

MDEQ Drafts Rules for Cleanups

As discussed in the Vol. 11, No. 12 (March 2001) issue of Michigan Environmental Compliance Update, the Michigan Department of Environmental Quality (MDEQ) has released extensive proposed revisions to the rules implementing Part 201 (Environmental Response) of the Michigan Natural Resources and Environmental Protection Act. Note, that as of this writing, the proposed revisions are still considered “preliminary” because they have not yet been formally published in the Michigan Register, nor has a date or location for public hearings or a deadline for submission of public comments been announced. A copy of the proposed rules may be obtained from the Office of Regulatory Reform’s Web site: www.state.mi.us/orr. The previous article discussed the proposed revisions to Part 7, Cleanup Criteria and Remedial Action Requirements, of the Part 201 rules. This article addresses the proposed revisions to selected rules, contained in Part 5, Response Activities, of the Part 201 Rules including proposed regulations regarding obtaining access to properties that are subject to off-site migration of hazardous substances and regulations regarding land use restrictions and notices that must be filed with the register of deeds. Proposed revisions to the Part 5 Rules not discussed in this article, including the proposed rules on interim response activities, remedial investigations, feasibility studies, remedial action, and operation and maintenance of remedial actions will be discussed in the future.

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.

Access To Property

Proposed Rule 501 addresses, among other things, access to properties not owned by a person responsible for conducting a cleanup, and provides that such access is subject to the property rights of the current owner of the property and that the obligation to perform response activities under Part 201 does not create or provide a right of access to another person's property. Proposed Rule 501 provides that a person who is liable under Part 201 to perform response activity must actively pursue access to property that he or she does not own or control as is necessary to investigate the nature and extent of the contamination and perform interim response, remedial action, and monitoring. Access to such offsite property must be pursued when: (i) reasonable inferences from available data support a conclusion that hazardous substances have or are likely to have migrated offsite; (ii) the hazardous substance is attributable to a release for which the person required to seek access is liable; and (iii) the concentration of a hazardous substance which has or is likely to have migrated offsite of property that is or was owned or controlled by that person exceeds one or more applicable generic residential cleanup criteria. If information or data supporting a conclusion that the foregoing conditions exist is available on the effective date of the new rules, then access must be obtained within six months after the effective date of the rule. If the information or data becomes available after the effective date of the new rules, then access must be obtained within six months after the information or data became available.

In addition, a person liable under Part 201 to perform response activity must pursue access to offsite property if one or both of the following conditions exist: (i) the concentration of a hazardous substance which has or is likely to have migrated offsite of

property that is or was owned or controlled by that person exceeds one or more applicable generic residential cleanup criteria; or (ii) the person seeking access is liable under Part 201 for a hazardous substance release on property that the person no longer owns or operates, but that the person owned or operated after June 5, 1995, (the date Part 201 was amended to incorporate a responsibility-based liability scheme). Access under the above provisions must be obtained within the earlier of six months after the date the need for response action is identified by the person seeking access or within six months after MDEQ requires the person to undertake response activity.

If the person seeking access is unable to obtain it within the applicable six month period, then the person must provide written notice to MDEQ within ten days after expiration of the six month period. Proposed Rule 501 provides that any penalty imposed by MDEQ for a person's failure to obtain access shall take into consideration that person's good faith efforts to comply and the seriousness of the violation. Notice must be made on a form provided by MDEQ and shall include:

- the location of the facility;
- the name, address, and phone number of the person seeking access;
- the address or location of the property to which access is sought;
- the name and address of the owner of record of the property to which access is sought;
- the nature of the contamination involved, including the impacted environmental media, the hazardous substances involved and their concentrations;
- the efforts made to obtain access, including the name, address, and telephone number of the person with whom access negotiations have been conducted;

- the reason why access has not been obtained; and
- the actions to be taken to obtain access and the estimated time to accomplish those actions.

A person providing the above notice to MDEQ must continue to actively pursue all reasonable efforts to obtain access after providing the notice.

