

Proposed Part 201 Rules – Feasibility Studies and Remedial Action Plans

This is the fifth and final article in a series of articles discussing extensive proposed revisions to the Michigan Department of Environmental Quality's (MDEQ) proposed rules under Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act. This article discusses Feasibility Studies and Remedial Action Plans under the Part 201 Rules. Copies of the Proposed Part 201 Rules may be downloaded from MDEQ's web site at <http://www.deq.state.mi.us/erd> or from the Office of Regulatory Reform's web site at <http://www.state.mi.us/orr>. A public hearing was held on the Proposed Part 201 Rules on August 28, 2001. Written comments on the Proposed Rules must be submitted to the MDEQ, Environmental Response Division, P.O. Box 30426, Lansing, Michigan 48909-7926, by 5:00 PM Eastern Daylight Time on September 11, 2001.

Feasibility Studies

Similar to the rules for remedial investigations discussed in the _____ MECU, the proposed rules for feasibility studies (FSs) are divided into three categories: (i) an FS conducted by a person who is liable under Part 201 and is seeking MDEQ's approval of the study (Proposed Rule 513a); (ii) an FS conducted by a liable person who is not seeking MDEQ's approval (Proposed Rule 513b); and (iii) an FS conducted by a person who is not liable and who is seeking MDEQ's approval (Proposed Rule 513c). The components of an FS are essentially identical under each of the three categories. A person who has not been required by MDEQ to perform an FS may seek MDEQ's approval of an FS before the work is undertaken or after doing so. A person seeking approval of an already-performed FS must submit an FS report that describes the work completed.

MDEQ may require a liable person to conduct an FS when more than one remedial action is practical at a "facility" and the FS will contribute to a more effective remedy selection process. Briefly, under Part 201, a "facility" is any place where a released hazardous substance comes to be located in excess of the generic residential cleanup criteria. Part 201 provides that MDEQ may establish land use based cleanup

criteria for various categories of land use, including residential, commercial, and industrial. An FS must evaluate a range of cleanup alternatives that reflects the practical options, the complexity of the contamination problem, and the remedial action that is necessary to address the contamination. An FS must include consideration of practical and relevant alternative final remedies in each of the following categories:

- Alternatives for treatment, disposal, waste minimization, recycling, or destruction at an offsite facility.
- Alternatives for treatment, disposal, waste minimization, recycling, or destruction at an onsite facility.
- Alternatives that provide for a reduction in risk that is sufficient to meet an appropriate land use based cleanup criterion under Part 201 (e.g., residential, commercial, or industrial).
- No action alternative – if it will satisfy the requirements of Part 201 and its rules.

An initial screening of alternatives under an FS must consider the following broad criteria:

- The ability to achieve an appropriate land use based cleanup consistent with Part 201 and its rules.
- Cost of the remedial actions.
- Acceptable engineering practices based on the following: (i) feasibility for the location and conditions; (ii) applicability; and (iii) reliability.

The FS must include a detailed evaluation of the alternatives that remain after the above initial screening, that addresses all of the following criteria:

- The effectiveness of the alternatives in protecting the public health, safety, welfare and the environment.
- A detailed refinement and specification of the alternatives.
- Detailed cost estimates, distributed over time, of implementing the remedy, including operation and maintenance costs.

- Engineering implementation, reliability, and constructability.
- Technical feasibility.
- Whether recycling, reuse, waste minimization, biodegradation, or destruction, or other advanced, innovative, or alternative technologies are appropriate.
- Adverse environmental impacts that may result, including those from demolition activities, and methods and costs of mitigating the adverse impacts.
- Risks and impacts that remain after implementation of the remedy.
- The extent to which a remedial alternative attains a degree of cleanup or control that complies with legally applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards under state and federal environmental law.

Remedial Action Plans

The Proposed Rules addressing remedial action plans (RAPs) are also divided into three categories: (i) remedial action undertaken by a person who is liable and who is seeking MDEQ's approval of the remedial action (Proposed Rule 515a); (ii) remedial action undertaken by a person who is liable, but is not seeking MDEQ's approval of the remedial action (Proposed Rule 515b); and (iii) remedial action undertaken by a person who is not liable and who is seeking MDEQ approval of the remedial action (Proposed Rule 515c). As with FSs, the components of RAPs under each of the three categories are essentially identical.

MDEQ may require a person who is liable under Part 201 to prepare a RAP and submit it to MDEQ for approval. A person who is liable under Part 201, but has not been required by MDEQ to prepare a RAP, may seek MDEQ's approval of remedial action that person has performed. If a remedial action includes any of the following three components, MDEQ must approve that component in order for the remedial action to be considered in compliance with Proposed Rule 515a:

- The remedial action relies on an institutional control (e.g., a municipal ordinance restricting the use of a resource, such as groundwater) that is not preapproved by MDEQ in lieu of a restrictive covenant to restrict land or resource use.

