

MDEQ Seeking Major Overhaul of Michigan's

Key Environmental Remediation

AND BROWNFIELD LAWS

By Richard A. Barr



Big Bluestem in the autumn prairie at Six Rivers' Golden Preserve in Springfield Township.
Photo by Heather Huffstutler

The success of Michigan's brownfield redevelopment program has been due in large part to groundbreaking reforms enacted by the legislature in 1995 in Part 201 of the Michigan Natural Resources and Environmental Protection Act of 1994 (NREPA), as amended (MCL 324.20101 *et seq.*). In 2005, the Michigan Department of Environmental Quality (MDEQ), which regulates most environmental activities in Michigan, started a four-year process to substantially revamp Part 201.

Michigan's Unique Environmental Liability Program

Michigan's causation-based liability scheme for environmental contamination replaced the traditional strict liability scheme in 1995. With few exceptions, to obtain protection from liability for property purchased or operated after June 5, 1995, an owner or operator of a "facility" (any area, place, or property where a hazardous substance in excess of the generic unrestricted residential cleanup criteria has come to be located) must conduct a baseline environmental assessment (BEA) within 45 days of becoming an owner or operator and submit it to the MDEQ.

The purpose of the BEA is to establish a baseline to distinguish existing contamination at a facility from potential future contamination that may be caused by the new owner or operator of the property. The BEA tool has been used to facilitate transactions at brownfield sites more than 12,500 times in the 14 years since the 1995 Part 201 reform.

Once the new owner or operator of a facility has conducted the BEA and disclosed it to the MDEQ, it is not liable for existing contamination but remains liable for future contamination on the property. To maintain this liability protection, owners or operators must disclose the results of the BEA to a subsequent purchaser or transferee (see MCL 324.20126).

The BEA process provides protection to developers and other owners—and thus important comfort to lenders—that the developer or owner usually will not be required to remediate all environmental contamination associated with the facility or brownfield property. However, owners and operators of property they know to be a facility are responsible for complying with due care obligations, which include:

- Undertaking measures necessary to prevent exacerbation of the existing contamination.
- Undertaking response activities necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the use of the facility in a manner that protects the public health and safety.
- Taking realistic precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that could potentially result from those acts or omissions.

In addition, the owner or operator of contaminated property must notify the MDEQ and affected adjacent property owners if

Timeline

1995: The legislature enacted reforms to the environmental liability scheme to facilitate brownfield redevelopment by moving from the traditional strict liability to causation-based liability

2005: The MDEQ commenced evaluation of Part 201 and potential reforms with the Phase I Discussion Group, which recommended a broader evaluation

2006/2007: The MDEQ proceeded with evaluation of Part 201 and potential reforms with the Phase II Discussion Group (with four subgroups: Administration, Brownfields, Complexity, and Liability)

April 2, 2007: Phase II Discussion Group released final report with 101 recommendations

November 1, 2007: MDEQ Director Steven E. Chester released MDEQ's response, "Implementation Report and Action Plan for Michigan's Part 201 Environmental Remediation Program Review: Final Report and Recommendations"

November 7, 2008: The MDEQ convened a stakeholder meeting to roll out its proposed Part 201 reforms

Summer-Fall 2009: The MDEQ holds a series of meetings on a variety of Part 201 reform topics to solicit input from stakeholders

Fall 2009: Legislation?

the person has reason to believe that a hazardous substance is emanating from, or has emanated from, and is present beyond the facility's property boundaries at a concentration in excess of applicable MDEQ criteria.

