

## Chapter 5: Part 201: Hazardous Substance Regulation

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## I. Background

### A. In General §5.1

Part 201 of Michigan's Natural Resources and Environmental Protection Act (Part 201), [MCL 324.20101-20142](#), governs the cleanup and redevelopment of contaminated properties in Michigan. Part 201 addresses liabilities associated with owning and operating contaminated properties in Michigan while simultaneously encouraging their redevelopment and reuse.

### B. Before Part 201: the Michigan Environmental Response Act §5.2

Part 201's predecessor was the Michigan Environmental Response Act (MERA). MERA was enacted in 1982 as Michigan's state-law counterpart to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and to ensure Michigan's eligibility for funds from the federal Superfund established under CERCLA. *See* [42 USC 9604\(c\)\(3\)\(C\)](#); [MCL 324.20103](#). MERA and CERCLA were relatively straightforward legislation intended to provide for prompt response to the release of hazardous substances into the environment. They allowed the government to issue cleanup orders, implement cleanups, and then recover the cost of cleanup activities from liable parties. They also allowed private parties to clean up contaminated property and then seek cost recovery or contribution from other liable parties.

CERCLA and MERA were primarily designed to allow, at least in theory, quick cleanup of contaminated property. Their secondary concern was allocating the cost of that cleanup among statutorily defined categories of liable persons. To that end, CERCLA and MERA imposed "status liability" on parties: owners, operators, arrangers (sometimes called generators), and transporters were strictly liable for cleaning up contaminated properties. Causation was inconsequential at the liability stage – with only a few very narrow exceptions, even innocent parties could be held responsible for the entire cost of cleaning up a contaminated site.

### C. Part 201 §5.3

Believing that the status liability imposed by MERA unnecessarily chilled property transactions and real estate development in Michigan, the legislature amended MERA. The result of that amendment process and the recodification of Michigan's environmental laws was Part 201. Part 201 marks a substantial departure from the strict, status-liability schemes of MERA and CERCLA. Key differences include the ability to avoid status liability by performing a Baseline Environmental Assessment (BEA) and the use of cleanup standards combined with institutional and engineering controls to determine when a property has been sufficiently cleaned of contamination.

Part 201 focuses on the risks and effects of exposure to hazardous substances given the intended future use of the property, rather than the simple fact of contamination. This risk-based focus provides more certainty than MERA and CERCLA regarding liability (that is, it more easily allows one to answer the question of how clean is clean) and more flexibility regarding transactions involving contaminated property (that is, it allows a person to avoid status liability,

and it also allows a person to “clean up” a property by imposing use restrictions that eliminate unacceptable exposure to contamination rather than cleaning up contamination to which no one would be exposed). In sum, Part 201 generally makes it easier than CERCLA and MERA for persons to own, redevelop, and transfer contaminated property in Michigan without incurring potentially substantial liability.<sup>1</sup>

As explained in detail below, Part 201 moved the liability line: if a person is responsible for “an activity causing a release,” then that person is liable. If a person is not responsible for an activity causing a release, and the person acquired the property before June 5, 1995, then the person is not liable. If a person is not responsible for an activity causing a release and the person acquired the property on or after June 5, 1995, then that person will not be liable provided that the person performs a BEA and exercises due care.

## II. Part 201 Triggers, Liability, and Potentially Responsible Persons

### A. Key Terms Triggering Part 201 §5.4

Part 201 is generally triggered when there has been or is likely to be a “release” of a “hazardous substance” from a “facility.”

#### 1. Release §5.5

With some very narrow exceptions, Part 201 defines “release” to include, but not be limited to “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance.” [MCL 324.20101\(1\)\(II\)](#). Like most definitions under Part 201, the definition of “release” is exceptionally broad. The definition includes both active and passive components – both pumping and pouring, and escaping and leaching. For that reason, there is usually no serious argument under Part 201 that a release has occurred when hazardous substances are found in the environment.

An important and sometimes easy to overlook component of the exceptionally broad definition of release is that the release must be “into the environment.” Cases interpreting the nearly identical definition of release in CERCLA have held that although it is “lexically possible” to interpret the “environment” so broadly as to cover “everything pertaining to the planet Earth,” such a broad definition would erase the term as a limitation and would be inconsistent with CERCLA. *Cyker v Four Seasons Hotels, Ltd*, No 90-11929-Z, 1991 WL 1401, at \*2 (D Mass Jan 3, 1991). So, for example, “[a] release into the air of a building or structure that does not reach the ambient air” is not a “release” under CERCLA. *Id.* Part 201 “was patterned after CERCLA” and “should be construed in accordance” with CERCLA, and caselaw interpreting CERCLA is, therefore, instructive when interpreting Part 201. *City of Detroit v. Simon*, [247 F3d 619](#), 630 (6th Cir 2001).

One additional consequence of the requirement that a release be to the environment is that it makes available a factual argument that what might otherwise be considered a release ought not be considered a release under Part 201 if it does not increase the concentration of hazardous

substances in the environment to levels exceeding the naturally occurring background concentrations of those substances. See *Stewman v Mid-S Wood Products of Mena, Inc.*, [993 F2d 646](#), 649 (8th Cir 1993) (affirming the district court’s finding of no release or threat of release where there was no proof that the chromium, copper, and arsenic “came from the Mid-South site as opposed to nature”).

## 2. Hazardous Substance §5.6

Section 20101(1)(x) expansively defines “hazardous substance.” A Part 201 hazardous substance is “any substance that the department demonstrates, on a case by case basis, poses an unacceptable risk to the public health, safety, or welfare, or the environment, considering the fate of the material, dose-response, toxicity, or adverse impact on natural resources.” [MCL 324.20101\(1\)\(x\)\(i\)](#). Part 201 hazardous substances include Part 111 hazardous wastes<sup>2</sup> and CERCLA hazardous substances.<sup>3</sup> [MCL 324.20101\(1\)\(x\)\(ii\)-\(iii\)](#).

Federal courts interpreting the scope of CERCLA’s definition of hazardous substance, which is included in Part 201’s definition of hazardous substance, have explained that “[t]he breadth of [CERCLA’s definition of hazardous substance] cannot be easily escaped, and . . . [q]uantity or concentration is not a factor.” *BF Goodrich v Betkoski*, [99 F3d 505](#), 515 (2d Cir 1996), quoting *United States v Alcan Aluminum Corp.*, [990 F2d 711](#), 720 (2d Cir 1993). In other words, a material need not actually be hazardous to be a hazardous substance; the mere presence of even trace amounts of a hazardous substance in a mixture or emulsion is enough to include a substance within CERCLA’s definition of hazardous substance. *United States v Alcan Aluminum Corp.*, [964 F2d 252](#), 259-60 (3d Cir 1992).

One of the only limitations on the breadth of the definition of “hazardous substance” under CERCLA is that the substance must be a hazardous substance at the time of the release. There is an argument that there is no liability for disposal of a non-hazardous substance that later becomes a hazardous substance. *Organic Chem Site PRP Group v Total Petroleum Inc.*, [58 F Supp 2d 755](#), 763–764 (WD Mich 1999), citing *City of New York v Exxon Corp.*, [766 F Supp 177](#), 187 (SD NY 1991); *United States v Western Processing Co.*, [761 F Supp 713](#), 721–22 (WD Wash 1991).

Although Part 201 generally includes CERCLA hazardous substances in its definition of hazardous substance, Part 201’s definition differs from CERCLA’s definition in two important ways. First Part 201 defines hazardous substance more broadly than CERCLA to include petroleum.<sup>4</sup> [MCL 324.20101\(1\)\(x\)\(iv\)](#). Second, unlike CERCLA, Part 201 exempts from the definition of hazardous substance “fruit, vegetable, [and] field crop residuals [and] processing by-products, [and] aquatic plants, that are applied to the land for agricultural use or for use as an animal feed, if the use is consistent with generally accepted agricultural management practices developed pursuant to the Michigan right to farm act.” [MCL 324.20101\(1\)\(x\)](#).

## 3. Facility §5.7

Section 20101(1)(r) broadly defines “facility” to mean “any area, place, or property where a hazardous substance in excess of [the unrestricted residential cleanup criteria established under Part 201] has been released, deposited, disposed of, or otherwise comes to be located.” [MCL](#)

[324.20101](#)(1)(r). “Simply put, the term ‘facility’ includes every place where hazardous substances come to be located” in concentrations above applicable criteria. *United States v Conservation Chem Co*, [619 F Supp 162](#), 185 (WD Mo 1985); [MCL 324.20101\(1\)\(r\)](#); *Approximately Forty Acres in Tallmadge Twp v Fenske*, [223 Mich App 454](#), 462; 566 NW2d 652 (1997); see *Flanders Industries, Inc v Michigan*, [203 Mich App 15](#), 26; 512 NW2d 328 (1993) (holding that the similar definition of facility under MERA was broad enough to encompass the bottom of a lake where hazardous substances had come to be located at any point in time). The cleanup criteria are found in tables in [DEQ Operational Memorandums](#).

An area, place, or property is not a facility if response activities at the area, place, or property have satisfied the cleanup criteria for unrestricted residential use. [MCL 324.20101\(1\)\(r\)\(i\)](#). An area, place, or property also is not a facility if corrective action has been performed under Part 213 that satisfies the cleanup criteria for unrestricted residential use. [MCL 324.20101\(1\)\(r\)\(ii\)](#). And an area, place, or property is not a facility if hazardous substances at the area, place, or property meet or satisfy site-specific criteria that have been approved by the DEQ and that do not depend on any land use or resource use restriction to ensure protection of the public health, safety, or welfare or the environment. [MCL 324.20101\(1\)\(r\)\(iii\)](#).

## **B. Part 201 Liability and the Categories of Liable Persons**

### **1. In General §5.8**

As a general rule, once Part 201 has been triggered by a release of a hazardous substance from a facility, the statute imposes liability on five classes of liable persons. These so-called Potentially Responsible Persons, or PRPs, are generally jointly and severally liable under Part 201 for cleanup costs and natural resource damages. More specifically, PRPs are jointly and severally liable for (1) “[a]ll costs of response activity lawfully incurred by the state relating to the selection and implementation of response activity,” (2) “[a]ny other costs of response activity reasonably incurred under the circumstances by any other person,” and (3) “the full value of injury to, destruction of, or loss of natural resources, including the reasonable costs of addressing the injury, destruction, or loss resulting from the release.” [MCL 324.20126a\(1\)](#).

Section 20126 provides that, with certain exceptions, “the following persons are liable under [Part 201]:” (1) the owner of a facility, (2) the operator of a facility, (3) a person who arranges for disposal or treatment of a hazardous substance at a facility, (4) a person who transports a hazardous substance to a facility, and (5) the estate or trust of any of the above persons. [MCL 324.20126\(1\)](#).

Among the persons exempted from liability under Part 201 are owners and operators who conduct a BEA, owners and lessees of severed subsurface mineral rights, owners and occupants of residential real property, persons who did not know and had no reason to know that the property was a facility, lessees of retail, office, and commercial space, occupiers and operators of property for the purpose of siting, constructing, operating, or removing a wind energy conversion system or related components, and owners and operators of property onto which contamination has migrated. [MCL 324.20126\(2\)-\(4\)](#). These persons are generally still liable “with respect to contamination at a facility resulting from a release or threat of release” if the person “is responsible for an activity causing that release or threat of release.” [MCL 324.20126\(3\)](#).

## 2. Owner and Operator Liability §5.9

Section 20126(1) provides that certain owners and operators of facilities are PRPs. Specifically, under Part 201 there are three categories of liable owners and operators: (1) current owners and operators of a facility who are “responsible for an activity causing a release or threat of release,” (2) past owners and operators of a facility who owned or operated the facility at the time of a disposal of a hazardous substance and who are “responsible for an activity causing a release or threat of release,” and (3) owners and operators of a facility who become an owner or operator on or after June 5, 1995, and who do not conduct and provide a BEA. [MCL 324.20126\(1\)\(a\)-\(c\)](#). In other words, Part 201 generally imposes status-based liability – liability irrespective of causation – on owners and operators who become an owner or operator after June 5, 1995, without conducting a BEA; it imposes causation-based liability on other categories of owners and operators.

