

7

Transactions

Richard S. Baron
Brian H. Phinney

I. Overview §7.1.....	1
II. Potential Liabilities	1
A. In General §7.2.....	1
B. Part 201 §7.3	1
C. Section 20107a §7.4.....	2
D. CERCLA Liability §7.5	3
E. Common Law Liability §7.6.....	3
III. Purchase Agreements.....	4
A. In General §7.7.....	4
B. Disclosure §7.8	5
C. Due Diligence §7.9	5
D. Due Diligence Cost Allocations §7.10.....	5
E. Curing Defects §7.11	5
F. Contingency for Cancellation §7.12	6
G. Indemnification §7.13	6
IV. Seller Perspectives	6
A. In General §7.14.....	6
B. Seller Disclosure Act	6
1. In General §7.15.....	6
2. Timing of Disclosure §7.16	7
C. Part 201 Disclosure	7
1. Disclosure Requirements §7.17	7
2. Potential Liability for Failure to Disclose §7.18.....	8
D. Common Law Disclosure Requirements §7.19	8
V. Buyer Perspectives.....	9
A. Non-Invasive Environmental Site Assessment (Phase I Investigation) §7.20.....	9
1. Considerations For When Appropriate §7.21	9
2. Typical Scope §7.22.....	10
B. Invasive Environmental Site Assessment (Phase II Investigation) §7.23.....	10
1. Considerations For When Appropriate §7.24	10
2. Typical Scope §7.25.....	10
C. Baseline Environmental Assessment	11
1. In General §7.26.....	11

2. Considerations For When Appropriate §7.27	11
3. Categories of BEAs §7.28.....	11
a. Category N BEA §7.29.....	11
b. Category D BEA §7.30.....	12
c. Category S BEA §7.31.....	12
4. Time for Completion of BEA §7.32	13
5. Petition Versus Disclosure of BEA §7.33.....	13
6. Consequences of Inadequate BEA §7.34.....	13
D. Section 20107a Compliance Analysis §7.35	14
E. “All Appropriate Inquiries” under CERCLA §7.36	14
Appendix -- Forms	15
Table of Authorities	18

I. Overview §7.1

This chapter discusses common issues that arise in transactions involving contaminated property. The information in this chapter is intended to provide buyers and sellers with knowledge of various state and federal laws that may be applicable to such transactions, and offers information to assist these parties in addressing environmental-related concerns. Many of the statutes and common law principles discussed are referenced in other chapters in this Deskbook.

II. Potential Liabilities

A. In General §7.2

Environmental liability relating to the purchase and sale of real property is governed by statutory and common law principles. Liability may arise by contractual agreement, by a party's status as an owner or operator of a contaminated site, by a party's conduct in causing a release or threatened release of contamination, or by a party's conduct in failing to prevent migration of contamination. Awareness of these potential liabilities will help buyers and sellers consider appropriate avenues to minimize and allocate their risk of exposure to lawsuits or government-mandated response activities.

B. Part 201 §7.3

Part 201 of NREPA, [MCL 324.20101](#) *et seq.* establishes, in part, the liability scheme for buyers and sellers of contaminated property. Part 201 serves as the Michigan counterpart to the federal liability scheme under CERCLA, [42 USC 9601](#) *et seq.*, discussed in [§7.5](#) and discussed generally in Chapter 5. Part 201 applies only to property that is a "facility", which is defined as:

any area, place or property where a hazardous substance in excess of the concentrations which satisfy the requirements of section 20120a(1)(a) or (17) or the cleanup criteria for unrestricted residential use under part 213 has been released, deposited, disposed of, or otherwise comes to be located.

[MCL 324.20101](#). Whether a "facility" requires cleanup or remediation will depend on its designated use (i.e., residential, commercial, recreational, industrial or other), as well as on the specific types and concentrations of contaminants existing on the property. [MCL 324.20120a](#). The DNRE has established generic soil and groundwater cleanup criteria for various common contaminants for facilities designated for residential, commercial and industrial use. 2002 AACS, [R 299.5744](#), [R 299.5748](#) and [R 299.5750](#)

. Buyers can determine if property is a facility by having soil and groundwater samples taken and obtaining a laboratory analysis of those samples to the part per million (ppm) level.

In contrast to the status-based strict liability scheme under CERCLA, liability under Part 201 is causation-based and arises where the owner or operator: (i) caused the release or threatened release; or (ii) became the owner or operator of a facility on, or after June 5, 1995 unless the

owner or operator conducted a Baseline Environmental Assessment (BEA) prior to or within 45 days after the earlier of the date of purchase, occupancy or foreclosure, and disclosed the results of the BEA to the DNRE. [MCL 324.20126](#). See [§7.26](#) for a discussion of BEAs.

Part 201 contains specific liability exemptions that may allow buyers or transferees of a facility (or a property interest therein) to avoid liability under Part 201. These liability exemptions apply to a person who hold an easement interest in a facility (for example, an access easement), a person who owns severed mineral rights or severed subsurface formations or who leases subsurface mineral rights or formations, a person who owns or occupies residential real property if hazardous substances use is consistent with residential use, a person who acquires a facility as a result of the death or the prior owner or operator of the facility, whether by inheritance, devise, or transfer from an inter vivos or testamentary trust (for example, transfer by will, trust or joint tenancy), and a lessee who uses property for retail, office or commercial purposes. [MCL 324.20126](#) and [\(4\)](#). These exemptions apply only if the owner or operator is not responsible for an activity causing the release or threatened release.

