

## DUE CARE CITIZEN'S GUIDE

# Due Care Requirements

*For owners or operators of contaminated property*

This handout describes the due care requirements for owners and operators of property that is contaminated.

Section 20107a of Part 201, Environmental Remediation, of Michigan's Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), requires that owners and operators take due care measures to ensure that existing contamination on a property does not cause unacceptable risks and is not exacerbated. Such measures include evaluating the contamination and taking necessary response actions. Due care requirements 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 requirements were designed so contaminated properties could be safely redeveloped.

### ◀◀ NOTE ▶▶

This is a guidance document from the Michigan Department of Environmental Quality (DEQ). A thorough review of the statute, administrative rules, and guidelines should be completed before making site-specific decisions.

The Part 201 statute, Due Care Administrative Rules, and guidelines are available electronically at this DEQ Web site: [www.michigan.gov/duecare](http://www.michigan.gov/duecare).

## DUE CARE REQUIREMENTS SECTION 20107a

An owner or operator of a facility shall do all of the following with respect to hazardous substances at a facility:

- ▶ Prevent exacerbation of the existing contamination.
- ▶ Prevent unacceptable human exposure and mitigate fire and explosion hazards to allow for the intended use of the facility in a manner that protects the public health and

safety.

- ▶ Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party
- ▶ Provide notifications to the DEQ and others.
- ▶ Provide reasonable cooperation, assistance, and access to the persons that are authorized to conduct response activities at the property.
- ▶ Comply with any land use or resource use restrictions established or relied on in connection with the response activities.
- ▶ Not impede the effectiveness or integrity of any land use or resource use restriction.

A facility is defined in Section 20101 of the NREPA as property with contamination concentrations above Michigan's cleanup criteria for residential property.

The requirements for due care are summarized on the next few pages and are specified in Part 201 Section 20107a and its Administrative Rules 1001-1021. Further information can be found on the DEQ Due Care web page ([www.michigan.gov/duecare](http://www.michigan.gov/duecare)):

- ▶ Part 201 of NREPA
- ▶ Part 201 Administrative Rules (Due Care)
- ▶ Part 201 Residential Cleanup Criteria
- ▶ Part 201 and Due Care Citizen's Guides
- ▶ Due Care Brochure, Matrix and Forms

A fact sheet on Michigan's environmental cleanup program from...



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## PREVENTING EXACERBATION

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. Examples of exacerbation can include: the mishandling of excavated contaminated soil such that contamination now migrates off-site; 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.

## PREVENTING UNACCEPTABLE HUMAN RISK

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 or working at the property would be exposed to contamination at levels above the appropriate criteria. Criteria for differing land uses can be found in the Part 201 Administrative Rules (Rules 744-752). For example, if groundwater used for drinking is contaminated above the drinking water criteria then the owner and operator must prevent the use of the contaminated drinking water. 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 can be clean soil, concrete, paving, etc. In some instances, remediation of the contamination may be the most cost effective due care measure. In addition, if there is a potential unacceptable risk 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 the situation must be mitigated.

## TAKING REASONABLE PRECAUTIONS

Taking reasonable precautions against the reasonably foreseeable actions and omissions of a third party means trying to prevent things that could cause a third party to be exposed to an unacceptable risk. This might include: notifying contractors of contamination so they can take proper precautions; preventing trespass that would result in an unacceptable exposure (neighborhood kids playing in a vacant industrial yard that has direct contact hazards); and taking actions to secure abandoned containers so they don't get damaged by traffic, etc.

## PROVIDE REASONABLE COOPERATION, ASSISTANCE, AND ACCESS

Owners and operators must allow a person authorized to take response activities on the property (such as the liable person, or the state) to take such actions as: installing monitor wells, operating a remediation system, and maintaining the integrity of a protective barrier, etc. However, the statute specifically states that this shall not be interpreted as providing

any right of access not expressly authorized by law. The authorized person must still go through the normal process of acquiring voluntary or court ordered access, including the potential for compensation as the parties and/or court deem reasonable.

### **COMPLY WITH AND NOT IMPEDE THE EFFECTIVENESS OF LAND USE AND RESOURCE USE RESTRICTIONS**

If there are land use or resource use restrictions on the property, owners and operators must comply with those restrictions and not take actions that would impede their effectiveness. Examples of compliance might include: not installing a well if there is a restriction on using the groundwater for drinking water purposes, not allowing a residential use on a property if there is a restriction limiting the property use to industrial, not removing a protective barrier installed to prevent contact with contaminated soil, and not turning off an operating remediation system.

