

Guidelines

Authority

These guidelines are being promulgated by the Department of Environmental Quality (DEQ) under Section 24 of the Administrative Procedures Act, 1976 PA 306, as amended (APA), MCL 24.221 *et seq.* to provide direction to DEQ staff on the implementation of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.20101 *et seq.*, and the associated administrative rules. As formal guidelines established under the APA, this direction is binding on the DEQ, but does not limit or affect the rights of persons outside the agency. These guidelines are being promulgated in conjunction with administrative rules for Part 201 (Rules) that are expected to take effect on December 21, 2002.

Definitions

Terms defined in Part 201 and the Rules have the same meaning when used in these guidelines.

Background

1995 Statutory Amendments

Part 201 was extensively amended in 1995, establishing a causation-based liability scheme for owners and operators of facilities. Those amendments had three primary goals:

- Provide for fairness in the liability scheme for owners and operators.
- Facilitate redevelopment of contaminated properties.
- Reduce excess conservatism in cleanup criteria and associated requirements.

Inconsistencies within the Statute

Fundamentally, Section 20118 of the NREPA gives the DEQ broad authority to decide what response activity is necessary to protect the public health, safety, or welfare, or the environment. An important corollary to that authority is the ability to determine when a response activity is complete. It is the clear and consistent exercise of these authorities that creates finality. During development of the 2002 Rules, an issue that became the subject of debate was whether achieving a complete response activity actually resolves liability. A broad interpretation of the language in the statute regarding the need for response activity to assure protection of the public health, safety, and welfare, and the environment suggests that response activity is never complete, or at least that liability is never extinguished. In contrast, the causation liability scheme, the land use based cleanup criteria, the explicit language regarding deed restrictions, taken together with the language in Section 20107a of the NREPA detailing the responsibilities of nonliable owners and operators, suggest that the Legislature intended that property where response activity has been completed can be transferred to new owners or operators without continuing transferor responsibilities outside of those activities required to assure the effectiveness and integrity of the response activity (e.g., operation and maintenance) and the traditional obligations of a real estate transaction. In short, the response activity could be compared to a "build-to-suit" agreement where a seller constructs the remedy that is

adequate for a proposed use of the property, and his obligation is satisfied upon Buyer's acceptance of the property after all appropriate disclosures have been made and due diligence conducted. Through these guidelines, the DEQ is attempting to establish an appropriate balance between these conflicting interpretations in order to produce the fairest outcome.

Reintroduction of Facilities into Productive Use

One key provision of the 1995 amendments that was intended to facilitate redevelopment is the baseline environmental assessment (BEA) process. By allowing new owners and operators of contaminated property to acquire that property without taking on liability for existing contamination, the Legislature eliminated a major obstacle to the sale and reuse of contaminated property. However, to balance the desire for redevelopment with the need for careful attention to the ways in which property use must be modified or controlled in response to the presence of contamination, the Legislature imposed certain requirements under Section 20107a of the NREPA, commonly referred to as the "due care obligations." The creation of due care obligations, along with the extensive statutory language regarding deed restrictions (Section 20120b) and notice of facility conditions (Sections 20116 and 20126(1)(c)(ii)) suggest that properties where response activity is complete are to be introduced into commerce with the new owner and operator accepting some level of responsibility. These guidelines are designed to respect the obligations of buyer and seller created under real estate laws, while at the same time trying to place responsibility for further response activity on the person whose action necessitates that change.

The Rules create the presumption that a complete response activity is protective until some future event causes reevaluation of that conclusion. In these guidelines, the DEQ is establishing the principle that the response activity deemed necessary and appropriate in direct response to a release at a facility may be different from that which is necessary and appropriate at a facility after a response activity has been completed but a new question of protectiveness arises. Accordingly when some type of change requires that technical measures be reevaluated, the DEQ will also perform an analysis to determine who should perform any addition response activity. The analysis should focus on whose behavior resulted in the need for further response activity. An inquiry into who caused the release(s) that was responded to in the initial action is of secondary importance and possibly irrelevant if the property has been transferred, except in the case of changes in cleanup criteria, as discussed below.

