

PART 201
CITIZEN'S
GUIDE

Baseline Environmental Assessments -- BEA

Liability protection for new or prospective owners or operators of contaminated property

This handout is designed for the person who is buying, leasing, or foreclosing on property that might be contaminated. A person can buy, lease, foreclose, or redevelop contaminated property and not become liable for cleanup of the property if they: 1) complete a baseline environmental assessment (BEA) and, 2) disclose it to the Department of Environmental Quality (DEQ) and subsequent purchasers and transferees of the property -- as specifically outlined under Part 201 (Environmental Remediation) of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA).

Also outlined is how to determine if a property is contaminated and whether it meets the definition of a "facility" under Part 201. If the property is a facility, this handout provides information on conducting a BEA to provide liability protection for the existing contamination.

◀ ◀ **NOTE** ▶ ▶

There are immediate time frames that must be met in conducting, completing, and disclosing a BEA to the DEQ; please refer to the section on Time Frames.

This is a guidance document. A thorough review of the statute/administrative rules/guidelines should be completed before making site-specific decisions.

The Part 201 statute, BEA and Due Care Administrative Rules, BEA Instructions, and guidelines are available electronically at this DEQ web site: www.michigan.gov/bea.

DUE DILIGENCE

Is this property contaminated?

A potential owner or operator is obligated to make appropriate inquiry (or, as it is often called, perform due diligence) as to whether environmental contamination is present on a

piece of property. The initial step is to ask the seller or owner about any known environmental conditions. The next step is to conduct an environmental assessment of the property. The American Society for Testing Methods (ASTM) Phase I and II environmental assessments (ASTM E1527 and E1903) or equivalent can be used as guidance (see Sources of Information).

Phase I assessments involve inspecting the property and collecting historical and current information to evaluate the potential for environmental contamination. The Phase I assessment involves a review of regulatory agency files, historical maps, and past uses to evaluate the potential for contamination to exist. A walk-through of the property can identify potential contamination sources. The Phase I report will conclude with a list of Recognized Environmental Concerns (REC). An environmental professional can assist in determining if it is necessary to proceed to a Phase II (or equivalent) investigation. The Phase II assessment involves further investigation into the RECs, including collecting soil and/or groundwater samples, determining if underground tanks are present, and identifying abandoned containers and their contents.

A fact sheet on Michigan's environmental cleanup program from ...



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IS THIS PROPERTY A FACILITY?

The information gained in the Phase I and II assessments is used to determine whether the property is a facility under Part 201. The concentration of hazardous substances at the property is compared to the residential criteria, the state's most protective cleanup criteria, provided in the DEQ's Part 201 Rules 744-752 (www.michigan.gov/deq select Land, Land Cleanup, Site Investigation and Cleanup; scroll down to Laws & Rules, select Part 201 Rules). If the contaminant concentrations do not exceed the residential criteria, then the property is not a facility as defined by the NREPA. Documentation of this conclusion should be maintained by the new owner or operator to show that they have conducted due diligence in accordance with Section 20126(3)(h) of the NREPA. If the contaminant concentration does exceed one or more residential criteria, then the property is a facility. A BEA may be the next step for properties that are facilities. Potential owners or operators may wish to discuss the necessity for a BEA with their environmental consultants and their attorneys. There may be other options for resolving potential liability in certain circumstances.

BASELINE ENVIRONMENTAL ASSESSMENTS

Part 201 defines a BEA as "an evaluation of environmental conditions which exist at a facility at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the facility so that in the event of a subsequent release, there is a means of distinguishing the new release from existing contamination." The purpose of the BEA is to establish the means to distinguish a new release from pre-existing contamination so the new owner or operator is not held liable

for responding to releases caused by others. The BEA provides liability protection for known and unknown contamination under specific "Parts" of the NREPA:

- ▶ Part 201 (Environmental Remediation)
- ▶ Part 213 (Leaking Underground Storage Tanks)
- ▶ Part 31 (Water Resources Protection)
- ▶ Part 17 (Michigan Environmental Protection Act)
- ▶ Part 615 (Supervisor of Wells)
- ▶ Part 625 (Mineral Wells)

A BEA does not provide protection from liability under other state and federal laws, including:

- ▶ Landfills regulated under Part 115 of NREPA,
- ▶ Treatment, Storage, and Disposal (TSD) facilities regulated by the federal Resource Conservation and Recovery Act (RCRA) and Part 111 (Hazardous Waste Management) of the NREPA,
- ▶ Underground storage tank operational requirements under Part 211 of the NREPA,
- ▶ Federal Comprehensive Environmental Response and Compensation Liability Act (CERCLA) and Superfund. The U.S. Environmental Protection Agency (USEPA) and DEQ have entered into an agreement that the USEPA will not take action against a person who has done a BEA unless the facility is on the federal National Priority List, federal funds have been spent to respond to conditions at the facility, or there is an imminent danger to the public health, safety, welfare, or the environment.