### a. Owner Defined §5.10

Section 20101(1)(gg) defines “owner” in a commonsense – although circular – way to mean “a person who owns a facility,” but an “owner” under Part 201 does not include certain fiduciaries and secured parties. The definition excludes persons who own property as a fiduciary under the Michigan Estates and Protected Individuals Code. [MCL 324.20101\(1\)\(gg\)\(ii\)](#), [MCL 324.20101b](#). It also excludes persons “who hold indicia of ownership primarily to protect [their] interest in the facility . . . unless [they] participate[] in the management of the facility” by engaging “in acts of facility management that constitute actual participation in the management or operational affairs of a facility and that exceed the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations.” [MCL 324.20101\(1\)\(gg\)\(i\)](#), [MCL 324.20101a](#).

### b. Operator Defined §5.11

Section 20101(1)(ff) defines “operator” to mean “a person who is in control of or responsible for a facility.” [MCL 324.20101\(1\)\(ff\)](#). The definition excludes the same two categories of persons excluded from the definition of owner: fiduciaries and secured parties. *Id.* In interpreting a nearly identical definition of operator in Part 201’s predecessor, MERA, the Michigan Court of Appeals looked to federal caselaw interpreting the definition of “operator” under CERCLA and held that “in order for operator status to apply, a defendant must have had authority to control the operations or decisions involving the disposal of the hazardous substance, or assumed responsibility or control over the disposition of the hazardous substance.”<sup>5</sup> *Farm Bureau Mut Ins Co v Carrico*, [220 Mich App 627](#), 642-653; 560 NW2d 367 (1996). In other words, an operator is not a person who merely has the ability to control a facility.

To be an operator under Part 201 a person must have the actual authority to control a facility’s hazardous-substance-disposal decisions. *Id.* Since 1996, when the Michigan Court of Appeals decided *Carrico* by applying federal law interpreting CERCLA, the U.S. Supreme Court has reaffirmed that to be liable under CERCLA “an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *United States v Bestfoods*, [524 US 51](#), 66-67 (1998).

### c. Baseline Environmental Assessments §5.12

The Baseline Environmental Assessment (BEA) process is unique to Michigan and Part 201, and it has been viewed by many as the keystone of redevelopment of contaminated properties in Michigan. The BEA process for real estate transactions is discussed in Chapter 7.

The BEA is best understood as part of the broader due diligence associated with property transactions. In almost every real estate transaction, a person purchasing property should perform at least some due diligence to determine whether environmental contamination is present, or is likely present, on the property. This process usually begins by asking the seller whether there are any known conditions that would make the property a facility under Part 201.<sup>6</sup> A buyer should generally follow up on the information supplied by the seller by conducting a Phase I environmental site assessment to determine whether there are any recognized environmental conditions (RECs) on the property that might make the property a facility under Part 201. If the Phase I identifies RECs then the person should consider performing a Phase II environmental site assessment to investigate the RECs and to identify and begin to delineate the presence of any hazardous substances on the property. An ASTM-compliant Phase I, and Phase II sampling results confirming that a property is a facility, will generally satisfy the BEA data requirements.

A BEA allows a person to become an owner or operator of a facility without incurring status environmental liability under section 20126. [MCL 324.20126\(1\)\(c\)](#), (2); [R 299.5905](#). Specifically, if a person becomes an owner or operator of a facility after June 5, 1995, and the following two conditions are satisfied, then the person will generally not be liable under Part 201: (1) a BEA “is conducted prior to or within 45 days of the earlier of the date of purchase, occupancy, or foreclosure,” and (2) “the owner or operator provides a baseline environmental assessment to the department and subsequent purchaser or transferee within 6 months after the earlier of the date of purchase, occupancy, or foreclosure.” [MCL 324.20126\(1\)\(c\)](#); [R 299.5919](#). Purchasing a property without performing a BEA will result in the person incurring status liability under § 20126 as an owner who became an owner after June 5, 1995, without conducting a BEA.

There are, however, two important exceptions to the general rule that a BEA allows a person to avoid Part 201 liability. First, as explained in [§ 5.25](#), a person who conducts a BEA will still have to comply with any applicable due care obligations and, therefore, may still be liable under § 20107a. [MCL 324.20107a](#), [MCL 324.20126\(1\)\(c\)](#), (2). Consequently, owners who conduct BEAs must ensure that they comply with the due care requirements in § 20107a. Second, a person who conducts a BEA will be liable under § 20126 for any contamination that the person causes. [MCL 324.20126\(1\)\(c\)](#), (2).

December 14, 2010, amendments to Part 201 significantly redefined BEA. Before the amendments, Part 201 defined 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 circumstance[s] 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 was to describe the condition of property and create a basis for distinguishing existing contamination from any new releases.



After the December, 2010, amendments, BEA is now defined simply as “a written document that describes the results of an all appropriate inquiry and the sampling and analysis that confirm that the property is a facility.” [MCL 324.20101\(1\)\(f\)](#). “All appropriate inquiry” is defined with a reference to the federal standard with the same name. [MCL 324.20101\(1\)\(c\)](#). It “means an evaluation of environmental conditions at a property at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the property in conformance with [40 CFR 312](#).” *Id.*

A Phase I environmental site assessment that conforms to the standards in the [ASTM E1527-05](#) Phase I Environmental Site Assessment Process or the [ASTM E2247-08](#) Phase I Environmental Site Assessment Process for Forestland or Rural Property may be used to comply with the provisions of the federal all appropriate inquiry rule. [40 CFR 312.11](#). Part 201’s definition of BEA makes it clear that despite the timing requirements in the federal rule, “for purposes of a baseline environmental assessment, the all appropriate inquiry under [40 CFR 312.20\(a\)](#) may be conducted within 45 days after the date of acquisition of a property and the components of an all appropriate inquiry under [40 CFR 312.20\(b\)](#) and [40 CFR 312.20\(c\)\(3\)](#) may be conducted or updated within 45 days after the date of acquisition of a property.” [MCL 324.20101\(1\)\(f\)](#).

The December 14, 2010, amendments substantially simplified the BEA process. Despite the fact that a BEA is still labeled a “baseline environmental assessment,” it is no longer a requirement for a BEA to establish an environmental baseline. This simplicity presents new risks to potential buyers of contaminated property. Although pre-amendment BEAs were sometimes costly and complex, they were useful because they created a baseline that could be used to distinguish existing contamination from any new releases. In the event of a future release, this made it possible for a person to avoid liability for cleaning up an entire facility by showing the limited extent of the new release relative to existing contamination. Without establishing a baseline, this task would be much more difficult—if not impossible.

A person who performs only the “skinny” BEA now allowed under Part 201 would technically not be a liable party under section 20126(1)(c), but potential buyers considering that course of action should take caution. Performing a BEA that meets the minimum requirements under Part 201 but that does not establish an environmental baseline could leave a person unable to avoid liability for contamination that the person did not cause. This is because even if a person performs a BEA the person is liable under Part 201 for contamination that the person causes or exacerbates, [MCL 324.20107a](#), [20126\(1\)-\(3\)](#), and without sufficient baseline information a person may be unable to distinguish a new release from an old release – particularly if the releases involve the same hazardous substances. Because the person would not be able to distinguish future releases for which the person is responsible from contamination that was already at the property, the person could ultimately be held liable for cleaning up all of the contamination at a facility. In that event the BEA’s liability protection would obviously be significantly limited.

### 3. Arranger Liability §5.13

Section 20126(1) provides that certain persons who arrange for the disposal, treatment, or transportation of hazardous substances are liable persons under Part 201. [MCL 324.20126\(1\)\(d\)](#). A person who arranges for the disposal, treatment, or transportation for disposal or treatment of a

hazardous substance is a liable person under Part 201 if that person arranges for another person to dispose, treat, or transport a hazardous substance, and the substance is, in accordance with those arrangements, disposed or treated at a facility that is owned by another person and that contains the hazardous substance. *Id.* These PRPs are sometimes referred to as generators because persons who fall within the definition of arranger are often the generators of the hazardous substances.

There are three important exclusions from arranger liability. First, “[a] person who, on or after June 5, 1995, arranges for the sale or transport of a secondary material for use in producing a new product” is not liable as an arranger. [MCL 324.20126\(1\)\(d\)\(i\)](#). Secondary material is essentially reusable or recyclable metal, paper, plastic, glass, textile, or rubber that is consistently separated from a waste stream in substantial amounts for reuse or recycling.<sup>7</sup> *Id.* Second, a person who arranged for the sale or transport of a secondary material before June 5, 1995, is not liable as an arranger unless the state incurred response activity costs associated with those materials before December 17, 1999. [MCL 324.20126\(d\)\(ii\)](#). Third, persons who arrange for the lawful transport or disposal of their residential household waste are not liable as arrangers. [MCL 324.20126\(d\)\(iii\)](#).

“Arrange” and “arranger” are not defined in Part 201, but courts have interpreted arranger liability under both CERCLA and Part 201 as requiring that a person actually intend to dispose of a hazardous substance in order to be liable as an arranger. *Burlington Northern & Sante Fe Ry v United States*, [556 US \\_\\_\\_](#); [129 S Ct 1870](#), 1879; 173 L Ed 2d 812 (2009) (“[U]nder the plain language of [CERCLA, which, like Part 201 does not define ‘arrange’], an entity may qualify as an arranger . . . when it takes intentional steps to dispose of a hazardous substance.”); *Cipri v Bellingham Frozen Foods, Inc.*, [235 Mich App 1](#), 10; 596 NW 2d 620 (1999) (“This Court agreed with the trial court that ‘the record was devoid of evidence tending to show that defendant intended to dispose of the heating oil’ and, therefore, defendant did not incur ‘arranger’ liability.”).

With the person’s intent to dispose as the touchstone, the class of arrangers is bounded on one side by those parties who enter into transactions for the sole purpose of discarding a used and no longer useful hazardous substance. These parties are clearly arrangers. *Burlington Northern*, 129 S Ct at 1878. Bounding the class of arrangers on the other side are those parties who sell a new and useful product that the purchaser later, and unbeknownst to the seller, disposes of in a way that causes contamination. These parties clearly are *not* arrangers. *Id.*, citing *Freeman v Glaxo Wellcome, Inc.*, [189 F3d 160](#), 164 (2d Cir 1999), and *Florida Power & Light Co v Allis Chalmers Corp.*, [893 F2d 1313](#), 1318 (11th Cir 1990).

The rest of the parties that could be classified as arrangers fall into the gray area somewhere in between those who contract for disposal and those who sell new and useful products that later cause contamination. Courts will perform a fact-sensitive inquiry to determine whether the parties in those circumstances took “intentional steps to dispose of a hazardous substance.” *Burlington Northern*, 129 S Ct at 1878. Under that inquiry, knowledge may provide some evidence of an entity’s intent to dispose of a hazardous substance. *Id.* at 1880. Indeed, there must usually be some knowledge of the planned disposal of hazardous substances. *Id.* at 1879-1880. But it is clear that “knowledge alone is insufficient,” and it is not enough to simply send a

product to a buyer knowing that minor, accidental spills of hazardous substances will occur during the transfer of the product. *Id.* In order to qualify as an arranger, a party must act “with the intention that at least a portion of the product be disposed of.” *Id.* at 1880.

