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MDEQ Collaborative Stakeholders Initiative Report Issued

Significant Changes Already Underway in the MDEQ Part 201 Program

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The final report and recommendations of the Collaborative Stakeholders Initiative (CSI) were recently released. The CSI was convened in November 2011 by the Michigan Department of Environmental Quality (MDEQ) with the support of Michigan Governor Rick Snyder to engage stakeholders and regulatory personnel in an intense, condensed and collaborative evaluation of Michigan's Part 201 clean-up and redevelopment program and the related Brownfield Redevelopment Financing Act (Act 381) program which has been used in connection with numerous Part 201 remediation and due care projects.

CSI participants were divided into seven small work groups, with each group comprised of stakeholders and regulatory personnel. The groups met on a compressed, but intense schedule to identify and deliberate solutions to problems in seven pre-identified subject areas: (i) brownfield redevelopment, (ii) cleanup criteria, (iii) due care obligations, (iv) free product/source removal/ C_{sat} , (v) groundwater surface water interface, (vi) Part 201 rules, and (vii) vapor intrusion. The CSI was also charged with considering the recommendations of the Environmental Advisory Rules Committee (EARC), which was organized by the Michigan Office of Regulatory Reinvention pursuant to Governor Snyder's executive order. EARC met for the last six months of 2011, and issued a comprehensive set of recommended revisions to the Part 201 program (laws, rules and policies) and other laws and programs administered by the MDEQ.

Honigman was represented on both the EARC and CSI by Richard A. Barr, a partner in the Environmental Law Department.

Key Recommendations — Some of the key recommendations of the CSI include:

1. *Brownfield Redevelopment* — Recommended that the availability of tax increment benefits under Act 381 be streamlined and expanded to allow reimbursement of additional types of costs that are incurred prior to approval of a work plan.
2. *Cleanup Criteria* — Recommended further refinement of cleanup criteria, especially during the establishment of new Part 201 criteria, which are required by law to be finalized by December 2012.

3. *Due Care* — Recommended clarification of the law and rules on due care, and the expansion of the permitted relocation of contaminated soil to encourage cost efficient yet environmentally protective remediation and due care activities. The expanded relocation authority would permit the creation of on-site berms of impacted soils as an alternative to more expensive off-site landfill disposal. Additionally, statutory changes were proposed to modify or eliminate special exceptions to due care obligations for the state and local units of government and the migration exception to due care obligations.
4. *Free Product/Source Removal/C_{sat}* — Recommended multiple revisions to the program in order to align regulation with the actual risk created by the presence of free product, non-aqueous phase liquid (NAPL), C_{sat} conditions and similar conditions that warrant improved regulatory approaches and new training for MDEQ staff and Michigan environmental professionals.
5. *Groundwater Surface Water Interface (GSI)* — Recommended a substantially revised approach to managing risk from the GSI pathway to facilitate more closures while continuing to protect surface water resources.
6. *Part 201 Rules* — Recommended 43 rescissions or updates of Part 201 rules as well as revisions to further promote self-implemented remedies and the increased use of No Further Action letters for minimal risk facilities.
7. *Vapor Intrusion* — Recommended the inclusion of a tiered approach to applying the new vapor intrusion criteria, which are expected to be included in the forthcoming updated Part 201 criteria. The tiered approach would provide for a process of easier implementation as well as for the approval of site-specific criteria.

Implementation — Some recommendations of the EARC and CSI have already been implemented by the MDEQ or will soon be implemented. For example, the MDEQ has eliminated the Lansing quality review team (QRT) and implemented a new, district-based peer review and approval process. The MDEQ has committed to begin work on 90% of the EARC's recommendations by the end of 2012 and complete all of the recommendations by the end of 2014, as well as to the deliberate implementation of a substantial portion of the CSI recommendations, demonstrating an unprecedented implementation strategy.

For questions about the CSI and EARC or other Part 201 or Act 381 questions, please contact any of the Honigman attorneys listed on this alert.