BEA CATEGORIES AND FUTURE HAZARDOUS SUBSTANCE USE

The BEA must contain information on how the new owner or operator will use the property and

what type of hazardous substances will be used, stored, handled, etc., on the property. BEAs are divided into three categories based on the hazardous substance use by the new owner and operator compared to the existing contamination:

- Category N: No significant hazardous substance use by the new owner or operator.
- Category D: The hazardous substances to be used will be different from the existing contamination.
- Category S: The hazardous substances to be used will be the same as the existing contamination.

Hazardous substances are defined in Part 201 as:

- ▶ Materials that the DEQ has determined will pose an unacceptable risk to the public health, safety, welfare, and the environment,
- ▶ Hazardous substances as defined in CERCLA,
- ▶ Hazardous wastes as defined in Part 111,
- ▶ Petroleum as described in Part 213.

Significant hazardous substance use is that which exceeds the quantities that are commonly used for typical residential or office purposes. Significant hazardous substances do not include:

- ▶ Gasoline, oil, or other vehicle fluids that are contained in vehicles traversing the property or parked there on a short-term basis,
- ▶ Storage of hazardous materials for retail sale in packaging and quantities consistent with use by occupants of residential dwellings,
- ▶ Hazardous substances contained in abandoned containers that are appropriately identified in the BEA as being abandoned or discarded.

In determining what the future hazardous substance use will be, it's important to evaluate the complete operation of the property, including the process materials, waste materials, hazardous substances used for maintenance and repair of the equipment and facility, equipment fluids, fuels, etc. A new owner must also take into consideration significant hazardous substance use by all tenants and operators who, at the time the BEA is completed, are currently in possession of, or are under agreement to take possession of all or part of the property. To determine the appropriate category of BEA, the significant hazardous substance use must be compared to the contaminants that are known or are likely to be present at the property.

If the owner or operator changes their hazardous substance use in the future, they can submit supplementary information to the DEQ that provides a mechanism to differentiate the new hazardous substance from the existing contamination. This will be filed with the BEA for future reference, but does not modify the original BEA.

BEA CONCLUSIONS

The conclusion is a vital part of the BEA. It must detail specifically how the BEA will be used to differentiate a new release from the existing contamination and why the information in the BEA is sufficient. The process and logic must be clearly explained so that a person can pick up the BEA in future years and use it to differentiate between an accidental release that has occurred and the pre-existing contamination. For a category N, the conclusion must include the language in BEA Rule 907(2)(h) stipulating that hazardous substances will not be used. For a category D, the body of the BEA must have sufficient information and data to support the

conclusion that the hazardous substances that will be used are not already contaminants on the property. For a category S, the conclusion must provide a method to differentiate a new release from the existing contamination and contain sufficient details and data to support that method. The method may include site characterization, engineering controls, isolation zones, stipulated conditions, or a combination of methods. The isolation zone or engineering control must address the entire area of existing contamination, rather than just the new storage or use area. There is specific language in BEA Rule 909 that must be in the petitioner's and consultant's affidavits when relying on engineering controls, isolation zones, or stipulated conditions.

BEA TIME FRAMES: CONDUCT, COMPLETE, SUBMIT

A BEA must be conducted prior to or within 45 days after becoming the owner or operator. Conducting means field work and sample analysis must be completed, conclusions drawn, and the basis of the BEA report written. The BEA must be completed within 60 days of becoming the owner or operator. The extra 15 days is allowed to finalize the report. The BEA must be submitted to the DEQ within 6 months of the date of completion for a petition and 8 months from becoming the owner or operator for a disclosure. Petitions and disclosures are discussed in the next section. Engineering controls and isolation zones must be installed within 45 days of becoming the owner or operator, unless hazardous substance use does not occur until the engineering controls / isolation zones are installed. The owner or operator must verify this in an affidavit. Rule 903(8) provides alternative time frames for new owners or operators of subsurface oil, gas, storage, or mineral rights regulated under Parts 615 or 625.

