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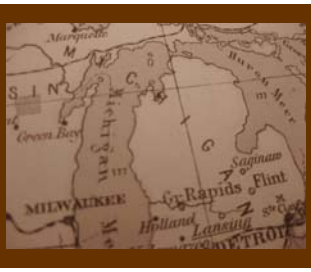
State Amends Environmental Cleanup Law

By: Steven D. Sallen



Effective December 14, 2010, Amendments to "Part 201"[2] (Michigan's pollution cleanup law) took effect. These Amendments (hereafter "Amendments") alter Michigan's groundbreaking "BEA"[3] process, enact a new voluntary response activity process and "no further action" status for cleaned up properties, create an appointed panel of experts to advise and resolve agency versus citizen disputes, simplify the number of environmental cleanup categories, and broadly amends Part 201, in many cases, to be more citizen-friendly. These changes were adopted by the Michigan legislature through a series of bills[4] with the public policy goal of encouraging more development of contaminated sites, by creating a more streamlined, certain, and less onerous regulatory process.

Over the past year or two, MDNRE[5] championed amendments to Part 201 that would have eliminated (or dramatically curtailed) the BEA program, placed renewed emphasis on so-called "due care" requirements for dealing with contaminated properties, expanding costs of real property ownership even for "non-liable" persons, and generally tipped the scales of environmental justice more toward the state and away from business interests. Given the distress of the commercial real estate market in Michigan over the past several years, it seemed to us that many of MDNRE's proposals were like egging-on the hangman! Fortunately for the business community and, we would argue, all of the citizens of the state of Michigan, what actually emerged was a far more business-friendly amendment of the law. In fact, the end result may have been more driven by fiscal realities facing the state, than by notions of policy perfection, as many of the Amendments appear intended to stretch agency resources as far as possible, without abdicating oversight altogether.

Baseline Environmental Assessment Amendments:

First and foremost, the Part 201 Amendments specifically preserve the integrity of existing BEA liability protection for owners and operators of contaminated properties who were, when the Amendments went into effect, in compliance with the BEA law as previously in effect.

So, for those owners who relied upon a BEA for liability protection in connection with purchases or leases of contaminated properties between July 1995[6] and December 14, 2010, the state did not pull the rug out from under!

The state adopted the Federal All Appropriate Inquiry ("AAI") standard for evaluation of environmental conditions as adopted in amendments to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[7]. The AAI standard for evaluation of environmental conditions is deemed to be met if in compliance with the ASTM[8] Standard E1527-05. While this AAI standard for environmental due-diligence is now statutorily adopted in Michigan, its use has been commonplace since its codification into CERCLA in 2006.

> ***"These changes were adopted by the Michigan legislature through a series of bills with the public policy goal of encouraging more development of contaminated sites, by creating a more streamlined, certain, and less onerous regulatory process."***

Where property is found to be a "facility"[9], prospective owners or operators of such contaminated properties may still avoid liability by providing a Baseline Environmental Assessment to the state of Michigan (and to subsequent transferees) within six months after the earlier of: purchase, occupancy, or foreclosure. Now, however, the definition of Baseline Environmental Assessment has been simplified to mean: a "written document that describes the results of an All Appropriate Inquiry and the sampling and analysis that confirm that the property is a facility". Gone is the requirement that BEA's be able to "distinguish the new release from existing contamination." Also excised from the statute are the three categories of BEA created by the MDNRE regulations [Category-N, *no* anticipated future hazardous substance use; Category-D, *different* anticipated future hazardous substance use; and Category-S, *similar* anticipated future hazardous substance use][10]. A notice issued by the MDNRE shortly after the effective date of the Amendments, however, cautions that a person may still make the business decision to pay for a BEA which identifies a means of distinguishing old, from new, releases. Consequently, the protection a BEA affords may be illusory, if it provides insufficient information to create a clear enough picture of site conditions at the time of purchase, occupancy or foreclosure. Only time will tell how this simpler definition of BEA impacts the real estate market.

All BEAs must now be disclosed to MDNRE within six months after the earlier of purchase, occupancy, or foreclosure. However, the optional process to petition the MDNRE for a written affirmation, that the BEA is adequate to provide exemption from liability for preexisting conditions, has been deleted entirely. Since many lenders (including the Small Business Administration) made it their practice to require their borrowers to obtain such affirmations as a condition of making new loans collateralized by "facility" property, it remains to be seen whether this lack of state approval will hinder future real estate transactions.

