

March 22, 2002

Environmental Response Division  
Department of Environmental Quality  
P.O. Box 30426  
Lansing, MI 48909-7926

Re: Part 201 Administrative Rules - revisions

Dear Sir/Madam:

The following are the Michigan Environmental Council's (MEC) comments on proposed rule changes to the Environmental Response (Part 201) program under the Natural Resources and Environmental Protection Act. They incorporate the partial submission placed into the record at the public hearing on March 4, 2002.

Members of the MEC staff have been involved in drafting the original rules, the 1990 amendments to 307 PA 1982 (the predecessor to Part 201), and the 1995 amendments to Part 201. We at MEC believe the proposed rules conflicts with fundamental provisions in Part 201; release responsible parties of legal liability in a manner not authorized by statute; substantially reduce the public's access to information regarding contaminated property; and undermine the ability of the Michigan Department of Environmental Quality (MDEQ) to discharge its duties under Part 201 and NREPA.

This attempt to rewrite Part 201 through the administrative rule process violates Michigan law, and will make it impossible for the MDEQ to protect the public from the discharge of hazardous substances from contaminated sites.

Our specific concerns are as follows:

**1. Duty to diligently pursue a cleanup**

Rule 526(3) and 532(1) state that interim response activities or remedial action only need to be performed when the MDEQ requests that one be performed or when the objective of a response activity is to address all releases of hazardous substances. These rules are in direct conflict with MCLA 324.20114, which states:

(1) Except as provided in subsection (4), an owner or operator of property who has knowledge that the property is a facility, and who is liable under section 20126 **shall** do all of the following:

...

(b) Report the release to the department within 24 hours after obtaining knowledge of the release.

...

**(g) Diligently pursue response activities necessary to achieve the cleanup criteria specified in this part and the rules promulgated under this part.**

Rules 526 and 532 are in direct conflict with the statute and thus need to be amended to reflect the duty of responsible parties to undertake the response activities necessary to meet the cleanup criteria specified in the section 20114.

## **2. Department approval of remedial action plans and public disclosures of contamination and cleanup activities**

Another major change being effectuated in the proposed rules allows response activities on both generic and limited cleanups to proceed without approval or notification of the department (Rules 101(f), 520, 522(10), 528(4), 532, 538(3), 540(4), 607). Under this approach, the responsible party, or current owner of a site, is authorized to make all the cleanup decisions regarding the nature of, and extent of cleanup required. The statute requires the party to document their actions, but they are not required to notify the MDEQ or any public health officials that the property was contaminated or that a cleanup has been conducted.

This approach is not authorized by statute and puts the department and the public in the dark regarding decisions that that will have dramatic impact on natural resources and may place the public health of Michigan residents at risk. This concern is heightened by the awareness that decisions on the extent of cleanup activities will be made by parties that have a financial incentive to minimize them.

The department is relying on just one sentence of Part 201 in support of major portions of the rules regarding “self-implemented” cleanups. That provision reads:

A person may undertake response activities without **prior approval** by the department unless that response activity is being done pursuant to an administrative order or agreement or judicial decree which requires prior department approval. (MCLA 324.20114 (2))

The department has taken this provision, that allows a responsible party to proceed with cleanup activities without “prior approval,” and has used it for the basis of rules that delegate all decisions regarding the appropriateness and scope of cleanup to the responsible party. Under the proposed rules the MDEQ never receives notice that a contaminated site existed, that decisions regarding the scope of cleanup activities have been made, or the final post-closure condition of the property. Neither the language, nor a reading of section 324.20114(2) in context with the rest of Part 201 supports that interpretation. The twisted reading of 324.20114(2) conflicts with the following provisions:

- *Duty to insure cleanups are being conducted on contaminated property*

As noted above, a responsible party has the duty to pursue response activities that meet the cleanup criteria. The MDEQ's duty to insure the cleanup of contaminated property is set forth in MCLA 324.20120a, which states:

(1) The department may establish cleanup criteria and approve of remedial actions in the categories listed in this subsection.

...

(2) The department may approve a remedial action plan based on site specific criteria that satisfy the applicable requirements of this part and the rules promulgated under this part.

...

(16) A remedial action plan shall provide response activity to meet the residential categorical criteria, or provide for acceptable land use or resource use restrictions pursuant to section 20120b.

MCLA 324.21014 states:

(1) The **department shall coordinate all activities** required under this part and shall promulgate rules to provide for the performance of response activities....