If the DEQ identifies deficiencies in the BEA petition, they can be cured within 6 months of the date the BEA was completed. However, if additional field work, engineering controls, or isolation zones are needed to cure the deficiencies, they must be completed within 45 days of becoming the owner or operator, unless there are no hazardous substances on-site. The owner or operator must verify this in an affidavit. ***The DEQ encourages early submittal of BEAs whenever possible to allow time to cure identified deficiencies. For a list of DEQ office locations, see: www.michigan.gov/bea.***

The owner or operator must document when engineering controls and isolation zones were installed and when hazardous substances were first on the property. The condition of any engineering control or isolation zone must be monitored and repairs made, if necessary, to maintain the validity of the engineering controls and isolation zone. Document the inspections and any maintenance or repair.

DISCLOSURE OF A BEA OR PETITION FOR DEQ APPROVAL OF A BEA

Part 201 requires that a BEA be disclosed to the DEQ to obtain liability protection. It also provides the option of petitioning the DEQ for a review of the adequacy of the BEA. While disclosure is free, there is a \$750 fee for a petition. Although the same liability protection is achieved by either a disclosure or a petition, a petition provides the petitioner with a written determination of the technical adequacy of the BEA. If the DEQ identifies deficiencies in the BEA, the petitioner may have the opportunity to cure those deficiencies within the allowed time frames to receive an adequate determination.

It is recommended that owners and operators ask their financial lending institution and other parties in the transaction if they require a determination by the DEQ. For example, if the owner or operator applies for financial assistance through the Small Business Administration (SBA), the SBA typically requires a determination on both the BEA and a Section 7a Compliance Analysis.

FORMAT AND FORMS

The required format for the BEA report is outlined in the BEA rules and in the "Instructions for Preparing Baseline Environmental Assessments and Section 7a Compliance Analyses". These documents are available at DEQ offices and electronically at the DEQ's web page: www.michigan.gov/bea. The BEA must contain all the elements and information required in order to be complete and technically adequate.

There are forms that must be submitted with a BEA. A person that can legally bind the petitioner, such as the owner or president of a company, must sign the forms and affidavits. Selection of required forms depends on: 1) whether the BEA is a disclosure or petition, 2) if engineering controls or isolation zones are part of a disclosure, 3) if the owner or operator is requesting a determination on a Section 7a Compliance Analysis, and 4) the presence of abandoned containers. All forms are available at the DEQ offices and electronically on the BEA and Due Care portion of the DEQ's web page (see web address above). The forms cannot be modified without DEQ approval. The affidavits must be signed and notarized in the county of the signatory. The instructions contain directions regarding the information that must be included in each blank on the forms.

DISCLOSURE TO SUBSEQUENT PURCHASERS OR TRANSFEREES

To obtain and maintain liability protection, BEAs must be submitted to the DEQ and to subsequent purchasers or transferees, including lessees.

SECTION 7A COMPLIANCE ANALYSIS

Section 20107a of the NREPA and the Due Care Administrative Rules requires owners or operators of contaminated property to take "Due Care" actions to prevent unacceptable exposures to the contamination, prevent exacerbation of the contamination, protect against the foreseeable actions of third parties, and provide notification of abandoned containers or migration of contaminants beyond the property boundary. The DEQ has developed a Citizen's Guide on Due Care that provides further information on the requirements and exemptions. This is available on the DEQ's BEA & Due Care web page. If a new owner or operator petitions the DEQ for a determination on their BEA, they may also choose to ask for a review of a Section 7a Compliance Analysis for no additional fee. This analysis outlines the due care evaluation and proposed due care actions.

ENVIRONMENTAL CONSULTANTS

Part 201 specifies that BEAs must be performed by an environmental professional. Environmental consultants can be located in the yellow pages of the telephone book under Environmental, Ecological, or Engineering; by asking your financial institution, real estate agency, or trade association for references; or

by word of mouth, etc. It's wise to ask the consultant for references and how many BEAs they have successfully completed. The DEQ cannot give recommendations regarding environmental consultants. Corrective actions on a regulated underground storage tank must be done by a Qualified Consultant (QC). A list of QCs is available at the DEQ offices and at www.michigan.gov/deq, select Land, Land Cleanup, Leaking Underground Storage Tanks. Although a QC is not required for a BEA, these companies often prepare BEAs.

SOURCES OF INFORMATION

DEQ Environmental Assistance Ctr: 1-800-662-9278

DEQ BEA-Due Care Web Page: www.michigan.gov/bea

(includes listing of DEQ Office locations)

ASTM Web Page: www.astm.org

DEQ Contacts:

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