ENVIRONMENTAL

PART 201 REVISIONS – STREAMLINING THE PATHWAYS TO CLOSURE

by Sharon R. Newlon

On January 10, 2015, Governor Snyder signed SB 891 into law, enacting revisions to Part 201 of the Natural Resources and Environmental Protection Act ("Part 201), Michigan's environmental remediation law. The revisions cover a number of areas, including consistency with the underground storage tank program and updated references to the Part 201 rules promulgated in 2013. Most significantly, the revisions establish new and quicker pathways to achieving partial or full closure of impacted properties.

Rethinking the Definition of "Facility"

The amendments expand the definition of properties that do not constitute Part 201 "facilities" to include:

- properties cleaned up under federal Superfund and hazardous waste laws to levels allowing unrestricted residential use,
- unimpacted properties that are lawfully divided from Part 201 facilities, and
- properties where impacts have naturally degraded to levels below unrestricted residential cleanup levels.

A facility can be limited to a portion of a parcel, and a responsible party now can propose a response activity that addresses only part of a facility – one area, one release, one hazardous substance, one type of impacted media or combinations of them. Responsible parties should be able to reach closure earlier on less complicated issues, and they can prioritize cleanup in areas to be sold or redeveloped.

Affirming a Risk-Based Cleanup System

Revisions affecting a responsible party's obligation to diligently pursue cleanup include:

- confirming that a liable party's cleanup obligations only apply to releases the party is responsible for under Part 201
- no longer requiring immediate source control or removal, but instead requiring measures to abate unacceptable risks to public health, safety or welfare or the environment
- replacing the prior obligation to immediately remove liquid phase hazardous substances (free product) with a requirement to address unacceptable risks associated with non-aqueous phase liquids (NAPL, i.e. liquids not soluble in water) using best practices for NAPL management

Further, where a release involves substances without cleanup standards or available analytical methods, the amendments provide other ways to determine the nature and extent of a release and to address it – by eliminating the potential for exposure, modelling and/or developing site-specific cleanup criteria. The amendments clarify that site-specific criteria can alter any assumption used to calculate the generic cleanup criteria other than the cancer and non-cancer risk targets. These provisions focus Part 201 toward risk management, instead of risk elimination, and allow much greater flexibility for property developers, owners and operators.

Revised definitions provide more clarity in determining appropriate remedial endpoints. They allow statistical data evaluation to determine "background;" they confirm that "source" means equipment from which a release originates and initially enters the environment; and they define non-residential and residential properties. Non-residential property includes not only industrial and commercial properties, but also recreational properties not contiguous to residential property, hotels, hospitals and campgrounds, and natural areas such as woodlands, grasslands and wetlands. Residential property includes homes and their yards, condominiums, apartments, and other properties where people live and sleep for significant periods of time.[1] The amendments also incorporate the definitions of NAPL, migrating NAPL and mobile NAPL from Michigan's leaking underground storage tank law into Part 201.

Strengthening Land and Resource Use Controls

Provisions governing land use or resource use restrictions were also revised significantly, to address obstacles encountered in obtaining MDEQ approvals. Use of an MDEQ form and MDEQ approval is no longer necessary for restrictive covenants in most cases. Third parties may be given the right to enforce restrictive covenants, and covenants can include supplemental agreements and undertakings by the property owner, including obligations:

1. to provide notice in advance of transfer or change in use,
2. to provide ongoing access to MDEQ and other named parties, and
3. to inspect or maintain exposure barriers, permanent markers, fences or other aspects of the remedy.

The covenant can also include subordination of a prior property interest if agreed to by the person holding a superior interest, such as a mortgagee. Local ordinances, State laws and regulations can be used in lieu of or in addition to restrictive covenants, and MDEQ can also approve the use of other alternative means, including licenses, contracts, health codes and governmental permits. The new provisions support, and do not invalidate, restrictive covenants or similar instruments recorded before the effective date of the amendments. The improved flexibility and enforceability of land and resource use restrictions should improve the pace of sites achieving closure.

BEA Timelines

The amendments enable a new owner/operator who misses the statutory deadline for conducting or submitting a baseline environmental assessment to be protected if s/he requests and receives a determination from the department that her/his failure to comply with the timeframes was inconsequential.

Overall, these Part 201 amendments should facilitate the investigation, remediation and closure of sites throughout the State, furthering the mutual goals of MDEQ, the regulated community and the citizens of Michigan.

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[1] The revisions reference a frequency of exposure similar to the assumptions used to develop the generic residential criteria, which include exposure frequencies between 160-350 days per year and exposure periods of 30 years.

DID YOU KNOW? The LUST Fund is Back

On December 29, 2014, Governor Snyder also signed SB 791 into law, reestablishing a state fund as a financial assurance mechanism for leaking underground storage tank (LUST) cleanup costs in Michigan. The fund, which will receive a share of the state fuel tax, is intended to replace insurance as the primary financial assurance mechanism. The deductible of $50,000 per claim for newly reported releases is higher than many current insurance policies, but owners of eight or fewer tanks will be able to lower their deductibles to $15,000 with an annual payment of $500 per tank.

DID YOU KNOW? U.S. EPA Finally Decides the Fate of Coal Ash Disposal

On December 19, 2014, U.S. EPA promulgated regulations on the management of coal ash as a solid waste. While preserving incentives for the beneficial reuse of coal ash, U.S. EPA has established standards for coal ash disposal areas that will require the closure of units that are causing groundwater pollution or don't otherwise meet the new engineering and structural standards. The regulations also address airborne impacts and mandate information sharing with the public.

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