



MICHIGAN DEPARTMENT OF  
ENVIRONMENT, GREAT LAKES, AND ENERGY

# 2019 Michigan Petroleum Storage Tank Conference

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# Responsibilities When Buying or Selling Property with USTs or Contamination

**BASELINE ENVIRONMENTAL ASSESSMENTS**

**DUE CARE COMPLIANCE**

**INSTITUTIONAL CONTROLS**

**MUSTA**

# 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 213, Leaking Underground Storage Tanks [21323a(1)(b)]

# Purpose of the BEA

- Provides liability protection from existing contamination.
- Part 213 sites of contamination
  - aka Leaking Underground Storage Tank Sites



# BEAs

Persons who “do” BEAs according to Part 213 are not liable.

- Only considered when property is demonstrated to be “contaminated”
- Part 213 “site”
- Conduct BEA prior to purchase, occupancy or foreclosure  
OR
- Within 45 days after
- Submit to EGLE within 6 months
- Disclose to subsequent purchaser or transferee
- Provides liability protection for various state laws

# BEAs

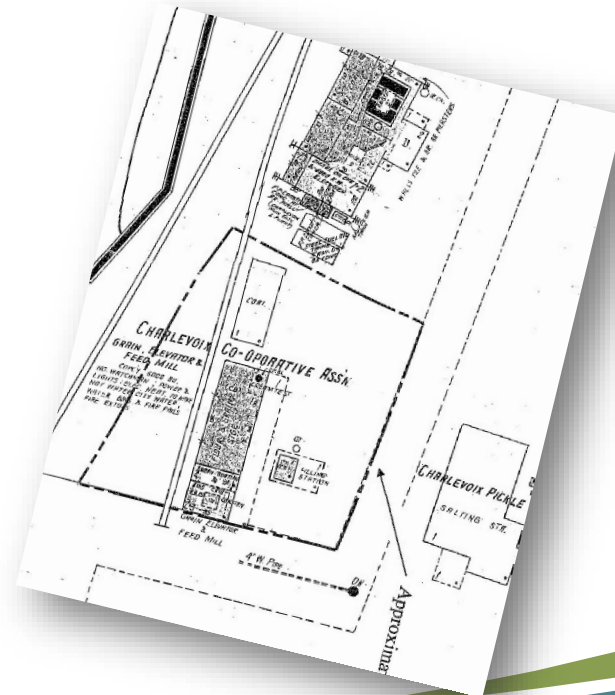
- Does not exempt an owner or operator from responsibility or compliance with:
  - Part 211 - Underground Storage Tanks
  - Michigan Flammable and Combustible Liquids Rules (FL/CL)



# BEA Contents

Two main components

- AAI or Phase I Environmental Site Assessment (ESA)
- Sampling and analysis



# BEA Contents cont:

## Content of BEA

Samples to determine property is contaminated and define the property as a "site"

Property information (legal description, maps)

No EGLE 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 or occupancy
- Not later than 45 days after
- Submit to EGLE within 6 months from date of purchase or occupancy
- The law allows an O/O to request a determination that their failure to meet the timeframes in the performance of a BEA is inconsequential

## **Must document that property is a “site”**

- Contamination above residential Risk-Based Corrective Action Screening Levels (RBSLs)

## **Each separate entity needs their own BEA submittal form**

- Owner, Operator, lessee, bank if foreclose

# 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 = property that has contamination above the concentrations protective for residential use
- BOTH Liable **and** non-liable parties are required to comply with 21304c (but maybe not all of the obligations)

# What are the Obligations?

## 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



# Obligations continued?

- 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

# When Do I Have Due Care?

- As soon as you have knowledge the property is contaminated
  - Spill or release
  - Both Part 201 and Part 213
  - 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
- ∅ Site Investigation
  - Define extent of known contamination
- ∅ Other Knowledge
- ∅ Soil and Groundwater Data (soil gas)
- ∅ Determine how far the contamination extends, the highest concentrations, etc.



# Mitigate Unacceptable Exposures

## O/O must

- Ø Eliminate the exposure or reduce to acceptable levels
- Ø Mitigate risk to other properties due to erosion or dust.



# What Reports or Records Do I Need to Keep?

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

• If you didn't  
**document**  
you didn't  
**do it.**

# On-going Obligations

- Monitoring and Inspection is an on-going obligation
  - Monitor effectiveness and integrity of corrective actions
  - 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 can be requested by EGLE

# Documenting Compliance with 4c

~~DUE  
CARE  
PLAN~~

# Documenting Compliance with 4c

~~RESPONSE  
ACTIVITY  
PLAN~~

# Under Part 213

- Ø O/O can submit a Documentation of Due Care Compliance for review, but not any type of plan.
- Ø Must be in compliance, not have a plan to come into compliance.
- Ø Will need to continue to undertake the actions necessary to maintain that compliance.

