

# Environmental remediation

Recent developments concerning Michigan environmental rules and regulations **Interviewed by Chelan David**

In 1995, Michigan's Natural Resources and Environmental Protection Act Part 201 on Environmental Remediation was amended to encourage and stimulate the reuse of contaminated properties. The amendments created baseline environmental assessments (BEAs) as a method for protecting new owners and operators of contaminated property from liability by establishing a method for distinguishing old contamination from new.

In 2005 the Michigan Department of Environmental Quality (MDEQ) began a multiphase process of evaluating and re-designing the Part 201 cleanup and redevelopment program. The consensus was that changes had to be made to protect the public health, safety and welfare while providing new owners and operators of contaminated property a means of protection from potential liability.

"The proposed redesign will continue to apply a causation standard for liability. It will also continue to apply a risk-based cleanup analysis," says Roy Cole, partner at Secretst Wardle. "However, the liability protection for new owners and operators of contaminated property will be changed from the baseline environmental assessment procedure to a due care focus."

*Smart Business* spoke with Cole about Part 201, how the proposed changes affect businesses and what type of legal liabilities can arise from environmental issues.

## When will the program redesign be introduced?

The specific requirements for new owners and operators of contaminated property to qualify for due care liability protection have not been finalized or implemented. MDEQ is currently conducting stakeholder input meetings on various topics for the cleanup program redesign. This includes input on liability protection and due care noncompliance consequences. Tentatively, MDEQ plans to seek introduction of legislation this summer.

## How do the MDEQ changes affect business owners?

During the past few years the declining economy has had a significant impact on business development in the state of Michigan. The cleanup and redevelopment program redesign envisions a significant degree of self-implementation of the reme-



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diation of contaminated property by liable parties. MDEQ's role in the remediation process will shift toward conducting audits of remedial cleanup work performed. Implementation of recommendations that have been compiled in the cleanup and redevelopment program redesign is being done in phases.

Part 201 of Michigan's Natural Resources Environmental Protection Act provides for the use of BEAs to protect purchasers of contaminated property from liability for cleanup of pre-existing contamination on the property. The redesign of the Cleanup and Redevelopment Program will significantly change the requirements that a new owner and/or operator of contaminated property must comply with to secure liability protection when purchasing contaminated property. Specific requirements for the due care process in the redesign may be revised through the stakeholders' input meetings and legislative process, so they are subject to change.

Businesses contemplating the acquisition of potentially contaminated property in the near future are confronted with the uncertainty of the final statutory requirements for securing due care liability protection. Companies should address the current law and anticipate changes in contracts for the acquisition of a commercial property. In doing so, companies should

also evaluate whether or not the acquisition and BEA process can be successfully concluded prior to the effective date of the expected changes in the law.

## What type of legal liabilities can arise from environmental issues?

An owner or operator who is liable under Part 201 is jointly and severally liable for (1) all costs of response activity lawfully incurred by the state, (2) any other necessary costs of response activity incurred by other persons, and (3) damages for the full value of injury to, destruction of, or loss of natural resources. Response activity includes evaluations, remedial actions or health assessments to protect the public health or environment. In the event the contamination migrates from the owner or operator's property, they may also be liable to affected property owners for remediation costs and other damages. A company or person may also be exposed to other legal liabilities depending on the specific contaminants and extent of the contamination involved.

## How should a company proceed if it is faced with an environmental lawsuit?

If you are served with a complaint in a lawsuit, you should immediately consult with an attorney. In state court, a response to the complaint must be filed within 21 days or 28 days of service depending upon the type of defendant and manner of service. Generally, if the complaint has been filed in federal court, the defendant's response must be served within 20 days after being served with the summons and complaint. Failure to respond to the complaint in the time provided by the applicable court rules can result in a default judgment against the defendant.

If the company has an insurance policy, it may provide coverage for one or more of the environmental claims in the lawsuit. A copy of the summons and complaint should be forwarded to the company's insurance agent and/or insurance company as soon as possible.

Retention of electronically stored information and company documents should be discussed with an attorney in the early stages of litigation. <<

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