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Part 201 Reform Package on Brink of Becoming Law

After several multi-year efforts to achieve substantial reform of Michigan's Part 201 environmental remediation program, the final bills of a scaled down reform package are expected to be approved by the Michigan Legislature within the next two weeks. Additionally, an environmental funding package that is tie-barred to the Part 201 reform amendments is also expected to be approved in early December, paving the way for Governor Granholm to sign the entire package into law in December 2010.

Previous efforts sought substantial reform of many elements of the Part 201 program desired by both the Michigan Department of Natural Resources and Environment ("MDNRE") (then, the Michigan Department of Environmental Quality) and the business community. The current bill package is more narrowly drafted and instead focuses on the following key elements of the program:

Liability Protection

The baseline environmental assessment ("BEA") program will be scaled back to no longer require an ability to distinguish new releases from old releases of hazardous substances and to eliminate the current BEA categories ("N", "D" and "S"). Instead, a BEA will consist of the results of an "All Appropriate Inquiry" ("AAI") Phase I environmental site assessment and sufficient data to determine "facility" status under Part 201 (i.e., federal AAI plus sufficient sampling to determine whether the property is a "facility"), all of which has to be "conducted" within 45 days after becoming the owner or operator of the facility and submitted to the MDNRE within 6 months after becoming the owner or operator or date of foreclosure. The process allowing new owners and operators to seek MDNRE affirmative determination of a BEA and obtain affirmative liability exemptions on that basis, as well as to obtain MDNRE approval of a due care plan, will be eliminated going forward.

A person will no longer have the burden of proving it is not liable under Part 201 after MDNRE proves a prima facie case of liability (e.g., proves that a person owns contaminated property and used hazardous substances that were released on the property). Instead, MDNRE will continue to have the burden of proof to establish liability throughout all legal proceedings and cannot shift the burden of proof to the defendant.

Due care requirements under section 7a of Part 201 will be expanded to align with the duties imposed under the federal Bona Fide Prospective Purchaser defense, which, in addition to the analogous current Part 201 Due Care requirements, generally requires an owner or operator to cooperate with persons conducting cleanup activity, comply with deed restrictions and not interfere with institutional controls or response activity, in order to maintain liability protection.

Cleanup Criteria

The Part 201 criteria will be simplified to include only "residential" and "nonresidential" categories. The current industrial criteria will be used as the nonresidential criteria until MDNRE publishes new nonresidential criteria.

Detroit**Lansing****Oakland County****Ann Arbor****Kalamazoo****Decrease in MDNRE RAP Response Time**

MDNRE must respond to a response activity plan approval request within 150 days (or 180 days if public notice or comment is required), and if no such response is provided, the plan will be deemed to have been approved.

No Further Action

No Further Action (“NFA”) reports may be submitted to MDNRE upon the completion of all cleanup requirements. Similar to response activity plans, MDNRE responses to NFA reports will be required within 150 days, or 180 days if the approval requires public notice or public comment. An NFA report that is approved (or deemed approved through MDNRE’s failure to timely respond) provides a liability exemption for the contamination addressed in the report. This exemption may be re-opened if, for example, the land use of the contaminated property changes or information shows that exposures to hazardous substances are not being properly controlled.

Creation of an Advisory Panel for Technical Disputes

An advisory Response Activity Review panel would be created to review technical or scientific disputes related to MDNRE denials of response activity plans or NFA requests. If the MDNRE refuses to follow the recommendation of the Response Activity Review panel, the applicant can seek circuit court review under a limited standard of review. Currently, Part 201 bars “pre-enforcement review” of MDNRE decisions.

GSI

Reform of the groundwater-surface water pathway requirements are expected to result from time to time in more flexible MDNRE reviews of proposals where this pathway is a relevant and key aspect of the propose response activity or closure proposal.

MDNRE Implementation of Part 201 Amendments

MDNRE is working on a transition plan and expects to issue guidance in December, as the laws are expected to take effect immediately upon the expected final legislative action and signature of Governor Granholm. One key consideration for transactions involving real property is that the old BEA program will no longer be in effect, and the AAI requirements will be applicable, as early as mid-December. MDNRE has indicated that upon the effective date of the proposed Part 201 amendments, it will no longer be authorized to issue any determinations on BEAs which are submitted to them under the existing law. Currently pending transactions, agreements or lending requirements which require MDNRE determinations will need to be reviewed if the bills become law as expected.

Honigman will issue a comprehensive update on the Part 201 reform package if it is signed into law. In the meantime, please contact any member of the Environmental Law Department with any questions on the pending bills and how the reform package may affect you.