# Documentation of Due Care Compliance (DDCC)

## Ø Stand-alone document

ü Must contain sufficient information for EGLE 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)

# Common Due Care Mistakes

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







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# INSTITUTIONAL CONTROLS & MUSTA

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# Institutional Controls

- Ø Restrictive Covenant
- Ø Notice of Corrective Action
- Ø Public Highway Institutional Control (PHIC)
- Ø MDOT – Environmental License Agreement
- Ø Ordinance

# Institutional Controls

- ∅ **Restrictive Covenant**
  - Applies to the property and restricts the land and resource uses
- ∅ **Notice of Corrective Action**
  - Applies to the property and only restricts the land use
- ∅ **Public Highway Institutional Control - PHIC**
  - Applies to locally owned roads and road right-of-ways
  - Local Unit of Government must receive and agree
- ∅ **MDOT – Environmental License Agreement**
  - Applies to state owned roads and road right-of-ways
  - Issued by Michigan Department of Transportation
  - Allows contamination to remain in place

# O/O and Institutional Controls

## ∅ Liable O/O Obligations

- An IC can be used as a corrective action to achieve closure
- Identifies the land or resource restrictions on the property
- Runs with the land
- Liable party maintains responsibility for on-going obligations set forth in the Closure Report and RC
- Must disclose to subsequent owners or operators
- Designed to prevent current and any future exposure risks
  - ❖ Must ensure the restrictions/requirements in the RC are adhered to:
    - ü Assure pavement remains in good condition
    - ü Assure the mitigation system is operating properly

# O/O and Institutional Controls

## ∅ Non-Liable O/O Obligations

- Required under 4c(1)(e) to comply with all land and or resource use restrictions
- Under 4c(1)(b) must assure there are no unacceptable exposures
  - ü Assure the pavement is maintained in good condition
  - ü Assure the mitigation system is operating properly

# Rescinding and Revising an RC

- ∅ May need department approval
- ∅ If need department approval, need to submit a new closure report
  - Must be able to document the revisions or rescission are appropriate

# MUSTA – NEW O/O - BEA

- ∅ Conduct a BEA and discover a release
  - Owner at the time of discovery should IMMEDIATELY report the release to Licensing and Regulatory Affairs (LARA), Bureau of Fire Services, Storage Tank Division
  - Approved claims can be transferred to new owner upon sale of property
- ∅ Financial Responsibility required for regulated USTs
- ∅ New Owner – intends to operate USTs
  - Register the tanks in your name
- ∅ New Owner – does NOT intend to operate USTs
  - Register the tanks in your name
  - Take immediate actions with LARA to have the USTs removed or closed

# MUSTA – Improving Eligibility

- **Newly discovered unregistered UST**
  - IMMEDIATELY register the tank with LARA
- **IF, a release is confirmed or suspected**
  - Report the release to LARA within 24 hours of discovery
- **IF a suspected release has been reported**
  - Upgrade to confirmed or cancel within 14 business days
- IMMEDIATELY obtain financial responsibility – required for all regulated USTs
- Not using the tank(s), take IMMEDIATE actions with LARA to have tank(s) removed or closed in place
- **ONLY the O/O at the time of the discovery of the release is eligible to file a MUSTA claim**



# Purchasing Former UST Property for Redevelopment

- Is or could the property be a Brownfield?
- IF, a release is confirmed or suspected
  - Report the release to LARA within 24 hours of discovery
- IF, a suspected release is reported
  - Upgrade to confirmed or cancel within 14 business days

# BROWNFIELDS

- The Remediation and Redevelopment Division provides financial and technical assistance including grants, loans, tax increment financing and free site assessments to facilitate the redevelopment of brownfield properties.
- Please contact 517-284-5113 or email at [EGLE-Brownfields@michigan.gov](mailto:EGLE-Brownfields@michigan.gov) for more information and assistance. Visit our RRD table this afternoon.

# Contacts

➤ UST: [LARA-BFS@Michigan.gov](mailto:LARA-BFS@Michigan.gov)

The Michigan Department of Licensing and Regulatory Affairs (LARA), Bureau of Fire Services, Storage Tank Division

➤ MUSTA: [EGLE-MUSTA@Michigan.gov](mailto:EGLE-MUSTA@Michigan.gov)

➤ LUST: [EGLE-RRD@Michigan.gov](mailto:EGLE-RRD@Michigan.gov)

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# Questions?