Guidelines for Compelling Additional Response Activity Subsequent to a Complete Response Activity

As a general rule, persons who have completed response activity shall not be subject to further demands from the DEQ for response activity unless their own actions or omissions have compromised the effectiveness of the response activity. Staff are to seek additional response activity first from the person whose action or omission gives rise to the need for additional response activity or, alternatively, from the owner or operator who controls the facility. Exceptions to these principles shall be limited and consistent with the rationale described herein for evaluating potential claims.

(1) If a response activity is determined not to have been complete, or was complete but nullified under the provisions of R 299.5520(11), the DEQ may do any of the following:

- (a) Require further response activity.
- (b) Allow unacceptable risk that exists to be addressed as a due care obligation of any person who is subject to Section 20107a of the NREPA.
- (c) Perform response activity and recover from a person who is liable all costs of response activity that were lawfully incurred.
- (d) Pursue penalties under any of the applicable provisions of the NREPA.
- (e) Take any other action authorized by the NREPA.

Items (2) through (5) below clarify who the DEQ expects will have the obligation to perform additional work as described in Item (1):

(2) Continuing owner or operator. If a person completes response activity at a facility and continues to own or operate that property, the DEQ will not pursue further response activity from that person unless the person's subsequent actions render his or her complete response activity ineffective in protecting the public health, safety, or welfare, or the environment, or unless Item 4(a) applies. Examples of a continuing owner or operator's subsequent actions that could trigger a DEQ demand for further response activity include:

- A change in land use to a use that presents greater potential for exposure than the land use upon which the initial response activity was based.
- An action that causes a release or threat of release.
- Failure to perform any component of the response activity.
- Failure of any component of the response activity to meet performance objectives.

(3) Subsequent owner or operator. At any property where a person other than the current owner or operator has implemented a complete response activity, and a subsequent owner or operator of the facility engages in an activity (including a change in land use) that either violates a land or resource use restriction or causes the complete response activity to no longer be protective, the DEQ will seek additional response activity from the property owner or operator whose action gave rise to the situation that requires additional response activity. Examples of subsequent actions that could trigger a DEQ demand for further response activity to be undertaken by a subsequent owner or operator or anyone else engaged in those actions are:

- A change in land use to a use that presents greater potential for exposure than the land use upon which the initial response activity was based.
- An action that causes a release or threat of release.
- Failure to comply with deed restrictions relating to the complete response activity.
- Damage to or interference with any ongoing response activity required to be operated or maintained

If efforts to compel additional response activity under the preceding guidelines fail or are not possible under Part 201, under certain circumstances, the DEQ will seek additional response activity from a liable person who undertook the original response activity. Generally, this approach is discouraged. However, it may be appropriate if the current owner and operator are unable to pay for the necessary response activity and the equities of the situation and/or the availability of public funding or financial assurance dictates that it is appropriate to seek response activity from the original liable party. Examples of

situations where it is appropriate for the DEQ to pursue a liable party who implemented the original response activity are:

- The liable party transferred the property to a “shell” corporation that is inadequately financed to manage its environmental liabilities.
- The current owner or operator has insufficient resources or is in bankruptcy.
- The current owner or operator cannot be located.
- Financial assurance for the response activity cannot be located, is inadequate or cannot be accessed by the DEQ.

(4) *Subsequent change in cleanup criteria.* The DEQ will not apply more stringent generic cleanup criteria subsequently developed under R 299.5706a or changed through the rule-making process as a basis for demanding additional response activity unless the Director of the DEQ makes a determination that a new or changed cleanup criterion renders response activity no longer protective of the public health, safety, or welfare, or the environment. The Director may make this determination either on a facility-specific basis, or require all parties who undertook response activity that addressed a hazardous substance with a changed criterion to reevaluate the response activity to determine whether it complies with the new or revised criterion. In addition to situations where a generic cleanup criterion changed through the rule-making process, a person whose response activity was based on a site-specific cleanup criterion may be required by the DEQ to reassess the adequacy of that response activity if the Director determines that new information calls into question the protectiveness of the site-specific criterion.

Under any of these processes, if the Director determines that a response activity does not comply with a new or revised cleanup criterion, additional response activity will be required as described in the lettered items (a), (b) or (c), below.

