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## *BEAs and Due Care*

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### **Baseline Environmental Assessments (BEA)**

- Michigan's liability scheme allows new owners or operators to buy property without being liable to remediate contamination, if they conduct and submit a Baseline Environmental Assessment
  - Part 201, Environmental Remediation [20126(1)(c)]
  - Part 213, Leaking Underground Storage Tanks [21323a(1)(b)]

### **Purpose of the BEA**

- Provides liability protection from existing contamination
- For both Part 201 and Part 213 sites of contamination

### **BEAs**

- Persons who "do" BEAs according to Parts 201/213 are not liable
  - Only considered when property is demonstrated to be "contaminated"
  - Part 201 "facility" OR Part 213 "site"
  - Conduct BEA prior to purchase, occupancy or foreclosure OR
  - Within 45 days after
  - Submit to DEQ within 6 months
  - Disclose to subsequent purchaser or transferee
  - Provides liability protection for various state laws
- Some exemptions to liability without doing a BEA
  - LUGs: Involuntary acquisition, condemnation, easements for utilities, transportation, etc.
  - All contamination is migrating onto the property
  - A lessee who uses the leased property for retail, office or commercial purposes
- Does not exempt an owner or operator from responsibility or compliance with:
  - Part 211 - Underground Storage Tanks
  - Michigan Flammable and Combustible Liquids Rules (FL/CL)

### **BEA Contents**

- Two main components
  - AAI or Phase I Environmental Site Assessment (ESA)
  - Sampling and analysis
- Content of BEA
  - Samples to determine property is contaminated and define the property as a "facility" or "site"
  - Property information (legal description, maps)
- No DEQ review and approval process
- Submitter will receive an acknowledgment letter that BEA was received in accordance with the requirements of the law

## BEA Important Points

- Time-frames for conducting and submitting
  - Conduct before purchase, occupancy, or foreclosure
  - Not later than 45 days after
  - Submit to DEQ within 6 months from date of purchase, occupancy or foreclosure
- Must document that property is a facility or site
  - Contamination above residential criteria/RBSLs
- Each entity needs their own BEA submittal
  - Owner, Operator, lessee, bank if foreclose
- Does not provide liability protection from other state and federal laws:
  - Part 115 – Solid Waste Management
  - Part 111 – Hazardous Waste Sites
  - Treatment, Storage and Disposal (TSD) facilities subject to corrective action under RCRA

## DUE CARE

- What is Due Care?
- Who needs to take Due Care?
- What are the Due Care requirements?
- When do I evaluate Due Care?
- How do I evaluate Due Care?
- Who performs the evaluation?
- What reports or records do I need to keep?
- Is that it?

## What is Due Care?

- The obligation of owners and operators of contaminated property to:
  - Assure the property is safe for people who work, reside, or visit the property.
  - Prevent unacceptable exposure to people from contamination in soil or groundwater (soil gas).

## Who Needs to Comply with Due Care Obligations?

- Applies to current owners and operators of “contaminated property” (limited exemptions)
  - Contaminated property is property that has contamination above the concentrations protective for residential use
- BOTH Liable and non-liable parties are required to comply with 7a/4c (but maybe not all of the obligations)

## Who Doesn't Need to Comply with Due Care Obligations?

- Certain exemptions for Local Units of Govt. (LUGs)
  - LUGs-that only have d-f
  - LUGs that are not liable or that acquired the property prior to June 5, 1995.
    - UNLESS! The LUG allows the general public to use the property for an express public purpose. Then the LUG has all due care obligations for the portion of the property being used.

## Who Doesn't Need to Comply with Due Care Obligations?

- Persons who's property is contaminated due to migration on to the property
  - Under Part 201 only obligated to comply with d, e, and f
  - Under Part 213 only obligated to comply with d and e
- Person who is not liable but holds:
  - an easement interest
  - a utility franchise

- owns or leases subsurface mineral rights or formations
- or acquires access through an easement.

### What are the Obligations?

- Section 20107a(1) and Section 21304c(1)
  - a) Prevent exacerbation of existing contamination
  - b) Mitigate unacceptable exposures to the existing contamination in soil/groundwater (soil gas)
  - c) Take reasonable precautions against the foreseeable and unforeseeable acts of third parties
  - d) Provide reasonable cooperation and access to those parties authorized to conduct response activities
  - e) Comply with land and/or resource use restrictions relied on in connection with the response activities
  - f) Do not impede the effectiveness or integrity of any land or resource use restrictions

### Don't Forget About the Part 10 Rules - Part 201 Only

#### Notifications Required by Rule

- Notice of Migration to adjacent property owners/operators
- Notice of Abandoned or Discarded Containers
  - does not include regulated USTs or ASTs
- Notice to Fire Department if flammable or explosive conditions
- Notice to Easement Holders if contamination would cause unacceptable exposures

#### When Do I Have Due Care?

- As soon as you have knowledge the property has contamination
  - Current spill or release
  - Obtain knowledge from other source
  - Personal knowledge
- On-going obligation – due care obligations begin when become the owner/operator of contaminated property

#### How Do I Evaluate Due Care? Identifying Contamination

- Phase II Environmental Site Assessment (ESA)
  - Look in areas of concern identified by the Phase I ESA
  - Look for USTs and ASTs
    - Geophysical evaluation
- Remedial Investigation
  - Define extent of known contamination
- Other Knowledge
- Soil and Groundwater Data (soil gas)
- Determine how far the contamination extends, the highest concentrations, etc.