The most important provision of Part 201 for buyers and sellers of real property is the liability exemption afforded with the successful completion of a BEA. A buyer should conduct due diligence to evaluate whether the parcel is a facility. If the property is a facility, DNRE may force the seller to conduct further environmental investigation and response activities even after the property is sold. Although a buyer may agree to remediate the property once the sale is complete, a seller cannot escape liability under Part 201 by contracting with another party. [MCL 324.20130](#).

Due diligence takes time and requires access to the property, typically through a written access agreement. Be sure to allow for ample time to investigate the status of the property with counsel and appropriate environmental professionals. The initial site investigation may lead to further sampling. The level of contamination discovered may impact the use of the property and cost of development, including the buyer's ongoing "due care" obligations (discussed in [§7.4](#)), which in turn may influence the purchase price.

C. Section 20107a §7.4

A buyer of a facility must comply with "due care" obligations even if the buyer completed a BEA (discussed in [§7.26](#) and following) or is otherwise exempt from liability under [MCL 324.20126](#). Section 107a requires owners and operators of a facility to take measures to prevent migration and further releases of contamination.

Due care requirements do not apply to an owner or operator where contamination has migrated onto the owner or operator's property from another site, a person who holds an easement interest in a facility, or a person who owns or leases severed subsurface mineral rights or formations, unless the owner or operator exacerbates existing contamination. [MCL 324.20107a \(4\)](#) and [\(5\)](#). Owners and operators violating section 107a may be liable for response activity costs and natural resource damages attributable to any exacerbation of contamination as well as fines and penalties imposed by DNRE. [MCL 324.20107a\(2\)](#). Conducting sufficiently detailed investigation before the transaction will help protect both the both buyer and seller by allowing them to define the

extent of contamination and determine whether post-sale activities caused the exacerbation or migration of contamination.

Although DNRE has the burden of proof to establish liability under Part 201, [MCL 324.20126](#), the “party seeking relief” has the burden of proof in a determination of whether exacerbation occurred. [MCL 324.20107a](#).

D. CERCLA Liability §7.5

A buyer of contaminated property can be liable under CERCLA even though the buyer complies with Part 201. [42 USC 9614\(a\)](#) (states may impose additional liability requirements); [MCL 324.20142](#) (compliance with Part 201 is exempt only from claims for performance of response activities under Part 17 (Michigan Environmental Protection Act), Part 31 (Water Resources Protection) and common law). CERCLA liability applies to the current owner of property contaminated with a hazardous substance, as well as the owner or operator of the property at the time hazardous substance was released. [42 USC 9607\(a\)](#). CERCLA is discussed in Chapter 5.

An owner or operator of contaminated property can be subject to CERCLA liability through the initiation of a lawsuit by a private individual. For example, an owner or operator of contaminated property could be liable under CERCLA to a neighboring landowner for the cost of remediating contaminants that have migrated onto the neighbor’s property.

Amendments made to CERCLA in 2002 allow a buyer of contaminated property to avoid liability. These amendments are discussed in [§7.36](#).

E. Common Law Liability §7.6

Buyers and sellers of contaminated property may be liable under common law principles for personal injuries and property damage caused by contamination. For example, common law claims by third parties relating to a failure to undertake due care obligations are not preempted by Part 201 (see [MCL 324.20142](#)) or CERCLA (see [42 USC 9652\(d\)](#)) . As with liability under Part 201, a seller’s potential liability under common law does not cease after completion of a sale, and a buyer of contaminated property is not immune from common law liability even when the buyer complies with the Section 20107a due care obligations. *Id.* Common law environmental liability is discussed generally in Chapter 13.

Negligence and nuisance are typical common law claims that are available for parties injured by soil or groundwater contamination originating on another’s property. While liability under Part 201 is strict, liability under common law principles is either fault-based (i.e., negligence) or measured by the utility of the conduct causing the contamination (i.e., nuisance). An action for trespass is not available where property damage is caused by migrating soil or groundwater contamination since soil and groundwater contamination does not constitute a direct, physical invasion of property. *Adams v Cleveland-Cliffs Iron Co.*, [237 Mich App 51](#), 66-67; 602 NW2d 215 (1999).

A buyer and seller of contaminated property can be subject to nuisance liability if the presence of the contamination presents a substantial harm caused by an unreasonable interference with

another's use and enjoyment of their property. *Id.* Whether interference is “unreasonable” is determined according to the public policy assessment of its overall value. *Id.*

The viability of a common law claim is not necessarily dependent on the level of contaminants in the soil or groundwater. For example, it is possible for low levels of contaminants to migrate onto an adjoining parcel without the adjoining parcel becoming a “facility” under Part 201. The levels of contaminants, however, may be sufficient to allow the landowner to assert a common law claim for property damage.

Depending on the degree of the perceived risks of common law liability involved, the parties to a purchase agreement may desire to shift the risks of incurring common law liability through the use of indemnification and hold harmless agreements. See [§7.13](#). Part 201 expressly allows these types of agreements between private parties, but they do not allow a party to absolve himself or herself from liability under Part 201. [MCL 324.20130](#). Be sure to provide for an adequate funding mechanism, such as insurance, in any risk-shifting arrangement to avoid the party assuming the liability not being able to pay the claim.

III. Purchase Agreements

A. In General §7.7

The purchase agreement defines the rights and obligations of the parties to a land transaction. When the transaction involves contaminated or potentially contaminated property, the purchase agreement is the main mechanism by which buyers and sellers structure their respective obligations and allocate risk.