Proposed Rule 501 also provides that a person may not represent that response activity to be approved by MDEQ has been approved unless MDEQ has approved in writing the specific response activity so identified. Any document, data, or other information relied upon to document the appropriateness of a response activity under the Part 201 rules, including the liability status under Part 201 of the person conducting the response activity, is deemed to be a document required to be maintained under Part 201, whether or not that document is submitted to MDEQ for approval. Proposed Rule 501 further provides that a person who intentionally makes a false statement, representation, or certification in any such document is subject to penalties under Part 201.

Land Or Resource Use Restrictions

Proposed Rule 507 is entitled “Land Or Resource Use Restrictions.” Part 1 of the proposed rules defines the term “land or resource use restrictions” as

the provisions of either of the following measures that are used to limit or prohibit activities that may interfere with the integrity or effectiveness of a response activity, or to limit or prohibit activities that may result in exposure to hazardous substances at a facility, or to provide notice about the presence of a hazardous substance at a facility in concentrations that exceed only an aesthetic-based cleanup criterion:

(i) a restrictive covenant, including a notice of environmental remediation and a notice of approved environmental remediation.

(ii) an institutional control, including a local ordinance or any form of pre-approved institutional control such as an approved notice of aesthetic impact.

An “institutional control” is defined as “a measure that is approved by [MDEQ], and which takes a form other than a restrictive covenant, that is undertaken to limit or prohibit certain activities that may interfere with the integrity or effectiveness of a remedial action or result in exposure to hazardous substances at a facility, or that provides notice about the presence of a hazardous substance at a facility in concentrations that exceed only an aesthetic-based cleanup criterion.”

Proposed Rule 507 describes the requirements that apply to the various forms of land and resource use restrictions allowed under Part 201 and its rules as a component of response activity. For example, a notice or restrictive covenant may be recorded that limits property use to commercial, industrial, or recreational uses in order to achieve the applicable land use based cleanup criteria. Any such notice or restrictive covenant must be filed with the register of deeds for the county in which a facility is located.

Approved Notice Of Aesthetic Impact

An “approved notice of aesthetic impact” is defined in Part 1 of the proposed rules as “a pre-approved institutional control in the form of a document that describes conditions at a facility that result from the presence of hazardous substances at concentrations which exceed cleanup criteria based on aesthetic impacts.” Proposed Rule 507(1)(a) provides that an approved notice of aesthetic impact shall be used only when

aesthetic impact-based cleanup criteria are exceeded at a facility and MDEQ has approved in writing a response activity that relies upon such a notice. An approved notice of aesthetic impact must be prepared on a form provided by MDEQ.

Notice Of Approved Environmental Remediation

Part 1 of the proposed rules defines the term “notice of approved environmental remediation” as “the document called for in section 20120b(2) of the act which is used in conjunction with a[n MDEQ] approved remedial action that describes the category or categories of land use that are allowable at a facility, in light of the degree of cleanup completed and the zoning of the property.” Proposed Rule 507(1)(c) provides that a notice of approved environmental remediation may be used only when MDEQ has approved a response activity that meets one of the non-residential generic cleanup criteria, for example, the commercial or industrial criteria, and must identify the property use category that is applicable to the property. The notice must be prepared on the form provided by MDEQ.

Notice Of Environmental Remediation

A “notice of environmental remediation” is defined under Part 1 of the proposed rules as “a document that is used in conjunction with a remedial action that was not approved by [MDEQ] and that describes the category of land use that is allowable at a facility, in light of the degree of cleanup completed and the zoning of the property.” Proposed Rule 507(1)(d) provides that a notice of environmental remediation may be used when a facility meets a non-residential cleanup criterion and the response activity has not been approved by MDEQ. The notice must state the property use category, for example, commercial, recreational, or industrial, that is applicable to the property. The

notice need not be on the form provided by MDEQ; however, any notice that does not use MDEQ's form must contain provisions that are functionally equivalent to those contained in MDEQ's form.

Restrictive Covenants

A restrictive covenant providing for limits on the use of property and resources as a component of a response activity also need not be prepared using MDEQ's form; however, a restrictive covenant that does not use MDEQ's form must contain provisions that are functionally equivalent to the MDEQ form.

Brian J. Negele