A BEA does not protect against liability under federal laws relating to contaminated properties, including the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USC 9601 *et seq.*), or certain other Michigan laws (e.g., Part 111 of NREPA). However, a written memorandum of understanding (MOU) between the MDEQ and the U.S. Environmental Protection Agency (EPA) provides that the EPA generally will not pursue legal action against a new owner or operator of a contaminated property when a BEA covering that property has been disclosed to the MDEQ unless the EPA determines that property conditions warrant such intervention.¹

The protection afforded by the MOU has been superseded or supplemented in most cases by the bona fide prospective purchaser provisions of CERCLA (42 USC 9601(40) and 9607(r)), which provide a framework for the knowing acquisition of contaminated property that is similar, but different in certain material ways, from the Michigan BEA program. One of the key differences between the CERCLA and Michigan BEA requirements is that CERCLA requires post-acquisition compliance with due care requirements

to maintain liability protection, while the BEA program does not impose retroactive liability for most pre-existing contamination on owners who fail to comply with due care requirements (other than regarding costs to remedy environmental damage caused by the failure to comply with the Part 201 due care requirements). Another difference is that CERCLA protection is available only if the due diligence is completed before acquisition of the property, while Michigan's BEA program allows the due diligence and BEA to be conducted until 45 days after the date of acquisition.

Reform Urged by the MDEQ

In early 2005, the MDEQ invited a small group of individuals to discuss possible reform of the Part 201 program. The group, known as the Phase I Discussion Group, met throughout 2005, leading to a report recommending the creation of a larger discussion group to consider reforms of Part 201. The larger group, known as the Phase II Discussion Group, met in four subgroups during 2006 and early 2007 and issued a report with 101 recommendations for change in the Part 201 program (the "final report").² Each of the four subgroups (identified as Administration, Complexity, Brownfields, and Liability) produced its own set of recommendations that were combined into the final report, but the overall Phase II Discussion Group never voted to approve the combined recommendations of the group as consolidated into the final report.

The final report attempted to address myriad concerns with both the language of Part 201 and the MDEQ's administration of the Part 201 program. Many of the recommendations sought to streamline perceived unnecessary complexities in the MDEQ's administration of the Part 201 program and facilitate more expeditious and economical safe reuse of brownfield properties throughout Michigan. The Liability Subgroup's recommendations included a proposal to replace the BEA program with a due-care-based evaluation of the property coupled with an exposure to administrative fines and penalties for subsequent failure to maintain the due care plan. The Liability Subgroup "did not reach consensus about whether liability for legacy contamination should be extinguished after the due care plan is written or after its elements are implemented" (Recommendation 72 of final report).

On November 1, 2007, seven months after the final report's release, MDEQ Director Steven E. Chester released the "Implementation Report and Action Plan for *Michigan's Part 201*

Environmental Remediation Program Review: Final Report and Recommendations."³ The report described the MDEQ's efforts and commitments to implement many of the final report's recommendations.

A year later, the MDEQ convened an open stakeholder meeting at which it explained its intention to obtain legislative approval for a comprehensive revision of the Part 201 program. As announced at that meeting, the revision would eliminate the BEA program and institute a due-care-based liability scheme that would penalize those who failed to properly conduct due care with liability for all pre-existing contamination at property they acquire or operate, regardless of who caused the contamination. Thus, protection from liability for pre-existing contamination would hinge on the owner's or operator's ongoing post-acquisition implementation of due care requirements, some of which are difficult to define.

The MDEQ's November 2008 proposal also included other key elements:

- Potentially requiring environmental testing at properties based on past use of hazardous substances, even if not necessarily required under CERCLA prescribed due diligence rules.
- Creating a greatly increased focus on immediate or prompt "source removal" based on a belief that such actions usually reduce overall environmental costs and result in significantly improved environmental benefits.
- Prioritizing risk reduction over MDEQ plan reviews and approvals, including eliminating most MDEQ work plan approvals and other traditional oversight of environmental response activities.
- Establishing multiple compliance endpoints for liable parties based in large part on the degree of existing contamination and requiring ongoing monitoring, restrictions, and other actions that could facilitate less costly required activities in certain circumstances.

The purpose of the baseline environmental assessment (BEA) is to establish a baseline to distinguish existing contamination at a facility from potential future contamination that may be caused by the new owner or operator of the property.

- Establishing specific deadlines for the performance of response activities and requiring submittal of annual reports to the MDEQ on the status of response activities and ongoing use and monitoring of properties.
- Creating more transparency to the regulated community and the public.

The MDEQ began to announce more detailed elements of the proposal in the first part of 2009, with a goal of submitting proposed legislative changes to the Michigan legislature in the fall of 2009.

