

This guide to Due Care describes the obligations of an owner or operator of contaminated property, which are designed so contaminated properties can be safely used.

Section 20107a of Part 201, Environmental Remediation, and Section 21304c, Leaking Underground Storage Tanks, of Michigan's Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), requires that owners and operators take 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 undertaking the necessary actions to address the unacceptable risks. Due care obligations are not related to the owner or operator's liability for the contaminants; they apply to both non-labile parties and liable parties.

### ◀◀ NOTE ▶▶

This is an informational 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 and Part 213 statutes, Part 10 Administrative Rules, and guidelines are available electronically at this DEQ Web site: [michigan.gov/deqducare](http://michigan.gov/deqducare)

## DUE CARE REQUIREMENTS SECTIONS 20107a & 21304c

An owner or operator of contaminated property shall do all of the following with respect to contamination at the property:

- ▶ 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 or corrective actions at the property.
- ▶ Comply with any land use or resource use restrictions established or relied on in connection with the response activities or corrective actions.
- ▶ Not impede the effectiveness or integrity of any land use or resource use restriction.

Sections 20101 and 21303 of the NREPA define a facility or a site as property with contamination in soil or groundwater at concentrations above Michigan's cleanup criteria for residential property.

An owner or operators "due care" obligations are summarized on the next few pages and are specified in Part 201, Section 20107a and its Administrative Rules 1001-1021 and Part 213, Section 21304c. Further information can be found on the DEQ RRD due care web page ([michigan.gov/deqducare](http://michigan.gov/deqducare)):

- ▶ Part 201 of NREPA
- ▶ Part 201 Administrative Rules (Part 10)
- ▶ Part 201 Residential Cleanup Criteria
- ▶ Part 213 of NREPA
- ▶ DEQ-RRD Citizen's Guides
- ▶ Due Care Brochure, Matrix and Forms

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

Michigan Department of Environmental Quality  
Remediation and Redevelopment Division  
PO Box 30426, Lansing, MI 48909-7926  
Main Telephone: 517-284-5087  
[www.michigan.gov/deqrrd](http://www.michigan.gov/deqrrd)

Rick Snyder, Governor \* Dan Wyant, Director



Revised May 2016

## 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 or soil. An owner or operator can also exacerbate contamination by changing the facility conditions in a manner that would increase the response activity or corrective action 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 or corrective action costs.

## PREVENTING UNACCEPTABLE HUMAN RISK

Owners and operators must evaluate the existing contamination to determine if the people using or working at the property would be exposed to contamination at levels above the appropriate generic or site-specific criteria. Upon the identification of unacceptable risks, the owner and operators must then undertake the actions that are necessary to prevent unacceptable exposures to contamination in order to demonstrate compliance with their due care obligations. Criteria for differing land uses can be found in the Part 201 Administrative Rules (Rules 1-50). 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 barrier to prevent exposure, or removing contaminated soil. Exposure barriers can be clean soil, concrete, paving, etc. In some instances, remediation of the contamination may be the most cost effective response. In addition, if there is a potential unacceptable risk for utility workers or people conducting activities in an easement on the property, then utility and/or easement holders must be notified in writing of the conditions by the owner and 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 or corrective actions 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 an exposure 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 nonresidential, not removing a barrier installed to prevent contact with contaminated soil, and not turning off an operating remediation system.

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

The necessity for conducting response actions are determined by evaluating the current/intended property use and the existing contamination. Based on that evaluation, the actions needed to prevent unacceptable exposures and comply with all due care obligations must be implemented. 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 an evaluation to identify unacceptable risks was conducted, any actions that are needed have been taken and are adequate. Certain response actions (e.g.,

exposure barriers, mitigation system, etc.) will require continued maintenance, inspections, and repair that must also be documented. Documentation requirements are described in the Part 201 Administrative Rule 1003. 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 contaminated. You may request and submit for DEQ to review and determination Documentation of Due Care Compliance pursuant to Sections 20114g or 21323n.

## **NOTIFICATION**

The Part 10 (“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: [michigan.gov/degducare](http://michigan.gov/degducare).

## **EXEMPTIONS/LIMITATIONS**

Parts 201 and 213 provide exemptions to the “due care” obligations 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 213, or by seizure, receivership or forfeiture or court order, or voluntarily acquired the property and conducted a baseline environmental assessment (BEA).
- ▶ 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-liaible party.

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

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, Sections 20107a(6) and 21304c(6) specify utilities and severed mineral right owners must comply with due care in regard to their own activities.

While Parts 201 and 213 provide 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

Resources for finding an environmental professional, consultant or engineer, include: online searches for Environmental, Ecological, or Engineering consulting firms; referrals from financial institutions, real estate agencies, or trade associations, etc. It's wise to ask the professional or consultant for references and inquire as to past due care compliance documentation reports they have successfully completed. The DEQ does not provide recommendations for environmental professionals, consultants or engineers.

## SOURCES OF INFORMATION

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

[michigan.gov/deqducare](http://michigan.gov/deqducare)

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

**DEQ Remediation and Redevelopment  
Division Contact**  
Jeanne Schlaufman  
586-753-3823  
[schlaufmanj1@michigan.gov](mailto:schlaufmanj1@michigan.gov)

**DEQ Office of Oil, Gas and Minerals Contact**  
Part 615 (Supervisor of Wells – oil/gas wells) and  
Part 625 (Mineral Wells)  
Janice Smith  
517-242-3134  
[smithj6@michigan.gov](mailto:smithj6@michigan.gov)

Revised May 2016