

SECTION ONE – ENVIRONMENTAL REGULATIONS

CHAPTER 7: Sites of Environmental Contamination, Property Transfers, and Liability Issues

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Purpose and Applicability of Regulations

Michigan has long been a state of substantial industrial activity. While this industry provided the basis for much of Michigan’s economic strength, the long-term environmental effects of many historical industrial processes and practices were not understood. Activities that we now know to cause environmental problems were unfortunately commonplace and many historical



commercial and manufacturing facilities are sites of environmental contamination. Many of the sites of environmental contamination are abandoned, idle, or under-utilized industrial and commercial properties, often referred to as “Brownfields.” Revitalization of Brownfields to achieve a healthier, cleaner, and more productive environment for Michigan’s citizens is critically important. This chapter focuses on the obligations of new owners and operators of sites of environmental contamination, including the responsibilities for liability protection and obligations to assure the safe use of the property, commonly referred to as “Due Care.”

Note: Appendix B contains definitions of the various regulated groups of material found in this chapter. These defined terms appear throughout this chapter in bold lettering. In some instances, multiple agencies use the same term to describe a regulated group of material; however, its definition differs. Such terms will be followed by a dash and the acronym of the defining agency or regulation (e.g., **hazardous substance-CERCLA** and **hazardous substance-Part 201**).

Agencies and Their Laws and Rules

The Department of Environmental Quality (DEQ) administers programs that involve the remediation and redevelopment of contaminated properties. The primary legislative authority for the state cleanup programs are Part 201 (Environmental Remediation) and Part 213 (Leaking Underground Storage Tanks) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (Act 451). These state programs have a unique, causation-based liability scheme, land use-based requirements, and a strong emphasis on redevelopment and reuse of contaminated property. Part 201 and Part 213 of Act 451 and the Part 201 Administrative Rules are available at www.michigan.gov/remediation.

The DEQ also manages portions of the federal Superfund program, established under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Additional information regarding implementation of the Superfund program is available at www.michigan.gov/remediation.

If your facility is regulated under Part 111 (Hazardous Waste Management) of Act 451, contact the Waste and Hazardous Materials Division for guidance on the applicability of Part 201 and/or Part 213 of Act 451 provisions to your facility. For more information regarding the regulation of hazardous waste, see Chapter 2.4 “Hazardous Waste.”

If your facility includes oil, gas or mineral wells regulated under Part 615 or Part 625 of Act 451, contact the DEQ at 517-284-6828 for guidance on the applicability of Part 201 and/or Part 213 of Act 451 provisions to your facility.

7.1 Background

Earlier decades of industry and manufacturing practices have left some properties in Michigan environmentally degraded, contaminated with heavy metals, organic and inorganic chemicals, petroleum based hazardous substances, and containing dilapidated buildings and debris. Expansion or redevelopment of these properties is hindered or complicated by real or perceived environmental conditions. These properties present challenges to potential developers, whether contamination is discovered or suspected. Parts 201 and 213 of Act 451 encourage solutions to historical contamination while protecting human health with several incentives for redevelopment, including causation-based liability and liability protection for new owners.

Michigan’s pre-1995 environmental cleanup and redevelopment efforts were constrained by strict liability laws. Prior to 1995, if a person purchased contaminated property, they acquired liability for the contamination and the obligations to address the contamination. The June 5, 1995, amendments to Part 201 of Act 451 and the March 6, 1996 amendments to Part 213 of Act 451 substantially modified provisions of the law regarding liability for environmental contamination. An owner or operator of a site of environmental contamination is liable for remediation of the environmental contamination if the owner or operator is responsible for an activity causing a release or threat of release. If an owner or operator acquires a site of environmental contamination regulated under Part 201 after June 5, 1995, they may conduct and submit a baseline environmental assessment (BEA) to the DEQ to obtain liability protection for the contamination on the property at the time they become the owner or operator. Likewise, if an owner or operator acquires a site of environmental contamination regulated under Part 213 after March 6, 1996, a BEA may be conducted and submitted to the DEQ to obtain liability

protection. For both Part 201 and Part 213 sites of environmental contamination, regardless of liability, the owner or operator must exercise due care with respect to the contamination on the property. Owners and operators are defined by Part 201 and Part 213 of Act 451. A party leasing property would generally have control or be responsible for the property and be defined as an operator.

A BEA is an evaluation of environmental conditions that exist at a facility at the time of purchase or occupancy, that reasonably defines the existing conditions and circumstances at the facility. Compliance with due care obligations includes measures taken to ensure that existing contamination on a property does not cause unacceptable human health risks and is not exacerbated. Due Care and BEA obligations are described in 7.2 and 7.3.