The typical purchase agreement for contaminated property contains provisions to allow the buyer to conduct due diligence and cancel the sale if unacceptable contingencies are discovered. A buyer of such property is often given a set period of time, as negotiated between the parties, to conduct any due diligence that the buyer deems necessary to minimize the potential liabilities associated with owning contaminated property. Typical terms in such a purchase agreement include:

- The buyer has the right to enter the premises at reasonable times with adequate notice;
- The buyer cannot damage or the property or interfere with the seller's operations;
- The buyer is given time to conduct a Phase I environmental site assessment (ESA), see [§7.20](#), invasive studies such as a Phase II ESA, see [§7.23](#), and a BEA, see [§7.26](#), and a Section 20107a Compliance Analysis, see [§7.35](#);
- The seller will provide the buyer with copies of any reports relating to any environmental conditions on the property;
- The seller warrants whether the seller has actual knowledge of any past or present violations of any environmental laws related to the property;

- The buyer has the right to cancel the purchase agreement within a specified time if the buyer is not satisfied with the condition of the property;
- The buyer waives the right to terminate the purchase agreement if the buyer does not provide notice of cancellation within the required time period; and
- The seller indemnifies the buyer for any claims and liabilities arising from a breach of any seller representations or warranties relating to the condition of the property.

See Forms in Appendix.

B. Disclosure §7.8

The typical purchase agreement requires sellers to disclose environmental conditions on the property. Disclosure is governed by the provisions of the Seller Disclosure Act (for residential sales), Part 201 and common law principles, discussed in [§7.15](#) and following.

C. Due Diligence §7.9

Buyers typically conduct environmental due diligence, which usually includes conducting a Phase I investigation and, if Recognized Environmental Conditions (RECs) are discovered, a Phase II investigation. These investigations are discussed in [Part V](#).

Sellers typically have no obligation to conduct environmental due diligence, except that a seller of commercial or industrial property may want to conduct its own due diligence to attract a broader base of potential buyers and eliminate uncertainty. The buyer's due diligence may help establish that the property is not a "facility", or define the nature and extent of contamination and avoid later negotiations to reduce the purchase price due to unexpected or newly discovered contamination.

D. Due Diligence Cost Allocations §7.10

Buyers traditionally bear the cost of conducting due diligence. Market conditions may provide a buyer with leverage to negotiate splitting due diligence costs with the seller. Define the scope of work and expected costs up front to avoid later misunderstandings.

E. Curing Defects §7.11

The typical purchase agreement gives the buyer the choice of either cancelling the transaction or allowing the seller to cure environmental defects with the property. For example, if contamination is found during the due diligence phase, the seller may opt to obtain site closure from DNRE to allow the transaction to go forward. Site closure is discussed in Chapter 5, §5.____. The seller will wish to limit its cost to cure to a defined dollar amount and require the buyer to accept any overage or cancel the transaction. This technique avoids the seller taking on expenses that will not be recovered at the existing sale price.

F. Contingency for Cancellation §7.12

Purchase agreements typically allow the buyer to accept the property or cancel the contract after completing environmental due diligence.

G. Indemnification §7.13

The typical purchase agreement requires the seller to indemnify the buyer for claims arising from contamination existing at the time of the sale. Although a buyer that conducts an adequate BEA is ordinarily exempt from liability under Part 201, a buyer nevertheless may face common law claims from neighboring property owners for damages caused by migrating contamination. Consider risk shifting based on a defined dollar amount, such as “Seller pays for first \$100,000 of remediation costs and Buyer pays for the next \$100,000 and then the parties split the remainder.” Any such agreement is only as good as the financial ability and willingness of the parties to perform.

IV. Seller Perspectives

A. In General §7.14

A seller of contaminated property may be obligated to disclose the presence of known contamination to a buyer under the Michigan Seller Disclosure Act, [MCL 565.951](#) *et seq.*, for residential sales, discussed in [§7.15](#), Part 201, discussed in [§7.17](#), or common law principles, discussed in [§7.19](#).

B. Seller Disclosure Act

1. In General §7.15

The Seller Disclosure Act, [MCL 565.951](#) *et seq.*, requires the disclosure of any environmental problems regardless of whether the property constitutes a “facility” under Part 201 (see [§7.3](#)). See Disclosure Form; [MCL 565.957](#). The Act, however, applies only to transfers of interests in real estate consisting of not less than one or more than four residential dwelling units. [MCL 565.952](#). The Act exempts the several transfers from its disclosure provisions. See [MCL 565.953](#). The Act requires disclosures to be made on a “Seller’s Disclosure Statement” form as found at [MCL 565.957](#).

Paragraph 10 of this form specifically requires the seller to describe any “environmental problems” with the property of which the seller is aware. The disclosure must be made in “good faith”, which is defined as “honesty in fact in the conduct of the transaction.” [MCL 565.960](#). A seller is not liable under the Act for failing to disclose information that could be obtained only through inspection or observation of inaccessible portions of real estate or could be discovered only by a person with expertise in a science or trade beyond the knowledge of the seller. [MCL 565.955\(1\)](#). For example, a seller would not be liable for failing to disclose the presence of an underground storage tank if the tank was unknown to the seller and discoverable only by an inspection conducted by an environmental consultant. Seeking information about the historical

fuel sources at a residence will help determine the likely presence of underground or above ground tanks.

A city, township or county may require additional disclosures. [MCL 565.959](#).

A seller is not liable for any error, inaccuracy or omission in any information disclosed if the error, inaccuracy or omission: (i) was not within the personal knowledge of the transferor or based entirely on information provided by public agencies or provided through a report authored by a professional expert dealing with matters within the expert's expertise; and (ii) ordinary care was exercised in transmitting the information. [MCL 565.955\(1\)](#).

The delivery of a report authored by an expert satisfies the seller's disclosure requirements under the Seller Disclosure Act if the information is provided upon the request of the prospective purchaser and the seller has no knowledge of information that contradicts the information contained within the report. [MCL 565.955\(3\)](#). A seller of contaminated property should be careful to disclose any contamination known to exist if the requirements of the Seller Disclosure Act apply.