#### 4. Transporter Liability §5.14

A person is liable under Part 201 if the person “accepts or accepted any hazardous substance for transport to a facility selected by that person.” [MCL 324.20126\(1\)\(e\)](#). Section 20126 apparently narrows the category of “transporters” who may be liable under Part 201 by making it clear that a person who simply transports hazardous substances to a facility is not liable unless the person actually selected the facility.

But courts interpreting nearly identical language in CERCLA have, consistent with their expansive interpretation of other provisions of CERCLA, broadly interpreted transporter liability to include not only transporters who actually select the facility, but also those transporters who “actively and substantially participate[] in the decision-making process which ultimately identifies a facility for disposal.” *Tippins, Inc v USX Corp*, [37 F3d 87](#), 90 (3d Cir 1994). Accordingly, transporter liability may attach if the person simply had “considerable input into the selection process.” *Id.* In other words, “[l]iability as a ‘transporter’ is established by showing that a person accepted hazardous substances for transport and *either* selected the disposal facility *or* had substantial input into deciding where the hazardous substance should be disposed.” *United States v USX Corp*, [68 F3d 811](#), 820 (3d Cir 1995) (emphasis added).

#### 5. Additional Categories of Potentially Liable Persons

##### a. Corporate Successors §5.15

As a general rule in Michigan, a corporate successor is liable for the actions of a predecessor corporation with which it merges, but it is not liable as a successor corporation if it merely purchases the assets of the predecessor corporation. E.g., *Craig v Oakwood Hosp*, [471 Mich 67](#), 96; 684 NW2d 296 (2004).

[T]he “traditional rule” [is] that successor liability requires an examination of “the nature of the transaction between predecessor and successor corporations.” In a merger in which stock is exchanged as consideration, the successor corporation “generally assumes all its predecessor’s liabilities.” When the successor purchases assets for cash, however, the successor corporation assumes its predecessor’s liabilities *only* “(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.”

*Id.*, quoting *Foster v Cone-Blanchard Machine Co.*, [460 Mich 696](#), 702; 597 NW2d 506 (1999) (footnotes omitted).<sup>8</sup>

This means that a person may be liable under Part 201 if it merges with a liable owner, operator, arranger, or transporter. See *Craig*, 471 Mich at 96; *Chrysler Corp v Ford Motor Co.*, [972 F Supp 1097](#), 1110-1111 (ED Mich 1997). A person may also be liable under Part 201 for onsite and offsite response costs if it purchases the assets of a liable person in the following circumstances: (1) the person assumes the liability, (2) the transaction is a de facto merger, (3) the transaction was fraudulent, (4) the transaction was not entered into in good faith or was without consideration and provision for creditors, or (5) the purchaser is the mere continuation of the seller. *Craig*, 471 Mich at 96; see *BF Goodrich v Betkoski*, [99 F3d 505](#), 518-19 (2d Cir 1996); *City Mgt Corp v US Chem Co.*, [43 F3d 244](#), 250-51 (6th Cir 1994); *Chrysler*, 972 F Supp at 1110-1111.

### **b. Parent Corporations and Shareholders §5.16**

In a case involving claims under both CERCLA and Part 201, the U.S. District Court for the Western District of Michigan held that a parent corporation can be held liable under CERCLA, but only under the traditional piercing the corporate veil analysis. *United States v CPC Int'l, Inc.*, No. 1:96-CV-680 consolidated with 1:96-CV-898, 1997 US Dist LEXIS 14154, at \*9-10 (WD Mich, Aug 11, 1997), quoting *United States v Cordova Chem Co.*, [113 F3d 572](#), 580 (6th Cir 1997) (en banc). In interpreting the question under CERCLA in that same case, the U.S. Supreme Court held that “it is hornbook law” that a parent corporation is generally not liable for the actions of its subsidiaries, and “nothing in CERCLA purports to reject this bedrock principle.” *United States v Bestfoods*, [524 US 51](#), 62 (1998).

But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.

*Id.* Thus a parent corporation or shareholder of a liable corporation may be liable under Part 201 only if it is possible, under traditional corporate law principles, to pierce the corporate veil.

### **c. Lenders §5.17**

Part 201 broadly defines “lender” to mean any state or federally chartered lending institution, any regulated affiliate or subsidiary of any such institution, an insurance company authorized to do business in Michigan under [MCL 500.100](#) to [MCL 500.8302](#), motor vehicle finance companies subject to [MCL 492.101](#) to [MCL 492.141](#) with net assets in excess of \$50,000,000.00, foreign banks, retirement funds regulated under state law with net assets in excess of \$50,000,000.00, pension funds regulated under federal law with net assets in excess of \$50,000,000.00, state and federal agencies authorized to hold security interests in real property, local units of government holding reversionary interests in real property, nonprofit tax-exempt

organizations created to promote economic development if the majority of the organizations' assets are held by a local unit of government, any person who loans money for the purchase or improvement of real property, and any person who retains or receives a security interest to service a debt or secure performance of an obligation. [MCL 324.20101](#)(1)(z).

A lender who marshalls or liquidates personal property on a facility is not liable under Part 201 unless the lender causes or contributes to environmental contamination. [MCL 324.20126](#)(4)(b).

Additionally, a lender “who has not participated in the management of the facility is not liable” under Part 201 for the costs or damages as a result of response activity taken prior to foreclosure in response to a release or threat of release. [MCL 324.20126](#)(5). A lender holding a security interest in a facility “participates in the management of the facility if that lender engages in acts of facility management that constitute actual participation in the management or operational affairs of a facility.” [MCL 324.20101a](#) (1). It is not enough to have the “mere capacity to influence, or ability to influence, or the unexercised right to control facility operations.” *Id.*; *Fed Nat'l Mortgage Ass'n v Univ Hous Leforge, LLC*, No 2:10-cv-10782, 2010 US Dist LEXIS 31884, at \*15–16 (ED Mich Apr 1, 2010). Instead, a lender must actually “[e]xercise[] decision making control over the borrower’s environmental compliance,” “[u]ndertake[] responsibility for the borrower’s hazardous substance handling or disposal practices,” or “[e]xercise[] control at a level comparable to that of a manager of the borrower’s enterprise, such that the holder has assumed or manifested responsibility for the . . . day-to-day decision making of the enterprise with respect to either” the borrower’s “environmental compliance” or substantially all of the borrower’s operational aspects. [MCL 324.20101a](#)(1)(a) -(c) (emphasis added); *Organic Chem Site PRP Group v Total Petroleum Inc*, [58 F Supp 2d 755](#), 762–763 (WD Mich 1999).

A security interest holder does not participate in the management of a facility unless it makes decisions about the borrower’s environmental compliance, assumes responsibility for the borrower’s hazardous substance handling or disposal methods, or exercises managerial control over environmental compliance or operational aspects of the facility. . . . A mere capacity to influence or an unexercised right to control the facility is insufficient to show participation in management. [*Organic Chem*, [58 F Supp 2d](#) at 762–763 (citation omitted).]

The lender liability exception applies only to periods of time before foreclosure when a lender holds a security interest and may exercise normal powers as a lender but may not participate in the management of the facility. Once a lender forecloses on a facility, the exception no longer applies, and a lender may become a liable person by becoming an owner after June 5, 1995, without performing a BEA. In that situation, a lender is treated like any other purchaser under Part 201. To avoid incurring liability for the cost of response activity that occurs after foreclosure, lenders should perform a BEA before foreclosing on a facility.

### III. Defenses to Part 201 Liability

#### A. Third Parties and the Innocent Landowner Defense §5.18

An owner or operator of a facility is not liable under Part 201 if the release or threat of release was caused solely by “[a]n act or omission of a third party other than an employee or agent of the person or a person in a contractual relationship existing either directly or indirectly with a person who is liable under” § 20126. [MCL 324.20126](#)(d)(iii). “Contractual relationship” is not defined in Part 201; under the plain language of the exception, it is clear that a property purchaser cannot utilize this defense to protect it from liability that would attach to the seller because a purchase and sale agreement obviously constitutes a contractual relationship.

Practitioners familiar with the “innocent landowner” defense under CERCLA should take note that the defense exists under Part 201 in a different form. Unlike CERCLA, which defines “contractual relationship” in such a manner as to provide a defense for so-called innocent owners who purchase or inherit a facility after conducting all appropriate inquiry, Part 201 provides a similar, and in some instances more complete, defense for innocent owners—but in a different way. As discussed more fully in [§ 5.9](#), owners and operators who became an owner or operator before June 5, 1995, are liable only if they caused a release or threat of release. [MCL 324.20126](#)(1)(a)-(c). And owners and operators who become owners or operators after June 5, 1995, may avoid liability for releases and threats of release that they did not cause by conducting a BEA. [MCL 324.20126](#)(1)(c), (2). Moreover, commercial, retail, and office lessees, along with owners and occupants of residential real property, owners of severed mineral rights, persons who acquire a facility by inheritance, devise, or transfer from an inter vivos or testamentary trust, and persons who undertake “all appropriate inquiry” to establish that they “did not know and had no reason to know that the property was a facility” are not liable under Part 201 unless they cause the release or threat of release that results in the contamination. [MCL 324.20126](#)(3).

#### B. The Migrating Contamination Defense §5.19

“The owner or operator of property onto which contamination has migrated” is not liable under Part 201 “unless that person is responsible for an activity causing the release that is the source of the contamination.” [MCL 324.20126](#)(4)(c). This defense is not limited in the usual Part 201 way – by making the defense unavailable if the person causes a release or threat of release at the facility. Instead, this defense is limited only if the person is responsible for an activity causing a release that is the source of the migrating contamination. There is no caselaw addressing this issue, but it may also be significant that the legislature chose to limit this defense by reference to migrating “contamination,” a word not defined in Part 201. Other defense sections (e.g., § 20126(3)) refer to activities that cause a release at the facility; the migration defense in § 20126(4)(c) refers to activities that cause a release that is the source of migrating contamination. This distinction arguably broadens the migrating contamination defense relative to other Part 201 defenses.

#### C. The Act of God Defense §5.20

There is an extremely limited defense available to owners and operators of facilities if the release or threat of release was caused solely by an act of God. [MCL 324.20126](#)(4)(d)(i). An act of God

is “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” [MCL 324.20101](#)(1)(a). No case under Part 201 has addressed the act of God defense.

#### **D. The Act of War Defense §5.21**

Like the act of God defense, the act of war defense is an extraordinarily narrow defense that has not been addressed in the caselaw. An owner or operator of a facility is not liable under Part 201 if the release or threat of release was caused solely by an “act of war,” which is not defined in Part 201. [MCL 324.20126](#)(4)(d)(ii).

### **IV. Part 201 Obligations**

#### **A. In General §5.22**

Part 201 imposes affirmative obligations on PRPs and on otherwise innocent and nonliable owners and operators of facilities.

#### **B. Due Care Obligations Imposed on all Facility Owners and Operators §5.23**

The stated purpose of Part 201 is to eliminate unacceptable risks to public health, safety, or welfare, or to the environment, from environmental contamination at facilities. [MCL 324.20102](#)(c). Significantly, the purpose of Part 201 is not to eliminate contamination, to clean up every facility, or even to eliminate all exposure to hazardous substances; the purpose is to eliminate unacceptable risks of exposure. [MCL 324.20102](#)(b)-(c).

In furtherance of that purpose, Part 201 provides that all owners and operators of facilities – even nonliable owners and operators – must exercise “due care” to appropriately manage exposure to hazardous substances at the facility. Specifically, § 20107a provides that “[a] person who owns or operates property that he or she has knowledge is a facility shall do [six things] with respect to hazardous substances at the facility.” [MCL 324.20107a](#) (1). The statute and rules are silent as to the degree of “knowledge” that triggers these obligations, but the rules suggest that owners and operators have an obligation to conduct “all appropriate inquiry” to determine whether the property is a facility. [R 299.51003](#)(1). The purpose of these so-called due care obligations is “to place certain obligations on the current owner of a facility to prevent unnecessary human exposure to hazardous substances, prevent disruption of limited response activities that have already been performed, and ensure the work being done at the facility does not result in new releases.” *Dep’t of Environmental Quality v Waterous Co*, [279 Mich App 346](#), 373-374; 760 NW2d 856, 871 (2008). Owners and operators must also document their compliance with all of these obligations. [R 299.51003](#)(5).