MCLA 324.20120d states:

(5) The department shall prepare a summary document that explains the reasons for the selection or approval of a remedial action plan. In addition, the department shall compile an administrative record of the decision process that results in the selection of a remedial action plan.

The rules regarding remedial action plans apply to both generic cleanup criteria (20120a (1) (a) through (e)) and limited cleanup criteria (20120a (f) through (j)). [Limited cleanup criteria are used when hazardous substances are left on site at levels that require exposure barriers to limit the public's exposure to hazardous substances.] Therefore, under Part 201, a party has the duty to diligently pursue response activities necessary to meet the cleanup criteria. Part 201 provides a process for meeting this requirement through completion of a remedial action plan. The rules, however, undermine this process by allowing a party to proceed without notifying the MDEQ of any cleanup activities. This process undermines the ability of the department to insure cleanups are being conducted, and to fulfill the statutory requirement to prepare an administrative record documenting the final plan and any required exposure barriers.

Nowhere in the law is the department authorized to delegate the ability to approve cleanups to other parties, nor does the law provide that the details are kept secret. Public policy dictates that decisions regarding public health not be vested in the party responsible for the cleanup and with a financial interest in minimizing costs. In addition,

without requiring notice of contamination and cleanup the MDEQ cannot discharge its other duties under Part 201 regarding tracking and approving cleanups.

The following provisions of Part 201 delineate some of the other duties DEQ has under Part 201 that would be impacted by failing to require department notification of cleanups:

- *Duty to provide information regarding cleanups to the public*

MCLA 324.20105 states in part:

(1) The department shall do all of the following:

...

(e) Maintain and make available to the public upon request records regarding sites where remedial actions have been completed, including sites where land use restrictions have been imposed, if the records are not otherwise protected from disclosure by law.

324.20120d states in part:

(2) The department shall maintain, and periodically publish, a list of remedial action plans submitted for approval that comply with the requirements of 299.5515 of the Michigan administrative code.

Rule 607 currently requires the department to prepare an administrative record in regards to all completed remedial action plans. The rule is amended to limit its application to only department-approved remedial action plans in direct conflict with section 20105.

- *Duty to insure public health is protected from the release of toxic chemical due to a improper cleanup – due to mistakes in testing, design flaws or faulty construction*

MCLA 324.20118 states in part:

(1) **The department** may take response activity **or approve of response activity proposed by a person** that is consistent with this part and the rules promulgated under this part relating to the selection and implementation of response activity **that the department concludes** is necessary and appropriate to protect the public health, safety, or welfare, or the environment.

(2) Remedial actions undertaken under subsection (1) at a minimum shall accomplish all of the following: (a) Assure the protection of the public health, safety, or welfare, or the environment.

The proposed rules take from the department the authority to determine which response activities are “necessary and appropriate to protect the public health” and transfers it to responsible parties in direct conflict with this provision.

- *Duty to track the sale and transfer of contaminated property*

MCLA 324.20120b states in part:

...

(4) If a remedial action plan relies in whole or in part on cleanup criteria approved pursuant to section 20120a(1)(f) to (j) or (2) [limited cleanups], land use or resource use restrictions to assure the effectiveness and integrity of any containment, exposure barriers, or other land use or resource use restrictions necessary to assure the effectiveness and integrity of the remedy shall be described in a restrictive covenant... The form and content of the restrictive covenant are subject to approval by the department and shall include provisions to accomplish all of the following:

...

(c) Require notice to the department of the owner's intent to convey any interest in the facility 14 days prior to consummating the conveyance.

Rule 532(1) & (2) only require that notice be provided to the MDEQ of limited cleanups when required by the department or when a party is attempting to “complete” all required response activities. Regardless of the intent of the party to complete cleanup activities, the Part 201 requires notification to the department of the transfer of contaminated property relying in whole or in part on a limited cleanup. Rule 532 undermines the ability of the department to perform this duty.

- *Summary*

The above noted provisions and others demonstrate the department’s duty to maintain a list of sites for the public, approve cleanup plans, insure ongoing operation and maintenance of cleanup technology, monitor conditions at the site, and access financial assurance mechanisms when necessary. The proposed rules undermine the ability of the department to perform its basic duties of protecting public health and the environment.

The rules should be amended to include a provision that requires the department to receive notice of all response activities undertaken in the state, approve remedial action plans, and insure the public has access to all related documentation so they may independently confirm that a cleanup is protective of their health. All rules that infer that a cleanup can be done without notice and department approval must be amended.