2. Timing of Disclosure §7.16

Disclosure is typically made before the execution of a purchase agreement so that the buyer is able to make an offer on the property based on its known conditions. If disclosure is made after the execution of a purchase agreement, the buyer may terminate the purchase agreement within 72 hours if disclosure was given in person, or within 120 hours if disclosure was given by registered mail. [MCL 565.954\(3\)](#).

C. Part 201 Disclosure

1. Disclosure Requirements §7.17

Section 20116 of Part 201 sets forth the disclosure requirement applicable to a transfer of an interest of a "facility":

A person who has knowledge or information or is on notice through a recorded instrument that a parcel of his or her 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](#). Unlike the Seller Disclosure Act (discussed in [§7.15](#) to [§7.16](#)), §20116(1) applies to all property transactions, including residential, commercial and industrial. Since a "facility" is defined broadly as any "area, place or property", a seller of property on or under which contamination is present at levels below DNRE's criteria for a "facility" may be required to disclose the general nature and extent of the contamination since the property could be considered part of a "facility". For example, if property A is contaminated with volatile organic compounds that have migrated from neighboring Property B, and the concentration of the VOCs

on Property A is below DNRE's cleanup criteria for unrestricted residential use, but the VOCs on Property B are above criteria, DNRE may consider Property A to be part of a "facility" due to the contamination on Property B.

[MCL 324.20116\(3\)](#) also requires a seller of an interest in real property to fully disclose any land or resource use restrictions that apply to that real property as part of a remedial action that has been or is being implemented in compliance with [MCL 324.20120a](#). Once the seller of a facility obtains approval from DNRE that all response activities have been completed, the seller can record a document with the local register of deeds verifying that all response activity required in an approved remedial action plan (RAP) has been completed. [MCL 324.20116\(2\)](#). If the remedial action plan is completed in accordance with DNRE's criteria for the applicable residential category, the property will no longer be considered a "facility" pursuant to [MCL 324.20101](#) and the disclosure requirements in [MCL 324.20116](#) would not apply.

2. Potential Liability for Failure to Disclose §7.18

If the seller prepared a Baseline Environmental Assessment (BEA, discussed in [§7.26](#)) when the seller purchased the property, and the seller wishes to maintain liability protection under Part 201, the Part 201 administrative rules require the seller to disclose the contents or a summary of the BEA to the purchaser. 2002 AACRS, [R 299.5919\(5\)](#), (7) . A seller should be sure to include any prior BEA or related documents in the disclosure packet and list the documents in the purchase agreement.

Unpublished decision: *1031 Lapeer LLC v Rice*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2010 ([Docket No. 290995](#)) (failure to comply with MCL 324.20116 can render a transaction void).

D. Common Law Disclosure Requirements §7.19

Compliance with the Seller Disclosure Act does not insulate a seller from common law liability for innocent or fraudulent misrepresentation. [MCL 565.961](#). A claim for innocent misrepresentation requires a buyer to prove detrimental reliance upon a false representation by the seller in a manner that the injury suffered inured to the benefit of the seller. *M&D, Inc v WB McConkey*, [231 Mich App 22](#), 27; 585 NW2d 33 (1998). A buyer does not need to prove the seller made an innocent misrepresentation with a fraudulent intent or purpose. *Id.* at 28.

A claim for fraudulent misrepresentation requires a showing that: (i) the seller made a material misrepresentation; (ii) the representation was false; (iii) when the seller made the representation, he knew it was false or he made it recklessly, without knowledge of its truth; (iv) the seller made the representation with the intent that the buyer would act upon it; (v) the buyer reasonably acted in reliance upon it; and (vi) the buyer suffered damages. *Bergen v Baker*, [264 Mich App 376](#); 691 NW2d 770 (2004). A claim of silent fraud is also available where there is a suppression of material facts, there is a legal or equitable duty of disclosure, and there is some type of misrepresentation whether by words or action. *Id.* An "as is" clause in a purchase agreement does not insulate a seller from liability where there is an alleged fraudulent misrepresentation. *Id.*

Compliance with the Seller Disclosure Act will not bar a claim for misrepresentation where the disclosure form contains a misrepresentation, error, inaccuracy or omission of which the seller had personal knowledge, or should have had personal knowledge with the exercise of ordinary care. *Id.* Furthermore, a misrepresentation claim may be allowed to proceed to a jury even if a buyer conducts his own inspection. *Id.*

A seller of contaminated property subject to the Seller Disclosure Act should carefully draft the language of the disclosure to avoid a potential claim for misrepresentation. Such a seller should consider disclosing any evidence of presently existing contamination on the property in order to minimize the potential for future litigation. Residential transactions that encourage professional inspections for matters other than environmental (furnace, structural, etc) may minimize post-purchase claims for later-discovered problems.

Unpublished decision: *Huhtasaari v Stockmeyer*, unpublished opinion per curiam of the Court of Appeals, issued Dec. 5, 2005 ([Docket No. 256926](#)) (claim for fraud may fail where the buyer knows of the existence of a report containing environmental information on a property, but fails to condition the purchase of the property on receiving the report).

V. Buyer Perspectives

A. Non-Invasive Environmental Site Assessment (Phase I Investigation) §7.20

A non-invasive environmental site assessment (commonly referred to as a Phase I investigation) is the preliminary step in conducting due diligence. A Phase I investigation often is conducted by an environmental consultant and will include reviewing historical data related to the prior use of hazardous substances on the property, conducting an on-site inspection, or both.

