

Appendix D:
*TAG 4 Final Report: Key Legal Issues
for Updating Michigan's Generic Cleanup Criteria*

Final Report:
*Part 201: Key Legal Issues for Updating Michigan's
Generic Cleanup Criteria*

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Prepared for
The Criteria Stakeholder Advisory Group (CSA)

Submitted by
TAG 4: Legal

In collaboration with
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TECHNICAL ADVISORY GROUP MEMBERS

Exhibit 1 details the TAG membership:

EXHIBIT 1. TAG Members

James Clift	Michigan Environmental Council
Troy Cumings	Warner, Norcross & Judd LLP
Anna Maiuri	Dickinson Wright PLLC
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KEY LEGAL QUESTIONS

The TAG was asked to review and address the following questions and issues from the CSA:

1. The Administrative Procedures Act (APA) requires any agency regulation, statement, standard, or policy to follow the rule-promulgation process if they have the force and effect of law and bind persons other than the agency. Part 201 authorizes the MDEQ to establish cleanup criteria and require a person to take certain actions if the concentration of a hazardous substance on that person's property exceeds a cleanup criterion established by the MDEQ. When establishing new and updated criteria, is the inclusion of an algorithm in the rule sufficient or do the results of the algorithm need to be included in the rule (for example, Toxicological and Chemical-Physical Data [Table 4])? Is the process utilized by the MDEQ since 2002 to select chemical-specific values, including toxicity values and physical chemistry parameters, appropriate? If not, what should be changed?

The TAG shortened Question 1 as follows:

- “The Administrative Procedures Act requires any agency regulation, statement, standard, or policy to follow the rule-promulgation process if they have the force and effect of law and bind persons other than the agency. Part 201 authorizes the MDEQ to establish cleanup criteria and requires a person to take certain actions if the concentration of a hazardous substance on that person's property exceeds a cleanup criterion established by the MDEQ. When establishing new and updated criteria is the inclusion of an algorithm in the rule sufficient or do the results of the algorithm need to be included in the rule (such as in Table 4)?”
2. The APA authorizes an agency to incorporate, by reference in a rule, any part of a code, standard, or regulation that has been adopted by a U.S. agency or a nationally recognized organization or association. The reference must fully identify the adopted matter, including the date, and cannot cover any later amendments or editions of the adopted matter. Rather, the agency must amend the rule or promulgate a new rule to incorporate the adopted matter. May a rule establishing cleanup criteria incorporate changes to referenced codes standards, or regulations automatically without following the process to promulgate a revised rule?
 3. What legal options are available to create a process whereby stakeholders may oversee the MDEQ's process to establish new or revised cleanup criteria?

Executive Summary

The Technical Advisory Group 4 (TAG) met three times in September and October 2014 to review, discuss, and develop responses to three questions that were outlined by the Criteria Stakeholder Advisory Group (CSA) addressing key legal questions related to updating Michigan's Part 201 generic criteria. This final report to the CSA presents the TAG's findings, analysis, and discussion.

TAG members drew a distinction between questions of a legal and policy nature and decided that they could provide an opinion(s) regarding legal matters and help evaluate policy alternatives for consideration by the CSA. Essentially, TAG 4 focused on how the Administrative Procedures Act (APA) must be followed for updating Michigan's generic criteria, considering the following questions:

1. Is the inclusion of an algorithm and a process for updating inputs promulgated in rule sufficient?
2. Do the inputs to the algorithm and the results (i.e., Table 4) also need to be established through rule promulgation, including future changes to inputs?

Generally, the TAG agreed that the APA would likely need to be followed, but to what degree was debated. Two views emerged within the TAG, with some members suggesting that TAG 1's recommended approach of promulgating only the algorithms in rule would meet the requirements. Others suggested that it may not. TAG members reviewed the APA definition of a rule and discussed whether promulgation of some parts of the criteria development process, but not all, would meet the APA requirements. It was suggested that if the algorithm and an update process was clear, transparent, and open to public review and comment, that individual inputs and future changes to the inputs would not need to go through the rulemaking process to result in enforceable and reliable criteria able to withstand legal challenge. An alternative, given the varying professional opinions associated with the determination of, or changes to, the inputs to the criteria development process, such as toxicity data, would necessitate review through the rulemaking process pursuant to Part 201 and the APA.