##### **1. “Prevent Exacerbation” §5.24**

The first of the six due care obligations is to “prevent exacerbation.” [MCL 324.20107a](#)(1)(a). Exacerbation is defined as the owner or operator causing either (1) the migration of contamination beyond the boundaries of the property to another property, where the property is

the source of a release at levels above relevant unrestricted residential criteria, or (2) “[a] change in facility conditions that increases response activity costs.” [MCL 324.20101\(1\)\(q\)](#). As defined in the Part 201 rules, an increase in response costs will not be considered exacerbation if, among other reasons, it “is small in relation to the total cost of response activity that would be required to satisfy the relevant land use-based cleanup criteria and other requirements,” or if “[t]he activity undertaken provides environmental or public health benefits.” [R 299.51007\(1\)-\(2\)](#).

## 2. “Exercise Due Care” §5.25

The second obligation is to “[e]xercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects public health and safety.” [MCL 324.20107a\(1\)\(b\)](#). Response activity is defined as “evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources.” [MCL 324.20101\(1\)\(pp\)](#). Evaluation means activities including, but not limited to, “investigation, studies, sampling, analysis, development of feasibility studies, and administrative efforts that are needed to determine the nature, extent, and impact of a release or threat of release and necessary response activities.” [MCL 324.20101\(1\)\(p\)](#). Interim response activity means “the cleanup or removal of a released hazardous substance or the taking of other actions, prior to the implementation of a remedial action, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.” [MCL 324.20101\(1\)\(y\)](#). Remedial action includes, but is not limited to, “cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, welfare, or to the environment.” [MCL 324.20101\(1\)\(mm\)](#).

The response activities in which an owner or operator must engage to comply with due care obligations include providing notice and managing containers to prevent and respond to releases of hazardous substances in quantities that are or may become injurious to the environment or public health, safety, or welfare. [R 299.51009](#), - [R 299.51015](#). As a more general matter, mitigation of unacceptable exposure is achieved by (1) eliminating or reducing exposure to hazardous substances in unacceptable amounts as determined by comparison to the Part 201 cleanup criteria or documented site-specific conditions, (2) undertaking response activity to mitigate offsite risks resulting from erosion of surface soils or dispersion of hazardous substances in the soil, and (3) complying with applicable provisions of the Part 201 rules. [R 299.51013](#). These requirements can often be satisfied by installing fencing and placing clean soil or pavement over contaminated soil to prevent exposure to hazardous substances in the soil.

If contamination in concentrations that exceed applicable criteria has migrated beyond the property’s boundaries, then, unless the person has a permit for the migrating contamination, the owner or operator must provide notice of migrating contamination to the DEQ and the affected adjacent property owners. [R 299.51017](#). Similarly, if a hazardous substance may present an unacceptable exposure to utility workers or other persons conducting activities at the property in



an easement, then the owner or operator can satisfy due care by notifying those persons in writing of the general nature and extent of the contamination. [R 299.51013](#)(6).

### **3. “Acts or Omissions of a Third Party” §5.26**

The third due care obligation is to “[t]ake reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.” [MCL 324.20107a](#)(1)(c).

### **4. Provide Reasonable Cooperation §5.27**

The fourth obligation is to “provide reasonable cooperation, assistance, and access to the persons that are authorized to conduct response activities at the facility.” [MCL 324.20107a](#)(1)(d). This obligation mandates providing access, but it does not “provide any right of access not expressly authorized by law,” and it does not “preclude access allowed pursuant to a voluntary agreement.” *Id.*

### **5. Comply with Land Use Restrictions §5.28**

The fifth due care obligation is to “comply with any land use or resource use restrictions established or relied on in connection with the response activities at the facility.” [MCL 324.20107a](#)(1)(e).

### **6. Not Impede Land or Resource Use Restrictions §5.29**

The final due care obligation is to “not impede the effectiveness or integrity of any land use or resource use restriction employed at the facility in connection with response activities.” [MCL 324.20107a](#)(1)(f).

### **7. Liability for Failure to Comply with § 20107a §5.30**

The due care obligations in § 20107a are independent of and in addition to the other obligations under Part 201. So regardless of whether a person is liable under § 20126, or whether the person is eligible for one or more defenses under that section, a person may nonetheless be liable under § 20107a if the person fails to exercise due care. Thus, a person who fails to comply with the person’s due care obligations and who is not otherwise liable under Part 201 “is liable for response activity costs and natural resource damages attributable to any exacerbation and any fines or penalties imposed under [Part 201] resulting from the violation of [the person’s due care obligations].” [MCL 324.20107a](#)(3). A person generally cannot be liable for the performance of additional response activities at a facility to address pre-existing conditions unless the person is liable for those activities under § 20126. *Id.* Similarly, an otherwise liable person cannot avoid Part 201 liability under § 20126 by pointing to another party’s failure to comply with its due care obligations. *Waterous*, 279 Mich App at 374. Of course, if the violation of these duties results in commingling of contaminants, increased contamination, or both, then these distinctions may be of little comfort.

### C. Obligations of Liable Owners and Operators §5.31

As discussed in [§ 5.25](#), all owners and operators of a property – including owners and operators who are not liable under § 20126 – who have knowledge that the property is contaminated above residential criteria must exercise due care. [MCL 324.20107a](#). In addition to those due care obligations, owners and operators of a property who know that the property is a facility *and who are liable persons under § 20126* must generally perform the following response activities:

- (1) “[d]etermine the nature and extent of a release at the facility;”
- (2) “[r]eport the release” to the DEQ within 24 hours of obtaining knowledge of a release of a reportable quantity of a hazardous substance under [40 CFR 302.4](#) and [302.6](#) (1989);
- (3) “notify the department and the owners of property where . . . hazardous substances are present within 30 days after obtaining knowledge that [a] release has migrated” if “the owner or operator has reason to believe that 1 or more hazardous substances are emanating from or have emanated from and are present beyond the boundary of his or her property at a concentration in excess of cleanup criteria for unrestricted residential use;”
- (4) “notify the department and the surface owner within 30 days after obtaining knowledge of [a] release” if “the release is a result of an activity that is subject to permitting under Part 615 and the owner or operator is not the owner of the surface property and the release results in hazardous substance concentrations in excess of cleanup criteria for unrestricted residential use;”
- (5) “[i]mmediately stop or prevent the release at the source;”
- (6) implement all practical, cost effective, and environmentally protective source control or removal measures necessary to remove or contain hazardous substances released after June 5, 1995;
- (7) “identify and eliminate any threat of fire or explosion or any direct contact hazards;”
- (8) initiate removal of any released hazardous substance that is in its liquid phase and that is not dissolved in water;
- (9) “[d]iligently pursue response activities necessary to achieve the” applicable cleanup criteria, through self-implemented response activities under section 20114a, department-approved response activities under section 20114b, or both; and
- (10) upon request of the DEQ, plan for and implement interim response activities, plan for and undertake evaluation activities, pursue remedial actions and submit a no further action report, submit a response activity plan for approval, implement an approved response activity plan, submit a no further action report after completing remedial action, and take any other response activity “determined by the department to be technically sound and necessary to protect the public health, safety, welfare, or the environment.”

[MCL 324.20114](#)(1).

Section 20120a and the DEQ administrative rules are used to determine how to implement response activities necessary to achieve applicable cleanup criteria. Section 20120a provides that the category of a facility determines the applicable cleanup criteria, and, in turn, the necessary level of cleanup. [MCL 324.20120a](#)(1). In particular, § 20120a provides that the DEQ may establish cleanup criteria by considering reasonable and relevant exposure pathways for the following categories: residential, nonresidential, limited residential, limited nonresidential, and site-specific. [MCL 324.20120a](#)(1)-(3), .2120b. The DEQ's categories and the cleanup criteria applicable in each of those categories can be found in Rules 744 to 752 of the Part 201 rules. [R 299.5744](#) - [R 299.5752](#). At the time of the writing of this Chapter, the Part 201 rules had not yet been amended to reflect the December, 2010, amendments to Part 201. In particular, the rules still contain industrial and commercial categories, which were eliminated from Part 201 when the categories were simplified in the December, 2010, amendments.

A person need not undertake the actions required under § 20114 if the release was a “permitted release” or a release that was otherwise in compliance with applicable air pollution control laws. [MCL 324.20114](#)(4). A permitted release is (1) a “release in compliance with an applicable, legally enforceable permit issued under state law,” (2) a “lawful and authorized discharge into a permitted waste treatment facility,” or (3) a “federally permitted release as defined in” CERCLA. [MCL 324.20101](#)(1)(ii).

#### **D. Response Activities §5.32**

Liable and non-liable parties alike may undertake actions to address the release or threat of release of hazardous substances from a facility. In fact, liable parties are generally required to initiate such activities, which usually fall under Part 201's definition of “response activities.”

Part 201 broadly defines response activity as “evaluation, interim response activity, remedial action, demolition, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources.” [MCL 324.20101](#)(1)(pp). It “also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the department of community health and enforcement actions related to any response activity.” *Id.*

Remedial action, which is within the definition of response activity, is also broadly defined. It includes “cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.” [MCL 324.20101](#)(1)(mm).

All of the following factors must be considered equally and on balance, with no single factor as the most important, when a person is selecting a remedial action or when the DEQ is selecting or approving a remedial action:

- (i) effectiveness of alternatives in protecting the public health, safety and welfare and the environment;

- (ii) the long-term uncertainties associated with the proposed remedial action;
- (iii) the persistence, toxicity, mobility and propensity to bioaccumulate of the hazardous substances;
- (iv) the short- and long-term potential for adverse health effects from human exposure;
- (v) the costs of remedial action, including long-term maintenance costs;
- (vi) reliability of the alternatives;
- (vii) potential future response activity costs if an alternative fails;
- (viii) potential threat to human health, safety and welfare and the environment associated with excavation, transportation and redispursal or containment;
- (ix) the ability to monitor remedial performance; and
- (x) for remedial actions requiring opportunity for public participation, the public's perspective about the extent to which the proposed remedial action effectively addresses Part 201 requirements.

[MCL 324.20120](#).

## **2. Self-Implemented Response Activities §5.33**

In general, a person may undertake response activities without first securing DEQ approval. [MCL 324.20114\(2\)](#), [.20114a\(1\)](#). This is the so-called Nike provision of Part 201 – “just do it.” But prior approval is required if the response activity will be done under an administrative order, agreement, or judicial decree “that requires prior department approval, and submitting a response activity plan to the department under section 20114b.” [MCL 324.20114\(2\)](#).

A non-liable person is generally free to voluntarily initiate and self-implement response activities at a facility. [MCL 324.20114a\(1\)](#). Liable persons are required to initiate response activities, but they may generally choose to self-implement those activities rather than to secure prior approval from the DEQ. [MCL 324.20114\(1\)\(g\)](#), [.20114a\(1\)](#). A person self-implementing response activities might also have additional obligations as required by the DEQ. [MCL 324.20114a\(1\)](#). If a person completes response activities that satisfy Part 201 cleanup criteria, then the person may submit a no further action report to the DEQ. [MCL 324.20114a\(2\)](#).

## **3. Department-Approved Response Activities: Response Activity Plans §5.34**

In some circumstances the DEQ may require a person to perform and submit a response activity plan for approval. Persons self-initiating response activities may choose to submit a response activity plan to the DEQ with a request for approval of one or more aspects of the response activity. [MCL 324.20114b\(1\)](#).

