



RESCISSION OF DEPARTMENT POLICY AND PROCEDURE

09-009 Facility Status Under Part 201

Rescission Date: March 26, 2020

EGLE Policy and Procedure No. 09-009, Facility Status Under Part 201, dated July 15, 2005, is rescinded.

With amendments to Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, over the years, this policy is no longer consistent with the statute. The Remediation and Redevelopment Division does not see a need for revisions to make it consistent as the main interpretation of the statute this covered has been addressed by statutory revisions to the definition of facility.

APPROVING AUTHORITY

A handwritten signature in blue ink, appearing to read 'Liesl Eichler Clark', is written over a light blue rectangular background.

Liesl Eichler Clark, Director

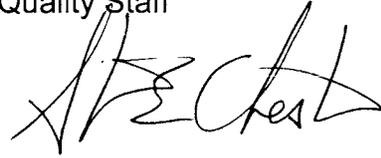
An EGLE policy and procedure cannot establish regulatory requirements for parties outside of EGLE. This document provides direction to EGLE staff regarding the implementation of rules and laws administered by EGLE. It is merely explanatory, does not affect the rights of or procedures and practices available to the public, and does not have the force and effect of law. EGLE staff shall follow the directions contained in this document.

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

INTEROFFICE COMMUNICATION

TO: Department of Environmental Quality Staff

FROM: Steven E. Chester, Director



DATE: July 15, 2005

SUBJECT: Policy on Facility Status under Part 201¹

This memorandum explains the reasons for development of the subject policy. Legislators, local officials, and affected citizens in the vicinity of Midland and the Tittabawassee River floodplain have expressed concern about a publication entitled "Supplemental Advisory Regarding Part 201 Requirements Applicable to Property Contaminated by Dioxin" (Supplemental Advisory) that was issued by the Department of Environmental Quality (DEQ) in June 2003. The Supplemental Advisory stated that "[b]ased on available data, the DEQ believes it is appropriate to conclude that all property within the 100-year floodplain downstream of the City of Midland, that is frequently flooded by the Tittabawassee River, is a facility." The Supplemental Advisory was one of a number of informational bulletins and advisories developed by the DEQ and other state agencies after environmental sampling showed that certain areas of Midland and the Tittabawassee River floodplain were contaminated by dioxin. The initial informational bulletins and advisories were intended to help area residents understand the potential risks posed by dioxin and the steps individuals could take to reduce exposure to dioxin.

The Supplemental Advisory was prepared in response to two concerns. First, the DEQ had been contacted by individuals who had recently purchased property in the floodplain and who learned only after completing the purchases that their property was contaminated by dioxin. Second, a number of activities were occurring in the floodplain that resulted in dioxin-contaminated soils being relocated to uncontaminated areas. The Supplemental Advisory was intended to provide property owners with information about the responsibilities that Part 201 places on persons who own property affected by contamination that migrated onto the property. Those responsibilities include the need to disclose information about contamination prior to selling or otherwise transferring an interest in the property, and the obligations not to exacerbate contamination or move contaminated soils into uncontaminated areas (compliance with Sections 20116, 20107a(1)(a), and 20120c, respectively). The Supplemental Advisory was sent to approximately 2000 property owners, including owners of property that had been tested and found to be contaminated, plus others in an area that may be affected.

¹ Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended.

In retrospect, it is clear that incomplete communication in the Supplemental Advisory has contributed to confusion and frustration in the Tittabawassee River floodplain communities regarding "designation" by the DEQ of certain properties as a facility and the consequences of that "designation." The statement in the Supplemental Advisory about which properties were facilities was not specific enough for property owners and others to understand clearly which properties were actually affected subject to Part 201 requirements. Some members of the community believe that the uncertainty about the facility status has resulted in reduced property values and created an unjustified negative impression about the community in general.

I am committed to ensuring that communication from the DEQ about contamination issues in any community does not unfairly affect the owners of nearby, uncontaminated property. It is essential that the DEQ continue to conduct outreach and provide information to the public, especially in areas affected by large and complex contamination sites. This includes making public, in a timely manner, information known to the DEQ about area-wide contamination and providing clear, practical information about how that contamination may affect area residents. At the same time, DEQ communications must provide sufficient context and explanation so that the information is meaningful to citizens.

The attached policy provides direction to staff regarding communication to the public about property that is a facility or that is potentially a facility. The objective of the policy is to ensure that DEQ communication about contaminated and potentially contaminated property does all of the following:

- informs property owners, residents, local officials, and other interested parties about actual and potential area-wide contamination in their communities;
- ensures that people have information to make informed choices to limit exposure to hazardous substances, if possible;
- explains the rights and obligations of persons who are liable and persons whose property is contaminated by others; and
- avoids unintended consequences for property owners and residents.

Questions about implementation of this policy should be directed to your supervisor. Division Chiefs are responsible for ensuring appropriate coordination with the Remediation and Redevelopment Division on any questions related to consistent application of the facility definition.



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The following policy will be implemented by the Department of Environmental Quality (DEQ) with regard to Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act (Part 201), 1994 PA 451, as amended.