#### Due Care Evaluation vs. Characterization for Closure

##### Generic Criteria/RBSLs

- Obligations under 7a or 4c are based upon the current generic cleanup criteria/RBSLs
- The application is not different than under other sections of 201 or 213
- If the property characteristics are not consistent with the assumptions.... You have an obligation to do an evaluation (site-specific)
- Are the criteria applicable (do site conditions meet the assumptions of the model)?

### **Determining Complete Exposure Pathways?**

- Human exposures only
  - Direct Contact
  - Volatilization to Indoor Air
  - Drinking Water
  - Volatilization to Ambient Air/Particulate Inhalation
- Only exposure pathways that can occur during the owner/operators tenure on the property
- Based on that owner/operators land use
- Current use only – not future

### **Mitigate Unacceptable Exposures**

- O/O must
  - Eliminate the exposure or reduce to acceptable levels
  - Mitigate risk to other properties due to erosion or dust.
  - Comply with the Part 10 Rules

### **Volatilization to Indoor Air Pathway Complete or Not?**

- Considerations:
  - Source of vapor present?
    - Remediation Conducted?
  - Route of Contamination?
  - Receptors?
    - Building Evaluation

### **Volatilization to Indoor Air Pathway Complete or Not?**

- How to compare the data collected?
- Generic Criteria (Does the site meet the assumptions?)
- Need Site-Specific Criteria?
  - comparison to values that are considered best science and most protective of public health???

### **What Reports or Records do I Need to Keep?**

- Where response activities necessary to mitigate an unacceptable exposure
- Are presumptive measures already in place?
  - Barrier to prevent direct contact with soils
  - Mitigation system to prevent volatilization to indoor air
- What measures were implemented?
  - Do not need deed restrictions
  - Do not need permanent measures

### **On-going Obligations:**

- Monitoring and Inspection is an on-going obligation
  - Monitor effectiveness and integrity of response activities
  - Frequency is as often as needed depending on the severity of the risk, reliability of the measure
- Re-evaluation is an on-going obligation
  - As property use or environmental conditions change
- Self-Implementing
  - Documentation must be maintained and available upon request of the Department of Environmental Quality

## Documenting Compliance with 7a/4c

- DUE
- CARE
- PLAN

## Demonstrating Compliance vs Documentation of Due Care Compliance

- Rule 1013(5) Requires Documentation be Maintained
  - Contaminant information, evaluation results, response actions taken – performance objectives met, justification for conclusions
  - Include date(s) response actions(s) were completed, inspections conducted
  - Make available to DEQ upon request within 8 months of obtaining knowledge of the contamination or becoming the owner/operator
- DDCC – 20114g or 21323n
  - Voluntary submission on form EQP4402
  - It's a request for DEQ review.
  - DEQ has 45 business days to review a submission that contains sufficient information.
  - No approval by law.
  - DEQ denial is subject to response activity review panel.
- Demonstrating Compliance With Section 20107a
  - No form.
  - DEQ requests from O/O.
  - Is not expected to be a report.
  - Must demonstrate adequate pathway evaluation and compliance with obligations.
  - Does not have to be formally approved or denied.

## Documentation of Due Care Compliance (DDCC)

- Stand-alone document
  - Must contain sufficient information for the DEQ to concur the submitter is in compliance
    - Copy of Phase I ESA (not the whole Phase I)
    - Color photographs
    - Scaled site maps – not aerial photographs
    - Phase II ESA or copies of investigations conducted
    - Soil, groundwater, and/or soil gas data
    - Copies of boring logs
    - Copies of laboratory data sheets (not already submitted)
- Point-in-time document
  - Can only documenting compliance at time of preparation
  - DEQ only concurring submitter is in compliance at time DDCC was prepared
  - Not a “plan”, no plan components, no if/then statements
  - Should not contain a plan for Response Activities

## Can I/Who Can Submit a Response Activity Plan?

- If current O/O is out of compliance with 20107a(1)(b), can submit a ResAP to identify necessary response activities to be undertaken.
- Prospective O/O can submit.
- DEQ approves, approves with conditions or denies (150 days or approved by law).
  - Can also send insufficient information response.
  - Denial subject to response activity review panel.
- Propose response activities to address one or more complete pathways.

### **The Part 213 Conundrum**

- O/O can submit a DDCC but not a Response Activity Plan.
- Part 10 Rules don't apply.
- Nothing to require an O/O to maintain documentation of compliance.
- No real provision for DEQ to ask for documentation.
- No provision requiring O/O to provide compliance documentation.
- What to do???

### **Common Due Care Mistakes**

- Waiting until after purchase for Due Care Evaluation
- BEA doesn't fully evaluate all of the Recognized Environmental concerns.
- More than demonstrating that property is a facility.

### **QUESTIONS?**