A response activity plan is a “plan for undertaking response activities.” [MCL 324.20101\(1\)\(rr\)](#). It may include “[a] plan to undertake interim response activities,” “[a] plan for evaluation activities,” “[a] feasibility study,” “[a] remedial action plan,” or a combination of the above. *Id.*

Within 150 days, or 180 days if public participation is required, of receipt of a response activity plan submitted for approval, the DEQ must approve the plan, approve the plan with conditions, deny the plan, or notify the submitter that the plan does not contain sufficient information for the DEQ to make a decision. [MCL 324.20114b\(3\)](#). If the DEQ’s response is a notification of insufficient information, then the DEQ must identify the information required to make a decision. *Id.* If the plan is approved with conditions, then the DEQ must specify the conditions of approval. *Id.* If the plan is denied, then the DEQ must, to the extent practical, state with specificity all of the reasons for denial. *Id.* Failure to timely respond means that “[t]he response activity plan is considered approved.” [MCL 324.20114b\(4\)](#).

A person whose response activity plan was denied may revise and resubmit the plan for approval. [MCL 324.20114b\(4\)](#). DEQ decisions on scientific and technical issues in a response activity plan are appealable to the panel. [MCL 324.20114b\(6\)](#).

#### **4. No-Further-Action Determinations §5.35**

Upon completion of remedial actions that satisfy applicable Part 201 requirements, a person may submit a no further action report on a form developed by the DEQ and available on the DEQ’s website. [MCL 324.20114d\(1\)](#). A no further action report is a report “detailing the completion of remedial actions and including a postclosure plan and a postclosure agreement, if appropriate.” [MCL 324.20101\(1\)\(ee\)](#). A submitted no further action report may include a request that, upon approval, the facility be designated a residential closure. [MCL 324.20114d\(1\)](#). If the DEQ approves a no further action report, it issues a no further action letter confirming that the report has been approved after review. [MCL 324.20101\(1\)\(dd\)](#).

A no further action report must document the basis for concluding that remedial actions have been completed. [MCL 324.20114d\(1\)](#). The person submitting the report must include a signed affidavit attesting to the fact that the information upon which the no further action report is based is complete and true to the best of that person’s knowledge. [MCL 324.20114d\(5\)](#). A no further action report must also include a signed affidavit from an environmental consultant attesting to the fact that the remedial actions detailed in the no further action report comply with all applicable requirements and that the information upon which the no further action report is based is complete and true to the best of the consultant’s knowledge. *Id.* The certifying consultant must meet the professional qualifications applicable to members of the response activity review panel, and the consultant must have prepared the no further action report. *Id.* The consultant must also attach a certificate of insurance demonstrating compliance with minimum insurance requirements. *Id.*

If the performed remedial action satisfies unrestricted residential criteria, then land use or resource use restrictions, monitoring and a postclosure plan and postclosure agreement are not required. [MCL 324.20114c\(1\)](#), [.20114d\(2\)\(a\)](#). If the remedial action requires land use or resource use restrictions and financial assurance is not required or is de minimis, then a postclosure plan, but not a postclosure agreement, is required. [MCL 324.20114c\(2\)](#),

[.20114d\(2\)\(b\)](#). For all other remedial actions seeking a no further action determination, the submitted no further action report must include both a postclosure plan and a postclosure agreement. [MCL 324.20114d\(2\)\(c\)](#).

A postclosure plan is “a plan for land use or resource use restrictions or permanent markers at a facility upon completion of remedial actions as required under section 20114c.” [MCL 324.20101\(1\)\(kk\)](#). It must generally include (i) a restrictive covenant describing the land use and resource use restrictions necessary to assure the effectiveness and integrity of any containment, exposure barrier or other land use or resource use restrictions, and (ii) permanent markers to describe restricted areas of the facility and the nature of any restrictions. [MCL 324.20114c\(2\)](#).

A postclosure agreement is “an agreement between the department and a person who has submitted a no further action report that prescribes, as appropriate, activities required to be undertaken upon completion of remedial actions as provided for in section 20114d.” [MCL 324.20101\(1\)\(jj\)](#). A proposed postclosure agreement must include the following: (i) provisions for monitoring, operation and maintenance and oversight necessary to assure the effectiveness and integrity of the remedial action; (ii) financial assurance to pay for monitoring, operation and maintenance, oversight and other costs determined by the DEQ to be necessary to assure the effectiveness and integrity of the remedial action; and (iii) a provision requiring notice to the DEQ of the owner's intent to convey an interest in the facility 14 days prior to consummating the conveyance. [MCL 324.20114d\(3\)](#). If the no further action report requires a postclosure agreement, then the DEQ may negotiate alternative terms from those in the proposed postclosure agreement. [MCL 324.20114d\(7\)](#).

Within 150 days, or 180 days if public comment is necessary, of receipt of a no further action report, the DEQ must approve, deny, or notify the submitter that the report does not contain sufficient information to make a decision. [MCL 324.20114d\(7\)](#). If the DEQ's response is that the report does not include sufficient information, then the DEQ must identify the information that is required to make a decision. *Id.* If the report is denied, then the DEQ's denial must, to the extent practical, state with specificity all of the reasons for the denial. *Id.* If the report, including any required postclosure plan and postclosure agreement, is approved, then the DEQ must provide the person submitting the report with a no further action letter. *Id.* If the DEQ does not respond in a timely manner, then the no further action report is considered approved. [MCL 324.20114d\(8\)](#). A person may appeal the DEQ's decision on technical or scientific issues in the no further action report to the review panel. [MCL 324.20114d\(9\)](#).

The person submitting a no further action report must maintain all documents and data prepared, acquired, or relied on in connection with the no further action report for at least ten years after the later of the date on which the DEQ approves the no further action report or the date on which no further monitoring, operation, or maintenance is required to be undertaken as a part of the remedial action covered by the report. [MCL 324.20114d\(6\)](#). These documents must be made available to the DEQ upon request. *Id.*

A no further action letter is a significant benefit for PRPs. A person is not liable under Part 201 for environmental contamination addressed in a no further action report that has been approved or considered approved by the DEQ. [MCL 324.20126\(e\)](#). So a no further action letter allows a

person who has performed response activities at a site to achieve a degree certainty and finality by addressing the lingering potential for residual liability under Part 201.

Despite their significant benefits, no further action letters have important limitations. Recipients of approved or considered-approved no further action letters remain liable for subsequent releases not addressed in the no further action report if they are otherwise liable for that release; they are still liable for environmental contamination that is not addressed in the no further action report and for which they are otherwise liable; they are liable for any response activities necessary to comply with Part 201 if relied-upon land-use or resource-use restrictions change; they are liable if the no further action report relies on monitoring necessary to assure the effectiveness and integrity of the remedial action and that monitoring shows a need for response activities to address potential exposure to environmental contamination in excess of the levels relied on in the no further action report; and they are still liable if the remedial actions that were the basis for the no further action report fail to meet performance objectives identified in the no further action report. *Id.*

### **5. Response Activity Review Panel §5.36**

Under Part 201, the director of the DEQ must establish a response activity review panel (the “Panel”). [MCL 324.20114e](#)(1). The purpose of the Panel is to advise the director on technical or scientific disputes, which include disputes regarding assessment of risk concerning response activity plans and no further action reports. *Id.*

The panel consists of fifteen individuals appointed for three-year terms by the director. [MCL 324.20114e](#)(2), (4). They serve without compensation – except for reimbursement for their actual and necessary expenses incurred in performing their duties – and they must meet statutory qualifications for education, minimum relevant experience, continuing education, and potential conflicts of interest posed by association with the DEA and the parties seeking review from the Panel. The Panel’s business is conducted under the Open Meetings Act. [MCL 324.20114e](#)(2)–(4).

Persons who submit response activity plans or no further action reports to the DEA will generally be able to appeal the DEQ’s decision on technical or scientific issues to the panel by filing a petition with the director. [MCL 324.20114e](#)(1), (7). The petition for appeal must include a \$3,500.00 fee as well as a statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis, opinion and supporting documentation for the petitioner’s position. [MCL 324.20114e](#)(7).

Within forty-five days of the filing of the petition, the director may negotiate a resolution of the dispute with the petitioner without convening the Panel. *Id.* If the dispute is not resolved within forty-five days of the filing of the petition, then the director must schedule a meeting of five members of the panel. [MCL 324.20114e](#)(8).

Within forty-five days of affording the petitioner and DEQ an opportunity to present their positions to the Panel, the Panel will make a recommendation to the director to adopt, modify, or reverse, in whole or in part, the DEQ’s decision. [MCL 324.20114e](#)(8)-(9). Failure to timely

make the recommendation means that “the decision of the DEQ is the final decision of the director.” [MCL 324.20114e](#)(9).

Within sixty days of receipt of the Panel’s written recommendation, the director must issue a final decision in writing. [MCL 324.20114e](#)(10). The director may agree with the recommendation and incorporate it in the response activity plan or no further action report, reject the recommendation and issue a written decision with specific rationale for the rejection, or fail to decide the recommendation in a timely manner, in which case the recommendation will be considered the final decision of the director. *Id.* The final decision of the director is subject to judicial review under section 631 of the Revised Judicature Act. *Id.*

## 6. Groundwater Issues §5.37

If a discharge of venting groundwater complies with Part 201, then a permit for the discharge is not required. [MCL 324.20120a](#)(15). Venting groundwater is “groundwater that is entering a surface water of the state from a facility.” [MCL 324.20101](#)(1)(vv).

A person may demonstrate compliance with Part 201 for a response activity providing for venting groundwater by meeting any of the following: (i) generic groundwater-surface water interface criteria; (ii) mixing zone-based groundwater-surface water interface criteria; or (iii) site-specific criteria, which may include mixing zones. [MCL 324.20120e](#)(1).

A person may generally self-initiate the following response activities with respect to venting groundwater: (i) a person may undertake evaluation activities associated with a response activity providing for venting groundwater using groundwater-surface water interface monitoring wells or alternative monitoring points; (ii) a person may undertake response activities that rely on monitoring from groundwater-surface water interface monitoring wells to demonstrate compliance; and (iii) except for certain specified circumstances, a person may undertake response activities that rely on monitoring from alternative monitoring points to demonstrate compliance with generic groundwater-surface water interface criteria if the person submits to the DEQ a notice of alternative monitoring points at least 30 days prior to relying on those alternative monitoring points. [MCL 324.20120e](#)(2).

A person may not self-initiate response activities and must obtain prior approval for response activities that rely on monitoring from alternative monitoring points to demonstrate compliance with generic groundwater-surface water interface criteria in any of the following circumstances: (i) an applicable criterion is based on acute toxicity endpoints; (ii) the venting groundwater contains a bioaccumulative chemical of concern as identified in the water quality standards for surface waters developed pursuant to Part 31 and for which the person is liable under this part; (iii) the venting groundwater is entering a surface water body protected for coldwater fisheries identified in a listed publication, or (iv) the venting groundwater is entering a surface water body designated as an outstanding state resource water or outstanding international resource water as identified in the water quality standards for surface waters under Part 31. [MCL 324.20120e](#)(3).

Alternative monitoring points may be used to demonstrate compliance for venting groundwater if the points meet all of the following standards: (i) the locations where venting groundwater enters surface water have been sufficiently identified to allow monitoring for the evaluation of



compliance with criteria; (ii) the alternative monitoring points allow for venting groundwater to be sampled at a point before mixing with surface water (this does not preclude location of alternative monitoring points in a floodplain); (iii) the alternative monitoring points allow for reliable, representative monitoring of groundwater quality at the groundwater-surface water interface; (iv) the potential fate and transport mechanisms for groundwater contaminants, including any chemical, physical or biological processes that result in the reduction of hazardous substance concentrations between the monitoring wells and the alternative monitoring points are identified; and (v) sentinel monitoring points are used in conjunction with the alternative monitoring points to assure that any potential exceedence of an applicable water quality standard can be identified with sufficient notice to allow additional response activity, if needed, to be implemented that will prevent the exceedence. [MCL 324.20114e](#)(4).