1. Considerations For When Appropriate §7.21

A Phase I investigation will typically be necessary for transactions involving commercial and industrial properties, as well as residential properties that are in close proximity to commercial or industrial areas and residential properties that may have environmental concerns such as heating oil storage tanks.

Industrial properties usually have the highest likelihood of having soil and groundwater contamination. Commercial properties also can have an elevated risk of having soil and groundwater contamination depending on their specific uses, such as gas stations or dry cleaners. For example, a former dry cleaning site is more likely to have soil and groundwater contamination than an office building because a dry cleaner typically uses petroleum or hydrocarbon based hazardous substances. Residential properties have a risk of soil or groundwater contamination when they are in close proximity to industrial or commercial sites that use hazardous substances.

2. Typical Scope §7.22

A typical Phase I investigation includes hiring an environmental consultant to review property records and conduct an on-site inspection. Rules promulgated by the EPA under CERCLA set the standard for the appropriate scope of a Phase I investigation. See [42 USC 9601](#) and [40 CFR 312.20](#). The standards for performing a Phase I investigation under these rules are referred to as “all appropriate inquiries,” which, among other obligations, requires an environmental consultant to conduct interviews with prior owners and operators, conduct a visual inspection of the property and review governmental records. [40 CFR 312.21](#). An environmental consultant should be able to identify any recognized environmental conditions (RECs) based on historical property use records, such as operating permits related to the property and hazardous substance storage records. If RECs are identified from such records, an inspection may be necessary to determine evidence of prior hazardous substance releases through visual observation. For example, evidence of staining on concrete or drains could be evidence of historical hazardous substance chemical releases at the property.

A Phase I assessment may, in fact, show that no recognized environmental conditions exist, but later be proved wrong. In *Krygoski Construction Co, Inc v City of Menominee*, [431 F Supp 2d 755](#), 757-758 (WD Mich 2006), the consultant prepared a Phase I for a proposed municipal park expansion that showed no RECs, but after a local environmental activist (and corporate representative of Krygoski) took samples at the site that allegedly showed elevated levels of lead and chromium, the consultant and city engineers met at the site and discovered “crushed barrels” that contained a substance that appeared to be yellow paint.

B. Invasive Environmental Site Assessment (Phase II Investigation) §7.23

A Phase II investigation is more detailed than a Phase I investigation. A Phase II investigation typically involves the use of an environmental consultant to determine the specific hazardous substance use and disposal activities on the property and take soil and groundwater samples for analysis.

1. Considerations For When Appropriate §7.24

A Phase II investigation is appropriate when property is known to be contaminated or when a Phase I investigation reveals RECs associated with the property.

2. Typical Scope §7.25

The scope of a Phase II investigation depends on the extent of the RECs found on the entire property. For example, soil and groundwater samples should be taken from an area of a suspected leaking underground storage tank (LUST) (storage tanks are discussed in Chapter 6). If the LUST is the only REC on the property, investigation on other portions of the property may not be necessary. The cost of the investigation will vary dramatically with the scope. Special care should be taken in defining the scope of the investigation to help ensure that the right level of effort is applied under the site-specific circumstances.

A typical Phase II report will contain data relating to results of soil samples, groundwater samples, or both, along with a map showing the location of the sampling points and a table showing the results as compared to the applicable action levels established by the DNRE. The Phase II is typically prepared to inform the buyer whether the property meets the definition of a “facility” under Part 201.

There are many qualified environmental consultants in Michigan that can perform a Phase II investigation. In circumstances where a party is unfamiliar working with consultants, one should consider working with experienced counsel to assist in streamlining the process, and potentially bidding out portions of the work if the investigation revealed elevated levels of contamination.

C. Baseline Environmental Assessment

1. In General §7.26

The purpose of a Baseline Environmental Assessment (BEA) is to define the nature and extent of contamination existing at the time of purchase so that buyers or transferees of a facility can maintain liability protection under Part 201. There are three types of BEAs: Category N involving no use of hazardous substances, discussed in [§7.29](#), Category D involving use of different hazardous substances, discussed in [§7.30](#), and Category S, involving use of the same hazardous substances, discussed in [§7.31](#).

2. Considerations For When Appropriate §7.27

In order to gain liability protection under Part 201, a BEA must be conducted by a buyer if the Phase II investigation reveals, or the buyer has information showing, that the property is a “facility”. [MCL 324.20126](#). A BEA only provides liability protection when the property is a facility before the transaction occurs. The definition of “facility” and a discussion of the Part 201 liability scheme is discussed in § II.A.

3. Categories of BEAs §7.28

BEAs are divided into three categories: (i) Category N, discussed in [§7.29](#); (ii) Category D, discussed in [§7.30](#); and (iii) Category S, discussed in [§7.31](#). The specific category that a buyer should conduct depends on what hazardous substances, if any, the buyer intends to use on the property.

a. Category N BEA §7.29

A Category N BEA is typically appropriate for a buyer of a facility that does not intend to use any hazardous substances on the property. DNRE rules describe a Category N BEA:

A ‘Category N BEA’ means a BEA that is conducted for a property where hazardous substances are not, as of the date the BEA is conducted, anticipated by the submitter to be present in a quantity and manner that constitute significant hazardous

substance use at the property after ownership or occupancy commences.

1999 AACS, [R 299.5901\(e\)](#). A Category N BEA is the least extensive type of BEA that is required by DNRE to gain liability protection under Part 201. The minimum requirements for a Category N BEA are specified in 1999 AACS, [R 299.5907\(2\)](#).