Initial Response to the MDEQ's Proposal and MDEQ's Revisions to its Proposal

The regulated community's reception of the MDEQ's proposal has been lukewarm, at best, in part because many believe that the BEA system, with its faults, is preferable to the MDEQ's proposed overhaul of Part 201. The MDEQ's proposed new liability protection scheme raises uncertainty for developers, owners, and lenders.

In apparent response to this feedback, the MDEQ's proposal was modified in recent months. For example, the revised resulting obligations (or penalty) for failure of an owner or operator to comply with its due care obligations would be enhanced obligations to remove source areas and prevent migration of contamination to another property, rather than strict liability for all pre-existing contamination. However, under this revised proposal, the BEA process for obtaining protection for pre-existing contamination would still be eliminated in favor of a liability protection scheme based on expanded pre-ownership/pre-operation inquiry. Thus, strict liability would not result from failure to conduct due care, but rather from failure to conduct appropriate inquiry before owning or operating the property with significant penalties/enhanced obligations for failure to comply with due care. Other proposed Part 201 requirements would create significant post-acquisition uncertainty that may materially increase financing obstacles and otherwise impede brownfield redevelopment.

Not satisfied with the MDEQ's initial revisions of its proposal, several large business groups urged the MDEQ to substantially revamp its proposal and focus on changes that would facilitate more reuse, redevelopment, and remediation of Michigan's brownfields. The groups concurred with the MDEQ's stated goals behind the reform, but strongly disagreed with the MDEQ's specific proposals and cautioned that the MDEQ's overall proposal would create further impediments to investment and redevelopment in Michigan.

Just before publication of this article, the MDEQ released the fines and penalties component of its reform proposal, which includes escalating "instant fines" and "accruing fines" and would empower the MDEQ to assess fines of up to \$15,000 a day for violations of obligations under Part 201. Judicial review of these fines would be limited to the administrative record, and the reviewing court could reverse the MDEQ's decision only if the record demonstrates that the MDEQ action was arbitrary and capricious or otherwise not in accordance with law. Needless to say,

many members of the regulated community do not view this part of the proposal as progress.

An evaluation of the entire proposed reform package is required to estimate the potential impact of the MDEQ's revised proposal on brownfield redevelopment. Stakeholder meetings were scheduled through September; the MDEQ was to provide more details on its proposed reforms, including the topics of release reporting, liable party obligations, liability and enforcement provisions, and changes to the very important cleanup criteria that form the technical foundation of the Part 201 program.

Future of the Proposed Reforms

It is not clear whether the Michigan legislature is interested in considering the substantial revisions to Part 201 necessary to implement the MDEQ's proposed changes, especially in light of the serious financial challenges and other priorities currently facing the legislature and the state. However, because the proposed reforms include combining the Part 213 program—which covers leaking underground storage tanks—with the Part 201 program to increase administrative efficiency and regulatory consistency, some aspects of the proposal may be attractive during these difficult times. It is clear that the MDEQ's proposals cannot be implemented without legislative approval, which likely would come only after further input from the regulated community and others concerned that Michigan not lose the substantial benefits brought to the state by the 1995 enactment of the key elements of the current Part 201 program. The MDEQ's progress with its Part 201 reform proposal may be monitored at www.michigan.gov/deqrrd. ■



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FOOTNOTES

1. Michigan Department of Environmental Quality, *Memorandum of Understanding Addendum 1: Brownfields Redevelopment*, available at <<http://www.deq.state.mi.us/documents/deq-rrd-sfsmoa1.PDF>>. All websites cited in this article were accessed July 26, 2009.
2. Michigan Department of Environmental Quality, *Michigan's Part 201 Environmental Remediation Program Review: Final Report and Recommendations* (April 2, 2007), available at <http://www.michigan.gov/documents/deq/rrd-PART201-FinalReport_196445_7.pdf>.
3. Michigan Department of Environmental Quality, *Implementation Report and Action Plan for Michigan's Part 201 Environmental Remediation Program Review: Final Report and Recommendations*, available at <http://www.michigan.gov/documents/deq/DEQ-RRD-Part201-DEQResponseToTheFinalPSCReport__216718_7.pdf>.