It was also noted that other divisions (e.g., Air Quality Division) within the MDEQ do not go through the APA rulemaking process when making updates to various criteria, which establishes a precedent that updates to the criteria do not need to be promulgated through the APA rulemaking process. To date, no challenges have emerged. However, a preliminary review of Part 31 (air) and Part 55 (water) was conducted by a TAG member that draws a distinction between Part 201, Part 31 and Part 55 (See Appendix C).

Another member indicated that regardless of what process is used to determine the inputs, the MDEQ has the decision-making authority on the matter, which may include varying professional opinions, and that the use of the APA rulemaking process would be equally acceptable as an approach outside of the APA.

TAG members discussed underlying reasons why the APA rulemaking or an alternative process may or may not be desirable. All TAG members agreed that the process to update criteria needs to include opportunities for meaningful stakeholder input. TAG members also agreed that some current APA requirements such as the cost-benefit analysis may not add value to the rulemaking process, nor is the MDEQ best positioned to prepare such studies. It was noted that the economic impact of a proposed rule would arise during the stakeholder engagement or public comment period, sufficient for it not to be required within the APA. Another member suggested that the alternative approach would include more opportunities for public comment than the APA rulemaking process and that, while carried out independently of the APA, could meet its requirements. The TAG discussed a potential policy recommendation to revise the APA statute to allow for the criteria to be updated through an alternative means to the APA rulemaking process, though consensus was not achieved.

TAG members did reach consensus that a rule establishing cleanup criteria may not incorporate changes to referenced codes, standards, or regulations automatically without following the process to promulgate a revised rule. TAG members noted that the incorporation by reference of a standard results in that standard being “frozen in time” at the time of the rule publication.

The TAG did reach consensus that a four-year update process proposed by TAG 1 was too long, suggesting that a one to two year process would be feasible, but concluded that required time frames or schedules for promulgation are not legally required and may not serve a beneficial purpose. TAG members suggested that it may be more appropriate to reevaluate the criteria as new science emerges rather than on a periodic basis (e.g. every four years).

Questions, Answers, and Discussion

The following section presents each question, a summary of the TAG's answer and discussion, and analysis.

Question 1 (shortened)

The Administrative Procedures Act requires any agency regulation, statement, standard, or policy to follow the rule-promulgation process if they have the force and effect of law and bind persons other than the agency. Part 201 authorizes the MDEQ to establish cleanup criteria and requires a person to take certain actions if the concentration of a hazardous substance on that person's property exceeds a cleanup criterion established by the MDEQ. When establishing new and updated criteria is the inclusion of an algorithm in the rule sufficient or do the results of the algorithm need to be included in the rule (i.e., "Table 4").

Summary Answer: TAG members did not achieve consensus on whether the algorithms alone, specific criteria (i.e., Table 4), and periodic updates to criteria need to be established in rule. Generally, the TAG agreed that the APA would likely need to be followed, but to what degree was debated. On the question of the algorithms, criteria, and updates, two opinions from TAG 4 are presented for consideration by the CSA:

Opinion 1: Place the algorithms, inputs and resulting tables into the rules (including future updates to inputs) pursuant to Part 201 and the APA.

Although Section 20120a does not explicitly state that the MDEQ must establish cleanup criteria through rules, other sections of Part 201 show the legislature's intent that the MDEQ should do so. Further, following the rule-promulgation process to establish criteria is likely required by the APA. Every court to analyze the definition of a "rule" under the APA has held that the term is to be read broadly, while any exceptions are to be read narrowly. The current state of the law interpreting the one exception that is potentially relevant, although the cases are somewhat inconsistent, likely would lead to the conclusion that the exception does not apply to establishing generic cleanup criteria under Part 201.