ISSUE:

The defined term “facility” is an important concept in Part 201. It describes an area affected by hazardous substance contamination where response activity is required to be undertaken by a liable party. The status of property as a facility also triggers limited responsibilities for a non-liable owner or operator of that property. Those responsibilities are most limited for a person whose property is affected by migrating contamination. In the case of migrating contamination, those responsibilities are to not exacerbate existing contamination, to disclose information about contamination when transferring an interest in the property, and to obey restrictions on the movement of contaminated soil. A non-liable person who owns or operates property that is the original source of migrating contamination also has somewhat broader obligations, commonly referred to as “due care,” to mitigate unacceptable exposure to contamination on his or her property.

DEFINITIONS:

Terms used in this policy that are defined in Part 201 have the same meaning as in Part 201. Of particular note is the definition of facility:

“Facility” means any area, place, or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located. Facility does not include any area, place, or property at which response activities have been completed which satisfy the cleanup criteria for the residential category provided for in section 20120a(1)(a) and (17) or at which corrective action has been completed under part 213 which satisfies the cleanup criteria for unrestricted residential use.

The term “area-wide” is used in this policy to refer to contamination that is part of a facility, and that has migrated from the source onto multiple properties, including residential properties.

Other terms have their ordinary meanings.

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POLICY:

This policy addresses area-wide contamination that is sufficiently large in scope or magnitude to raise community-level concerns. It is designed to assure that properties in the vicinity of area-wide contamination are not *inappropriately* treated as part of a facility; that owners of property that is part of area-wide contamination are given relevant information; and that other people in a community affected by area-wide contamination are given appropriate information that may be relevant to their activities in the contaminated area. DEQ communication about contaminated property and potentially contaminated property will do all of the following:

1. Inform property owners, residents, local officials, and other interested parties in a timely manner about actual and potential area-wide contamination in their communities;
2. Identify or refer to property as a facility in public communications only if the conditions described in the Implementation section of this policy are satisfied;
3. Assure that people have information to make informed choices to limit exposure to hazardous substances, if possible;
4. Explain the rights and obligations of persons who are liable and persons whose property is contaminated by others;
5. Avoid, as much as possible, unintended consequences, such as stigma impacts on property value, for property owners and residents;
6. Be updated as additional information becomes available that allows for more precise definition of a facility, or for refined advisories to be developed.

Accordingly, it is in the public's interest to receive reliable information regarding area-wide contamination. As appropriate, the DEQ will continue to make such information available through brochures, informational memoranda, and other means of communication.

Implementation:

The DEQ will continue to conduct outreach and provide information about environmental contamination to the public, especially in areas affected by large and complex contamination sites. This includes making available in a timely manner to the public information that is known to the DEQ about area-wide contamination and providing clear, practical information about how that contamination may affect area

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residents. This communication will provide sufficient context and explanation so that the information is meaningful to citizens.

DEQ staff will take action that is based on the status of a parcel of property as a facility under Part 201 only if one or more of the following conditions are satisfied:

1. Available data from samples taken from the property in question demonstrate that hazardous substance concentrations exceed one or more applicable generic residential cleanup criteria.
2. A plan for response activity (remedial investigation, feasibility study, remedial action, interim response, or interim response designed to meet criteria), which has been submitted to the DEQ or has been approved by the DEQ, includes the property in question in an area subject to response activity.
3. When data are not available to document hazardous substance concentrations on the property in question and no plan for response activity exists, but it is appropriate to make reasonable inferences from existing data.
 - It is not necessary for data to be available for every parcel in an area to determine that a parcel within that area is a facility, provided that available data supports a reasonable inference concerning the facility status of the parcel in question.
 - When making inferences from available data, DEQ staff will consider the reasons why available data may or may not represent conditions on nearby properties. Staff should consider factors such as the nature of the release, the physical and chemical properties of the released hazardous substance, the mechanism(s) of transport for the hazardous substance, and conditions at point of release and in the surrounding area that influence the fate of released hazardous substances.
 - When the DEQ considers a property as a facility based on an inference from available data, the basis for that inference must be clearly described as part of communication with the public.

The DEQ staff should not convey to property owners, either in general or targeted communication, that property is part of a facility unless one of these three conditions is met. In other words, DEQ communication should not indicate or imply that a property is part of a facility if that conclusion is not supported by data, a plan for response activity, or reasonable inferences from data.

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Communication by the DEQ about facility status will also appropriately reflect the fact that an entire parcel (i.e., legally described property) is not necessarily a facility as a result of criteria exceedances on part of that parcel.

This policy recognizes that some response activities will extend to property outside the boundaries of a facility. An example of this situation is the imposition of groundwater use restrictions in an area where hazardous substance concentrations do not exceed criteria, but that is in proximity to a groundwater contamination plume and the restrictions are necessary to assure that the plume does not expand.

Limitation:

Nothing in this policy is intended to modify or limit the responsibilities of a person who is liable to conduct required response activity, or modify or limit the responsibilities of a person who has knowledge that his or her property is a facility to comply with applicable requirements of Part 201.

Approved: _____



Date: _____

July 15, 2005