When revising response activity to satisfy a new cleanup criterion, a person has the full range of options under Section 20120a(1) and (2). A person may, as a result of the need to comply with revised cleanup criteria, change the category of cleanup criteria being relied upon. This may involve imposition of land or resource use restrictions implemented in compliance with Section 20120b and the relevant Rules, and may necessitate revised or additional elements under Section 20120b(3).

(a) Continuing owner or operator. If the person who implemented the response activity is still the owner or operator of the facility, and is liable, he or she must either revise the initial response activity to comply with new criteria or implement due care measures to address any unacceptable risks. If the person who implemented the response activity is not liable, he or she is required only to comply with any due care obligations that arise from the changed criteria. The choice between revising the original response activity or dealing with the issue under due care is the option of the property owner/operator, except with regard to contamination that has migrated beyond the boundary of property owned or operated by the liable person. If contamination extends off the property, a liable owner or operator of the facility cannot limit his or her response to compliance with due care and must undertake additional response activity to assure that the off-property risks are addressed in a manner that complies with Part 201.

(b) Subsequent owner or operator. If the person who implemented the response activity is no longer the owner or operator of the facility, staff will generally seek to

have the current owner or operator of the property address the changes in cleanup criteria through due care compliance measures. However, for aspects of the formerly complete response activity that are not covered by the new owner's or operator's due care obligations (generally, contamination that has or will migrate off-site, including soil contamination that will contaminate groundwater, or groundwater surface water interface compliance issues), staff will demand additional response activity, if necessary, from a liable party who implemented the response activity.

(c) Response activity achieving generic residential cleanup criteria. If a generic residential cleanup criterion changes after a response activity is complete, it will be the responsibility of the current owner or operator to review the impact of the change and determine whether additional response activity is necessary, unless the person who completed the response activity did not disclose enough information about the condition of the property for the current owner to have knowledge of the potential issue. If a subsequent owner or operator of the property does not know or have reason to know that his or her property had been a facility and consequently is a facility as a result of the residential cleanup criterion change, the DEQ will look to the person who completed the response activity and who was liable for any additional response activity. If the person who completed a generic residential cleanup is still the owner or operator of the property at the time a criterion changes, that person is required to undertake any additional response activity necessitated by the change (following the options described above). If the issue is adequately dealt with through the owner's and operator's due care compliance, no further action will be required of the original implementing party to address the changed criterion. However, if the contamination extends beyond the property boundary such that due care obligations will not provide an adequate response, the liable party is responsible for any modifications to the original response activity to address the off-property issues.

(5) Penalties. Staff may seek penalties for violations of the NREPA and/or seek additional enforcement in relation to response activity that is no longer complete in accordance with the DEQ Compliance and Enforcement Policy and other relevant directives.

Matters not Addressed by the Definition of Complete

The DEQ views the following issues to be outside the scope of the definition of complete, such that a person's obligation to address an issue or comply with these requirements is unaffected by having achieved complete response activity:

Natural resource damages.

Citizen suits or other civil actions under Section 20135.

Penalties under the NREPA or an administrative or judicial agreement or order.

Compliance with Section 20107a.

Compliance with Section 20117.

Compliance with disclosure requirements in Sections 20116 and 20126(1)(c)(ii).

Staff are to pursue these issues according to the DEQ Compliance and Enforcement Policy and other relevant directives.

Guidelines for Implementation of the 2002 Rules

Staff are to begin full implementation of the Rules on their effective date. Submittals such as remedial action plans, closure reports, and other facility-specific reports are to be reviewed for compliance with all of the relevant requirements of the Rules and the statute. The administrative record for all document reviews and other actions should be clear and complete with regard to compliance with the Rules.

Note that there is not a later effective date for the cleanup criteria, or a phase-in period as has been the custom when criteria were revised in the past. Staff are to review submittals that involve compliance with cleanup criteria in light of the criteria that are part of the Rules. Staff may exercise judgment about whether the site investigation and characterization process was adequate in light of any criteria which differ from those in place at the time the investigation was conducted. Additional characterization and/or revisions to proposed response activity that are designed to meet revised cleanup criteria may be required by the DEQ Remediation and Redevelopment Division Chief to assure compliance with the current Rules.

Staff are reminded that compliance with cleanup criteria is an element of the definition of complete and that any DEQ determinations under Section 20114(5) that response activity is complete must be based on the cleanup criteria in the Rules.