

MDEQ Drafts Revisions to Cleanup Rules

As previously reported, the Michigan Department of Environmental Quality (MDEQ) has released extensive proposed revisions to the rules implementing Part 201 (Environmental Response) of the Michigan Natural Resources and Environmental Protection Act. Note, that as of this writing, the proposed revisions are still considered “preliminary” because they have not yet been formally published in the Michigan Register, nor has a date or location for public hearings or a deadline for submission of public comments been announced. A copy of the proposed rules may be obtained from the Office of Regulatory Reform’s Web site: www.state.mi.us/orr.

Previous articles in the Michigan Environmental Compliance Update discussed the proposed revisions to Part 7, Cleanup Criteria and Remedial Action Requirements, and portions Part 5, Response Activities, of the Part 201 rules. This article addresses the remaining draft revisions to the Part 5 Rules concerning interim response activities.

Interim Response Activities By Liable Person Seeking MDEQ Approval

Proposed Rule 509a applies to “interim response activities” that are performed by a person who is liable under Part 201 and who is also seeking MDEQ’s approval of those interim response activities. Part 201 defines “interim response activity,” in part, as “the cleanup or removal of a released hazardous substance or the taking of other actions, prior to the implementation of a remedial action . . . [and include, but are not limited to] measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by [MDEQ].” Proposed Rule 509a also provides that MDEQ may require a person who is liable under Part 201 to perform interim response activity if necessary to eliminate or mitigate conditions which may pose an unacceptable risk to the public health, safety, welfare, or the environment or natural

resources, and the interim response activity is consistent, to the extent practical, with the remedial action that will likely be performed.

If an interim response activity includes any of the three following components, MDEQ must specifically approve that component in order for MDEQ to consider the interim response activity to be consistent with or in compliance with Proposed Rule 509a:

- an institutional control that is not pre-authorized by MDEQ to be used to achieve land or resource use restrictions in lieu of recording a restrictive covenant to do so;
- interim response activity for aquifer contamination is intended to be final action for that contamination and it will be necessary to obtain from MDEQ a waiver of the requirements in Rule 705(5), which provides that the horizontal and vertical extent of hazardous substances greater than the residential cleanup criteria shall not increase after remedial actions begin, or the requirements of Rule 705(6), which requires that remedial actions for an aquifer shall provide for the removal of hazardous substances from the aquifer either through active remediation or documented naturally occurring biological or chemical processes; and
- a “mixing zone” determination is required to show that contaminated groundwater “venting” to surface water bodies is protective of the public health, safety, welfare and the environment.

MDEQ must consider the following factors in determining whether an interim response activity is appropriate:

- actual or potential threats to public health, safety, and welfare, and the environment;
- actual or potential contamination of drinking water supplies or sensitive ecosystems;

- the presence of hazardous substances in abandoned or discarded containers;
- whether weather conditions will cause the migration or release of hazardous substances;
- whether demolition activities will cause the migration or release of hazardous substances; and
- fire and explosion threats.

Proposed Rule 509a contains an extensive list of activities that constitute “interim response activities,” including: (i) erecting fences and warning signs or other control precautions to limit the access of people and animals; (ii) installing drainage control; (iii) stabilization of berms, dikes, or impoundments to maintain their integrity; (iv) capping contaminated soil or sludge to prevent its migration or unacceptable exposures; (v) using chemicals or other materials to retard the spread of contamination; (vi) removing contaminated soils from drainage or other areas; (vii) removal of drums, tanks, or other bulk storage containers to reduce the likelihood of threat of spills, leaks, fire or explosion; (viii) groundwater control and removal systems; (ix) providing an alternate water supply; (x) temporary evacuation when an imminent and substantial endangerment has been identified; (xi) demolition; (xii) restoration of property improvements damaged or destroyed by response activities; and (xiii) any other actions judged by MDEQ to be technically sound and necessary to protect the public health, safety, or welfare, the environment, or natural resources.

A person who is liable under Part 201 may seek MDEQ’s approval of both proposed or completed interim response activities. To seek prior approval, a workplan for interim response activity must be submitted before starting the work. To seek approval of completed work, an interim response implementation report must be

submitted that describes in detail the interim response activities performed, the objectives that were met by those activities, whether the interim response activities are intended to meet particular land use based cleanup criteria, whether the interim response activities are a subset of the planned remedial actions for the facility, and, if so, the relation to those planned remedial actions. A workplan for proposed interim response activities must also cover the same subjects.

