

MDEQ Re-Proposes Draft Part 201 Rules

The Michigan Department of Environmental Quality (MDEQ) has issued substantially-revised draft rules under Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA). The revisions follow a public hearing and comment period on a previous revision of these Part 201 rules that was summarized in previous MECU editions. The revised draft Part 201 rules discussed in this article are available on the Office of Regulatory Reform's worldwide web site at <http://www.state.mi.us/orr/>, but have not yet been formally public noticed in the Michigan Register or on MDEQ's web site.

Cleanup Criteria Now Listed In The Rules

MDEQ personnel have stated that the revised draft Part 201 rules are intended to address many of the public comments received by MDEQ on the prior proposed rules. According to MDEQ personnel, the revised draft rules are intended to address four general comments: (1) the proposed rules are too complex; (2) the proposed rules for determining compliance with the groundwater surface water interface (where groundwater "vents" to surface water) cleanup criteria, especially with respect to storm sewers, were too prescriptive; (3) the proposed rules provided for insufficient MDEQ involvement in approval of remedial action plans; and (4) the proposed rules did not provide for sufficient notice to the public under various circumstances.

One particularly notable revision to the draft Part 201 rules is the wholesale inclusion in the rules of the cleanup criteria tables that are currently published by MDEQ as Attachment A to MDEQ Environmental Response Division Operational Memorandum ("Op. Memo") No. 18. This approach seems to be directed at addressing arguments that the cleanup criteria published in Op. Memo No. 18 constituted "unpromulgated rules," that is, the cleanup criteria should have been promulgated in accordance with the Michigan Administrative Procedures Act (APA) and

because they were not, they are merely guidelines that may not be enforced against third parties. Of course, formally promulgating the cleanup criteria as administrative rules will mean that MDEQ generally would have to propose and promulgate new rules in order to revise a cleanup criterion or implement a new one – a slower and more burdensome process than the approach of issuing Op. Memos that has been followed by MDEQ in the past.

In order to address this perceived problem, draft Rule 299.5706a sets forth procedures for MDEQ to develop cleanup criteria for a substance that is not already listed in the cleanup criteria tables and to revise the cleanup criteria for certain substances that are already listed, but do not have one or more cleanup criteria listed. Draft Rule 299.5706a(10) provides that MDEQ may determine, using the best available information, whether a substance not listed in the cleanup criteria tables in the rules is a hazardous substance and develop generic or site-specific cleanup criteria for that substance. For a substance that is already listed in the cleanup criteria tables, but is listed as having insufficient information to develop a cleanup criterion, draft Rule 299.5706a(11) provides that MDEQ shall develop a cleanup criterion for such a substance if it obtains sufficient information to do so. Further, if a new state drinking water standard is established or an existing standard is changed after the effective date of the rules, draft Rule 299.5706a(12) provides that the new state drinking water standard shall become a generic residential cleanup criterion under the rules. If a generic cleanup criterion is developed under either of draft subrules (10) or (11), MDEQ will announce the new criterion on its Internet web site and in the MDEQ calendar or by such other means that will effectively notify interested persons. The draft rules provide that the new criterion shall take effect when so published/announced and shall remain in effect until MDEQ promulgates the revised criteria

under the APA. Notably, the provisions discussed above do not provide for revision of an already-promulgated cleanup criterion.

New “Hazardous Substances”

As they did in Op. Memo format, the cleanup criteria tables in the draft rules continue to list cleanup criteria for a number of substances and water quality characteristics that are not listed as a “hazardous substance” under the federal Comprehensive Environmental Response, Compensation, and Liability Act, defined as “hazardous waste” under Part 111 (Hazardous Waste Management) of NREPA, or “petroleum” as described under Part 213 (Leaking Underground Storage Tanks) of NREPA, all of which are included within the definition of “hazardous substance” under Part 201. Part 201 does, however, provide for other substances to be designated as a “hazardous substance” if MDEQ “demonstrates on a case by case basis, [that substance] poses an unacceptable risk to the public health, safety, or welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources.” Examples of some such new “hazardous substances” include the “water quality characteristics” of dissolved oxygen, pH, and total dissolved solids. Other examples include sodium and chloride, such as would result from salt dissolving in water (notably, salt itself is not listed), and iron, sulfate, nitrate, and nitrite.