Other Non-Liable Parties.

The Amendments provide liability clarification for tenants under leases of retail, office and commercial properties, "regardless of the level of the lessee's hazardous substance use" so long as such lessee is not responsible for an activity causing the hazardous substance release in question.[11]

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So, non-industrial tenants that use hazardous materials need not worry that they will be called to account for pre-existing environmental contamination.

A new class of non-liable party was added to the law, being persons (who might otherwise be liable) where contamination is addressed in a "no further action report" that is either approved, or deemed approved (*i.e.*, by the passage of time, with no agency response) by MDNRE.[12] The concept of *no further action* is discussed in greater detail, below.

Another significant citizen-friendly change, is a provision that places the burden of proof of environmental liability under Part 201 on the state.[13] Prior law required only that the state establish a *prima facie* case against a person, and then the accused was burdened to prove that he was not liable. Any lawyer will tell you that *who* bears the burden of proof in litigation can be a *very big deal*.

Due Care.

The so-called *due care* requirements, whereby owners or operators of facilities must take mitigating measures concerning contaminated properties, even if such person is not a "liable person" under Part 201, have been somewhat expanded. In addition to the three prior due care obligations (to prevent exacerbation; to undertake response activities to mitigate unacceptable exposure hazards; to take reasonable precautions against third party acts or omissions), the Amendments add three new due care obligations. These new due care obligations include: to provide reasonable cooperation, assistance, and access to persons authorized to conduct response activities at a facility; to comply with any land use restrictions established in connection with response activities at a facility; and to not impede the effectiveness of any land use restriction employed at a facility.[14] To this author, these additional burdens seem unlikely to represent a significant burden to most owners and operators of facilities.

No Further Action Status.

While Michigan's BEA process was, and remains, a singularly important tool for re-sale and re-use of contaminated properties, many other states relied upon voluntary cleanup programs, that would culminate in the regulatory authority in those states issuing a "no further action" (NFA) letter. That NFA letter essentially assures the responsible party that its cleanup efforts would result in the state recognizing "completion" of the cleanup, and assuring no further enforcement action would be taken against the citizen. Michigan, too, has now adopted such a voluntary, and unsupervised cleanup program.[15] Owners and operators of "facility" properties may undertake response activities with or without prior approval from the MDNRE, and then submit a "no further action report" to the state.

Where a citizen prefers prior approval from the regulators, owners may submit a response activity plan to the MDNRE, with a request for approval of all or part of the plan.[16] The department, generally, must respond (*i.e.*, either: approve; approve with specified conditions; or deny) within 150 days after receipt of the response activity plan, or approval is deemed to be given. If the department denies a response activity plan, then the department must, to the extent practical, state with specificity all of the reasons for such denial[17] and then the owner may revise, and resubmit, the response activity plan for approval.[18]

Once remedial actions are completed, owners or operators may (but are not obligated to) submit a "no further action report" to the department, detailing the completion of remedial actions. If a less stringent closure than unrestricted residential is sought, then submission of a no further action report must include a post closure plan and a post closure agreement, if appropriate.[19]

Owners or operators of properties where a no further action report is approved, must beware of the requisite contents of postclosure plans and postclosure agreements. For example, in a postclosure agreement, a provision must be added requiring notice to the department of an owner's intent to convey any interest in a facility 14 days prior to consummating the conveyance, and such conveyance shall not be closed without "adequate and complete" provision for compliance with the terms of the postclosure plan or postclosure agreement.[20]

Response Activity Review Panel.

The state has also formed a fifteen member Response Activity Review Panel to review disputes concerning assessment of risk, response activity plans, no further action reports, and other defined responsibilities.[21] Members of the panel are to be appointed by the director of the MDNRE, and are to have prescribed industry experience. They are not to be employees of the state.[22]

Aggrieved citizens may appeal a decision made by the department regarding a technical or scientific dispute concerning a response activity plan or no further action report by submitting a petition, together with a fee of $3,500.[23] Five members of the Response Activity Review Panel shall review the dispute at a public meeting within 45 days after receiving the original petition. Within 45 days after the hearing, the Panel shall make a recommendation regarding the petition and, within 60 days after written notice of the Panel's recommendation, the department shall make a final decision. The MDNRE has up to 180 days under certain circumstances to render a determination and failure to respond timely is deemed an approval. Interestingly, however, the decision of the Panel is not binding on MDNRE.[24]

Cleanup Categories:

The Part 201 Amendments reduced the number of cleanup categories to just four: residential; nonresidential; limited residential; and limited nonresidential.[25] In addition, the Amendments authorize the use of alternative site-specific cleanup criteria.[26] This will allow citizens to argue for customized solutions to specific problems.