If a person uses alternative monitoring points and intends to utilize mixing zone-based groundwater-surface water interface criteria or site-specific criteria, then the person must submit a response activity plan, which is subject to a 30-day public comment period. [MCL 324.20120e](#)(5), (8). Response activity plans are generally discussed in section 5.34. If the DEQ denies the request to rely on alternative monitoring points, it must state the reasons for the denial, including the scientific and technical basis for the denial. [MCL 324.20120e](#)(7). A person may appeal a scientific or technical aspect of the decision to the review panel. [MCL 324.20120e](#)(9).

## V. Cost Recovery and Contribution: Apportionment of Liability and Allocation of Damages Among PRPs

### A. Cost Recovery

#### 1. In General §5.38

Part 201 allows parties who incur response activity costs to bring cost recovery actions against PRPs. A person who incurs “costs of response activity reasonably incurred under the circumstances” may bring a civil action to recover those costs from any person who is liable for those costs under § 20126. [MCL 324.20126a](#)(1)(b), (7). The general rule is that all parties liable under § 20126 are jointly and severally liable for the state’s lawful response activity costs, another liable person’s reasonably incurred response activity, and any natural resource damages. [MCL 324.20126a](#)(1). Accordingly, if any person incurs such response activity costs then it may bring an action under § 20126a(7) to recover (potentially all of) those costs from any other persons liable under § 20126.

An earlier version of section 20126a required cleanups to be “appropriate” in light of criteria, and that costs be “necessary” to be recovered. *99-1073 the City of Detroit v Simon*, [247 F3d 619](#), 630 (6th Cir 2001); *Ford Motor Co v Mich Consol Gas Co*, No 08-cv-13503-DT, 2010 US Dist LEXIS 88728, at \*9–10, 20–23 (ED Mich Aug 27, 2010). “Necessary” meant “required,” *Village of Milford v K-H Holding Corp*, [390 F3d 926](#), 936 (6th Cir 2004), and costs incurred on a cleanup going beyond the level necessary to make a property safe for industrial use were denied as unnecessary costs that would have provided a windfall to the beneficiary of the cleanup. *Simon*, [247 F3d](#) at 630.

The December 14, 2010, amendments to Part 201 replaced section 20126a's "necessary" requirement with a "reasonably incurred under the circumstances" requirement. [MCL 324.20126a\(1\)\(b\)](#). This amendment arguably broadens the scope of costs recoverable in an action under Part 201 and overrules the holdings in *Simon and Ford*. Under the amendments to section 20126a, a person may recover not only "necessary" costs of response activities incurred consistent with applicable rules, but also any costs of response activity "reasonably incurred under the circumstances." *Id.*

**Unpublished decision:** *Taylor Land Group, LLC v BP Products N America, Inc*, unpublished opinion per curiam of the Court of Appeals, decided May 26, 2011 ([Docket No 294764](#)) (interpreting pre-amendment section 20126a, agreeing with the trial court that "any liability by defendants under NREPA for plaintiff's cleanup costs extends only to remediation activities that were 'necessary costs of response activity' under § 20126(2)," and holding that "plaintiff is not entitled to reimbursement for the cost of any remediation of environmental hazards, but rather only for remediation that is consistent with the regulations promulgated under the NREPA.").

## 2. Apportionment of Liability in Cost Recovery Claims §5.39

A person sued in a cost recovery action may try to establish that "there is a reasonable basis for division of harm according to the contribution of each person." [MCL 324.20129\(1\)](#). This is known as apportionment. It is an attempt to apportion harm and avoid joint and several liability. It should be distinguished from allocation, which is an attempt to use a contribution action to allocate damages in an equitable manner among parties already found to be jointly and severally liable. The apportionment analysis looks to traditional common law tests to determine whether a given harm is divisible. Courts faced with apportionment arguments under CERCLA have looked to the Second Restatement of Torts to inform their analysis of whether a reasonable basis for division exists such that a given harm (and liability) can be said to be divisible (rather than joint and several). *E.g., United States v Chem-Dyne Corp*, [572 F Supp 802](#), 810 (SD Ohio 1983), *quoting* Restatement Torts, 2d (1963), § 433A, 875.

### a. The Historic Apportionment Test §5.40

Establishing apportionment has historically been an exceptionally difficult task; the nature of contamination at facilities has led very few courts to find that the harm associated with that contamination is sufficiently divisible to allow apportionment of harm. The burden is on the party requesting apportionment to establish the reasonable basis for apportionment, and a party must prove, in detail and by a preponderance of the evidence, the degree of contamination traceable to its activities. The overwhelming majority of cases, therefore, have emphasized the difficulty of meeting the divisibility-of-harm burden and refused to hold that the harm is divisible. *E.g., United States v Burlington Northern & Sante Fe Ry*, [479 F3d 1113](#), 1136 (9th Cir 2007), *rev'd* [556 US \\_\\_\\_\\_](#); [129 S Ct 1870](#); 173 L Ed 2d 812 (2009) ("CERCLA is not a statute

concerned with allocation of fault. Instead, CERCLA seeks to distribute economic burdens. Joint and several liability, even for PRPs with a minor connection to the contaminated facility, is the norm, designed to assure, as far as possible, that some entity with connection to the contamination picks up the tab. Apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible.”).

### **b. The Potential Effect of *Burlington Northern* on Apportionment §5.41**

A recent U.S. Supreme Court case may dramatically change the previously understood rule that apportionment is exceptionally difficult to establish. In *Burlington Northern & Sante Fe Ry Co v United States*, the U.S. Supreme Court appears to have significantly lowered the bar to avoiding joint and several liability under CERCLA. *Burlington N & Sante Fe Ry Co v United States*, [556 US \\_\\_\\_](#); [129 S Ct 1870](#); 173 L Ed 2d 812 (2009). The district court in that case had apportioned liability by looking to the percentage of surface area owned by the defendants, the percentage of time each defendant owned the facility, and the volume, identity, and location of the contamination that could be attributed to the portion of the site owned by each defendant. *Id.* at 1882. The court then built in a fifty percent safety factor on top of each party’s share to account for possible “calculation errors.” *Id.* The Ninth Circuit rejected the district court’s apportionment, concluding that the court’s rough approximations lacked the necessary supporting data and precision to serve as a truly reasonable basis for attributing each defendant’s share of the harm at the site. *Id.* The U.S. Supreme Court reversed the Ninth Circuit and held that the district court’s apportionment was sufficiently reasonable. *Id.* at 1882–83.

If Michigan courts adopt the *Burlington Northern* test and apply it to the essentially identical apportionment-and-allocation scheme in Part 201, then it may become much easier for liable persons to establish apportionment and avoid joint and several liability under Part 201. But if Michigan courts refuse to adopt the more lenient *Burlington Northern* test, or if a party simply fails to meet its burden – whether the high historic burden or the low *Burlington Northern* burden – of showing that the harm is capable of apportionment, then to avoid being liable for the entire amount of a cleanup a jointly and severally liable party will need to argue that the damages should be allocated among all of the PRPs under Part 201’s contribution provisions in § 20129. See *Forest City Enterprises, Inc v Nationwide Ins Co*, [228 Mich App 57](#), 66; 577 NW2d 150 (1998) (“Once it is determined that these parties are jointly and severally liable, the critical issue becomes one of contribution.”).

## **B. Contribution**

### **1. In General §5.42**

In addition to cost recovery actions, Part 201 also provides for contribution actions to apportion harm and allocate damages among liable parties. Once a cost recovery action against a liable person has been initiated, that person may seek to show that it should not be jointly and severally liable because the harm is apportionable or it may “seek contribution from any other person who is liable under section 20126.” § 20129(1), (3).

Actions for contribution can be brought only by certain PRPs. Under the similar framework in CERCLA, a person can bring a contribution action only after the person is subject to a civil

action. *Cooper Indus, Inc v Aviall Servs, Inc*, [543 US 157](#) (2004). The similarity of the language in CERCLA's contribution provision, § 113(f)(1) of CERCLA, and the contribution language in section 20129(3) of Part 201 strongly suggests that a similar rule applies under Part 201, and at least one Michigan court has so held in an unpublished decision. Thus, unlike cost recovery, contribution is available under Part 201 only when a person has already been subject to a civil action.

*Unpublished decision: Hicks Family Ltd P'ship v Nat'l Bank of Howell*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 3, 2006 ([Docket 268400](#)) ("There is no material difference in the two saving clauses, and the United States Supreme Court's construction of § 113(f)(1) is consistent with the basic principle that unambiguous statutory language should be enforced as written. . . . Accordingly, we conclude that § 20129(3) does not permit a party who is not a defendant in an action under part 201 to bring an action for contribution." (citations omitted)).

## 2. Equitable Allocation of Damages §5.43

Once initiated, a contribution claim allows a person already exposed to liability in a cost recovery action to allocate its share of liability associated with response activity costs incurred at a facility among all of the other PRPs. In other words, once a person's liability under Part 201 has been established, contribution allows the court to allocate damages in an equitable manner. In performing that allocation, a court must look to five factors set forth in Part 201. [MCL 324.20129](#)(3). Courts are also likely to look to what are known as the "Gore factors" in the CERCLA context.<sup>9</sup> The mandatory statutory factors in Part 201 are as follows: (1) the persons' relative degrees of responsibility for the release, (2) the "principles of equity pertaining to contribution," (3) the degree of the person's cooperation with enforcement officials, (4) the person's relative degree of involvement and care exercised with respect to the hazardous substances at the facility, and (5) "[w]hether equity requires that the liability of some of the persons should constitute a single share." [MCL 324.20129](#)(3). The Gore factors, some of which are nearly identical to Part 201's statutory factors, are: (1) the ability of the parties to distinguish their contribution to the release, (2) the amount of hazardous substances involved, (3) the toxicity of the substances involved, (4) the degree of the parties relative involvement in generating, transporting, storing, treating, or disposing the substances, (5) the relative degree of care exercised by the parties, considering the characteristics of the substances, and (6) the degree of the parties' cooperation with enforcement authorities. *United States v RW Meyer, Inc*, [932 F2d 568](#) (6th Cir 1991).

## C. The Ability to Bring Both a Cost Recovery Claim and a Contribution Claim §5.44

Under CERCLA's cost-recovery-and-contribution scheme, which courts have held to be instructive in interpreting Part 201, *City of Detroit v Simon*, [247 F3d 619](#), 630 (6th Cir 2001),<sup>10</sup> it is still an open question as to whether cost recovery is available to parties that may bring a contribution claim. It is clear that a cost recovery action may be brought both by PRPs who voluntarily incur response costs and by truly voluntary parties—that is, 'innocent,' non-PRPs who voluntarily choose to incur response costs. *United States v Atlantic Research Corp*, [551 US](#)

[128](#), 135, 139 (2007). But in deciding that issue the U.S. Supreme Court left open the question of whether there might be circumstances where a PRP has claims for both cost recovery and contribution. *Id.* at 139 n6. Courts appear to be trending towards denying cost recovery in circumstances where contribution is available, but this area of the law is still developing. *See, e.g., Niagara Mohawk Power Corp v Consol Rail*, [596 F3d 112](#), 127–128 (2d Cir 2010); *Kotrous v Goss-Jewett Co*, [523 F3d 924](#), 933 (9th Cir 2008); *Centerior Service Co v Acme Scrap Iron & Metal Corp*, [153 F3d 344](#), 356 (6th Cir 1998) *overruled on other, related grounds, ITT Indus, Inc v BorgWarner, Inc*, [506 F3d 452](#) (6th Cir 2007); *Appleton Papers, Inc v George A Whiting Paper Co*, No 08-C-16, 2009 WL 3931036, at \*3 (ED Wis, Nov 18, 2009). *But see Ford Motor Co v Mich Consol Gas Co*, No 08-CV-13503, 2009 WL 3190418, at \*8-9 (ED Mich, Sept 29, 2009).