Background

Section 20120a authorizes the MDEQ to establish cleanup criteria and approve of remedial actions in four categories: residential, nonresidential, limited residential, and limited nonresidential. Unfortunately, the section does not state whether the MDEQ must follow the APA rule-promulgation process to establish the categorical criteria. Subsection (18) requires the MDEQ to "evaluate and revise" the cleanup criteria by December 31, 2013. But this subsection does not necessarily allow the MDEQ to do so outside the APA rule process. Indeed, the legislature amended this subsection to extend the date from December 31, 2012 to December 31, 2013 because the MDEQ was not able to promulgate new rules by the end of 2012.

Further, the public act containing this amendment repealed the cleanup criteria rules effective on December 31, 2012 for the sole purpose of forcing the MDEQ to actually review and revise the criteria through new rules. In fact, the MDEQ did promulgate new rules in December of 2013 to comply with this subsection. Moreover, the requirement in subsection (18) for the MDEQ to "prepare and submit to the legislature a report detailing any revisions made to cleanup criteria under this section" is not inconsistent with the APA rule-promulgation process. That process requires a specific report to be submitted to the Joint Committee on Administrative Rules rather than the legislature as a whole. Subsection (18) requires more than the APA rule-promulgation process, which is not unusual considering the broad impact of cleanup criteria to the state and the historic difficulties in reaching consensus among the MDEQ and regulated community.

In addition, other sections of Part 201 demonstrate the legislature's intent that the MDEQ follow the APA rule-promulgation process when developing the categorical cleanup criteria. In Section 20118(2)(c), the legislature clarifies how a liable person must meet the categorical cleanup criteria when pursuing remedial actions:

(2) Remedial action undertaken under subsection (1) at a minimum shall accomplish all of the following:

(c) Except as otherwise provided in subsections (5) and (6), be consistent with any cleanup criteria incorporated in rules promulgated under this part.

Subsections (5) and (6) then cite to the now-revised cleanup-criteria rules promulgated by the MDEQ. This is an explicit endorsement by the legislature of following the APA rule-promulgation.

Similarly, the legislature has endorsed the now-revised cleanup criteria rules when defining the term "background concentration:"

(e) "Background concentration" means the concentration or level of a hazardous substance that exists in the environment at or regionally proximate to a facility that is not attributable to any release at or regionally proximate to the facility. A person may demonstrate a background concentration for a hazardous substance by any of the following methods:

(i) The hazardous substance complies with the statewide default background levels under R 299.5746 of the Michigan administrative code.¹

Further, the legislature has also explicitly stated its intent that the algorithms used to develop the categorical cleanup criteria must also follow the APA rule-promulgation process:

(2) Site-specific criteria approved under subsection (1) may, as appropriate:

(a) Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.²

Finally, the legislature's clarification throughout Part 201 that both the categorical criteria and the algorithms used to develop those criteria are to be established by rule is consistent with the legislature's general statement in Part 201 that the MDEQ's implementation of the statute is to be done through rules:

Sec. 20104. (1) The department shall coordinate all activities required under this part and may promulgate rules necessary to implement this part.³

Additional statutory references are included in Appendix A.

Opinion 2: Place the algorithms in the rule; publish the inputs along with a process for revising those inputs similar to a process outlined below. Therefore, there would always be a table of the criteria based on the current inputs plugged into the algorithms as established by rule.

If the rule includes the algorithm and a method of publishing and revising the inputs to the algorithms, and the resulting value table (that included a robust public participation component), the rule would survive any challenge under the APA.

¹ MCL 324.20101(1)(e).

² MCL 324.20120b(2)(a).

³ MCL 324.20104(1).

Background

The only reference in Part 201 to rulemaking is included in Section 20120b as it references the algorithms having to be promulgated through rules. Therefore, the argument is that the algorithms being included in rule are a minimum, but that department would have the discretion to revise the inputs using a process other than the rule promulgation process. That interpretation would be bolstered by the discretion given to the department to revise the inputs under section 20120b on a site-specific basis (even if the modification is not directly related to site-specific factors). In addition, multiple other programs at the department allow revisions to permit emission levels based on new science and the revision to the inputs used in a manner similar to the cleanup standards.