A Category N BEA is appropriate when the buyer does not anticipate using any hazardous substances on a “facility”. For example, a Category N BEA would be appropriate for a purchaser of an abandoned gas station that intended to use the property for a retail clothing store. A Category N BEA must contain an affirmative statement that the buyer will not use any significant hazardous substances on the property. [R 299.5907\(2\)\(h\)](#). The typical scope of a Category N BEA contains the same information that is typically generated in a Phase II environmental investigation report, such as the location of all known contamination, locations of aboveground and underground storage tanks, photographs of the property. [R 299.5907\(2\)\(a\)-\(g\)](#).

b. Category D BEA §7.30

A Category D BEA is appropriate where the buyer intends to use hazardous substances that are different from hazardous substances present in the soil and groundwater at the property at the time of the sale. For example, a Category D BEA would be appropriate for a buyer of a former dry cleaning site that used perchloroethylene that intends to use the property as a gas station. The minimum technical standards under the Part 201 regulations are set forth in 1999 AACS, [R 299.5907\(3\)](#).

A Category D BEA is required to contain the same information as a Category N BEA, but must also include the identification of all hazardous substances that the buyer intends to use on the property as well as environmental data showing that such hazardous substances have never been used on the property. [R 299.5907\(3\)\(i\)](#).

c. Category S BEA §7.31

A Category S BEA is appropriate when the buyer intends to use the same hazardous substances that are present in the soil and groundwater at the property. As might be expected, the Category S BEA is the most difficult to obtain and likely will be the most expensive to conduct. For example, a Category S BEA would be appropriate for a buyer of a gas station that intends to operate the property as a gas station. The minimum technical standards for a Category S BEA under the Part 201 rules are set forth in 1999 AACS, [R 299.5907\(4\)](#).

A Category S BEA is required to contain the same information as a Category D BEA, but must also include information to allow the delineation of existing environmental contamination from new releases of hazardous substances on the property. [R 299.5907\(4\)\(i\)](#). This may include, for example, the placement of clean fill to over an area of existing contamination to show that the contamination was present before purchase rather than caused by a release that occurred post-purchase.

4. Time for Completion of BEA §7.32

Two important time limitations apply to a purchaser conducting a BEA: (1) the date by which the BEA must be completed, and (2) the date by which the BEA must be disclosed. A BEA must be completed within 45 days of after the earliest of the following events: (i) date of purchase; (ii) date of occupancy; or (iii) date of foreclosure. [MCL 324.20126](#). The date of occupancy is not triggered by accessing the property to conduct a BEA. MCL 324.20126(1)(c)(i). A BEA must be disclosed to DNRE within eight months after the latest of the following events: (1) the date of purchase; (2) the date of occupancy; or (3) the date of foreclosure. 2002 AACS, [R 299.5919\(3\)](#).

5. Petition Versus Disclosure of BEA §7.33

If a BEA is only disclosed to DNRE, DNRE will not determine whether the BEA is adequate. Rather, DNRE will file the BEA. No further action on the part of the purchaser is required. There is no fee to disclose a BEA to DNRE.

A purchaser may choose to petition DNRE for a determination that the BEA is adequate. 1999 AACS, [R 299.5911](#). The fee to submit a petition is \$750.00. Depending on the time that the petition is submitted, the petitioner may have the opportunity to cure any defects in the BEA. 1999 AACS, [R 299.5917](#). For example, the DNRE may believe that soil samples should be expanded into areas not investigated during a Phase II investigation. The petitioner may be given additional time to take such samples and provide the results to the DNRE to supplement the BEA. On the other hand, there will be additional expense for the additional work and the DNRE ultimately may determine that the investigation is not sufficient.

A petition for a determination of the adequacy of a BEA is used less often than disclosure due to the additional fee for a petition and the length of time the DNRE may take to review a petition. Also, a buyer who conducts a Category N or Category D BEA has less of an incentive to submit a petition because the technical requirements for those BEAs are less stringent and thus there is less risk that the DNRE would find those BEAs to be inadequate. A buyer who conducts a Category S BEA has more of an incentive to file a petition since the technical requirements of a Category S BEA are more stringent and the buyer may have an opportunity to cure defects if the petition if the buyer has not yet began to use hazardous substances on the property. 1999 AACS, [R 299.5917](#). The advantages and disadvantages of disclosure and petitions should be carefully evaluated.

6. Consequences of Inadequate BEA §7.34

A buyer that fails to complete an adequate BEA will be liable under Part 201. [MCL 324.20126](#). A BEA will be inadequate if it fails to meet the minimum technical standards for the applicable BEA category discussed above (i.e., Category N, Category D, Category S). A buyer should visually inspect property to judge whether a consultant identified and inspected obvious areas of concern, such as above-ground storage tanks and to better understand the recommendations for further investigation.

D. Section 20107a Compliance Analysis §7.35

Compliance with [MCL 324.20107a](#) is discussed in [§7.4](#). A buyer of a facility is required to prepare a “due care plan” upon purchasing the property. A due care plan is typically prepared by a qualified environmental consultant. The scope of the due care plan will depend on the risk of exposure that exist at a facility. For example, an owner of a site with abandoned containers containing a hazardous substance may be required to place spill containment around the containers to prevent a release. [R 299.51009](#). Buyers of contaminated property should take due care requirements into consideration when purchasing a facility, since due care measures can be costly depending on the degree of risk of a release of contamination from the property.

E. “All Appropriate Inquiries” under CERCLA §7.36

The “all appropriate inquiries” (AAI) rule is CERCLA’s counterpart to a BEA conducted under Part 201. See [42 USC 9601](#). The requirements for conducting AAI are found at [40 CFR 312.2](#), which incorporates the American Society for Testing and Materials (ASTM) 1527–97 and the procedures of the American Society for Testing and Materials (ASTM) 1527–00, both entitled “Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process.” The AAI rule is discussed more fully in Chapter 8.

