

Environmental E-news

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Changes to Michigan's Laws for BEAs and Cleanups are Imminent

Long awaited changes to Michigan's brownfield cleanup and liability protection laws championed by the industry and business communities have passed the Michigan House and Senate and are being readied for submission to the Governor for approval. Part 201, Environmental Remediation, of the Natural Resources & Environmental Protection Act, which regulates the cleanup of contaminated sites in Michigan and provides liability protection for buyers of contaminated sites, has long been criticized as a deterrent to closure of site remediation, with State approval of remedial action plans and Baseline Environmental Assessments ("BEA") subject to standards and criteria often not supported by statute or regulation, with no opportunity for technical appeal. Recently adopted legislative reforms seek to remedy many of these criticisms and increase the number of site closures, allow for transparent decision-making with respect to required regulatory approvals, and more closely align liability protections available under state law with federal liability protections. Some highlights of the Part 201 revisions include:

- BEAs will no longer be investigations designed to define existing conditions or based on categories of use. Instead, BEAs will be investigations consistent with EPA's All Appropriate Inquiry (AAI) requirements as set forth in 40 CFR Part 312. This investigation and resulting report is basically the Phase I (Phase II investigations may be necessary in some instances) investigation most of us are familiar with and is already used by most consultants and environmental professionals in performing Phase I investigations. The investigation can follow the ASTM E1527-05 standards or those standards set forth in the federal rule, which are for the most part nearly identical. In addition to this AAI report, data indicating the site is a "facility", i.e., contaminated, must be also submitted. Existing rules inconsistent with the new BEA concept, including those providing for MDNRE determinations will be repealed. Because many lending institutions, including the United States Small Business Administration and the Michigan State Housing Development Authority, require BEA-affirmation from MDNRE, MDNRE will have to decide whether to promulgate new rules providing for such reviews.
- The ability for property owners or operators to conduct self-implemented cleanups or MDNRE-involved cleanup following remedial action plan approval.
- No Further Action letters will be issued by MDNRE upon completion of cleanup activities.
- Establishment of specific timeframes in which MDNRE must review reports; reports are automatically approved absent MDNRE comment within the given timeframes.
- Clean-up criteria limited to residential and nonresidential, with the ability to seek site-specific cleanup criteria from MDNRE in certain circumstances.

- Creation of a Response Activity Review Panel comprised of 15 members appointed by the MDNRE Director to advise the Director on technical or scientific disputes and provide a mechanism to appeal MDNRE staff determinations.
- Augmented due care obligations to include cooperation and site access.

What happens to BEAs previously denied by MDNRE on technical grounds? Will completion of a BEA pursuant to the new Part 201 protect you under federal law? Is a Phase II necessary to obtain liability protection? How are State due care obligations different than federal due care obligations? Butzel Long's environmental specialists can assist in answering these questions as well as others you may have regarding the changes to Part 201. Give us a call to discuss your concerns.

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