

## ***Legislators Request Attorney General Opinion On Part 201 Liability Protection***

State Representative Matt Gillard, State Senator Tony Stamas and U.S. Representative Bart Stupak have requested that the Michigan Attorney General issue an opinion on the constitutionality of a section of Part 201 (Environmental Remediation) of the Michigan Natural Resources and Environmental Protection Act, which protects persons who meet the requirements of Part 201 from liability under the federal Superfund law (CERCLA).

The legislation requested an opinion regarding Section 20129 (6), which provides:

A person who is not liable under this part, including a person who is issued a written determination under section 20129a affirming that the person meets the criteria for an exemption from liability [under the “BEA” process], and who is otherwise in compliance with section 20107a [the “due care” requirements], shall be considered to have resolved his or her liability to the state in an administratively approved settlement under the comprehensive environmental response, compensation, and liability act of 1980 [“CERCLA”], Public Law 96-510, 94 Stat. 2767 and shall by operation of law be granted contribution protection under section 113(f)(2) of [CERCLA] and under this part in the same manner that contribution protection is provided pursuant to subsection (5).

The three legislators have asked the Attorney General whether the protection provided by this provision from liability to the State and third parties under CERCLA violates the Supremacy Clause, the Interstate Commerce Clause, the Due Process Clause, or any other provision of the United States Constitution.

The legislators have also asked the Attorney General whether the administrative settlement with the State that arises under the provision by operation of law violates the Separation of Powers Clause or any other provision of the Michigan Constitution. That is, they are questioning whether the Legislature exceeded its authority when it deemed that persons who

are not liable under Part 201 have also resolved their potential federal CERCLA liability to the State.

Section 20129(6) is an important part of the Part 201 liability protections enacted by the Michigan Legislature in 1995 when Part 201 was amended to hold only those who are actually responsible for contamination liable for its cleanup, rejecting the approach under the federal CERCLA, which imposes an owner/operator-based joint and several liability scheme. The new Part 201 liability scheme encourages the redevelopment of contaminated property by offering protection to new owners of contaminated property that did not cause the contamination. For example, through the BEA (baseline environmental assessment) process, a person may develop contaminated brownfield property without becoming liable for historical contamination.

Section 20129(6) provides protection to innocent parties that are not liable under Part 201 (including those that have performed a BEA), but would nevertheless be liable under CERCLA because of CERCLA's owner/operator-based liability scheme. This provision also prevents the State from skirting Part 201's liability protections by utilizing federal law (i.e., CERCLA) to impose liability on persons who are not liable under state law, such as persons who became the owner of a contaminated property after it became contaminated.

Michigan has become a leader in the revitalization of brownfields, largely due to the liability protections afforded nonpolluting landowners under Part 201. An opinion from the Attorney General that Section 20129(6) is unconstitutional could seriously undermine the redevelopment of brownfields in Michigan. Although an opinion of the Attorney General does not have the force of law, state agencies generally consider the Attorney General's opinion binding unless overruled by a court. Consequently, a finding by the Attorney General of

unconstitutionality could cause considerable confusion within the Michigan brownfields program.

Honigman Miller Schwartz and Cohn LLP is proposing to submit an analysis to the Attorney General, akin to an amicus brief, demonstrating Section 20129(6)'s constitutionality on behalf of businesses and industries that would be impacted by an adverse Attorney General opinion and is seeking parties to participate in such a brief to the Attorney General. If you are interested in participating in this effort, please contact Joseph M. Polito, Esq. of Honigman Miller Schwartz and Cohn LLP by email at [jpolito@honigman.com](mailto:jpolito@honigman.com), phone at 313-465-7514, or facsimile at 313-465-7515.

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