Proposed Rule 509a provides that MDEQ shall approve completed interim response activities if the liable person provides sufficient information to demonstrate that the interim response is complete. If the interim response activities are sufficient to meet one or more of the applicable cleanup criteria for all or a portion of the facility, MDEQ may approve the interim response as the final response activity anticipated to be necessary. Such an approval may be withdrawn by MDEQ if it determines that a substantial change in data, facility conditions, or the scientific basis for the cleanup criteria causes the interim response to no longer be protective of the public health, safety, welfare, or the environment. MDEQ may make its approval of completed interim response activities as final response activities subject to certain conditions if MDEQ determines that the conditions are necessary to ensure the effectiveness and integrity of the response activities. These conditions include:

- a legally enforceable agreement to implement the response activity;
- operation and maintenance requirements for the response activity;
- land or resource use restrictions;
- provision of a financial assurance mechanism to ensure that there are funds available to pay for monitoring, operation and maintenance, oversight, and other costs, including a reasonable amount for contingencies, that MDEQ

determines are necessary to ensure the effectiveness and integrity of the response activity.

Interim Response Activities By Liable Person Not Seeking MDEQ Approval

Proposed Rule 509b addresses interim response activities performed by a person who is liable under Part 201, but who is not seeking MDEQ's approval of those activities, either before or after their implementation. Many of the requirements under proposed Rule 509b are identical to those under Proposed Rule 509a for a liable person seeking approval from MDEQ of interim response activities, such as the listing of factors to be considered in determining whether an interim response activity is appropriate and the listing of activities constituting "interim response activities."

Proposed Rule 509b lists five circumstances under which a person liable under Part 201 may not perform interim response activity without receiving MDEQ's approval. In addition to the three circumstances also listed above under Proposed Rule 509a, MDEQ's approval must be obtained if:

- MDEQ has required the person to perform interim response activity; or
- the interim response activity is being performed pursuant to an administrative order or agreement or a judicial decree which requires MDEQ's prior approval.

If MDEQ's approval is required under one of the three circumstances listed under Proposed Rule 509a, then MDEQ's approval needs to be sought for only the interim response activity listed as requiring MDEQ's approval and not any other response activity that is also being performed.

A person liable under Part 201 who performs interim response activities is required to prepare and retain an interim response activity report similar to that required under Proposed Rule 509a within six months of implementing the activities, even when not seeking MDEQ's approval. The rule states that the purpose of the report is to demonstrate compliance with Section 114(g) of Part 201, which requires a liable person to "diligently pursue" response activities to achieve the Part 201 cleanup criteria.

A person who implements interim response activities intended to constitute final response activities for all or a portion of the facility and who wishes to establish for the record that the activity satisfied the applicable cleanup criteria must document: (i) the implementation date; (ii) the cleanup criteria in effect on that date; and (iii) data showing environmental conditions both before and after completion of the interim response activities. If MDEQ reviews the documentation in the future and all the following conditions are satisfied, then it may not require additional response activity to achieve compliance with subsequent routine modifications to the cleanup criteria that occur after the implementation date:

- the interim response activity was sufficient to meet the then-applicable cleanup criteria for all or a portion of the facility;
- the documentation retained demonstrates to MDEQ's reasonable satisfaction that all applicable cleanup criteria were met; and
- the interim response activity was completed no later than 18 months after the implementation date, unless additional time was necessary, in which case, the necessity for additional time must also be documented and show that the schedule for completion was reasonable and diligent.

Interim Response Activities By Non-Liable Person Seeking MDEQ Approval

Proposed Rule 509c provides procedures for a person to obtain MDEQ approval for an interim response even though that person is not liable under Part 201 to perform interim response activities, and not otherwise required to obtain MDEQ's approval therefor.

Proposed Rule 509c lists four circumstances under which a person not liable under Part 201 may not perform interim response activity without receiving MDEQ's approval. In addition to the three circumstances also listed above under Proposed Rule 509a, MDEQ's approval must be obtained if the interim response activity is being performed pursuant to an administrative order or agreement or a judicial decree which requires MDEQ's prior approval. As is also the case under Proposed Rule 509b, if MDEQ's approval is required under one of the three circumstances listed under Proposed Rule 509a, then MDEQ's approval needs to be sought for only the interim response activity listed as requiring MDEQ's approval and not any other response activity also being performed.

Proposed Rule 509c also lists the same factors to be considered in determining the appropriateness of an interim response activity and the same activities constituting "interim response activities" as do Proposed Rules 509a and 509b.

In order to obtain MDEQ's approval of interim response activities, a non-labile person must submit to MDEQ a workplan prior to starting work, or an interim response activity report if the work has been completed. The factors to be considered by MDEQ in approving interim response activities and the conditions MDEQ may attach to that approval are the same as those set forth under Proposed Rule 509a for liable parties.

Proposed Rule 509a additionally provides that MDEQ's approval of an interim response activity undertaken by a person who is not liable under Part 201 shall survive the sale or transfer of the facility, provided that the seller or transferee (note, the proposed rule states "transferee" here, but it probably should state "transferor") is in compliance with the terms of the approval at the time of the sale or transfer. If any operation and maintenance, financial assurance, or other obligations imposed under MDEQ's approval are not met by the subsequent owner or operator of the facility, Proposed Rule 509a provides that MDEQ's approval shall then become void as of the time the subsequent owner or operator fails to meet the obligations.

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