When selecting a remedial action both the citizen *and* the MDNRE must consider a bevy of factors, including effectiveness of alternatives, reliability of the alternatives, and costs.[27]

Regulatory Restraint.

The Part 201 Amendments have several instances of what appear to be a bit of regulatory wing-clipping. First and foremost, is the creation of the Response Activity Review Panel described above, charged with advising the department, hearing appeals, and making recommendations concerning citizen disputes with the department. Also, authorization for civil fines were amended to omit references to promulgated rules, referring only to Part 201. Other provisions concerning imposition of civil fines are limited by requirements that they be "based upon the seriousness of the violation and any good-faith efforts by the violator" to comply. Neither shall be imposed "against a person who made a good-faith effort... to comply".[28]

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New Year Kicks Off With Important Tax Law Changes

By: William E. Sigler

The New Year kicks off with important new tax law changes affecting the real estate industry. On September 27, 2010, the Small Business Jobs Act of 2010 ("SBA") was signed into law, which includes a number of taxpayer-friendly changes, as well as some unfavorable changes. Then, on December 17, 2010, before the ink was even dry on SBA, the Tax Relief, Unemployment Reauthorization and Job Creation Act of 2010 ("TRA") was signed into law.

Section 179 First-Year Depreciation Deductions

Section 179 allows many small and medium-sized businesses to write off most or all of the cost of qualifying new and used assets in the first year, instead of having to depreciate the cost over a number of years. SBA doubles the maximum annual Section 179 deduction to $500,000 for eligible assets placed in service in tax years beginning in 2010 and 2011. Most types of depreciable personal property, such as computers, other equipment and furniture, and most purchased software, qualify. However, larger businesses can lose all or part of the Section 179 deduction allowance due to an unfavorable phase-out rule. Under that rule, the allowance is reduced dollar-for-dollar by the cost of qualifying assets placed in service during the year in excess of the applicable threshold. For tax years beginning in 2010 and 2011, SBA increases the phase-out threshold to $2 million. Additional changes were made by TRA. TRA provides for a $125,000 limit (indexed for inflation) and a $500,000 investment limit (indexed for inflation) for tax years beginning in 2012, but sunsetting after December 31, 2012.

Section 179 Deductions Can Now be Claimed for Real Property

Until now, real property costs were ineligible for the Section 179 deduction. For tax years beginning in 2010 and 2011, up to $250,000 of qualified improvement costs involving the interiors of leased non-residential buildings, restaurant buildings, or interiors of retail buildings can be immediately deducted under Section 179. The $250,000 Section 179 allowance for real estate improvements is part of the overall $500,000 allowance. Generally, excess Section 179 deductions that cannot be taken in the current tax year can be carried forward indefinitely. This is not true for excess Section 179 deductions relating to qualified real property. Those excess deductions can only be carried over to a tax year that begins in 2011. Thus, there is no carryover available for excess Section 179 deductions from real property placed in service in a tax year that begins in 2011. Instead, the taxpayer must depreciate those amounts under the standard rules for real property.

50% Percent First-Year Bonus Depreciation

SBA retroactively reinstates the 50% first-year bonus depreciation break to cover qualifying new (not used) assets that are placed in service by December 31, 2010. However, the deadline is extended through December 31, 2011 for certain assets that have longer production periods, including transportation equipment and aircraft. These rules were then further modified by TRA. For investments placed in service after September 8, 2010 and through December 31, 2011, TRA provides for 100% bonus depreciation. For investments placed in service after December 31, 2011 and through December 31, 2012, TRA provides for 50% bonus depreciation. TRA also allows taxpayers to elect to accelerate some alternative minimum tax credits in lieu of bonus depreciation for taxable years 2011 and 2012.

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Progress in Motion … Hotel Fort Shelby

A group of investors looking for an affordable hotel near the Fort Street Union Station purchased the property at West Lafayette and First Street in 1917 for $200,000. Hiring an architectural firm in Chicago for design work, the Classic Beaux Arts style, 10-story 450 room hotel quickly opened that same year, for the reported cost of $890,000. Being a huge success at the time, in 1926 ground was broken on the first of two 21-story expansions, this time, being designed by the hugely successful Albert Kahn. The looming Depression stopped plans for the second expansion, but the first one was completed and opened in 1927. Just 24 years later, the hotel was sold to the Albert Pick hotel chain in 1951, its 27th hotel acquisition at the time. Struggling for years, the Pick hotel closed and was sold in 1973. Interim ownership, declining rentals and population, the hotel lost its last tenant in 1998, despite receiving its historic designation from the National Register of Historic Places in 1983.

