

Due Care Requirements

For owners or operators of contaminated property

This handout describes the "Due Care" requirements for owners and operators of property that is contaminated.

Section 20107a of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), specifically requires that owners and operators take due care measures to ensure that existing contamination on a property does not cause unacceptable risks and is not exacerbated. Such measures include evaluating the contamination and taking necessary response actions. Due care requirements are not related to the owner or operator's liability for the contaminants; they apply to non-liable parties and liable parties alike. The due care requirements were designed so contaminated properties could be safely redeveloped.

◀ ◀ **NOTE** ▶ ▶

This is a guidance document from the Michigan Department of Environmental Quality (DEQ). A thorough review of the statute, administrative rules, and guidelines should be completed before making site-specific decisions.

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

DUE CARE REQUIREMENTS SECTION 20107a

An owner or operator of a facility shall do all of the following with respect to hazardous substances at a facility:

- ▶ Prevent exacerbation of the existing contamination.

- ▶ Prevent unacceptable human exposure and mitigate fire and explosion hazards to allow for the intended use of the facility in a manner that protects the public health and safety.
- ▶ Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party.
- ▶ Provide notifications to the DEQ and others.

A facility is defined in Section 20101 of the NREPA. Further information can be found electronically on the DEQ Web Page:

- ▶ *Part 201 Rules 744 - 752*
(www.michigan.gov/deq; select Land, Land Cleanup, Site Investigation & Cleanup; scroll down to Laws & Rules, select Part 201 Rules)
- ▶ *Part 201 Citizen's Guide on Baseline Environmental Assessments*
(www.michigan.gov/bea; scroll down to Information, select BEA Citizen's Guide)

The requirements for due care are summarized on the next few pages and are also specified in the Due Care Administrative Rules (www.michigan.gov/bea; scroll down to Laws & Rules, select Section 20107a "Due Care" Administrative Rules).

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



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PREVENTING EXACERBATION

Exacerbation occurs when an activity undertaken by the person who owns or operates the property causes the existing contamination to migrate beyond the property boundaries. Examples of exacerbation include: the mishandling of excavated contaminated soil such that contamination now migrates off-site; pumping contaminated water from footing drains into a nearby ditch; or creating a new migration pathway by putting a utility line through a zone of highly contaminated groundwater. An owner or operator can also exacerbate contamination by changing the facility conditions in a manner that would increase the response activity costs for the liable party. An example might be to place a building over the source of the existing contamination. A person that causes exacerbation would be liable for remediation of the contamination they caused or paying the increase in the response activity costs.

PREVENTING UNACCEPTABLE HUMAN RISK

Owners and operators must exercise due care by undertaking response activities that are necessary to prevent unacceptable exposures to contamination. The existing contamination must be evaluated to determine if the people using or working at the property would be exposed to contamination at levels above the appropriate criteria. Criteria for differing land uses can be found in the Part 201 Administrative Rules (Rules 744-752). For example, if groundwater used for drinking is contaminated above the drinking water criteria then the owner and operator must provide an alternative water supply. If soils are contaminated above the direct contact criteria for the appropriate land use at the surface of the property, then people must be prevented from coming into contact

with those soils by restricting access, installing a protective barrier, or removing contaminated soil. Protective barriers can be clean soil, concrete, paving, etc. In some instances, remediation of the contamination may be the most cost effective due care measure. In addition, if there is a potential unacceptable risk for utility workers or people conducting activities in an easement, then utility and/or easement holders must be notified in writing of the conditions by the owner or operator. If there is a fire and explosion hazard, the local fire department must be notified and the situation must be mitigated.

TAKING REASONABLE PRECAUTIONS

Taking reasonable precautions against the reasonably foreseeable actions and omissions of a third party means trying to prevent things that could cause a third party to be exposed to an unacceptable risk. This might include: notifying contractors of contamination so they can take proper precautions; preventing trespass that would result in an unacceptable exposure (neighborhood kids playing in a vacant industrial yard that has direct contact hazards); taking actions to secure abandoned containers so they don't get damaged by traffic, etc.

DUE CARE DOCUMENTATION

Owners and operators must maintain documentation that due care needs have been evaluated and any response actions that are needed have been taken. If applicable, maintenance and repair of the response action must also be documented. The documentation does not need to be submitted to the DEQ, but must be available for the DEQ to review upon request within 8 months of becoming the owner or operator or of having knowledge that the property is a facility. Documentation

requirements are described in the Due Care Administrative Rules. If a person is petitioning the DEQ to review a Baseline Environmental Assessment (BEA), that person may request the DEQ to also review a Section 7a Compliance Analysis. This is a report of the evaluation of the due care needs and a plan for response actions. The required format and content for the Section 7a Compliance Analysis to be submitted with a BEA are provided in the BEA Instructions, available from DEQ District Offices and the DEQ Web Page: www.michigan.gov/bea. The DEQ has developed a Citizen's Guide on BEAs that is also available at the above Internet address.

NOTIFICATION

The Due Care Rules require notification to the DEQ and others in the following circumstances:

- ▶ Notify the DEQ if there are discarded or abandoned containers that contain hazardous substances on the property; see Form EQP 4476.
- ▶ Notify the DEQ and adjacent property owners if contaminants are migrating off the property; see Form EQP 4476.
- ▶ Notify the local fire department if there is a fire or explosion hazard.
- ▶ Notify utility and easement holders if contaminants could cause unacceptable exposures and/or fire and explosion hazards.

These notices must be made within 45 days of becoming the owner or operator, or of having knowledge of the conditions. The forms are available at DEQ District Offices and the DEQ Web Page: www.michigan.gov/bea.

EXEMPTIONS/LIMITATIONS

Part 201 provides an exemption to the Due Care requirements for the following entities:

- ▶ A local unit of government (LUG) that involuntarily acquires title or control of property by virtue of its governmental functions, or the property is transferred to the LUG from the state or a LUG that is not liable under Part 201.
- ▶ A LUG that has an easement interest or holds a utility franchise for a transportation or utility corridor or public right of way.
- ▶ A LUG that is not liable and is leasing the property to a non-liable party.
- ▶ An owner or operator of property where the contamination is migrating onto the property.
- ▶ An owner or operator of a utility franchise on the property.
- ▶ An owner or operator of the severed mineral rights to the property.

This exemption does not include exacerbation caused by the owner or operator. While Part 201 provides these exemptions, it may be in the owner or operator's best interest to ensure the property is safe for the intended use and that they do not cause a new release by their actions or exacerbate pre-existing contamination. Section 201071(5) specifies utilities and severed mineral right owners must exercise due care in regard to their own activities.

SOURCES OF INFORMATION

DEQ Environmental Assistance Center:

1-800-662-9278

DEQ BEAs & Due Care Web Page:

www.michigan.gov/bea

(includes DEQ District Office locations)

DEQ Contacts:

Remediation and Redevelopment Division

Part 201 (Environmental Remediation)	Part 213 (Leaking Underground Storage Tanks)
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