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State Amends Environmental Cleanup Law

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Effective December 14, 2010, Amendments to "Part 201"[1] (Michigan's pollution cleanup law) took effect. These Amendments (hereafter "Amendments") alter Michigan's groundbreaking "BEA"[2] 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.[3] 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.

Over the past year or two, MDNRE[4] 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.

BEA 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[5] 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")[6]. The AAI standard for evaluation of environmental conditions is deemed to be met if in compliance with the ASTM[7] 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.

Where property is found to be a "facility,"[8] 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]. 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.[9] 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.[10] 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.[11] 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.[12] 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.[13] 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.[14] 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[15] and then the owner may revise, and resubmit, the response activity plan for approval.[16]

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.[17] Further, the owner may request a “No Further Action letter” from the MDNRE, confirming that the no further action report has been approved after review by the department.

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.[18]

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.[19] 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.[20]

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.[21] 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 as an approval. Interestingly, however, the decision of the Panel is not binding on MDNRE.[22]

Cleanup Categories

The Part 201 Amendments reduced the number of cleanup categories to just four: residential; nonresidential; limited residential; and limited nonresidential.[23] In addition, the Amendments authorize the use of alternative site-specific cleanup criteria.[24] 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.[25]

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 was 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."[26]

For years, the MDNRE has relied upon published guidelines, bulletins and, especially, operational memoranda, as authority for its policy. 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.

[1]Michigan Public Act 451 of 1994, as amended.
[2]Baseline Environmental Assessment.
[3] Please refer to the following bills passed by the 2010 legislature: Senate Bill 437; Senate Bill 1345; Senate Bill 1346; and Senate Bill 1349. These enacted bills effectively amended sections MCL 324.126, MCL 324.20126(a), MCL 324.20114, MCL 324.20101, and MCL 324.210107a.
[4]Michigan Department of Natural Resources and Environment
[5]When the Baseline Environmental Assessment was first enacted.
[6]CERCLA is also known as the federal Superfund law.
[7]ASTM International, formerly known as American Society for Testing and Materials
[8]“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."
[9]Section 20126(3)(j).
[10]Section 20126(4)(e)
[11]Section 20126(6).
[12]Section 20107a(d), (e) and (f)
[13]Section 20114a.
[14] Section 20114b.
[15] Section 20114b(3).
[16] Section 20114b(4).
[17] Section 20114d(2)(c).
[18] Section 20114d(3)(c)
[19] Section 20114e.
[20] Section 20114e(3)(a).
[21] Section 20114e(7).
[22] Section 20114e(10).
[23] Section 20120a(1).
[24] Section 20120a(2).
[25] Section 20120.
[26] See MCL 324.20137(1)(f), (2) and (3)