- The remedial action addresses groundwater contamination and requires a waiver under Section 20118 of Part 201 of the requirement that the vertical and horizontal extent of groundwater contamination not increase after beginning remedial actions or of the requirement that remedial actions addressing groundwater contamination provide for the removal of contaminants.
- A “mixing zone” determination is needed for groundwater venting into surface water. (Mixing zones under the Proposed Part 201 Rules were discussed in the ____ MECU.)

“Rule 515a RAPs”

A Rule 515a RAP may describe activities that are proposed to be performed or that have already been performed, or both. If the Rule 515a RAP describes activities already performed, except for long-term monitoring and operation and maintenance, and the person submitting the RAP believes that the actions comply with Part 201 and its rules, Proposed Rule 515a directs that the Rule 515a RAP be subtitled as a “Closure Report.”

A Rule 515a RAP must address contamination in all environmental media at the entire facility, unless the RAP precisely describes the contamination to be excluded and is accompanied by an affidavit from the person submitting the RAP that he or she is not liable for that contamination and can demonstrate divisibility of the harm and apportionment of liability as required under Section 20129 Part 201. The affidavit must contain information that explains and supports the basis for the conclusion that the person submitting the Rule 515a RAP is not liable for the contamination proposed to be omitted from the RAP. The affidavit must also document the demonstration of divisibility of harm and apportionment of liability required under Part 201. MDEQ may approve a Rule 515a RAP that excludes unremediated contamination relying on the affidavit of the person seeking approval of the RAP; however, MDEQ reserves the right to later review the liability of that person for the unremediated contamination. Proposed Rule 515a further provides that a liable person who undertakes a remedial action that does not, when complete, address all contamination known to exist at a facility is subject to fines and penalties under Part 201.

A Rule 515a RAP submitted to MDEQ for approval must include all of the following elements:

- A description of the remedial action which has been or will be implemented and a description of how it will meet the requirements of Part 201 and its rules.
- The documentation required under Part 7 of the Part 201 Rules (discussed previously).
- A discussion of any statistical methods to be used to evaluate data and why those methods are appropriate.
- An evaluation of the impact of any planned demolition activities.
- An analysis of indicator chemicals that will be used to evaluate the implementation of the Rule 515a RAP.
- A description of environmental monitoring activities to be undertaken.
- An operation and maintenance (O&M) plan including sufficient detail for MDEQ to reasonably estimate O&M costs that will need to be covered by a financial assurance mechanism (FAM), if one is required.
- A monitoring plan if monitoring is required to confirm the effectiveness or integrity of the remedial action. The monitoring plan should also provide sufficient detail for MDEQ to reasonably estimate monitoring costs that need to be covered by a FAM, if one is required.
- If necessary, a request for a waiver, as noted above, of the requirement that the vertical and horizontal extent of groundwater contamination not increase after beginning remedial actions.
- If venting groundwater is entering surface water in excess of the generic groundwater surface water interface criteria, a request for approval of that condition, such as a request for a mixing zone determination.
- An explanation of any land use or resource use restrictions to be imposed and how those restrictions will be effective in preventing or controlling unacceptable exposures.
- For cleanups other than a generic residential cleanup, identification of easement holders and a copy of notices provided to the easement holders.

- If a restrictive covenant is to be employed to implement a land use or resource use restriction, a copy of the proposed restrictive covenant, together with a written statement from the owner(s) of the property that he or she consents to the recording of the restrictive covenant once MDEQ approves the RAP or closure report.
- If land use restrictions are to be accomplished through a notice of approved environmental remediation (NAER), a proposed NAER for each property affected and a written statement from the property owner that he or she approves recording of the NAER upon approval of the RAP or closure report by MDEQ.
- If land or resource use restrictions are to be accomplished through an institutional control in the form of an ordinance that has already been enacted, then a copy of the ordinance must be included. If the ordinance has not yet been enacted, then a draft of the ordinance must be included, and a written confirmation that the local unit of government is willing to enact an ordinance substantially similar to the one included in the RAP.
- Other forms of institutional controls or land uses restrictions proposed to be utilized.
- A schedule for implementing the Rule 515a RAP.
- An explanation of whether permanent markers are proposed and the design and language of the markers.
- A proposed FAM to cover monitoring, O&M, and other costs necessary to ensure the effectiveness and integrity of the remedial action, if financial assurance is required under Part 201, or an explanation of why financial assurance is not required. The costs of the activities covered by the FAM must be documented on the basis of an annual estimate for a third party to perform the work under contract to the State – not on the basis of the employees of the person submitting the RAP.
- If required under Part 201, a proposed legally enforceable agreement for implementation of the RAP.

Proposed Rule 515a provides that MDEQ's approval of a Rule 515a RAP shall not take effect until all of the following have occurred:

- If required, a detailed O&M plan or monitoring plan is approved by MDEQ.
- The required land use restrictions are recorded and proof of recording is provided to MDEQ.

- If applicable, an approved FAM is in place.
- A legally binding agreement has been signed by all parties and provided to MDEQ.

Finally, Proposed Rule 515a provides that a Rule 515a RAP must be promptly modified, and that modification approved by MDEQ, to address any substantial change in circumstances that results in the remedial action no longer being protective or reliable.

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