## *New Part 201 Rules Become Effective*

Revised rules for Part 201 (Environmental Remediation) of the Michigan Natural Resources and Environmental Protection Act (NREPA) became effective on December 21, 2002. The proposed revisions to these rules were summarized previous editions of MECU. This article will highlight some of the new requirements added to the rules by the Michigan Department of Environmental Quality (MDEQ) after the version noticed for public comment in the March 1, 2002 Michigan Register discussed in the previous articles, several new deadlines imposed under the rules, and additional aspects of the new rules.

**New "Due Care" Requirements**

Section 20107a of Part 201 requires owners and operators of property that is contaminated above the generic residential cleanup criteria (known as a "facility" under Part 201) to exercise "due care" by performing response activities to mitigate "unacceptable exposures" to hazardous substances in order to allow use of the property in a manner that protects public health and safety. Part 10 of the Part 201 rules contains the so-called "due care" rules. MDEQ's due care rules previously addressed the offsite migration of contamination only when it occurred through groundwater migrating offsite. Even then, a non-liable owner of property was only required to notify MDEQ of the offsite migration and did not have to take any actions to prevent the offsite migration.

MDEQ has now added requirements to the due care rules that require a non-liable owner or operator of property that is a facility to address the offsite migration of contaminants through surficial erosion and airborne dispersion. These requirements, which were added by MDEQ after the close of public comment on the rules, require an owner/operator to undertake "response

activity at the property as necessary to mitigate off-property risks resulting from erosion of surface soils at the property or from dispersion of particulate or volatile hazardous substances in surface soils at the property." Thus, the new due care rules require a non-liable property owner/operator to take response activities designed to protect against off-property risks resulting from the above-ground migration of contamination.

Previously, the due care requirements were understood to require a non-liable owner/operator to address only on-property exposures and not to prevent potential off-property exposures. Although it is difficult to generalize as to the response activities that may be necessary to comply with this new requirement, it seems likely that MDEQ intends that, under at least some circumstances, a due care property owner may need to install a protective cover of some sort over contaminated soils to prevent the surficial or airborne offsite migration of contamination.

Notably, however, a non-liable property owner or operator still is not required to take any response activity to address off-property exposures caused by migrating contaminated groundwater. MDEQ has, however, amended the notification requirement for contaminated groundwater that is migrating offsite. As noted above, the prior due care rules only required that the property owner or operator notify MDEQ of the offsite migration of contamination in excess of the generic residential cleanup criterion. Presumably, MDEQ would notify any persons that were impacted by the offsite migration or would take any necessary response activities to mitigate the offsite impacts. The notification requirement has been revised to now require that an "affected adjacent property owner" also be notified of the migrating contamination.

The notification requirement is triggered when the property owner has "a reason to believe" that groundwater contaminated above the residential cleanup criteria is migrating offsite. This determination must be based upon "reasonable inferences" from available data. The notices required under the rule must be provided within 45 days after the time a person has reason to believe that conditions triggering the notice requirement exist. If, however, a person is required to make an additional notice of offsite migration as a result of the amendments (i.e., if a person who previously provided notice to MDEQ is now required to notify an adjacent property owner), that notice must be made within nine months after the effective date of the rule, that is, by September 21, 2003.

The rules also provide that MDEQ may prescribe a form to be used for making notices of offsite migration. Although MDEQ had previously published a form for providing notice to MDEQ of offsite migration, it has not yet published a form for notifying affected adjacent property owners.

**Groundwater Surface Water Interface (GSI) Controversy**

The new rules also provide a greater focus on groundwater that is "venting" to surface water, such as a stream or a lake. The GSI rules have been particularly contentious within the regulated community. Rule 716 provides:

> The pathway addressed by groundwater surface water interface (GSI) criteria ***shall be considered a relevant pathway*** when a remedial investigation or application of best professional judgment leads to the conclusion that ***a hazardous substance in groundwater is reasonably expected to vent to surface water in concentrations that exceed the generic GSI criteria***.

The GSI rules list the following factors to be considered in determining whether the GSI pathway is relevant:

- Whether there is a hydraulic connection between the groundwater and a surface water body.
- The proximity of a surface water body to contaminant source areas and areas that currently exceed the generic GSI cleanup criteria or areas that may be expected to exceed the criteria in the future.
- Whether the potentially impacted surface water is defined as a "surface water of the State" under MDEQ's rules under Part 31 (Water Resources Protection) of NREPA (e.g., a wastewater management impoundment is not a "surface water of the State").
- The direction of groundwater flow.
- The presence of natural or artificial features that alter groundwater flow pathways, for example, utility corridors and sea walls.
- The mass of hazardous substances present that may impact groundwater.
- Documented natural attenuation at the facility.

