

# Baseline Environmental Assessments and “Due Care”



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# BEAs

**Protect against liability for previously existing  
contamination**

**Part 213 Sec. 2(c), 23a**

**Part 201 Sec. 1(f), 26**



# Baseline Environmental Assessment

- **Liability pertains to:**

- Part 201 “facilities” and
- Part 213 “releases”

- **Ways to be liable:**

- Part 201: responsible for release, arranged for disposal, transporter, became O/O after 6/4/95 w/o BEA
- Part 213: responsible for release, became O/O after 3/5/96 w/o BEA



# Baseline Environmental Assessment

- Other ways to not be liable:
  - Part 201: 17 more beyond BEA
  - Part 213: 13 more beyond BEA
  - LUGs: Involuntary acquisition, condemnation, easements for utilities, transportation, etc.
  - All contamination is migrating onto the property



# Baseline Environmental Assessment

- Persons who “do” BEAs according to Parts 201/213 are not liable
  - Only pertinent when property is “contaminated”
  - Conduct BEA within 45 days
  - Submit to DEQ within 6 months
  - Disclose to subsequent purchaser or transferee
  - Provides liability protection for various state laws



# Baseline Environmental Assessment

- **Content of BEA**
  - **AAI or Phase I Environmental Assessment**
  - **Samples to determine property is contaminated**
  - **Property information (legal description, maps)**



# Baseline Environmental Assessment

- No DEQ review and approval process
- Submitter will receive an acknowledgment letter that BEA was received in accordance with the requirements of the law



—BEA Questions?



# “Due Care”

Duties of O/Os to protect users of property

Part 201 Sec 7a

Part 213 Sec 4c



# “Due Care”

**Intended to allow safe use of contaminated properties while protecting public health, safety and welfare**



# “Due Care”

- Applies to O/Os of a “facility” or “property”
  - Contamination above
    - Part 201 criteria for unrestricted residential use (or SS) or
    - Part 213 applicable RBSLs

# O/O “Due Care” Duties

- a. **Prevent exacerbation of existing contamination**
- b. **Mitigate unacceptable exposures to contaminants**
- c. **Take reasonable precautions against the reasonable foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those actions**

# O/O “Due Care” Duties

- d. Provide reasonable cooperation, assistance, and access to person authorized to conduct response/corrective activities
- e. Comply with land or resource use restrictions (deed restrictions) established or relied on in connection with the response/corrective action activities
- f. Do not impede the effectiveness or integrity of land or resource use restrictions



# "Due Care" Notifications

This slide pertains only to Part 201 Facilities

- Notice DEQ of Abandoned or Discarded Containers
- Notice DEQ and neighbors of Migration
- Mitigate any fire/explosion hazard and notify the fire department.
- Notice to easement holders if conditions would cause unacceptable exposure to person working in easement



# “Due Care” Exceptions

- From requirements a, b, and c only
- Contamination is migrating onto the property
- Local Unit of Government and State
  - Involuntary acquisition
  - Transfer from a non-liable LUG or state
  - Condemnation, receivership, etc.
  - Utilities, easements, transportation



# Exception to LUG Exceptions

- - State or LUG invites public onto the property for **Express Public Purpose**
    - Parks, municipal office buildings, DPW buildings, schools, etc.
    - All “Due Care” obligations apply
    - Exception to exception does not apply if property acquired for redevelopment purposes and public is not invited onto property



# Identify Potential Risks

- Evaluate for current complete pathways with exposure to humans
  - Adequacy of existing data
  - Need for further data collection?
- Do not need to define entire extent of contamination
  - Only the investigation needed to evaluate complete pathways and determine if unacceptable human exposure exists
  - Presumptive measures can be used in lieu of collecting additional data.

# Identify Potential Risks

- **Groundwater:**
  - Drinking water,
  - Volatilization to indoor or ambient air,
  - Groundwater surface water interface **ONLY** if there is a human exposure issue
- **Soil:**
  - Direct contact,
  - Volatilization to indoor or ambient air,
  - Inhalation of soil particulates,
  - Protection of drinking water or other complete groundwater pathways



# Prevent Unacceptable Exposures

- **Are Response Activities Needed?**
  - Are there presumptive measures already in place?
    - Protective barrier over contaminated soils
  - What mitigation or prevention measures needed?
    - Provide alternative water supply
    - Install protective barriers
  - Only applicable while this person owns/operates
    - Do not need deed restrictions, permanent remedies
- **Implement of Response Activities**



# “Due Care” On-Going Needs

## – Monitoring and Inspection

- Monitor effectiveness and integrity of any response activities taken
- May be visual, collection of data, record of system operating, etc.
- Frequency is as often as needed depending on the severity of the risk, reliability of the measure

## – Re-evaluate as property use changes or conditions change



# “Due Care” Documentation

- **Your evaluation of due care obligations**
  - Prevent exacerbation
  - Prevent unacceptable exposures
  - Take reasonable precautions
  - Provide cooperation, assistance, and access
  - Comply with deed restrictions
  - Do not impede effectiveness
  - Any required notifications
- **Documentation provided to DEQ upon request for Part 201, per Part 10 Rules**



# DEQ Review of “Documentation of Due Care Compliance”

- **DEQ approval can be requested, not required.**
  - Only current O/O may request/has obligations
  - Documentation of Due Care Compliance Submittal Form
  - DEQ response
    - 45 business days allowed by law, may be less depending on district workload and resources
    - If sufficient information: approve, approve with conditions, deny



# Other Options

- Planning for “Due Care” under Part 201
- Part 201 “closure”
- Part 213 “closure”



# Part 201 Response Activity Plan

- Prospective O/Os don't have “due care” obligations and can't submit DDCCs
- But they can submit a Plan for conducting response activities aimed at complying with anticipated “due care” obligations.
  - Must be for “response *activities*”, not just discussions or explanations.



# Part 201 No Further Action Report

- Not a requirement for non-labile parties
- Could render property not a Part 201 “facility”
- No Further Action Report
  - Contamination has been reduced to below the applicable criteria, or other remedial action (e.g. land use restrictions)
  - May include on-going remedial action, operating, monitoring, inspection to continue to satisfy criteria
- 7a obligations may still apply if not unrestricted residential (or SS, per 2014 amendments)



# Part 213 Closure Report

- Not a requirement for non-liaible parties
- Could render property not a Part 213 “property”
- Closure Report
  - Contamination has been reduced to below the applicable RBSLs, or other corrective actions have been implemented (e.g. ICs)
  - May not include on-going active operations
  - May include on-going monitoring to assure protectiveness
- 4c obligations may still apply if not Tier 1

– “Due Care” Questions?



# Further Resources

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BEA web page: [www.michigan.gov/bea](http://www.michigan.gov/bea)

DEQ Remediation Division web page, “program links due care”:

[www.michigan.gov/deqrrd](http://www.michigan.gov/deqrrd)

