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Environmental Law Alert - Michigan "Lame Duck" Legislature Again Revises State Environmental Cleanup Requirements

January 27, 2015 | Atlanta | Chicago | Columbus | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

Amendments of Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act (NREPA) were passed by the Michigan Legislature in "lame duck" session. Michigan Governor Rick Snyder signed into law in January 2015 Public Act 542, which creates new definitions and amends current provisions regarding remediation and cleanup at sites where hazardous substances have been released. A separate bill, Public Act 416, passed during this same time, makes significant changes to underground storage tank cleanup funding under Part 215 (UST Corrective Action Funding) of NREPA.

Definitions

The new Part 201 law updates the definition of "all appropriate inquiry" to clarify applicability of the new ASTM 2013 Phase I Environmental Site Assessment standard (E1527-13). This makes Michigan consistent with EPA's recent rulemaking and eliminates the unnecessary potential confusion and complexity of different standards applying under state and federal law.

The new law clarifies the definition of "non-residential" and "residential" uses for remedial plans. The Michigan Department of Environmental Quality (MDEQ) risk-based clean-up criteria are based on current and future land use of the contaminated site, which fundamentally distinguishes between "residential" and "non-residential" properties. These categories have prompted some confusion, and this legislation now clarifies that non-residential would mean the category of land use for parcels, or portions of parcels, that are not residential, such as any of the following:

- Industrial, commercial, retail, office, and service uses.
- Recreational properties that are not contiguous to residential property.
- Hotels, hospitals and campgrounds.
- Natural areas such as woodlands, brushlands, grasslands, and wetlands.

On the other hand, residential is defined as the category of land use for properties where people live and sleep for significant periods of time – and references the frequency of potential exposure to contaminants reasonably expected or foreseeable compared with the exposure assumptions used by the MDEQ to develop generic residential cleanup

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criteria under Part 201. Homes and surrounding yards, condominiums and apartments are examples of this category.

These Part 201 amendments also clarify that pieces of a property which have been lawfully divided from the rest of the contaminated site and do not contain hazardous substances in excess of concentrations that satisfy the cleanup criteria for unrestricted residential use are NOT a regulated Part 201 "Facility." Also excluded from the definition of "facility" are sites where natural attenuation or other natural processes have reduced the concentrations of hazardous substances below the criteria for unrestricted residential use. The previous exclusion of sites that do not fall under the definition of "facility" is amended by eliminating the requirement that MDEQ-approved site-specific criteria may not depend on any land use or resource use restriction to ensure protection of the public health or the environment.

The new Part 201 law also removes the definition of "free product" and adds definitions for "migrating NAPL," "mobile NAPL" and "NAPL" that are tied to the definitions of these terms in Part 213 of the statue, which is the underground storage tank cleanup program. Additionally, certain obligations to address a "source" existed in the statute, but now "source" is a defined term; "source" means "any storage, handling, distribution, or processing equipment from which the release originates and first enters the environment."

Environmental Diligence

In addition to clarifying which ASTM standard satisfies all appropriate inquiry under Michigan law, the new Part 201 law makes other changes to the environmental diligence process required to acquire and maintain a defense to liability under Part 201. A provision allows for possible late filing of Baseline Environmental Assessments (BEA) under certain limited circumstances. For example, if the timing requirements for completing and filing a BEA are not met, an owner or operator may request from the MDEQ "a determination that its failure to comply with the time frames [] when completing the BEA was inconsequential." The new law also relaxes contaminated site "facility" transfer disclosure notice requirements

Changes to Clean-up Criteria

The Part 201 legislation includes three main changes important to cleanup criteria determinations. First, the way the MDEQ calculates the *background* concentration of a hazardous substance is expanded beyond the 2005 Michigan Background Soil Survey, by adding additional ways of calculating the background levels based upon the site-specific location being investigated.

Another significant change regarding clean-up criteria relate to the former "free-product" references for hazardous substances in a liquid phase, by instead referencing Non-Aqueous Phase Liquids (NAPL) and including best practices for managing NAPL developed by the American Society for Testing and Materials (ASTM) or the Interstate Technology and Regulatory Council (ITAR).

Third, developing site-specific approaches in instances where there is no analytical method or generic cleanup criteria available for any particular hazardous substance is also facilitated by references to surrogates, modeling or other methods.

Risk-Based Closures and Restrictive Covenants

As part of a risk-based clean-up approach, a facility can now, in lieu of determining the nature and extent of the hazardous substance release, opt for, in essence, a presumptive remedy of eliminating the potential for exposure in areas where the hazardous substance is *expected* to be located through removal, containment, exposure barriers, or land-use or resource-use restrictions.

Throughout the Part 201 amendments, there is an emphasis on partial clean-ups. Such partial remedial actions may be based on separate parcels or areas within a site of contamination (or facility), types of hazardous substances, and impacted media.

Corrective actions under Federal RCRA or NREPA Part 111 are now explicitly correlated with Part 201 clean-ups to avoid or minimize possible duplication.

New Section 21 of Part 201 amends the Restrictive Covenant requirements for land use or resource use restrictions relied on to assure the effectiveness and integrity of a remedy. This new section clarifies the purpose of land or resource use restrictions to include: reducing or restricting exposure to hazardous substances, eliminating a potential exposure pathway, providing for access, and to otherwise assure the effectiveness of response activities being undertaken at the property. Previously-recorded covenants remain in effect and enforceable.

Institutional controls can also be accomplished by a local ordinance or other law or regulation that for instance limits or prohibits the use of contaminated groundwater, development in certain locations, or how the land is used. These alternative instruments may also include license agreements, contracts with local, state or federal governments, health codes, and government permitting requirements.

Importantly, in addition to being recorded by the real estate owner, restrictions on land and resource uses could be imposed on a property, or part of a property, as part of a conservation easement, court order, or judicially-approved settlement involving the property. A restrictive covenant must be written in “plain, everyday language” and the statute now contains very limited required provisions and other optional or variable provisions, the scope of which is similar to those contained in the model document maintained on the MDEQ’s website.

UST Corrective Action Funding

Public Act 416 was enacted separately and amends Part 215 of NREPA, now titled “Underground Storage Tank [UST] Corrective Action Funding.” This law creates a new administrative authority, the Underground Storage Tank Cleanup Fund Authority. Significantly, a portion of the fuel tax will be used to establish and finance a new UST Clean-up Fund, administered by the new Authority, to help owners with UST financial assurance requirements and eventually replace private insurance.

For more information, contact the Barnes & Thornburg environmental attorney with whom you work, or one of the following attorneys in the firm’s Environmental Law Department: Charles Denton at charles.denton@btlaw.com or 616-742-3974; or Tammy Helminski at

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