Generally, compliance with the GSI criteria is to be determined in vertical monitoring wells at locations that are representative of groundwater entering the surface water. A GSI monitoring well may be installed as close as practical to the surface water body, provided it can be demonstrated that groundwater flow is towards the surface water and that the water sampled is representative of groundwater and not the surface water. Although the rules specifically provide that one is not precluded from locating GSI monitoring wells in a floodplain, sample collection must take into account seasonal or periodic fluctuations in groundwater flow (for example, spring flooding).

If groundwater is venting to a storm sewer, the GSI monitoring wells must be placed in a location as close as practical to the storm sewer, or at an alternative monitoring location approved by MDEQ, to allow representative monitoring of the groundwater before it mixes with any flow in the storm sewer. Thus, the point of compliance is adjacent to the storm sewer pipe,

and not where the storm sewer discharges to surface water – which effectively treats the storm sewer as if it were a surface water of the State.

Part 201 specifically provides that MDEQ shall grant a "mixing zone" for venting groundwater in the same manner that it does for point source discharges. In order to rely on a mixing zone for complying with the GSI criteria, however, a person must obtain approval from MDEQ. Note also that the "water quality characteristics" contained in the generic groundwater cleanup criteria tables (which are now promulgated in the Part 201 rules instead of the former "operational memorandum" format) apply only to groundwater venting to surface water, not groundwater cleanups in general.

The GSI rules are controversial, in part, because although they are intended to address potential impacts to surface water and compliance is evaluated as if the groundwater was a point source discharging to the surface water, one is not allowed to demonstrate compliance by simply sampling the surface water to determine whether there is a measurable unacceptable impact to the surface water. That is, the rules require what may be, in many cases, a largely theoretical, yet not inexpensive, exercise to demonstrate compliance.

**"Complete" Response Activity – Are We Done Yet?**

The new Part 201 rules establish standards for deeming a cleanup to be "complete" – a point at which MDEQ generally cannot require further action. The definition of the term "complete" distinguishes between response activities that are intended to achieve the generic cleanup criteria and those intended to achieve either a "limited" or site-specific cleanup.

**Complete Generic Cleanups**

A generic cleanup (i.e., a cleanup intended to achieve one of the generic residential, commercial, and industrial cleanup criteria published in the rules) is deemed to be complete when:

- The response activity complies with the requirements of the rules for interim response activities or the rules for response activity plans, as applicable, including any requirement to obtain MDEQ's approval under those rules.
- The response activity achieves the applicable numerical cleanup criteria.
- If applicable, a notice of approved environmental remediation has been recorded with the register of deeds.
- If applicable, the appropriate notice of land or resource use restrictions has been provided to MDEQ, the local unit of government, and zoning authority for the local unit of government.

**Complete Limited or Site-Specific Cleanups**

Establishing "completeness" for a limited or site-specific cleanup is not quite as straightforward as for a generic cleanup. A limited or site-specific cleanup is complete when:

- The response activity complies with the requirements of the rules for interim response activities or the rules for response activity plans, as applicable, including any requirement to obtain MDEQ's approval under those rules.
- The physical components of the response activity have been constructed and demonstrated to be capable of meeting the applicable performance standards and are functioning effectively.
- Any applicable numerical cleanup criteria have been achieved and performance standards have been established for the components of the response activity that are associated with long-term performance.
- If applicable, a restrictive covenant has been recorded.
- If applicable, the appropriate notice of land or resource use restrictions has been provided to MDEQ, the local unit of government, and zoning authority for the local unit of government.
- Any of the following, if required, are in place and being complied with: land or resource use restrictions, monitoring, operation and maintenance, permanent markers, and a financial assurance mechanism.

**When Is Complete No Longer Complete?**

Complete status may be lost, however, if any of the following occur: (i) unknown conditions requiring response activity are later discovered; (ii) the remedy fails; (iii) failure of the person who completed the response activity to maintain a reliable mechanism for ongoing compliance with land/resource use restrictions, monitoring, operation and maintenance, and permanent marker requirements; or (iv) the financial assurance mechanism is inadequate or cannot be verified or accessed by MDEQ.

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