Part 201 and Part 213 of Act 451 have disclosure requirements for property transfers. A person who has knowledge or information, or is on notice through a recorded instrument, that a parcel of real property is a Part 201 or Part 213 site of environmental contamination must provide written notice to a purchaser or other person to which the property is transferred. The notice must advise that the property is a Part 201 or Part 213 site of environmental contamination and disclose the general nature and extent of the contamination.

Information regarding the obligations of an owner or operator of a Part 201 of Act 451 site of environmental contamination is contained in Chapter 6.4 “Release Response and Cleanup.” Information regarding the obligations of an owner or operator of a Part 213 of Act 451 site of environmental contamination is contained in Chapter 4.3 “Storage Tanks.”

Information regarding financial incentives for Brownfield redevelopment is available at www.michigan.gov/remediation.

7.2 “Due Care” Obligations

Section 20107a of Part 201 and Section 21304c of Part 213 of Act 451 requires that owners and operators of contaminated property take measures to ensure that the existing contamination does not cause unacceptable human health risks and is not exacerbated. Such measures include evaluating the contamination and taking necessary response or corrective actions. Due care obligations are not related to the owner or operator’s liability for the contaminants; they apply to non-labile parties and liable parties alike. The due care obligations are designed so contaminated properties can be safely used.

An owner or operator of a site of environmental contamination must prevent exacerbation of the existing contamination. Exacerbation occurs when an activity undertaken by the person who owns or operates the property causes the existing contamination to migrate beyond the property boundaries, i.e., the mishandling of excavated contaminated soil such that contamination from the soil pile goes off-site from blowing winds; pumping contaminated water from footing drains into a nearby ditch; or creating a new migration pathway by putting a utility line through a zone of highly contaminated groundwater. An owner or operator can also exacerbate contamination by changing the facility conditions in a manner that would increase the response activity costs for the liable party. An example might be to place a building over the source of the existing contamination. A person that causes exacerbation would be liable for remediation of the contamination they caused or paying the increase in the response activity costs.

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Owners and operators must exercise due care by undertaking response activities that are necessary to prevent unacceptable exposures to contamination. The existing contamination must be evaluated to determine if the people using, working, or visiting the property would be exposed to contamination at levels above the criteria appropriate for the property use. Criteria for differing land uses can be found in the Part 201 Administrative Rules (R 299.1-R 299.50). For example, if groundwater used for drinking is contaminated above the drinking water criteria, then the owner and operator must provide an alternative water supply. If soils are contaminated above the direct contact criteria for the appropriate land use at the surface of the property, then people must be prevented from coming into contact with those soils by restricting access, installing a protective barrier, or removing contaminated soil. Protective barriers may be clean soil, concrete, or paving. In some instances, remediation of the contamination may be the most cost-effective response actions. In addition, if there is a potential unacceptable risk due to the presence of contamination for utility workers or people conducting activities in an easement, then utility and/or easement holders must be notified in writing of the conditions by the owner or operator. If there is a fire and explosion hazard, the local fire department must be notified, and immediate actions taken to mitigate the situation.

An owner or operator must take reasonable precautions or steps needed to prevent exposure to an unacceptable risk for a third party. This might include notifying contractors of contamination, so they can take proper precautions; preventing trespass that would result in an unacceptable exposure (e.g., children playing in a vacant industrial yard that has direct contact hazards); or taking actions to secure abandoned containers so they do not get damaged by traffic.

Owners and operators must maintain documentation they have conducted an adequate evaluation to determine the need for response actions and that they have taken or conducted all necessary actions to assure the property is safe. If applicable, maintenance, repair, and monitoring of existing exposure barriers, vapor mitigation systems, etc. must be conducted and documentation maintained. The documentation does not need to be submitted to the DEQ but must be available for the DEQ to review upon request within eight months of becoming the owner or operator or of having knowledge that the property is contaminated. Documentation requirements are described in the Administrative Rules: Property Owner or Operator Obligations to Under Section 20107a of the Act (R 299.51007-R 299.51021). Both Part 201 and Part 213 allow an owner or operator to submit and request a DEQ review of a Documentation of Due Care Compliance (DDCC). A DDCC is a report, a point-in-time document, that contains sufficient information to demonstrate that an adequate evaluation of the risks was conducted, that any response actions to mitigate unacceptable exposures have been undertaken, that the response actions are effectively preventing unacceptable exposures, and all required notices were provided and received (see Appendix C).

The rules require notification to the DEQ and others in the following circumstances:

1. Notify the DEQ and adjacent property owners using the “*Notice of Migration of Contamination Form*” (EQP 4482) if contaminants are migrating off the property [Rule 1017].
2. Notify the DEQ using the “*Notice Regarding Discarded or Abandoned Containers Form*” (EQP 4476) if there are discarded or abandoned containers that contain hazardous substances-Part 201 on the property [Rule 1015]. Underground storage tanks regulated pursuant to Part 211, Underground Storage Tanks of Act 451 and aboveground storage tanks regulated pursuant to NREPA; and the Michigan Fire Prevention Code, 1941 PA 207, as amended, are not considered to be abandoned.