### **3. Finality of Response Activities**

The proposed rules introduce the concept of “complete” into the Part 201 process (rule 101(f), 107, 520(14) and 532 among others) that conflicts with Part 201. Under rule 101(f), if a party completes certain actions they are deemed to have satisfied his or her “obligations under the statute,” with respect to a release. It is important to note that cleanup criteria do not have to necessarily be achieved in all cases, only that construction of physical components that may one day result in cleanup be finished. In the case of

historic sites, rule 107(4) allows an additional 18 months to finish actions under the current rules to be deemed complete.

Rule 520(14) goes on to transfer, from a liable party to the current owner of the property, any liability for additional response activities required by the following:

- (a) Changes in the act or enactment of contradictory legislation, unless language therein explicitly requires it.
- (b) Changes in cleanup criteria developed by the department pursuant to section 20120a(1)
- (c) Changes in institutional controls.
- (d) Changes in land use.

The concept of completeness is not supported by the language of Part 201 in the following manners:

- *Language is inconsistent with language in the law regarding completeness*

MCLA 324.20114 states in part:

(5) Upon a determination by the department that a person has **completed** all response activities at a facility pursuant to an approved remedial action plan prepared and implemented in compliance with this part and the rules promulgated under this part, the department, upon request of a person, shall execute and present a document stating that all response activities required in the approved remedial action plan have been completed.

The language in rule 101(f) does not require: 1) the existence of an approved remedial action plan, or 2) a department determination that a person has completed all activities included in the remedial action plan.

MCLA 324.20114 (2) (quoted above), states that although a person may undertake response activities prior to getting department approval, “any such action shall not relieve any person of liability for further response activity as may be required by the department.” Thus a party cannot “complete” response activities until a determination is made by the department that all obligations to perform response activities required by the statute have been fulfilled.

Thus, the language in rule 101(f) conflicts with explicit language of Part 201.

- *Language transfers legal obligations between parties without statutory authority*

MCLA 324.20129a regarding baseline environmental assessments, states in part:

(5) **A person who is provided an affirmative determination under this section is not liable for a claim for response activity costs, fines or penalties, natural**

resources damages, or equitable relief under part 17, part 31, or common law resulting from the contamination identified in the petition or from contamination existing on the property on the date in which ownership or control of the property was transferred to the person.

Rule 520 transfers from the party responsible for an activity causing a release or threat of release to future owners of property, the responsibility to undertake additional cleanup activities that may required by a change in the statute, new health-risk information or changes in institutional control that may subject the public to greater risk. This represents a major shift in responsibility that is not authorized by statute and is on conflict with section 20129a. An administrative rule cannot eliminate a legal obligation unless explicitly authorized by statute.

- *Language conflicts with other provisions of the statute on consent orders and covenants not to sue*

MCLA 324.20132 states in part:

(1) The state may provide a person with a covenant not to sue concerning any liability to the state under this part, including future liability, resulting from a release or threatened release addressed by response activities, whether that action is on a facility or off a facility, if each of the following is met:

- (a) The covenant not to sue is in the public interest.
- (b) The covenant not to sue would expedite response activity consistent with rules promulgated under this part.
- (c) There is full compliance with a consent order under this part for response to a release or threatened release concerned.
- (d) The response activity has been approved by the department.

...

(3) A covenant not to sue concerning future liability to the state shall not take effect until the department certifies that remedial action has been **completed** in accordance with the requirements of this part at the facility that is the subject of the covenant.

This section directly references limiting future liability under Part 201. Section 20132 conflicts with the provisions of rules 101 and 520 in that it requires, 1) an explicit agreement with the department, 2) an approved remedial action plan, and 3) the requirement that all remedial action be completed.

We understand the desire of responsible parties to receive some degree of finality when they conduct remedial action plans. However, this must be balanced against the strong overriding consideration of protecting the public health of Michigan residents. If new health data suggests that further cleanup is required, then the cleanup should be conducted. The costs for the added cleanup should fall to the responsible party as opposed to the taxpayers of Michigan or the current owner (and redeveloper) of contaminated property.

The changes being pursued through the rules on “completeness” are policy changes that would require amendments to Part 201. They cannot be instituted through administrative rules. All rules that attempt to change when a remedial action has been completed inconsistent with Part 201 need to be deleted from the proposed rules.