### **EVALUATING THE NEED FOR DUE CARE**

The need for due care actions are determined by evaluating the property use and the existing contamination. Based on that evaluation, actions needed to prevent unacceptable exposures and comply with all due care obligations re-identified and implemented. The DEQ has a matrix available to aid in this evaluation. Environmental professionals often assist with this process (see Environmental Professionals section at end of document).

### **DUE CARE DOCUMENTATION**

Owners and operators must maintain documentation that due care needs have been evaluated and any response actions that are needed have been taken. If applicable, maintenance and repair of the response action

should also be documented. The documentation does not need to be submitted to the DEQ, but must be available for the DEQ to review upon request within eight (8) months of becoming the owner or operator or of having knowledge that the property is a facility. You may request the DEQ to review and approve: a due care investigation plan, an evaluation of exposure pathways, a plan for response activities, or a due care report documenting what response activities have been taken and your compliance with due care. Documentation requirements are described in the Part 201 Administrative Rule 1003.

### **NOTIFICATION**

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

- ▶ Notify the DEQ if there are discarded or abandoned containers that contain hazardous substances on the property; see Form EQP 4476.
- ▶ Notify the DEQ and adjacent property owners if contaminants are migrating off the property; see Form EQP 4482.
- ▶ Notify the local fire department if there is a fire or explosion hazard.
- ▶ Notify utility and easement holders if contaminants could cause unacceptable exposures and/or fire and explosion hazards.

These notices must be made within 45 days of becoming the owner or operator, or of having knowledge of the conditions. The forms are available at DEQ District Offices and the DEQ Web Page: [www.michigan.gov/due\\_care](http://www.michigan.gov/due_care).

### **EXEMPTIONS/LIMITATIONS**

Part 201 provides an exemption to the due care requirements to prevent exacerbation, prevent or mitigate unacceptable exposures, and take reasonable precautions for the following entities:

- ▶ An owner or operator of property where the

contamination is migrating onto the property.

- ▶ An owner or operator of a utility franchise on the property.
- ▶ An owner or operator of the severed mineral rights to the property.
- ▶ A local unit of government (LUG) that involuntarily acquires title or control of property by virtue of its governmental functions, or the property is transferred to the LUG from the state or a LUG that is not liable under Part 201, or by seizure, receivership or forfeiture or court order, or voluntarily acquired the property and conducted a Baseline Environmental Assessment.
- ▶ A LUG that has an easement interest or holds a utility franchise for a transportation or utility corridor or public right of way, or for conveying or providing goods and services.
- ▶ A LUG that is not liable and is leasing the property to a non-labile party.

However if the state or LUG exempted above offer access to the property and make it available for public use, such as for parks, schools, municipal office buildings, public works operations, etc., then the state or LUG must comply with all due care obligations for that portion of the property that is accessible.

Additionally, the person, state, or LUG that is exempted above still has due care obligations to provide cooperation, assistance, and access, comply with land use or resource use restrictions, and not impede the integrity or effectiveness of the land or resource use restriction. Further, Section 20107a(6) of Part 201 specifies utilities and severed mineral right owners must exercise due care in regard to their own activities.

While Part 201 provides these exemptions, it may be in the owner or operator's best interest to ensure the property is safe for the intended use

and that they do not cause a new release by their actions or exacerbate pre-existing contamination.

## ENVIRONMENTAL PROFESSIONALS

Obtaining an environmental professional, consultant or engineer, can be addressed in a manner of ways: via a web search or in the yellow pages of the telephone book under Environmental, Ecological, or Engineering; by asking your financial institution, real estate agency, or trade association for references; or by word of mouth, etc. It's wise to ask the professional or consultant for references and inquire as to past due care evaluations they have successfully completed. The DEQ cannot provide recommendations for environmental professionals, consultants or engineers.

## SOURCES OF INFORMATION

**DEQ Environmental Assistance Center**  
1-800-662-9278

**DEQ Due Care Web Page**  
(with DEQ Office Locations)  
[www.michigan.gov/duecare](http://www.michigan.gov/duecare)

**DEQ Remediation Division Web Page**  
[www.michigan.gov/deqrrd](http://www.michigan.gov/deqrrd)

**DEQ Remediation Division Contact**  
Part 201 (Environmental Remediation) and  
Part 213 (Leaking Underground Storage Tanks)  
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**DEQ Office of Oil, Gas and Minerals Contact**  
Part 615 (Supervisor of Wells – oil/gas wells) and  
Part 625 (Mineral Wells)  
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*Revised February 2012*

**DRAFT**