Legislature Passes Significant Changes to Environmental Remediation Statute

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Michigan Governor Rick Snyder recently signed into law 2014 Public Act 542, which enacts several significant changes affecting property transactions and cleanups of property under Part 201 of the Natural Resources & Environmental Protection Act ("Part 201"), as amended. This legislation will take effect 91 days after the 2014 legislative session ended. Some of the important changes resulting from the legislation – which will provide the Department of Environmental Quality more flexibility to work with businesses in dealing with contaminated sites – are discussed below.

NEW DEFINITION FOR DUE DILIGENCE STANDARD

"All appropriate inquiry," which is the due diligence standard for phase I environmental site assessments that can become part of baseline environmental assessments, will be redefined through this legislation as an evaluation in conformity with Federal Regulation, 40 CFR 312 (2014). See MCL 324.20101(c). This amendment allows the use of the 2013 ASTM 1527-13 Standard, in addition to the previous 2005 ASTM Standard 1527-05 and the 2008 ASTM Standard E2247-08, which applies to forestlands or rural properties.

NEW DEFINITION OF "FACILITY"

"Facility" is redefined more narrowly to cover a portion of parcels or parcels where hazardous substances exist in excess of cleanup standards for the unrestricted residential use, subject to exclusions for sites where:

- response activities have been completed that meet the unrestricted residential use;
- corrective actions under Part 111 (the Hazardous Waste Management Act) or Part 213 (leaking underground storage tank) have satisfied cleanup for unrestricted residential use;

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- site specific cleanups have met site specific criteria as long as any other hazardous substances meet criteria unrestricted residential use;
- properties whose only hazardous substances are present relate to the placement, storage or use of beneficial use byproducts or inert materials, properties have been lawfully split, divided or subdivided from a “facility” and do not contain hazardous substances in excess of cleanup criteria for unrestricted residential use;
- and properties in circumstances when natural attenuation or other natural processes have reduced levels to below cleanup criteria for unrestricted residential use.

See MCL 324.20101(s).

“NONRESIDENTIAL” AND “RESIDENTIAL”

Cleanups in Michigan are categorized based on whether the properties being cleaned are viewed as "nonresidential" or "residential" in nature. “Nonresidential” is defined as property that is not residential, including:

- industrial, commercial, retail, office and service use, recreational properties that are not contiguous to residential property;
- hotels, hospitals and campgrounds;
- and natural areas such as woodlands, brush lands, grass lands and wetlands.

See MCL 324.20101(ii).

“Residential” is defined as parcels, portions of parcels where people live and sleep for a significant portion of time such that the frequency is reasonably expected to meet the exposure assumptions for generic residential cleanup criteria and includes homes, yards, condominiums and apartments. See MCL 324.20101(ss).

PROPERTY TRANSFER DISCLOSURES

Section 20116 of Part 201 has been revised to clarify that a person who has knowledge or information or is on notice through a recorded instrument that the property is a “facility” shall not transfer that property without providing written notice disclosing the general nature and extent of hazardous substances released and any land or resource use restrictions that are known to apply. See MCL 324.20116(1). A restrictive covenant or notice that is recorded will satisfy this requirement. *Id.* An owner for which notice has been recorded in connection with a transaction may submit upon the completion of response activities under this Part a certification that the response activity is complete. See MCL 324.20116(2).

NEW CLEANUP OPTIONS AND STANDARDS

The new amendments also address some of the provisions regarding cleanups. For example, cleanups can address less than all releases, all hazardous substances, contamination in all media, or contamination in all portions of a "facility." See MCL 324.20118(2). This provision means that a party can clean up one particular release, one type of hazardous substance, contamination in one media or only one area of contamination. *Id.* This amendment should allow parties greater flexibility in undertaking cleanups and receiving recognition for the cleanup that is complete.

The legislation clarifies the definition of "background concentration." See MCL 324.20101(e). It also clarifies that an immediate response to stop and prevent a release at a "source" relates to storage, handling, distribution or processing equipment from which the release originates and enters the environment. MCL 324.20101(zz). Immediate measures required in response to a release are conditioned not only on whether they are technically practical and cost effective but also on whether they are needed to abate an unacceptable risk to public health, safety or welfare or the environment. MCL 324.20114(1)(d). Thus "unacceptable risk" trigger is a new qualification. Furthermore, cleanups of liquid phase materials can now be based on best practices of the American Society for Testing and Materials and the Interstate Technical and Regulatory Council, which focus on nonaqueous phase liquids. (NAPLs).

RESTRICTIVE COVENANTS, ORDINANCES OR OTHER RESTRICTION OPTIONS

The legislation intends to recognize that restrictive or limited cleanups can be accomplished not only through restrictive covenants but also through institutional controls such as an ordinance or alternative instruments. See MCL 324.20121. The legislation appears to eliminate the past preference for restrictive covenants by eliminating a requirement to show "impracticality" before opting for ordinances as an institutional control. MCL 324.20121(8). This legislation also recognizes several other options such as licenses, agreements, and other documents accepted by the MDEQ as alternate institutional control mechanisms.

In the amendments, Section 20121 would provide the following requirements regarding a restrictive covenant: (a) description of the property; (b) a brief narrative description of response activities and contamination of the property; (c) description of the activity and use limits; (d) a grant to the Department to enforce the restrictive covenant; and (e) a signature of the owner. Moreover, restrictive covenants may include (a) a provision requiring notice to the Department and other persons upon transfer or before construction or changes in use; (b) a provision granting rights of access to the Department or other persons to monitor compliance, take samples and implement response activities; (c) a provision subordinating any property interests that would otherwise have priority; (d) a provision granting right to enforce to other persons, including local units of government and USEPA; (e) a provision requiring the owner to inspect and maintain exposure barriers, permanent markers and fences; (f) a provision limiting restrictive covenants to a specific period or an occurrence of a specific event, such as completion of additional response activities as approved by the Department; and (g) a provision providing notice of exceedances that contaminants above aesthetic criteria. See MCL 324.20121(2)-(3). The restrictive covenants also would require that the restrictive covenant run with the land and be perpetual (unless its terms allow for termination of the restriction), and a legal survey showing the portions restricted. See MCL 324.20121(5). The amendments further allow for conservation easements, court orders or judicially approved settlements to accomplish the restrictions. See MCL 324.20121(7).

In terms of institutional controls such as an ordinance, the proposed legislation would require local governments to provide at least thirty (30) days notice to the Department about any changes in lapse or termination of the ordinance. See MCL 324.20121(8).

The legislation also clarifies that a restrictive covenant will not be rendered enforceable if it is not appurtenant to an interest in real property, the right of enforcement is assigned, common law has not recognized the restriction traditionally, the restriction imposes a negative burden or an affirmative obligation on persons having an interest in property, there is no privity of estate or contract, or the fact that an owner of the land and the person benefitted or burdened are the same person. MCL 324.20121(11). Prior restrictive covenants will be left unaffected by this legislation.

UNTIMELY BEAS MAY STILL BE ACCEPTABLE

Finally, the amendments will allow for a baseline environmental assessment (BEA) to be submitted after the six (6) month period following purchase, occupancy or foreclosure, as traditionally required. This change would allow a party to demonstrate and the Department to determine that a failure to comply with the timeframe for conducting and disclosing the BEA was inconsequential and to allow such a BEA to provide a legal defense to that party. See MCL 324.20126(1)(c)(ii).

If anyone has questions about these amendments, please feel free to contact one of this firm's environmental attorneys.