3. Notify the local fire department if there are fire or explosion hazards [Rule 1019].
4. Notify utility and easement holders if contaminants could cause unacceptable exposures and/or fire and explosion hazards [Rule 1013(6)].

The Notice of Migration of Contamination must be submitted by the liable party within 30 days of becoming owner or operator, or of having knowledge of the conditions. Notice 2 above must be made within 45 days of becoming the owner or operator, or of having knowledge of the conditions. Notice 3 is required to be made immediately to the local fire department and if the condition is not permanently abated, then, within 7 days after notice to the local fire department, the owner or operator shall provide written notice to the DEQ. Notice 4 is required to be provided as soon as the situation is known to exist. Persons required to provide notice under Section 21309a(3) of Act 451, but who have not yet made that notice in compliance with Part 213 should do so as soon as possible. Part 201 and the Part 10 Administrative Rules, Part 213 of Act 451, the notification forms, and additional guidance are available at www.michigan.gov/deqducare.

Part 201 and Part 213 provide limited exemptions to the some of the due care obligations. For example, an owner or operator of contaminated property is exempt from complying with Section 20107a(1)(a-c) or Section 21304c(1)(a-c), when the sole source of the contamination on the property is from contamination migrating onto the property. This exemption does not include exacerbation caused by the owner or operator. While the exemption may be applicable, it may be in the owner or operator's best interest to ensure the property is safe for the intended use.

7.3 Due Diligence and Baseline Environmental Assessments

7.3.1 Due Diligence

Due Diligence is the act of making an appropriate inquiry as to whether environmental contamination is present on a piece of property. The prospective owner or operator of commercial and industrial properties should undertake all appropriate inquiry to determine how the property was used and whether/what activities involving the use of hazardous substances occurred. The initial step in demonstrating due diligence is to request disclosure from the seller or owner about any known environmental conditions. The next step is to conduct an environmental assessment of the property.

The federal All Appropriate Inquiry (AAI) standard or the American Society for Testing and Materials (ASTM), Phase I and II Environmental Site Assessment (ESA) (ASTM E1527-13 and E1903) standards or equivalent can be used as guidance (available at www.astm.org). The Phase I ESA involves physically inspecting the property, examining historical records such as deed and property tax records, a review of regulatory agency files (local and state), historical maps, and present/past property uses to evaluate the potential for contamination to exist. The Phase I ESA walk-through of the property can identify potential contamination sources such as abandoned containers, aboveground storage tanks or underground storage tanks. The AAI or the Phase I ESA report will conclude with a list of Recognized Environmental Conditions (REC). An environmental professional can assist in determining if it is necessary to proceed to a Phase II ESA investigation. The Phase II ESA involves further investigation into the RECs, including collecting soil and/or groundwater samples, and confirming if underground tanks are present,

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The information gained in the AAI or Phase I and II ESAs is used to determine whether the property is a facility under Part 201 or a property under Part 213. The concentration of hazardous substances at the property is compared to the residential criteria, the state's most protective cleanup criteria, provided in R 299.1-R 299.50. If the contaminant concentrations do not exceed the residential criteria or risk-based screening levels (RBSLs), then the property is not a facility or a property as defined by Act 451. Documentation of this conclusion should be maintained by the new owner or operator to show that they have conducted due diligence in accordance with Section 20126(3)(h) or Section 21323a(3)(g) of Act 451. If the contaminant concentration does exceed one or more residential criteria or RBSLs, then the property is a facility or property. Potential owners or operators are strongly urged to discuss conducting and submitting a BEA with their environmental consultants and their attorneys. There may be other options for resolving potential liability in certain circumstances.

7.3.2 Baseline Environmental Assessments (BEAs)

The purpose of the BEA is to provide the new owner or operator liability protection for known and unknown contamination under specific Parts of Act 451:

- Part 201 (Environmental Remediation)
- Part 213 (Leaking Underground Storage Tanks)
- Part 31 (Water Resources Protection)
- Part 17 (Michigan Environmental Protection Act)
- Part 615 (Supervisor of Wells)
- Part 625 (Mineral Wells)

A BEA does not provide protection from liability under other state and federal laws, including:

- Landfills regulated under Part 115 of Act 451.
- Treatment, Storage, and Disposal facilities regulated by the federal Resource Conservation and Recovery Act and Part 111 (Hazardous Waste Management) of Act 451.
- Underground storage tank operational requirements under Part 211 of Act 451.
- Federal CERCLA and Superfund. The United States Environmental Protection Agency (U.S. EPA) and the DEQ have entered into an agreement that the U.S. EPA will not take action against a person who has done a BEA unless the facility is on the federal National Priority List, federal funds have been spent to respond to conditions at the facility, or there is an imminent danger to the public health, safety, welfare, or the environment.