#### **4. Transfer of affirmative duty**

Rule 520(3) attempts to eliminate the affirmative duty to perform a cleanup from one class of liable parties. The rule states in part:

A former owner or operator of property that is a facility may continue to have the affirmative obligation under section 20114(1)(g) if all of the following conditions apply:

- (a) He or she owned or operated the property on or after June 5, 1995.
- (b) He or she had knowledge at that time that the property was a facility.
- (c) He or she is liable
- (d) The subsequent owner or operator obtains an affirmative determination on a baseline environmental assessment from the department under section 20129a.

All liable parties have an affirmative duty to pursue cleanups (section 20114(1)(g)). Under rule 520(3) a party’s affirmative duty is eliminated if a subsequent owner fails to perform a baseline environmental assessment. Obtaining a baseline environmental assessment is not mandatory, but a tool available to a new owner designed to limit potential liability. Whether or not a subsequent owner decides it is in their best interest to obtain a baseline environmental assessment should not eliminate the affirmative duty a party responsible for contamination has under the law.

The only provisions of Part 201 through which a responsible party can limit their liability act are covenants not to sue (section 20132) and consent orders (section 20134). Neither of these tools can operate without an expressed agreement between the party and the department and each of them require more than a failure of a party to perform a baseline environmental assessment. Therefore, rule 520(3) conflicts with part 201.

#### **5. Notification of adjacent property owners**

Rules 522 and 1017 govern when a party has to notify adjacent property owners of the release of hazardous substance. These rules are 1) inadequate to protect public health, and 2) fail to give residents of Michigan sufficient information to protect their own property rights.

The rules are inadequate in the following ways:

- *The rules are unnecessarily complex*

Rule 522(5) and 1017(6) require an owner or liable party to notify their neighbors when hazardous substances are emanating from their property only when they decide one of the following conditions exists:

- (a) A threat of fire or explosion.
- (b) Potential exposure in a relevant pathway that may exceed applicable criteria under section 20120a(1)
- (c) Migrating contamination may restrict that adjacent property owner's use of his or her property.
- (d) Any other circumstances when notification can result in prevention, minimization or mitigation or injury to public health, safety, or welfare or to the environment.

We at MEC would argue that these conditions are met in every case in which hazardous substances are, or are likely to, migrate beyond one's property boundaries in excess of the applicable standard under section 20120a(1). Therefore, the rule should not set conditions, but simply operate in the same manner as rule 522(2) and rule 1017 that require notice to the MDEQ in every case where contaminants above residential cleanup criteria levels are migrating offsite. The fact that the party who may be responsible to perform cleanup activities is being asked to apply a different set of criteria before informing neighbors would lead to a high likelihood of underreporting of the migration of contaminants.

- *Notification of releases for oil and gas operations is insufficient*

Rule 522(3) and rule 1017(2) only require notification of release when contaminants migrate further than the "well location". To make this rule clearer, it should require notice whenever contamination has occurred beyond the boundaries of an area where exposure barriers or contained vessels are present that limit possible movement of contaminants beyond the well location.

- *Notification of releases from owners of easements is insufficient*

Rule 522(4) and rule 1017(3) require notice by easement holders when hazardous substances migrate beyond the borders of an easement. Easements are granted for a variety of purposes, such as utility lines, roads, or ingress and egress from a property. None of these uses authorize the easement holder to contaminate the property within the easement, only to use it for a designated purpose. Notification of the contamination should be required in every case in which contamination in excess of criteria developed under section 20120(1)(a) has resulted from activities of the easement holder or their agents.

## **6. Inclusion of generic cleanup values in the rules**

For the first time, the proposed rules include tables that reflect the current cleanup criteria values for various chemicals and compounds (rules 744, 746, 748, 752). These values in the past have been generated from the algorithms and exposure assumptions that did

appear in the rules. Department staff would then incorporate the latest health exposure data to determine the appropriate cleanup criteria value. Including the values in the rules makes them more difficult to change since the administrative rule process will need to be followed for each change in value. This could place public health at risk due to the delay in incorporating new data that shows a compound is more dangerous than previously believed. This will also raise the cost of updating the rules and correcting mistakes.

## **7. Raising the cleanup criteria for dioxin**

Raising the cleanup criteria for dioxin in residential areas is not supported by current health data. The proposed rules raise the cleanup criteria value for dioxin in soil from .09 parts per billion (ppb), to .150 ppb. A recent paper released by scientists at the Agency for Toxic Substances and Disease Registry (ATSDR) recommended lowering the cleanup criteria in soils to a value of .04 ppb. Analysis prepared by a toxicologist at the Michigan Department of Community Health showed that due to health impacts, a residential cleanup criterion between .012 and .053 ppb was needed (attached). Raising the cleanup criterion in the face of this information is not supported by sound science. Other states have residential cleanup levels as low as .008 parts per trillion.

