooked the fact that if “complete” is never defined or achieved, there is no operative CNTS, and the proposed definitions in the rules were designed and intended to bring finality to cleanup obligations. The AG’s concerns under M.C.L. §324.20132(3) are also unfounded with respect to future CNTS because the AG is not compelled to grant a CNTS in any case, even if MDEQ determines the remedy is “complete.”

Due Care Obligations

The AG next commented on the supposed limitation created by proposed rule 520(12), which states that “[t]he completion of a response activity does not exempt an owner or operator of a facility from his or her ongoing obligations, if any, under Section 20107a of the Act,” clarifying that a party’s “due care” obligations may continue after response activity has been completed. In the AG’s view, however, the rule might “be construed as limiting the responsibility of a liable owner or operator of a facility to the obligations set forth in 20107a,” when statutory responsibilities other than the §20107a “due care” obligations exist.

Other Rules

The memorandum next addressed proposed Rules 107(3) and (4), which state that:

(3) Response activity approved by the Department before the effective date of these amendatory rules, and that has been complete, or is being implemented according to a schedule approved by the Department, shall comply with the laws, rules, and other requirements applicable at the time the response activity was approved, unless the person implementing the response activity requests that the Department approve changes that are consistent with Sections 20118 and 20120 of the Act. The

Department shall approve such requests if the response activity is consistent with Sections 20118 and 20120a of the Act, is protective of the public health, safety and welfare and the environment, and, after the effective date of these amendatory rules, is consistent with these rules.

(4) Response activity that was not approved by the Department, but that was complete before the effective date of this amendatory rule, or will be implemented within 18 months of the effective date of these amendatory rules, or according to such other schedule that is documented by the person conducting the response activity to be diligent and appropriate to the circumstances, shall comply with the laws, rules, and other requirements applicable at the time the response activity was initiated, unless the person implementing the response activity elects to implement changes that are consistent with Sections 20118 and 20120a of the Act and secures any required Department approvals.

According to the AG, these rules limit the obligations of liable parties because such parties “could come up with any kind of schedule at any time between now and 18 months after the rules are passed and claim that they do not have to implement any new response activities.” Additionally, the AG noted that DEQ lacks authority to limit the effect of future changes in law.

Proposed Rule 107(5) was also objectionable, in the AG’s view, for conflicting with the statute. This rule states:

(5) Those rules apply to the release or threat of release of a hazardous substance and not to hazardous substances that are being lawfully used or manufactured in operations at a facility or are being properly stored at a facility in compliance with all applicable laws and regulations.

The AG stated that, to be in accordance with the statute, the rule should mention that it does not apply when there is a “threat of release.”

The AG next moved on to proposed Rule 522(10), which provides:

In making a determination whether there is significant public interest in a remedial action under Section 20120d of the Act or in any other response activity being conducted with Department knowledge, the Department shall consider all of the following:

(a) Whether the response activity addresses a bioaccumulative chemical of concern, as that term is defined in R 323.1043(1).

(b) Whether hazardous substances migrated beyond the boundaries of the source property before or during response activities to address the facility.

(c) Whether the remedial action being proposed potentially impacts surrounding properties or residents in the area.

(d) Whether a neighboring property owner or resident or a local government official has communicated to the Department that the category of response activity proposed or land use upon which the remedial action was based is inconsistent with local zoning, other local ordinance, or, in the case of property that is not zoned, the proposed reasonably foreseeable use is inconsistent or incompatible with surrounding land uses.

This supposedly conflicts with §20120d, which was cited by the AG to provide that:

Upon a request for a public meeting by the governing body of the local unit of government or by 25 citizens of the local unit of government, the Department shall, within 30 days of the request, meet with persons in the local unit of government. The person or persons requesting the public meeting shall publicize and provide accommodations for the meeting. The meeting shall be held in the local unit of government in which the facility is located.

In the AG's view, any request for a public hearing is enough to require such hearing to be held, and the rule's limitations are thus in conflict with the statute. The AG, however, failed to cite the triggering language of §20120d, which applies "where state funds will be spent to develop or implement a remedial action plan or where the department determines there is a significant public interest." Only in *such situations*, DEQ is to provide notice to the county and local units of government, and a hearing can be requested; the public is not entitled to a hearing where state funds are not used and DEQ determines that no significant public interest exists.