## VI. State Enforcement Powers

### A. In General §5.45

The DEQ has a number of enforcement powers under Part 201 to both clean up facilities and to recover the costs of cleanup from liable parties. The DEQ may seek information from any person; it may access a facility to gather information and inspect the facility; it may initiate its own response activities at the site – and then bring a civil action seeking to recover the cost of its response activities from liable persons; it may issue administrative orders requiring liable persons to undertake response activities; and it may recommend and seek to enforce criminal sanctions against liable persons.

### B. Information Requests §5.46

Part of the DEQ’s broad investigative powers under Part 201 is its broad authority to require owners to provide information. In order to ensure compliance with Part 201, and to “determine the need for response activity or selecting or taking response activity or otherwise enforcing” Part 201, the DEQ “may upon reasonable notice require a person to furnish any information that the person may have relating to” either the nature or extent of a release or threat of a release at a facility, or the nature and extent of materials generated, treated, stored, handled, disposed of, or transported to the facility. [MCL 324.20117](#)(1). Failure to comply with an information request can result in the DEQ obtaining the information with a warrant or obtaining other injunctive relief from the refusing party. [MCL 324.20117](#)(7).

### C. Facility Access §5.47

In addition to its ability to request and obtain information, the DEQ also has the authority to enter and investigate property. If “there is a reasonable basis to believe that there may be a release or threat of release at a facility,” then the DEQ “may enter at all reasonable times any public or private property” to identify a facility, investigate a release or threat of release, inspect the property, including its soil, air, surface water, groundwater, and containers, and determine the need for and select and undertake appropriate remedial activities. [MCL 324.20117](#)(3). As with failure to comply with a request for information, failure to allow access can result in the DEQ obtaining a warrant or other injunctive relief. [MCL 324.20117](#)(7).

#### **D. Response Activity §5.48**

The DEQ may take any response activity at a facility that is consistent with Part 201 and its rules and that the DEQ determines is necessary to protect the public health, safety, or welfare, or the environment. [MCL 324.20118](#)(1). Any such response activity by the DEQ must protect the public health, safety, and welfare, and the environment; comply with “all applicable or relevant and appropriate requirements, rules, criteria, limitations, and standards of state and federal environmental law,” and “be consistent with” the cleanup criteria established under § 20120a and discussed in [§ 5.31](#). [MCL 324.20118](#)(2). As explained in [§ 5.49](#), after undertaking such response activities the DEQ may then bring a civil action against all liable persons to recover the costs it incurs.

#### **E. Civil Actions §5.49**

If the DEQ determines “that there may be an imminent and substantial endangerment to the public health, safety, or welfare, or to the environment because of an actual or threatened release from a facility, the attorney general may bring an action against [a liable person] or any other appropriate person to secure the relief that may be necessary to abate the danger or threat.” [MCL 324.20126a](#)(6).

The DEQ, like any other party that incurs costs by implementing response activities at a facility, may bring an action under Part 201 for cost recovery: the costs recoverable under § 20126a (i.e., “costs of response activity lawfully incurred by the state,” “costs of response activity reasonably incurred under the circumstances by any other person,” and natural resource damages) “may be recovered in an action brought by the state or any other person.” [MCL 324.20126a](#)(7).

In addition to the above civil actions, “the attorney general may, on behalf of the state, commence a civil action seeking 1 or more of the following:” (1) injunctive relief; (2) a declaratory judgment on liability for future response activity costs and damages; (3) a civil fine of up to \$1000 per day of noncompliance with a request made to a liable owner or operator as part of the owner or operator’s response activity obligations under § 20114(1)(h); (4) a civil fine of up to \$10,000 per day per violation of Part 201 or its rules; (5) a civil fine of up to \$25,000 per day per violation of a judicial order or unilateral administrative order issued under § 20119; (6) enforcement of a § 20119 unilateral administrative order; (7) enforcement of a § 20117 information request; (8) enforcement of the reporting requirements that are part of an owner and operator’s response activity obligations under § 20114 (including, in some circumstances a civil penalty of up to \$25,000 per day); and (9) “[a]ny other relief necessary for the enforcement of” Part 201. [MCL 324.20137](#)(1)-(2). Additionally, when the state finds itself without a party liable under Part 201, it has been known to refer the matter to U.S. EPA for a CERCLA removal action.

There are some limitations on the attorney general’s miscellaneous authority to commence a civil action. For example, a person who is responsible for a release in excess of appropriate criteria may be subject to a civil fine only if a fine or penalty has not already been imposed for the release under another part of NREPA (e.g., Part 31). [MCL 324.20137](#)(3). And a civil fine may not be imposed under Part 201 if the person made a good-faith effort to prevent the release and to

comply with Part 201. *Id.* These limitations do not apply to releases to underground storage tank systems under part 213. *Id.*

#### **F. Unilateral Administrative Orders §5.50**

If the DEQ “determines that there may be an imminent and substantial endangerment to the public health, safety, or welfare, or the environment, because of a release or threatened release,” then the DEQ may require any liable persons to “take necessary action to abate the danger or threat.” [MCL 324.20119\(1\)](#). In addition, the DEQ “may issue an administrative order to [a liable person] requiring that person to perform response activity relating to a facility for which that person is liable or to take any other action required by [Part 201].” [MCL 324.20119\(2\)](#). Upon receipt of such an order, a person must respond to DEQ within 30 days and indicate whether the person intends to comply with the order or not. [MCL 324.20119\(3\)](#).

Persons who receive such an order from the DEQ and who fail, without sufficient cause, to properly comply are liable for civil fines up to \$25,000 per day, per violation, as well as “[e]xemplary damages” up to three times the amount of any costs of response activity incurred by the state as a result of the person’s failure to comply with the order. [MCL 324.20119\(4\)](#).

On the other hand, a person who receives an order, complies with the terms of the order, and believes that the order was arbitrary and capricious or otherwise unlawful may petition the DEQ for reimbursement of the cost of those response activities plus interest and other necessary costs incurred in seeking reimbursement; if the DEQ does not grant the petition or fails to respond to the petition for 120 days then the person may seek this same relief by filing an action in state court of claims. [MCL 324.20119\(5\)](#).

#### **G. Criminal Actions §5.51**

A person can be found guilty of a felony under Part 201 if the person “knowingly releases or causes a release contrary to applicable federal, state, or local requirement or contrary to any permit or license held by that person, if that person knew or should have known that the release could cause personal injury or property damage.” [MCL 324.20139\(2\)\(a\)](#). A person can also be found guilty of a felony under Part 201 if the person “[i]ntentionally makes a false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained” under Part 201 and its rules. [MCL 324.20139\(2\)\(b\)](#). Similarly, a person can be found guilty of a felony under Part 201 if the person “[i]ntentionally renders inaccurate any monitoring device or record required to be maintained under” Part 201 and its rules. [MCL 324.20139\(2\)\(c\)](#). Finally, a person can be found guilty of a felony under Part 201 if the person “[m]isrepresents his or her qualifications in a document prepared” as part of the no further action report or response activity review panel processes. [MCL 324.20139\(2\)\(d\)](#).

Persons found guilty of these felonies are subject to fines between \$2500 and \$25,000 for each violation; they may also be fined up to \$25,000 per day for each day during which a release occurred. [MCL 324.20139\(2\)-\(3\)](#). Moreover, they may be sentenced to up to 2 years imprisonment or probation. [MCL 324.20139\(3\)](#). A person who commits subsequent violations under these criminal provisions faces fines between \$25,000 and \$50,000 per day of violation. *Id.* If the court finds that in committing one or more of the above felonies the defendant acted

knowingly or recklessly in such a manner as to cause a danger of death or bodily injury involving a “substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty,” and that the defendant had actual awareness, belief, or understanding that his conduct would cause such danger or the defendant acted in gross disregard of the standard of care in causing such danger, then the court must impose an additional fine of at least \$1,000,000 and sentence the defendant to a term of 5 years imprisonment. [MCL 324.20139](#)(4)-(5).

## VII. Citizen Suits §5.52

A person may bring an action in circuit court in Ingham County at any time to require the DEQ to perform a nondiscretionary duty under Part 201. [MCL 324.20135](#)(1)(c), (2)-(3). A person may bring such an action only after providing the DEQ written notice at least sixty days before bringing suit. [MCL 324.20135](#)(4). The notice must state the person’s intent to sue, the basis for the suit, and the relief to be requested. *Id.*

A person may also bring an action in circuit court in the circuit in which the alleged release, threatened release, or violation occurred against a liable owner or operator of a facility for injunctive relief to prevent irreparable harm resulting from a release or threat of release or to enforce Part 201, its rules, or an order issued under Part 201. [MCL 324.20135](#)(1)(a) -(b), (2), (7). A person may bring such an equitable action only after giving the proposed defendants, the DEQ, and the attorney general at least sixty days notice in writing of the person’s intent to sue, the intended basis for the suit, and the relief to be requested. [MCL 324.20135](#)(3)(a). Furthermore, such a person may not bring such an action if the state has already commenced and is diligently prosecuting an action to “obtain injunctive relief concerning the facility or to require compliance with” Part 201 or its rules or an order under Part 201. And a person may not bring such civil actions if the release was a permitted release or if it was otherwise “in compliance with federal, state, and local air pollution laws.” *Id.*

Attorney’s fees are available to persons who successfully bring an action under § 20135. [MCL 324.20135](#)(5).

## VIII. Settlement with the State

### A. Covenant not to Sue §5.53

Part 201 provides two potential covenants not to sue. Under the first option, a person may enter into a covenant not to sue with the state and thereby resolve all present and future liability to the state under Part 201. Under the second option, a person may negotiate a covenant not to sue that provides liability protection from past releases in order to facilitate the person’s redevelopment or reuse of the property.

Section 20132 provides that “[t]he state may provide a person with a covenant not to sue concerning any liability to the state under [Part 201], 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 four requirements are met: (1) the covenant would serve the public interest,



(2) the covenant would expedite appropriate response activity, (3) the person is fully complying with a consent order and responding to the release or threatened release, and (4) the response activity is approved by the DEQ. [MCL 324.20132](#)(1). Because this covenant not to sue requires DEQ approval of response activity it is rarely sought and very rarely granted. The DEQ's response activity approval process, which involves submission and approval of a remedial action plan, is exceptionally time consuming and expensive. It almost never reaches finality. Consequently, although this covenant not to sue is theoretically available under Part 201, as a practical matter it is unavailable in all but the most exceptional circumstances.

Section 20133 allows a would-be purchaser to secure some degree of liability protection under Part 201 without performing a BEA. As explained in [§ 5.12](#), sometimes – as with category S BEAs – BEAs can be prohibitively expensive. In those circumstances, a party may enter into a covenant not to sue with the DEQ under § 20133 to secure an alternative form of liability protection.

A party requesting a covenant not to sue under § 20133 initiates the process by contacting the DEQ – there is no notice form, application, or other formal process. From there, the parties will interact as they would in almost any other negotiated transaction. Ultimately, if the DEQ is amenable to a covenant not to sue, it will present the requesting party with a model covenant. The parties can then negotiate the terms of the covenant.