In practice, compliance with Part 201’s BEA requirements will satisfy the AAI rule under CERCLA as the standards for completing AAI are similar to the standards for preparing BEA. In addition, DNRE and EPA have a Memorandum of Understanding in place that implies that EPA will not take enforcement action against an owner or operator who complies with Part 201’s BEA and Section 20107a due care requirements.

In order to obtain liability protection under CERCLA, in addition to performing AAI, a buyer must be a “bona fide prospective purchaser” and enter into a prospective purchaser agreement with the EPA. In order to qualify as a bona fide prospective purchaser, a buyer must: (i) not have caused contamination on the property; (ii) performed all appropriate inquiries into the past uses of the property; (iii) undertake due care activities; and (iv) cooperate with those responsible to conduct response activities. [42 USC 9601](#). A bona fide prospective purchaser cannot be affiliated with any other person that is potentially liable for conducting response costs. Compliance with Part 201’s BEA requirements generally alleviates the need to enter into a prospective purchaser agreement with EPA. [42 USC 9601](#).

Appendix -- Forms

Typical Purchase Agreement Provisions

Due Diligence Period and Escrow for Purchaser's Due Care Obligations

(a) Purchaser shall have until [DATE], to conduct, at its sole discretion, the following invasive and non-invasive studies at its own expense:

(i) Phase I and/or Phase II Environmental Investigations (Reports) on the Premises that provide that the information and opinions in the Reports may be relied upon by Purchaser in respect of the Premises, and which may include analysis of soil and groundwater samples taken from the Premises.

(ii) A Baseline Environmental Assessment (BEA), as defined by MCL 324.20101 (d), applicable to any parcel that is identified in the Report as a "Facility", as defined by MCL 324.20101(o).

(iii) A Section 7a Compliance Analysis (Section 7a CA) that conforms to the requirements of MCL 324.20129a(1). This Agreement is expressly contingent upon Purchaser receiving a written determination before the Closing Date from the Michigan Department of Natural Resources and Environment, pursuant to MCL 324.20129a(2)(a), that affirms that the criteria for obtaining an exemption from liability under MCL 324.20126 (1)(c) have been met and that the proposed use of the Premises would satisfy the Purchaser's "Due Care" obligations imposed under MCL 324.20107a.

(b) On or before the Closing Date, Seller shall, at his own expense, dispose of all aboveground materials on the Premises that are identified in the Reports as Hazardous Substances (as defined hereinafter). All such Hazardous Substances shall be manifested in the Seller's name for disposal.

(c) Further, Seller hereby makes the following representations and warranties, which Seller understands to be material:

(i) Except for the environmental disclosures in Exhibit [X – ATTACH SEPARATE LIST OF KNOWN ENVIRONMENTAL CONDITIONS] of this Agreement, Seller has no actual knowledge that Seller has ever used Hazardous Substances on, from, or affecting the Premises in any manner which violates in any respect any federal, state, or local laws, ordinances, rules, regulations, or policies governing the use, storage, treatment, transportation, manufacture, refinement, handling, production, or disposal of Hazardous Substances. Further, to Seller's actual knowledge, no prior owner of the Premises or prior tenant, subtenant or occupant of the Premises has used Hazardous Substances on, from, or affecting the Premises in any manner which violates in any material respect any federal, state or local laws, ordinances, rules, regulations or policies governing the use, storage, treatment, transportation, manufacture, refinement, handling, production or disposal of Hazardous Substances.

(ii) Except for the environmental disclosures in Exhibit [X] of this Agreement, Seller has never received any notice of any "Material Violation", defined as: (1) any condition giving rise to the issuance of a "Consent Order", pursuant to MCL 324.1115a(2), by the Michigan Department of Natural Resources and Environment (previously, Michigan Department of Environmental Quality); (2) any condition giving rise to the issuance of a notice designating the Seller as a "Potentially Responsible Party" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC 9607(a); or (3) migration of Hazardous Substances from the Premises, and has no actual knowledge of any existing violation of federal, state or local laws, ordinances, rules, regulations or policies governing the use, storage, treatment, transportation, manufacture, refinement, handling, production or disposal of Hazardous Substances at the Premises, and Seller has no actual knowledge of any actions commenced or threatened by any party for noncompliance which affects the Premises.

(iii) Except for the environmental disclosures in Exhibit [X] of this Agreement, Seller has not caused or permitted as a result of any intentional or unintentional act or omission on the part of Seller a release of any Hazardous Substances onto or from the Premises.

(d) For purposes of this Agreement, "Hazardous Substances" include, without limitation, any flammable explosives, radioactive materials, hazardous wastes, hazardous or toxic substances or related materials defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 USC 9601 *et seq.*), the Hazardous Materials Transportation Act, as amended (49 USC 5101 *et seq.*) and in the regulations adopted and publications promulgated pursuant to such Acts, the Michigan Natural Resources and Environmental Protection Act (MCL 324.20101 *et seq.*) or any other federal, state, or local governmental law, ordinance, rule, or regulation. The provisions of this paragraph shall be in addition to any and all other obligations and liabilities Seller may have to Purchaser in common law and shall survive the execution of this Agreement and the closing of this transaction.