The alternative argument endorsed in Opinion 1 is that the language of the APA would require all information to be included within the rule itself. The cases interpreting the APA on this point can be used to bolster arguments on both sides, and thus are not dispositive.

Another legal concept which may be helpful is whether failure to include the input and tables in the rule would render them vague and unenforceable. The Supreme Court on that issue has set forth the following general rule:

“A statute may be unconstitutionally vague on any of three grounds: (1) it is overbroad, impinging on First Amendment freedoms, (2) it fails to provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unlimited and unstructured discretion on the trier of fact to determine whether an offense has occurred. To evaluate a vagueness challenge, this Court must examine the entire text of the statute and give the words of the statute their ordinary meanings. ‘To afford proper notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited’.”⁴

In general, the rules regarding cleanup criteria and similar programs are among the most complex in the administrative code. An argument that all parts of the criteria development process must be promulgated could be made if the rule failed to require that the department “publish” its inputs to the algorithms, and follow a public process for revising them over time. However, if the algorithms are promulgated, the inputs published, and a public process is outlined in the rules and followed by the department when making any changes, the rule coupled with the statutory provisions should survive any challenge based on vagueness or a party arguing they didn’t know what the standard was.

The process to update the rules could be based on a similar one recommended in the air program and would follow these steps:

(1) The department would announce its intention to re-evaluate a number of candidate chemicals (5-10 a year). It would allow 30 days for any party to nominate additional chemicals which they thought should be reviewed along with supporting documentation of why it should be considered.

(2) After review of the any petitions submitted, the department would provide notice of the list of each chemical under review, the proposed change in treatment, along with explanation of the science being relied on to support the change in treatment. They would take public comment on the proposed changes for a period of 60-90 days.

⁴ People v Hrllic, 277 Mich App 260, 262-263; 744 NW2d 221 (2007)

(3) Within 90-120 days following the receipt of comments and full consideration thereof, the department would finalize and publish the list and the associated change in treatment together with a response to substantive comments received.

(4) The changes would be implemented 30 days later.

If rules (without the tables) were challenged and struck down by the court, the department could immediately remedy the problem through the issuance of emergency rules while going through the process of curing any defect identified by the courts.

Question 2

The Administrative Procedures Act authorizes an agency to incorporate by reference in a rule any part of a code, standard, or regulation that has been adopted by an agency of the U.S. or by a nationally recognized organization or association. The reference must fully identify the adopted matter, including the date. And the reference cannot cover any later amendments or editions of the adopted matter. Rather, the agency must amend the rule or promulgate a new rule to incorporate the adopted matter. May a rule establishing cleanup criteria incorporate changes to referenced codes standards, or regulations automatically without following the process to promulgate a revised rule?

TAG members reached consensus that a rule establishing cleanup criteria may not incorporate changes to referenced codes, standards, or regulations automatically without following the process to promulgate a revised rule. TAG members noted that the incorporation by reference of a standard results in that standard being “frozen in time” at the time of the rule publication.

Question 3

What legal options are available to create a process whereby stakeholders may oversee the MDEQ’s process to establish new or revised cleanup criteria?

Summary Answer: TAG members noted that, within the context of their discussion, the answer to Question 1 would inform the answer to Question 3. It was noted that both the APA rulemaking process and the process recommended by TAG 1 include opportunities for stakeholder input. The group discussed standing stakeholder committees established in other states that review criteria updates. TAG members discussed whether such an approach would be desirable for Michigan, though no specific recommendation was offered.