Part 201 and Part 213 of Act 451 and BEA guidance are available at the DEQ District Offices (see Appendix C) and at www.michigan.gov/bea.

BEA General Information

The BEA report will consist of an All Appropriate Inquiry (AAI) in compliance with 40 CFR 312 (2014) or an ASTM Phase I ESA, sufficient sampling and analysis to confirm the property is a facility as defined by Section 20101(1)(r), or a site as defined by Section 21303(l) or a property as defined by Section 21303(d) and documentation of the property identification. The EPA has determined that the ASTM Phase I ESA is acceptable and complies with AAI. The AAI compliant report or ASTM Phase I ESA (E1527-13) is acceptable for the BEA process.

The former requirements to identify the future hazardous substance use and to provide a means to differentiate a new release of that hazardous substance from existing contamination have been eliminated from the BEA process. A person may still want to establish a means to distinguish a new release, but that will be a business decision rather than a BEA requirement. The contents of a BEA is included as the third page of the BEA submittal form, form EQP4025, but is not required to be submitted as part of the submittal form. The form is available at www.michigan.gov/bea.

BEA Time Frames

A BEA can be conducted and submitted to the DEQ any time prior to purchase but must be conducted not later than 45 days after becoming the owner or operator. Conducting means field work and sample analysis must be completed, conclusions drawn, and the BEA report written. The BEA must be submitted to the DEQ District office for the county in which the property is located. The submission must occur within six months of the date of becoming the owner, operator, or of the foreclosure. The map for RRD District offices is located at www.michigan.gov/bea. The BEA must also be submitted to subsequent purchasers or transferees, including lessees, prior to transfer of the interest in the property. The DEQ encourages early submittal of BEAs whenever possible.

Environmental Consultants

Environmental consultants can be located in the yellow pages of the telephone book under Environmental, Ecological, or Engineering; or by asking your financial institution for referrals. To increase the odds of hiring a good consulting firm; ask the consultant for prior job references, information concerning previous BEAs they have completed. The DEQ cannot give recommendations regarding environmental consultants.

7.4 Summary

This document provides a summary of due care obligations and the BEA process. A thorough review of the statutes, administrative rules and DEQ guidance should be completed before making site-specific decisions.

The field staff located at DEQ District Offices statewide (see Appendix C) are the first line of contact for prompt service about Part 201 and Part 213 of Act 451 programs.

Publications and forms are available from www.michigan.gov/bea or www.michigan.gov/deqducare, by contacting the DEQ District Office (see Appendix C) or by contacting the DEQ Environmental Assistance Center at 800-662-9278.



If you need further information about liability, Due Care, or BEA requirements, please contact your local DEQ District Office (see Appendix C) at www.michigan.gov/bea or call the Environmental Assistance Center at 800-662-9278.

WHERE TO GO FOR HELP

SUBJECT: Learn how to protect public water supply systems that use ground water from potential sources of contamination

CONTACT: DEQ, Wellhead Protection Program
517-284-6519 | www.michigan.gov/deqwhp

SUBJECT: Sites of contamination; property transfers, due care, and liability protection measures

CONTACT: DEQ, District Offices (see Appendix C)
Part 201 (Environmental Remediation) and Part 213 (Leaking Underground Storage Tanks) - Jeanne Schlaufman, BEA/Due Care Specialist
586-753-3823 | schlaufmanj1@michigan.gov
www.michigan.gov/deqrrd
www.michigan.gov/bea
www.michigan.gov/deqducare

PUBLICATIONS:

1. Environmental Cleanup Part 201 Citizen's Guide: What You Need to Know if you Own or Purchase Property with Environmental Contamination
2. DEQ-RRD BEA Guide
3. BEA Submittal Form (EQP4025)
4. DEQ-RRD Due Care Guide
5. Documentation of Due Care Compliance Submittal Form (EQP4402)
6. Response Activity Plan to Comply with 7a(1)(b) or 7a(2)(b) (EQ4382)
7. Notice of Migration Guidance (EQP4482)
8. Instructions for Notice Regarding Abandoned or Discarded Containers
Notice Regarding Discarded or Abandoned Containers (EQP4476)
9. Q & A: BEAs, Foreclosures and Receiverships
10. Administrative Rules – Property Owner or Operator Obligations to Under Section 20107a of the Act Addresses for Submittals

SUBJECT: Superfund Program

CONTACT: DEQ
517-284-6902
www.michigan.gov/deqrrd
