

Due Care Obligations

For Owners or Operators of Contaminated Property

Introduction

This guide to Due Care describes the obligations of an owner or operator of contaminated property, which are designed so that contaminated property 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 document is provided by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) for informational purposes. A thorough review of Part 201 and Part 213 Statutes, Part 10 Administrative Rules, and guidelines should be completed before making site-specific decisions. These documents are available at Michigan.gov/EGLEDueCare.

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 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 is protective of the public health and safety.
- ▶ Take reasonable precautions against reasonably foreseeable acts or omissions of a third party.

- ▶ Provide notification to EGLE 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.

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’s or operator’s “due care” obligations summarized in this document are specified in Part 201, Section 20107a and its Administrative Rules 1001-1021 and in Part 213, Section 21304c. Find more information at Michigan.gov/EGLEDueCare, including:

- ▶ Part 201 of NREPA
- ▶ Part 201 Administrative Rules (Part 10)
- ▶ Part 201 Residential Cleanup Criteria
- ▶ Part 213 of NREPA
- ▶ EGLE RRD Guidance Documents
- ▶ Due Care Brochure, Matrix, and Forms

Prevent 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:

- ▶ Mishandling excavated contaminated soil such that contamination now migrates off-site
- ▶ Pumping contaminated water from footing drains into a nearby ditch
- ▶ 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.

Prevent 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.

Take 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)
- ▶ 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 when 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
- ▶ 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 the Environmental Professionals section).

Due Care Documentation

Owners and operators must maintain documentation that an evaluation to identify unacceptable risks was conducted, necessary actions have been taken, and the actions 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 EGLE but must be available for EGLE 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 an EGLE review and determination and submit Documentation of Due Care Compliance pursuant to Sections 20114g or 21323n.

Notification

The Part 10 (“due care”) Rules require notification to EGLE and others in the following circumstances:

- ▶ Notify EGLE if there are discarded or abandoned containers that contain hazardous substances on the property; see Form EQP 4476.
- ▶ Notify EGLE 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.

Notices must be made within 45 days of becoming the owner or operator, or of having knowledge of the conditions. Forms are available at EGLE District Offices and online at Michigan.gov/EGLEDueCare.

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-labile 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's and 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 conditions.

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 is wise to ask the professional or consultant for references and inquire as to past due care compliance documentation reports they have successfully completed. EGLE does not provide recommendations for environmental professionals, consultants or engineers.

EGLE Resources

Environmental Assistance Center:

800-662-9278 | EGLE-Assist@Michigan.gov

Remediation and Redevelopment Division:

Michigan.gov/EGLEERRD

Due Care

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Office of Oil, Gas and Minerals Division

Michigan.gov/EGLEOilGasMinerals

Part 615 (Supervisor of Wells – oil/gas wells)

Part 625 (Mineral Wells)

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