Appendices

- **Appendix A:** Statutory References for Opinion 1
- **Appendix B:** Statutory References for Opinion 2
- **Appendix C:** Preliminary Review of Part 31 (air) and Part 55 (water)

Appendix A:

Statutory References for Opinion 1

1. Part 201 when read as a whole probably requires the MDEQ to follow the APA rulemaking process when establishing the generic cleanup criteria, including the algorithms and the criteria themselves.
 - Section 20120a authorizes the MDEQ to establish cleanup criteria and approve of remedial actions in four categories: residential, nonresidential, limited residential, and limited nonresidential. Unfortunately, the section does not explicitly state whether the MDEQ must follow the APA rule-promulgation process to establish the categorical criteria.
 - Other sections of Part 201 demonstrate the legislature’s intent that the MDEQ follow the APA rule-promulgation process when developing the categorical cleanup criteria
 - Section 20118(2)(c):
 - (2) Remedial action undertaken under subsection (1) at a minimum shall accomplish all of the following:
...
 - (c) Except as otherwise provided in subsections (5) and (6), be consistent with any cleanup criteria incorporated in rules promulgated under this part.
 - Subsections (5) and (6) then cite to the now-revised cleanup-criteria rules promulgated by the MDEQ.
 - Section 20101(1)(e):
 - (e) "Background concentration" . . . A person may demonstrate a background concentration for a hazardous substance by any of the following methods:
 - (i) The hazardous substance complies with the statewide default background levels under R 299.5746 of the Michigan administrative code.⁵
 - Section 20120b(2)(a):
 - (2) Site-specific criteria approved under subsection (1) may, as appropriate:
 - (a) Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.⁶
 - Section 20104(1):

Sec. 20104. (1) The department shall coordinate all activities required under this part and may promulgate rules necessary to implement this part.⁷
2. In addition to legislature’s direction in Part 201, the MDEQ’s establishing of generic cleanup criteria fits within the APA’s definition of “rule.”

⁵ MCL 324.20101(1)(e).

⁶ MCL 324.20120b(2)(a).

⁷ MCL 324.20104(1).

- The APA defines a rule to include "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."⁸
- Courts have consistently held that "with a preference for policy determinations pursuant to rules the definition of 'rule' is to be broadly construed, while the exceptions are to be construed narrowly."⁹
- Establishing generic cleanup criteria under Part 201 fits within the definition of "rule" under the APA. The cleanup criteria are a "regulation" or "standard" of "general applicability" under the APA definition. Under Part 201, generic cleanup criteria are used to determine whether every property in the state is a "facility" and whether response activities are required to address contamination. The generic cleanup criteria also "implement[] or appl[y] law enforced or administered by the agency", namely the authorization in Section 20120(a) to establish cleanup criteria.¹⁰

3. Establishing generic cleanup criteria under Part 201 does not fit within an exception to the APA's definition of "rule."

- The only exception to the definition of "rule" that could possibly apply to establishing general cleanup criteria under Part 201 is "a decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected."¹¹
- The development of the case law interpreting this exception has been inconsistent—with early Court of Appeals cases interpreting the exception broadly and more recent and binding Supreme Court cases interpreting the exception narrowly.
- For example, in the most recent Supreme Court case, the Court held that the exception did not apply to the department's development of form contracts: "[W]hile the department has discretion regarding whether to contract for the provision of statutorily mandated services, once it chooses to do so, it cannot abdicate its responsibilities under the ... APA and set standards and policies that regulate the provision of such services without complying with the APA's procedural requirements."¹²
- Under the Supreme Court's reasoning, the MDEQ's decision whether or not to establish categorical criteria under Section 20120a would not be subject to the APA rulemaking process. But if the MDEQ decided to establish criteria, it must do so through the APA rulemaking process.

4. The requirement to follow the APA rulemaking process when establishing generic cleanup criteria should apply to the algorithms, the inputs to the algorithms, and the criteria.

- Some have argued that promulgating only the algorithms would comply with Part 201 and the APA. This argument would essentially allow the MDEQ to establish criteria outside the

⁸ MCL 24.207.

⁹ *AFSCME v Michigan Dep't of Mental Health*, 452 Mich 1, 10 (1995).