Thus, by only citing part of §20120d, the AG appears to have overlooked a specific statutory requirement.

The AG continued by addressing proposed Rule 526(9), which states that:

The Department may authorize a mixing zone that is based on compliance with a mixing zone determination issued under Section 20120a(15) of the Act as part of an interim response if information is provided which supports a conclusion that the discharge is protective of the public health, safety and welfare and the environment.

The AG noted that this rule would conflict with certain provisions of Part 201 and Part 31, which require legally enforceable agreements in some situations, while the rule makes no mention of such agreements. Additionally, the rule was seen as “circumventing the intent of the legislature” by allowing parties to undertake interim response activities that, if undertaken through a remedial action plan, would have required a legally enforceable agreement. The AG’s comments ignore the fact that interim responses are not final actions and MDEQ and the AG have never treated interim responses as final response requiring a legally enforceable agreement.

Next on the AG’s list of concerns was proposed Rules 532(1) and (2), which state:

(1) A remedial action shall be performed by a person when the Department requests one under Section 20114(1)(h) of the Act or when the objective of a response activity is to address all releases of hazardous substances in all environmental media at a facility consistent with Sections 20118, 20120a and 20120b of the Act, except as provided in R 299.5534 and R 299.5536. Response activity will be considered a remedial action only if it complies with Sections 20118, 20120a, 20120b of the Act and these rules.

(2) Remedial actions in the cleanup categories provided for in Section 20120a(1)(a) to (e) of the Act may be completed by operation of rule, without facility specific approval by the Department of the remedial action, except as provided in subrule (5) of this rule, by preparing and completing a remedial action plan (RAP) that complies with subrules (6) to (11)(k) and (15) of this rule or an equivalent closure report. Remedial actions in the categories of cleanup provided for in Section 20120a(1)(f) to (j) or

Section 20120a(2) of the Act shall be complete only after Department approval of a RAP or closure report, and when all required elements are in place.

The AG's concern with Rule 532(1) was that it suggests that remedial actions are optional, when, in fact, all liable parties are required to undertake remedial actions by §20114(1)(g). The problem with Rule 532(2), in the AG's view, is that it conflicts with the "legislative intent apparent throughout the statute" that DEQ must approve of any response activities. The AG did note §20114(2), which provides that a party can undertake response activities without "prior" DEQ approval, but a party who does so is not relieved of further liability. The AG opined, however, that the word "'prior' contemplates that the MDEQ would ultimately be notified and that it would review and ascertain if appropriate actions had been undertaken."

The AG went on to disagree with proposed Rule 522, which allows liable parties to undertake response activities without notifying MDEQ or the public that a contaminated "facility" exists. In the AG's view, this conflicts with §20105(e), which requires MDEQ to maintain and make publicly available records of sites where remedial actions have been completed.

Another problem was identified in proposed Rule 524(5), which allows response activities for generic cleanup to be undertaken without MDEQ approval, if a Notice of Environmental Remediation (NER), granting MDEQ access to the property, is filed with the register of deeds. But the AG noted that the rule does not require MDEQ to be notified of the NER, which renders the access provision "meaningless."

Finally, the AG observed that proposed Rule 705(7) provides that, in certain circumstances, compliance with Rules 705(5) and (6) may be waived "by operation of this rule."

The problem arises in connection with §20118(6) and (7), which indicate that a waiver of Rules 705(5) and (6) can only be accomplished through MDEQ approval, “based on the administrative record.”

An overarching theme that the AG touched on with respect to many of the proposed rules was the statutory requirement that any Part 201 remedies must be protective of “public health, safety and welfare and the environment.” In the AG’s view, because the proposed rules set up specific requirements that, once met, would relieve a party of further obligations, the rules were contrary to the statutory mandate, which supposedly requires DEQ to impose further obligations whenever necessary to protect “public health, safety, and welfare and the environment.” In effect, it appears based on a plain reading of the AG’s comments that the logical extension of the AG’s position is that the statute should be read to require that all remedies be open-ended and subject to future change.

Copies of the AG’s comments may be obtained from the MDEQ by contacting Lynelle Marolf’s office at (517) 373-9893.

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