(e) In the event that Purchaser reasonably determines as a result of his own investigation during the due diligence period that there exists a condition, or in the event at any time prior to closing Purchaser reasonably determines that there is a violation of any representation or warranty contained in this Paragraph, which affects the Premises such that Purchaser reasonably deems the same to be unsatisfactory for the intended use of the Premises (an "Environmental Condition"), the Purchaser shall have the right, by written notice to the Seller given in the manner provided in Paragraph [Y – PROVIDE THE NAME AND ADDRESS FOR WRITTEN DISCLOSURE], on or before the expiration of said due diligence period, as to matters disclosed in the Report, and at any time prior to closing, as to violations of the referenced representations or warranties, or as a result of any other Environmental Conditions, at his option, to elect to receive an immediate refund of the entire deposit in full termination of this Agreement and reimbursement of any costs expended by Purchaser for the Environmental Due Diligence under this Paragraph. In the event Purchaser elects not to so terminate on account of the existence of the Environmental Condition, Purchaser shall be deemed to have waived any objections as to any matters raised in the environmental report and/or relating to any Environmental Condition. The parties shall proceed to close on the Closing Date, unless said Closing Date occurs earlier or is extended as set forth herein.

(f) Upon acceptance of this Agreement, Seller shall turn over to Purchaser any copies of environmental or engineering reports or soil boring reports and site plans Seller has in its possession or control with respect to the Property. Seller shall also advise Purchaser in writing of any other environmental or soil boring reports respective to the Property which are known to Seller but which are not in Seller's possession or control.

(g) Purchaser shall cause [\$ DOLLARS] of the total Purchase Price to be placed into escrow to cover Purchaser's "Due Care" obligations imposed under MCL 324.20107a. Purchaser shall complete any "Due Care" necessary, and upon written notice of Purchaser's satisfactory completion of Purchaser's "Due Care" obligations by the Michigan Department of Natural Resources and Environment, Purchaser shall release the remaining sums to Seller, less amounts expended for "Due Care" costs. In no event shall Purchaser receive any such funds prior to [Closing Date].

Representations and Warranties of Seller

Except as provided by Seller in Exhibit [X] to this Agreement, Seller represents and warrants to Purchaser that:

(a) Seller has received no notice of any such, actions, or proceedings pending, by any person or party, including any governmental authority or agency, against or involving the Premises, or to which Seller is or may become a party in connection with the Premises. Seller has no actual knowledge of any violations of zoning, building, fire, health, environmental, private restrictions of record, or other statutes, ordinances, regulations or orders in regard to the Premises or any part or use thereof.

(b) During the interim period between the signing of this Agreement and the closing, Seller will continue to maintain the Premises in the same manner that Seller has maintained the Premises since the time the Seller first obtained title to the Premises.

(c) Seller represents and warrants, which representation and warranty shall survive the closing, that Seller has disclosed any and all information on the environmental condition of the property, as set forth in Exhibit (X) to this Agreement, attached hereto, except for such additional conditions that are disclosed in any environmental report provided by Seller to Purchaser within three (3) days before the Closing Date.

Indemnification and Right of Setoff

Seller agrees to indemnify Purchaser and hold Purchaser harmless from and against all damages, including but not limited to actions, suits, judgments, costs, charges, expenses, fines, penalties, reasonable attorney fees, and the consequences of any liabilities of any nature that are asserted against or affect the Premises arising out of any Hazardous Substance present on, or migrating from, the Premises prior to the Closing Date, regardless of whether such actions or claims are asserted prior to, or subsequent to, the Closing Date. To the extent that any damages to arise, Purchaser may set off the amount of the damage against the Purchase Price, as set forth in Paragraph [LIST PARAGRAPH CONTAINING PURCHASE PRICE].

Table of Authorities

Cases

<i>1031 Lapeer LLC v Rice</i> , unpublished opinion per curiam of the Court of Appeals, issued August 5, 2010 (Docket No. 290995)	8
<i>Adams v Cleveland-Cliffs Iron Co</i> , 237 Mich App 51, 602 NW2d 215 (1999)	3
<i>Bergen v Baker</i> , 264 Mich App 376; 691 NW2d 770 (2004).....	8
<i>Huhtasaari v Stockmeyer</i> , unpublished opinion per curiam of the Court of Appeals, issued Dec. 5, 2005 (Docket No. 256926)	9
<i>Krygoski Construction Co, Inc v City of Menominee</i> , 431 F Supp 2d 755, (WD Mich 2006).....	10
<i>M&D, Inc v WB McConkey</i> , 231 Mich App 22, 585 NW2d 33 (1998).....	8

Statutes

42 USC 9601	1, 10, 14
42 USC 9614(a)	3
42 USC 9652(d)	3
MCL 324.20101 <i>et seq.</i>	1, 8
MCL 324.20107a (4), (5).....	2
MCL 324.20107a(2)	2
MCL 324.20116.....	7, 8
MCL 324.20116(2)	8
MCL 324.20116(3)	8
MCL 324.20120a	1, 8
MCL 324.20126.....	2, 3, 11, 13
MCL 324.20126(1)(c)(i)	13
MCL 324.20130.....	2, 4
MCL 324.20142.....	3
MCL 565.951 <i>et seq.</i>	6
MCL 565.952	6
MCL 565.953.....	6
MCL 565.954(3)	7
MCL 565.955(1)	6, 7
MCL 565.955(3)	7
MCL 565.957	6
MCL 565.959	7
MCL 565.960.....	6
MCL 565.961	8

Rules

40 CFR 312.2	14
40 CFR 312.20.....	10
40 CFR 312.21	10
R 299.51009.....	14
R 299.5744.....	1
R 299.5748.....	1

R 299.5750.....	1
R 299.5901(e)	12
R 299.5907(2)	12
R 299.5907(2)(a)-(g).....	12
R 299.5907(2)(h).....	12
R 299.5907(3)	12
R 299.5907(3)(i)	12
R 299.5907(4)	12
R 299.5907(4)(i)	12
R 299.5911	13
R 299.5917.....	13
R 299.5919(3)	13
R 299.5919(5).....	8