¹⁰ MCL 324.20120a(3).

¹¹ MCL 24.207(j).

¹² *AFSCME v Michigan Dep't of Mental Health*, 452 Mich 1, 10 (1995), citing *Spear v Michigan Rehabilitation Serv's*, 202 Mich App 1 (1993).

rulemaking process because the inputs to the algorithms are subjective.

- The legislature, however, has acknowledged that both the algorithms and the criteria are to be promulgated in rules. And the inputs to the algorithms and the criteria clearly fit within the definition of “rule” in the APA and are likely not excepted under the above analysis.

Appendix B: *Statutory References for Opinion 2*

The statutory sections addressing this question are mainly section 20120a and 20120b as listed below (in part, emphasis added):

Sec. 20120a.

(1) The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection. The cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval if required, considering the appropriateness of the categorical criteria to the facility. The categories are as follows:

(a) Residential.

(b) Nonresidential. The nonresidential cleanup criteria shall be the former industrial categorical cleanup criteria developed by the department pursuant to this section until new nonresidential cleanup criteria are developed and published by the department pursuant to subsection (17).

(c) Limited residential.

(d) Limited nonresidential.

(2) As an alternative to the categorical criteria under subsection (1), the department may approve a response activity plan or a no further action report containing site-specific criteria that satisfy the requirements of section 20120b and other applicable requirements of this part. The department shall utilize only reasonable and relevant exposure pathways in determining the adequacy of a site-specific criterion. Additionally, the department may approve a remedial action plan for a designated area-wide zone encompassing more than 1 facility, and may consolidate remedial actions for more than 1 facility.

(3) The department shall develop cleanup criteria pursuant to subsection (1) based on generic human health risk assessment assumptions determined by the department to appropriately characterize patterns of human exposure associated with certain land uses. The department shall utilize only reasonable and relevant exposure pathways in determining these assumptions. The department may prescribe more than 1 generic set of exposure assumptions within each category described in subsection (1). If the department prescribes more than 1 generic set of exposure assumptions within a category, each set of exposure assumptions creates a subcategory within a category described in subsection (1). The department shall specify facility characteristics that determine the applicability of criteria derived for these categories or subcategories.

...

(9) The department may establish cleanup criteria for a hazardous substance using a biologically based model developed or identified as appropriate by the United States environmental protection agency if the department determines all of the following:

(a) That application of the model results in a criterion that more accurately reflects the risk posed.

(b) That data of sufficient quantity and quality are available for a specified hazardous substance to allow the scientifically valid application of the model.

(c) The United States environmental protection agency has determined that application of the model is appropriate for the hazardous substance in question.

...

(17) Remedial actions that rely on categorical cleanup criteria developed pursuant to subsection (1) shall also consider other factors necessary to protect the public health, safety, and welfare, and the environment as specified by the department, if the department determines based on data and existing information that such considerations are relevant to a specific facility. These factors include, but are not limited to, the protection of surface water quality and consideration of ecological risks if pertinent to the facility based on the requirements of this part.

....

(18) Not later than December 31, 2013, the department **shall evaluate and revise the cleanup criteria derived under this section.** The evaluation and any revisions shall incorporate knowledge gained through research and studies in the areas of fate and transport and risk assessment and shall take into account best practices from other states, reasonable and realistic conditions, and sound science. **Following this revision, the department shall periodically evaluate whether new information is available regarding the cleanup criteria and shall make revisions as appropriate. The department shall prepare and submit to the legislature a report detailing any revisions made to cleanup criteria under this section.**

Sec. 20120b

(1) The department shall approve numeric or nonnumeric site-specific criteria in a response activity under section 20120a if such criteria, in comparison to generic criteria, better reflect best available information concerning the toxicity or exposure risk posed by the hazardous substance or other factors.

(2) Site-specific criteria approved under subsection (1) may, as appropriate:

(a) **Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.**

(b) Alter any value, parameter, or assumption used to calculate generic criteria.