With $90 million dollars spent and restorations complete, the *DoubleTree Guest Suites Detroit Downtown - Fort Shelby* finally reopened in 2008 with 203 guest suites and permanent-living apartments, full-service restaurant, fitness center and concierge. Another grand and historic legacy still stands proudly in Detroit.

New Year Kicks Off With Important Tax Law Changes

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Break for S Corporation Built-in Gains Recognized in 2011

When a C Corporation converts to S Corporation status, the corporate-level built-in gains tax generally applies when built-in gain assets, including receivables and inventories, are turned into cash or sold within the recognition period. The recognition period is normally the ten year period that begins on the date of the *C to S* conversion. For tax years beginning in 2011, the SBA exempts gains from the built-in gains tax if the fifth year of the recognition period has gone by before the start of the 2011 tax year.

Rental Property Owners Must Issue 1099s to Service Providers

For service-provider payments made after 2010, owning rental real property will generally be considered a business for purposes of the Section 1099 information return reporting requirements. Therefore, rental property owners will generally be required to file a 2011 Form 1099 for any service provide that is paid $600 or more during 2011 for such things as property management, maintenance, landscaping, painting, accounting, etc. Also, a copy of Form 1099 must be provided to each payee. Starting in 2012, another tax law change included in the health care reform legislation will impose onerous new Form 1099 reporting requirements for payments by businesses. Since owning rental real property is now considered a business for purposes of the 1099 rules, property owners will be affected by the new requirements.

Harsher Penalties for Failure to Comply with Form 1099 Reporting Rules

Beginning in 2011, the IRS can assess much harsher penalties for failing to file Form 1099 information returns with the IRS, and failing to send copies to payees. In many cases, the penalties will be doubled. The new rules, which are quite complicated, will apply to Forms 1099 and payee statements due in 2011 and beyond.

These changes are certainly a lot to digest, and they are made all the more complicated by the fact that many of them will only be in effect for a limited period of time. In addition, this article only highlights what we consider to be some of the more important changes. If you have questions about any of the issues discussed, or if you want information about provisions that we have not addressed here, please do not hesitate to contact us.

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For years, the MDNRE has relied upon published guidelines, bulletins and, especially, operational memoranda, as authority for its policies. The Amendments, however, specifically provide that such self-published interpretations "shall not be given the force and effect of law." So, while the MDNRE may follow its own interpretations, the courts of Michigan will have no such compulsion.

Conclusion.

The Part 201 Amendments were substantive and substantial. It remains to be seen how these Amendments are received by the regulated community, but indications are that they are a step in the right direction.

Steve Sallen

Endnotes:

[1] The author gratefully acknowledges the assistance of Kasturi Bagchi in the preparation of this article.
[2] Michigan Public Act 451 of 1994, as amended.
[3] Baseline Environmental Assessment.
[4] Please refer to the following Bills passed by the 2010 legislature: Senate Bills 1345, 1346, 1347, 1348, 1349 and 437.
[5] Michigan Department of Natural Resources and Environment.
[6] When the Baseline Environmental Assessment was first enacted.
[7] CERCLA is also known as the Federal Superfund Law.
[8] ASTM International, formerly known as American Society for Testing and Materials.
[9] "any area, place, or property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located."
[10] Section 20126(7) provides that the MNDRE "shall not implement or enforce" the rules pertaining to the three categories of BEA.
[11] Section 20126(3)(j)
[12] Section 20126(4)(e)
[13] Section 20126(6)
[14] Section 20107a(d), (e) and (f)
[15] Section 20114a
[16] Section 20114b
[17] Section 20114b(3)
[18] Section 20114b(4)
[19] Section 20114d(2)(c)
[20] Section 20114d(3)(c)
[21] Section 20114e
[22] Section 20114e(3)(a)
[23] Section 20114e(7)
[24] Section 20114e(10)
[25] Section 20120a(1)
[26] Section 20120a(2)
[27] Section 20120
[28] See MCL 324.20137(1)(f), (2) and (3)

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