The parties are free to negotiate the terms of a covenant not to sue, but – apart from the DEQ's usual reluctance to use nonmodel language – there are some limits to that freedom. Section 20133 has certain minimum requirements that must be met before the DEQ may enter into a covenant not to sue, and § 20133 also places certain limitations on the liability protection afforded by a covenant not to sue. In particular, a covenant not to sue must be in the public interest, it must yield new resources that can be used for response activities, and it must, if appropriate, expedite response activity at the site. [MCL 324.20133](#)(1). Moreover, the proposal to redevelop or reuse the site must have economic-development potential, and the DEQ must determine that the proposed redevelopment or reuse will not worsen existing site conditions, interfere with response activities, or pose health risks to persons in the vicinity. *Id.* A person requesting a covenant not to sue has the burden of satisfying the DEQ that the person can afford to complete the proposed redevelopment or reuse, and that the person is not affiliated with a person who is liable under Part 201 for a release or threat of release at the site. [MCL 324.20133](#)(2). Finally, a covenant not to sue must give the DEQ authority to enter the site to perform response activities and monitoring. [MCL 324.20133](#)(4).

A covenant not to sue under § 20133, unlike the more comprehensive but impossible to obtain in practice covenant not to sue under § 20132, provides liability protection only from past releases; it does not protect a person from claims arising out of future releases or threats of release, claims arising out of a person's interference with DEQ-approved response activities, or claims arising out of a failure to comply with due care obligations. [MCL 324.20133](#)(3).

## **B. Consent Order and Contribution Protection §5.54**

A liable person may resolve its Part 201 liability by entering into a consent order with the DEQ and attorney general. Settlements are expressly encouraged when a person would be responsible

for only a minor portion of response costs at a facility or the person did not purchase the property with knowledge of the contamination and did not directly contribute to the contamination. [MCL 324.20134](#). In fact, Part 201 provides that if it is both practical and in the public interest the DEQ and attorney general must promptly settle with a liable person if the settlement “involves only a minor portion of the response costs at the facility concerned,” the person’s relative contribution of hazardous substances at the facility is minimal, and the relative toxicity of the hazardous substances contributed by the person at the facility is minimal. [MCL 324.20134\(2\)\(b\)](#). Settlements are similarly endorsed if the person owns the facility, the person did not generate, transport, store, treat, or dispose of a hazardous substance at the facility, and the person did not contribute to a release or threat of release at the facility. [MCL 324.20134\(2\)\(b\)](#). Any other party may negotiate with the DEQ and attorney general in an attempt to resolve liability by agreeing to perform a response activity. To enter into a consent order with the DEQ, the DEQ must first determine that the person is, in fact, liable under § 20126, that the person will properly implement the agreed response activity, that the consent order is in the public interest, that it will expedite response activity, and that it will minimize litigation. [MCL 324.20134\(1\)](#). The consent order may—but need not—provide for implementation by any individual or group of liable persons. *Id.* The DEQ and attorney general generally have broad discretion over whether to enter into a consent order with a liable person; “[a] decision of the attorney general not to enter into a consent order . . . is not subject to judicial review.” *Id.*

Apart from allowing persons to avoid litigation and secure early finality regarding their potential liability exposure at a facility, consent orders may be worthwhile because they insulate settling parties from contribution liability to other liable persons. “A person who has resolved his or her liability to the state in an administrative or judicially approved consent order is not liable for claims for contribution regarding matters addressed in the consent order.” [MCL 324.20129\(5\)](#). In other words, a settling person enjoys contribution protection such that it cannot be brought into a contribution action by a nonsettling person for liability associated with matters addressed in the consent order. *Id.* The phrase “matters addressed in the consent order” is obviously of critical importance, as the scope of the “contribution protection” afforded by § 20129(5) depends entirely on the scope of the “matters addressed.” *See, e.g., G&H Landfill PRP Group v American Premier Underwriters, Inc*, No 96-CV-72947, 1999 US Dist LEXIS 5539, at \*7–11 (ED Mich Jan 29, 1999) (analyzing the factors considered in determining the matters addressed in a settlement decree for purposes of contribution protection). Accordingly, persons entering into consent orders with the DEQ should take particular care to delineate the “matters addressed” as precisely and broadly as possible under the circumstances. On the other hand, the model document developed by DEQ in consultation with the Department of Attorney General for this purpose reasonably can be characterized as extraordinarily one-sided, and a person might think twice (or more) before signing the model document, which purports to bind the parties “in perpetuity.”

## IX. Statute of Limitations §5.55

Part 201 has three limitations periods: six years, three years, and July 1, 1994. [MCL 324.20140](#).

A cost recovery action for response activity costs and natural resource damages under § 20126a must be brought within six years of the initiation of physical on-site construction activities for the remedial action selected or approved by the DEQ at the facility. [MCL 324.20140](#)(1)(a). The limitations period begins to run from the date that on-site construction begins. *Federated Ins Co v Oakland Cty Rd Comm'n*, [263 Mich App 62](#), 69; 687 NW2d 329 (2004). It does not require DEQ to first approve the activities in a remedial action plan or work plan. *Id.* The common law discovery rule does not toll this period of limitations. *Id.*

Part 201 does not explicitly provide a statute of limitations applicable to “contribution” actions. There is at least some authority suggesting that the general six-year limitations period applicable under Michigan’s Revised Judicature Act, MCL 600.5813, would apply to contribution actions under Part 201. See *ITT Corp v BorgWarner, Inc.*, No. 1:05-CV-674, 2009 WL 2252145, at \*3 (WD Mich, July 28, 2009) (observing that Part 201 does not provide a limitations period applicable to contribution actions, assuming without deciding that the RJA’s six-year statute of limitations applied, and holding that because a claim accrues under the RJA at the time the wrong occurs – not at the time damage results or is discovered – the plaintiff’s contribution claims were time barred).

Actions for civil fines must be brought within three years after the discovery of the violation. [MCL 324.20140](#)(1)(c). Although Michigan courts have recently curtailed the application of the discovery rule to other statutes of limitations under the Revised Judicature Act (see Chapter 13), by the plain language of this section the common law discovery rule applies to the limitations period applicable to these actions. *Federated Ins Co*, 263 Mich App at 69.

Actions for response activity costs or natural resource damages accrued or incurred before July 1, 1991, must have been brought before July 1, 1994. [MCL 324.20140](#)(2)–(3).

## X. Notice Requirements

### A. Release Notification §5.56

As mentioned in [§ 5.31](#), one of the specific obligations imposed on liable owners and operators under § 20114 is the obligation to notify the DEQ of a release. Specifically, Part 201 requires that a liable owner or operator of a facility must report to the DEQ within 24 hours of obtaining knowledge of the release of a reportable quantity of a hazardous substance as specified in sections 302.4 and 302.6 of the 1989 Code of Federal Regulations. [MCL 324.20114](#)(1)(b), (6); [R 299.5117](#). A person need not report a permitted release. *Id.* A person who fails to comply with its reporting obligation faces civil fines up to \$25,000 per violation per day. [MCL 324.20114](#)(1)(b)(i), [.20137](#)(2)..

### B. Notice upon Transfer of Property Interest §5.57

Sellers with knowledge that their property is a facility must notify the purchaser in writing that the property is a facility.<sup>11</sup> [MCL 324.20116](#)(1). The seller must also disclose the general nature and extent of the release on the property. *Id.* In addition, sellers must fully disclose any applicable land or resource use restrictions in existence as a result of a remedial action under § 20120a. [MCL 324.20116](#)(3). The Michigan Court of Appeals has held that a lessor’s failure to

provide lessee with the notification required under § 20116(1) voids the lease. *1031 Lapeer LLC v Rice*, No 290995, [2010 Mich App LEXIS 18674](#) (Mich Ct App Aug 5, 2010). The reasoning employed by the court has the potential to render void the transfer of any property interest in a facility without providing disclosure under § 20116(1).

***Unpublished decision:*** *A D Transp, Inc v Mich Materials & Aggregates Co*, [unpublished opinion per curiam of the Court of Appeals](#), decided Sept 30, 2010 (Docket Nos 290236, 290250) (explaining that failure to provide notice when required under section 20116 may not only violate Part 201 but may also give rise to claims of fraud and negligence, but holding that summary disposition was inappropriate because a finder of fact could find either way on the issue of whether the defendants knew or had sufficient information to know that property at issue was a facility such that notice would have been required).

**Table of Authorities**

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## Endnotes

<sup>1</sup> CERCLA does allow some purchasers to avoid status liability. 2002 amendments to CERCLA provided for a bona fide prospective purchaser defense that, in basic terms, allows a purchaser who meets specified criteria to conduct all appropriate inquiries and to then purchase property without incurring CERCLA liability as an owner or operator of a facility, even if the person purchases the property with knowledge that the property is contaminated with hazardous substances.

<sup>2</sup> A Part 111 hazardous waste is:

waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material that because of its quantity, quality, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible illness or serious incapacitating but reversible illness, or may pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed. Hazardous waste does not include material that is solid or dissolved material in domestic sewage discharge, solid or dissolved material in an irrigation return flow discharge, industrial discharge that is a point source subject to permits under section 402 of title IV of the federal water pollution control act, chapter 758, 86 Stat. 880, 33 U.S.C. 1342, or is a source, special nuclear, or by-product material as defined by the atomic energy act of 1954, chapter 1073, 68 Stat. 919.

[MCL 324.11103](#)(3). Hazardous waste regulation is discussed in Chapter 4.

<sup>3</sup> A CERCLA hazardous substance is:

(A) any substance designated pursuant to section 311(b)(2)(A) of the Federal Water Pollution Control Act [[33 U.S.C. 1321](#) (b)(2)(A)],

(B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title,

(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. 6921] (but not including any waste the regulation of

which under the Solid Waste Disposal Act [[42 U.S.C. 6901](#) et seq.] has been suspended by Act of Congress),

(D) any toxic pollutant listed under section 307(a) of the Federal Water Pollution Control Act [[33 U.S.C. 1317](#) (a)],

(E) any hazardous air pollutant listed under section 112 of the Clean Air Act [[42 U.S.C. 7412](#)], and

(F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 7 of the Toxic Substances Control Act [[15 U.S.C. 2606](#)]. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

[42 USC 9601](#)(14).

<sup>4</sup> “Petroleum includes but is not limited to mixtures of petroleum with de minimis quantities of other regulated substances and petroleum-based substances composed of a complex blend of hydrocarbons derived from crude oil through processes of separation, conversion, upgrading, or finishing such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, and petroleum solvents.” [MCL 324.20101](#)(t)(iv), [MCL 324.21303](#)(d)(ii).

<sup>5</sup> The Michigan Environmental Response Act defined operator as “a person that is in control of or responsible for the operation of a facility.”

<sup>6</sup> Section 20116 obligates a seller to notify a purchaser of the property’s facility status:

A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her real property is a facility shall not transfer an interest in that real property unless he or she provides written notice to the purchaser or other person to which the property is transferred that the real property is a facility and discloses the general nature and extent of the release.

[MCL 324.20116](#)(1).

<sup>7</sup> Currently, the CERCLA “recycling exemption” is broader in scope than that found in Part 201.

<sup>8</sup> See also *City Mgt Corp v US Chem Co*, [43 F3d 244](#), 250-51 (6th Cir 1994) (applying Michigan law to a corporate successor question under CERCLA); *Chrysler Corp v Ford Motor Co*, [972 F Supp 1097](#), 1110-1111 (ED Mich 1997) (applying successor liability analysis under Michigan law to CERCLA and Part 201's predecessor statute, MERA); *Dep't of Environmental Quality v Waterous Co*, [279 Mich App 346](#), 374, 380; 760 NW2d 856 (2008) (holding that a person may be liable under Part 201 under a corporate-successor theory).

<sup>9</sup> The factors are called the Gore factors because they were initially proposed in an unsuccessful amendment to CERCLA by then Representative Al Gore.

<sup>10</sup> See also *Pitsch v ESE Mich, Inc*, [233 Mich App 578](#); 593 NW2d 565 (1999).

<sup>11</sup> The section applies not only to sellers, but also to any person who transfers property with knowledge or information that the property is a facility. "Seller" is used here for convenience.