(c) Take into consideration the depth below the ground surface of contamination, which may reduce the potential for exposure and serve as an exposure barrier.

(d) Be based on information related to the specific facility or information of general applicability, including peer-reviewed scientific literature.

(e) Use probabilistic methods of calculation.

(f) Use nonlinear-threshold-based calculations where scientifically justified.

The other statute which comes into play is the Administrative Procedures Act (APA).

The APA defines a “rule” to mean:

[A]n agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.¹³

¹³ MCL 24.207.

Appendix C:

Preliminary Review of Parts 31 (water) and Part 55 (air)

During a TAG meeting, research provided by a TAG member proposed that the way the legislature drafted specific provisions in Part 201 enhances the position that the legislative intent was for the MDEQ to follow the rule promulgation process when developing cleanup criteria. However, the research was not dispositive of the issue, so the TAG decided that a review of the rule related provisions of Part 31 (water) and Part 55 (air) might help provide more insight on the legislative intent for Part 201. Consequently, another TAG member did a search of all the provisions in Parts 31, 55 and 201 of the word “rule” and analyzed how the word was used in each part. The results are presented below:

All 3 Parts have the following similar language allowing MDEQ to promulgate rules. The language is found toward the beginning of each Part and states:

Part 31:

Sec. 3103 (2): The department shall enforce this part and may promulgate rules as it considers necessary to carry out its duties under this part. However, notwithstanding any rule-promulgation authority that is provided in this part, except for rules authorized under section 3112(6), the department shall not promulgate any additional rules under this part after December 31, 2006.

Sec. 3103 (3): The department may promulgate rules and take other actions as may be necessary to comply with the federal water pollution control act, 33 USC 1251 to 1387, and to expend funds available under such law for extension or improvement of the state or interstate program for prevention and control of water pollution. This part shall not be construed as authorizing the department to expend or to incur any obligation to expend any state funds for such purpose in excess of any amount that is appropriated by the legislature.

Part 55:

Sec. 5503. The department may do 1 or more of the following:

(a) Promulgate rules to establish standards for ambient air quality and for emissions.

Part 201:

Sec. 20104 (1) The department shall coordinate all activities required under this part and may promulgate rules necessary to implement this part.

Of the three parts, Part 201 has the least amount of language concerning the establishment of rules. In both Parts 31 and 55, the legislature seemed to use more forceful, prescriptive language when it felt it did not want to give discretion to the agency for rulemaking. For example, Sections 3106, 3107, 5505(4) all start out with the preface “[t]he department **may** promulgate rules to/for” [Emphasis added.] In Sections 3104(6), 3109(a), 3109 (e), 3131, 5504(5), 5505(2), 5506(4) and 5512, the language changes to “[m]inor project categories **shall** be established by rule” or “[t]he department **shall** promulgate rules for” [Emphasis added.]

Nevertheless, Sec. 20120b (2) (a) explicitly implies that the algorithms are to be part of the rulemaking process by stating:

(2) Site-specific criteria approved under subsection (1) may, as appropriate:

(a) Use **the algorithms for calculating generic criteria established by rule** or propose and use different algorithms. [Emphasis added.]

As discussed during a TAG meeting, there appears to be a different type of statutory construction for Parts 31 and 55 versus Part 201. The reason may be that Parts 31 and 55 are prospective in that they provide for permit limits or emissions limits to operate or conduct an activity in the future. Part 201 is addressing current or historical conditions and trying to establish a cleanup standard to address a release that has often occurred historically. This may also be a primary reason why the regulated community appears more interested in having input on the cleanup rules for Part 201 than with the other statutes. Many of the cleanups or due care obligations under Part 201 are undertaken by non-labile parties who had not caused the contamination and therefore are more interested in containing costs. Those regulated under Parts 31 and 55 are folks with operating facilities who have much more control over their activities going forward and need a permit to continue their operation so they may be less likely to contest new limits. Therefore, more opportunities for input from the regulated community for any criteria changes under Part 201 may not necessarily spill over to the way the other divisions have historically operated.