“Complete” Response Activities

MDEQ has added a new defined term, “complete,” to the draft rules with respect to response activities. The effect of this new term is in many respects similar to that of a covenant not to sue for “completed” response activities under an administrative or judicial consent agreement – offering some assurance of finality with respect to a completed response activity. “Complete” is defined under the draft Part 201 rules as follows:

“Complete,” when used to describe a response activity that is intended to attain the cleanup criteria established under section 20120a of the act, means that the person has performed and documented the following response activity, thereby satisfying his or her obligations under the statute for the release addressed by the response activity

The remainder of the definition lists the showings that must be met in order to demonstrate that a response activity is “complete.” The definition distinguishes between: (i) response activities that are intended to attain the “generic” land use based cleanup criteria – i.e., the generic residential, commercial, and industrial cleanup criteria listed in the cleanup criteria tables now contained in the draft rules; and (ii) response activities to achieve “limited” land use based cleanup criteria or site-specific cleanup criteria.

“Complete” Generic Cleanups

The draft rules provide that a response activity intended to attain a generic cleanup category is complete when:

- The applicable numerical cleanup criteria have been achieved.
- If applicable under Part 201, the notice required for cleanups achieving the non-residential (e.g., commercial or industrial) generic land use based cleanup criteria has been recorded with the register of deeds for the county in which the property is located.
- If applicable under Part 201, the notice required for certain cleanups has been provided to the zoning authority for the local unit of government.

“Complete” Limited and Site-Specific Cleanups

The draft rules provide that a response activity intended to attain a “limited” land use based or site-specific cleanup is complete when:

- Construction of all physical components of the response activity has been completed.

- The response activity has achieved any applicable limited or site-specific numerical cleanup criteria.
- If applicable under Part 201, a restrictive covenant for the site has been recorded with the register of deeds for the county in which the property is located.
- If applicable under Part 201, notice has been provided to the zoning authority for the local unit of government.
- If applicable to the site, the following elements are in place (i) land use or resource use restrictions; (ii) monitoring plan; (iii) operation and maintenance (O&M) plan; (iv) permanent markers describing the restricted areas of the site and the nature of those restrictions; and (v) a financial assurance mechanism (FAM) in a form acceptable to MDEQ to pay for monitoring, O&M, oversight, and other costs necessary to ensure the effectiveness and integrity of the remedial action.
- MDEQ has approved the components of the response activity that require MDEQ's approval under the Part 201 rules for interim response activities and remedial action plans.

Nullification of "Complete" Status

The draft rules provide that the conclusion that a response activity is "complete" may be nullified under the following circumstances, unless the lapse or violation causing the nullification is corrected within a reasonable time after discovery:

- A later discovery that unknown hazardous substances were present on the property at levels in excess of the selected cleanup criteria at the time the response activity was conducted.

- Failure of the physical components of the response activity, e.g., exposure barriers, to mitigate exposure or perform as designed.
- Failure by the person completing the response activity to maintain compliance with applicable: (i) land use or resource use restrictions; (ii) monitoring requirements; (iii) O&M requirements; (iv) permanent marker requirements; or (v) requirements for a FAM.
- If a FAM required under Part 201 is no longer adequate or it cannot be verified or accessed by MDEQ.

The draft rules additionally provide that the following changes will not, individually or collectively, nullify the “complete” status of a response activity:

- Legislative changes to Part 201 or enactment of contradictory legislation, unless the legislation expressly provides otherwise.
- Changes in the cleanup criteria developed by MDEQ.
- Changes in a local ordinance that serves as an institutional control for a site.
- Changes in land use.

The draft rules further provide that any additional response activity required under Part 201 as a result of one of the above changes will be the responsibility of the owner or operator of the property at the time of the change.

There are numerous other changes to the previous proposed Part 201 rules that are contained in the new draft proposed Part 201 rules. Some of these changes will be highlighted in future articles.

Brian J. Negele