## **8. Failing to lower the cleanup criteria for trichloroethylene (TCE)**

Failing to lower the cleanup criteria for TCE is not supported by current science. DEQ is currently basing cleanup criteria for TCE, a contaminant widespread in Michigan groundwater and soils, on a federal health assessment dating to 1985 and an addendum dated 1987. However, this information has been superseded by a recent review of the scientific evidence.

An August 2001 draft document entitled, "Trichloroethylene Health Risk Assessment: Synthesis and Characterization," prepared by U.S. EPA's National Center for Environmental Assessment, strongly indicates a need for a more protective approach, based on the weight of evidence. Although the document is still a draft, a formal revision to the federal health assessment dating to the 1980s is highly likely within the year.

The August 2001 document identifies, among other factors, two reasons why TCE is a greater human health concern than previously thought. First, the weight of the epidemiologic (human) evidence of TCE's potential carcinogenicity is stronger than before. Recent analyses of the epidemiologic studies show statistically significant increases in the incidences of kidney and liver cancer in workers exposed to TCE. Further, the human results are supported by the animal studies with TCE causing kidney cancer in rats and liver tumors in mice.

Secondly, metabolites of TCE are also metabolites of other contaminants commonly found in the environment, such as byproducts of drinking water disinfection and perchlorethylene. Further, exposure to alcohol and other drugs and environmental pollutants has now been found to alter and enhance TCE's metabolism and toxicity. Thus,

a background level of exposure to these metabolites must be considered when setting health-based standards for TCE exposure.

It is our understanding that if these factors are taken into account, DEQ's current cleanup criterion for TCE would be lowered by one to nearly two orders of magnitude to assure protection of public health. We urge you to reflect the weight of the latest evidence in promulgating any criterion for this widespread and dangerous substance.

## **9. Preference for permanent solutions**

Rule 603 sets forth the criteria for evaluating the appropriate remedial action to be undertaken at a site. Subrule (2) states:

Evaluation of the factors in subrule (1) of this rule shall consider all factors in balance with one another as necessary to achieve the objectives of Part 201 of the act and R 299.5601. No single factor in subrule (1) shall be considered most important.

Deleted from this rule is a sentence taken directly from Part 201, section 20118(4):

Remedial actions that permanently and significantly reduce the volume, toxicity, or mobility of the hazardous substances are to be preferred.

This sentence needs to be included in rule 603 as the overarching principle guiding cleanup decisions. Without it, subrule (2) appears to give no preference to long-term solutions as opposed to short-term cleanup fixes that may temporarily contain hazardous substances, but leave future generations at greater risk.

## **10. Groundwater-Surfacewater Interface**

Rule 532(11) and 716 contain requirements for the method of calculating the level of contamination that is venting to lakes, rivers and streams. These determinations can be difficult because sometimes surface water will be recharging groundwater and can change based on the barometric pressure. For those reasons and others, the proposed rule contains a specific definition regarding the point of compliance. We support this definition, which is based on sound science and gives the department a standard measure under which to evaluate cleanup proposals. Requests by the regulated community to have a site-by-site determination will result in the expenditure of significant DEQ staff time that is not currently available and will lead to potential risks to the water resources of the state.

Consistently, the number one environmental concern of Michigan residents is the protection of the Great Lakes and surface waters of the state from toxic contamination. The department must demonstrate its commitment to protecting the Great Lakes and other surface water bodies by including, without modification, the proposed rules for protection of surface water from contaminated groundwater venting.

## **11. Treatment of property that is not zoned**

Rule 532(8)(B) allows a party to determine the proper cleanup level on property that is not zoned by providing documentation of “the reasonable foreseeable future use of the property and natural resources in question.” Any such cleanup should fall under the site-specific provisions of section 210120b(2) and cannot be made without department approval.

## **12. Waiver by rule of the need to remediate groundwater contamination**

Rule 705(7) allows for a party to waive the application of rule 705(5) & (6) regarding the cleanup of contaminated groundwater if they can demonstrate that groundwater will not migrate beyond the boundary of the source property above residential cleanup levels.

Section 20118(6) & (7) make it clear that rules 705(5) & (6) can only be waived by the department after a site-specific determination is made. Therefore, rule 705(7) conflicts with Part 201 and should be deleted.

Sincerely,

James Clift, Policy Director