

## Environmental E-news

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### Self-Implementing Cleanups and "No Further Action" Letters

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Butzel Long recently informed you that a package of bills reflecting significant amendments to Michigan's cleanup and liability protection laws passed the State House and Senate, and were awaiting the Governor's signature. Those bills were signed into law and became effective on December 14, 2010.

Two provisions of the new laws concern (a) self implementing cleanups and (b) letters that the Michigan Department of Environmental Quality ("MDEQ") (yes, effective January 4, 2011, it is back to being called DEQ) is now authorized to issue stating that there is no further response action required at a site. This alert provides a brief overview of these two new provisions.

In the past, a person who undertook response activities at a contaminated site, prepared a plan on how it would investigate and remediate the site, sent the plan to MDEQ for approval, and then, once approval was obtained, implemented the response plan. The preparation of the plan could be time consuming and costly. The approval process could also be time consuming and costly, delaying cleanups. Additional costs and delays occurred when MDEQ raised issues or wanted additional investigation conducted before it would approve the plan. The new amendments include several tools to simplify this process. One tool is to allow for self-implementing response activities without going through the MDEQ approval process. Under the new section MCL 324.20114a, a person may undertake response activities without prior MDEQ approval if response activities are not already being conducted under an agreement with, or order by, the state. The amendments also allow a party who has completed a remedial action to submit to MDEQ a report documenting what was done and requesting that MDEQ provide a letter stating that no further response action is required. These amendments do not change the liability scheme or the obligation of persons responsible for the contamination to remediate the contamination. The amendments also do not alter MDEQ's ability to require additional response activities if MDEQ believes they are required. The amendments simply make clear that a party is not required to seek and obtain MDEQ approval for the remediation.

If a party conducting a remediation wants some assurance that the plan being implemented is acceptable to MDEQ, under section MCL 324.20114b, the person may submit to MDEQ a **response plan** for the proposed action and a request for MDEQ to approve that aspect of the remediation. MDEQ has 150 days (180 if public participation is required) to either approve, approve with conditions or deny the plan. If MDEQ does not respond timely, the plan is deemed approved. The deadlines can be extended in writing by mutual agreement of the requestor and MDEQ.

Once the remediation is completed, a post-closure plan for the site must be prepared if it is not remediated to an unrestricted residential cleanup criteria, but requires some other control or action for protection to human health or the environment, such as groundwater use restrictions, monitoring, containment, exposure controls, or barriers, etc. MCL 210.114c. The plan must include both (1) the applicable land use or resource use restriction and (2) permanent markers to describe the restriction. Although, the permanent markers are not required for a number of different situations. For example, markers are not required if the restriction is for groundwater use. Markers may not be required for contamination in the soils if the exposure controls involve maintaining asphalt, concrete or landscaping material, or limits on construction on the property. Even if a marker is not required, a restrictive covenant will still be required for land use and resource use restrictions "that assure the effectiveness and integrity of the remedy." MCL 324.20114c (3). The amendments specify the contents of the restrictive covenant and require the format for restrictive covenants be posted on the MDEQ website. A restrictive covenant shall not indicate approval by MDEQ unless MDEQ has actually approved the recording of the restrictive covenant.

The amendments also require the remediating party provide notice of the land use or resource use restrictions to MDEQ and local zoning authority. Noteworthy, the amendments do not place an obligation on the zoning authority to include the restriction in a master plan, ordinance or any other mechanism.

Once remediation is complete and the property satisfies the applicable cleanup criteria and the other requirements, such as the post-closure plan, the party may submit a **report to MDEQ requesting a No Further Action letter**, as noted above. MCL 324.20114d. MDEQ must develop a form for the report requesting a No Further Action letter. The report form must be posted on MDEQ's web page. MDEQ has 150 days (180 if public participation is required) to approve or deny the report requesting a No Further Action letter, or request more information. MDEQ may also negotiate a post closure agreement, discussed below. As with the response report, if MDEQ fails to approve the report requesting a No Further Action letter within the timeframe, it is deemed approved.

If the report is approved and a No Further Action letter is issued by MDEQ, then the facility will be considered achieving a closure. If, as part of the closure, certain activities are required, such as monitoring, operations and maintenance, or oversight to ensure the effectiveness and integrity of the remedy, then MDEQ will require the party to enter into a post-closure agreement with MDEQ for these activities. If the costs of the activities are of any significance, then the **post-closure agreement** may also include some type of **financial assurance** to ensure that the activity will be conducted. The agreement will also require the owner of the property to provide MDEQ with **notice of any sale** 14 days prior to the transfer of the property. There is some flexibility with the agreements and their modification as conditions change. There is also flexibility with the restrictive covenant if it is impractical. For example, it may be impractical to place a restrictive covenant over a large area with multiple owners to limit groundwater use. In such a case, an ordinance may be allowed.

The ability to remediate a property without being required to seek MDEQ approvals should speed up some response activities and reduce costs. The remediating party should keep in mind the risk that once the response activity is complete, MDEQ may ask for additional work. The "No Further Action" letter could also be a good tool to facilitate property transfers and financing. Although,

again, the risk is that MDEQ may require additional response activities before it will issue a letter. It will also be interesting to see how the financial assurance requirements will be implemented.

If you would like more information about the foregoing or any other environmental law needs, please feel free to contact one of the following Butzel Long lawyers:

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