Part 201 reforms to move Michigan forward

In 1995, the Michigan legislature enacted Part 201 which, among other changes, fundamentally shifted Michigan’s liability standard from strict liability to causation-based. This change and others in Part 201 have been successful. Over the years, the MDEQ and businesses have identified problems with the Part 201 and brownfield programs. So in 2006, the MDEQ asked Public Sector Consultants (PSC) to facilitate a stakeholder-driven process to discuss and identify potential improvements to the programs. A group of experienced individuals met periodically between 2006 and early 2007 to identify and discuss problems and improvements to the Part 201 and brownfield programs. PSC then issued a report in April, 2007 documenting that process.

At the end of 2007, Michigan enacted legislation addressing the recommendations in the PSC report associated with improving Michigan’s brownfield program. But nothing has been done yet to address improving Part 201. The problems identified in the PSC report and other problems identified since that report continue to substantially bar increased investment in remediation and redevelopment in Michigan. The over-arching theme representing the greatest barrier is conservative decision-making by the MDEQ, which appears to be spurred by a desire to avoid making a wrong decision. This tendency imposes an environmental and economic cost to the State. Creative and practical evaluations are squelched. The incentive for investment is significantly diminished. The economic and environmental consequences of ultra-conservatism are clear: the environment does not benefit from investment and the State does not benefit from increased economic activity and the commensurate tax revenue.

Over the last six months, the MDEQ “rolled out” a set of conceptual changes to Part 201 in which MDEQ asserted the following principles:

1. maintain the causation based liability standard
2. continue to provide liability protection to new owners/operators of facilities
3. continue to distinguish between liable and non-liable party obligations
4. provide incentives for source removal and brownfield redevelopment
5. provide greater clarity of obligations and transparency
6. streamline the cleanup processes under Part 201

The regulated community agrees with these principles. Unfortunately, many of the MDEQ’s conceptual changes will hinder the achievement of some of these goals and do not address the major issues being voiced by the regulated community.¹ These concepts that MDEQ has floated will discourage people looking to do business in Michigan, direct the state’s limited resources

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¹ Although MDEQ has not proposed any legislative language, MDEQ has said at various times that it intends to: (a) obligate non-liable property owners to investigate the properties to determine if they must exercise due care; (b) require every Phase II investigation that detects contamination be reported to MDEQ; (c) create a multi-track remediation approach where final “closure” for limited remedies may never be obtainable; (d) eliminate the successful BEA program in favor of an MDEQ-supervised expanded due care obligation with significant penalties; and (e) shift the burden of proof to land owners to avoid liability and putting MDEQ above lenders and creditors even when MDEQ has spent no money and may never do so.
on looking for problems where none are known to exist, increase regulatory burdens and transaction costs without providing much improvement in Michigan’s environment. In some cases, by discouraging redevelopment, these concepts may make Michigan’s environment worse.

It appears that there is little support for the MDEQ’s conceptual changes. But the Part 201 program must be reformed for Michigan to move forward and maintain its “cutting edge” approach and appeal to those interested in investing in brownfields. To that end, this document proposes comprehensive changes to the Part 201 program that address many of the issues identified in the PSC report and also other issues that have arisen since. The themes of these changes are to streamline many of the Part 201 processes and create transparency, flexibility and incentives for the MDEQ to make less conservative decisions, while maintaining the current causation-based liability scheme.

Accordingly, we suggest the following changes:

1. **Create a cleanup process that achieves appropriate remedial objectives and leads to clear finality.** “Finality/certainty is critical to improving the overall rate of compliance with Part 201.”\(^2\) Unfortunately, Part 201’s cleanup process is “overly complex and the endpoint is ambiguous.”\(^3\) This has stunted Michigan’s growth because national lenders demand site closures that offer a level of certainty similar to that available in other states. We propose streamlining the MDEQ-approval process for RAPs and site closures while clarifying the existing self-implemented closure process to provide greater certainty. Specifically, we propose the following changes:

   a. **MDEQ-approval process.** MDEQ’s responses and time frames associated with a plan review should be strictly defined to avoid prolonged review periods. This would quicken the pace of cleanups by eliminating the multiple review/comment cycles resulting from new issues raised by staff and management in Lansing. Further, a closure process should be created that clearly defines the standard and time frames for the MDEQ’s approval of a site closure and provides for the issuance of a no-further-action letter.

   b. **Self-implementation process.** In the alternative, a person may choose to follow a self-implementation process similar to the closure process under Part 213. Under this process, a person could remediate property and submit a closure report to the MDEQ. The MDEQ will have a period of time to audit the report. If the MDEQ does not audit the report within that time frame, the report is deemed approved.

   c. **Prioritize sites.** Sites should be prioritized, and shorter time frames (as short as 30 days) should be established for reviews of low-risk site closures – not 6 months. There should staggered review periods over three classes of sites, so that the highest-risk sites receive longer time for MDEQ review. This will foster more closures and allow MDEQ to dedicate the proper level of resources to sites based on their risk.

\(^2\) Final Report and Recommendations, Appendix B: Part 201 Discussion Group Summary, pg. 41.
\(^3\) *Id.*
d. **MDEQ must meet time deadlines.** Failure to approve a site closure on time should be deemed an approval as it currently is under the law. Where MDEQ approval is required, there should be hard deadlines on all reviews and consequences if MDEQ does not meet the deadlines.

2. **Appointed review board.** PSC Recommendation No. 12 validates the use of third parties to assist in the MDEQ approval process. To that end, we propose creating a review board comprised of independent qualified technical experts to which a person could appeal MDEQ decisions regarding a site closure, a BEA petition, or a RAP. The review board would be appointed and required to adhere to the legislature’s goals of protecting human health and the environment. The Director of the MDEQ would have the final decision over any issue appealed to the review board subject to a standard of review.

3. **Clarify Legislature’s intent that decision making be based on realistic and not hypothetical risks.** Recommendation No. 62 states that the MDEQ should review the level of conservatism in its decision-making and consider risk reduction when approving cleanups at sites so that more sites would be cleaned up. As noted previously, over time, a level of hyper-conservatism has crept into MDEQ approvals and the number of closures based on evaluations of site-based risks has dropped. The review board will take into account realistic and not hypothetical risks. For example, if isolating property with a fence is presumed to limit access, then the MDEQ should accept it and move forward. Too often, the MDEQ focuses on hypothetical situations like whether someone could cut a hole in the fence to gain access. Also, the MDEQ should approve closures whether based on source removal, risk assessment, pathway controls, or use controls. This will greatly increase the number of closures approved by the MDEQ and the number of sites for redevelopment. This intent should be reflected in the review board’s evaluations.

4. **Open and transparent decision-making.** Currently, much of the MDEQ’s decision-making is conducted in secret. A person seeking the MDEQ’s approval is given no opportunity to participate in, or respond to, issues before being handed what is effectively a final decision. The MDEQ’s decision-making processes should be open and transparent. Transparency is essential to the early scoping meetings suggested in Recommendation No. 2 to encourage positive interaction between stakeholders and the MDEQ. We propose creating additional transparency in the MDEQ’s approval processes.

5. **Define water bodies subject to groundwater surface water interface (GSI) criteria.** [Recs. 50, 51, 52, 53, 54, 55] This will insure consistency with the Legislature’s goal of protecting fish, wildlife and human health without the current hyper-conservatism of assuming that every drop of groundwater will impact surface water in the absence of any proof of such impact or even of a connection.

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5 Final Report and Recommendations, Appendix A: Characteristics of a Successful Cleanup and Redevelopment Program, pg. 37.
6 Final Report and Recommendations, pg. 8.
6. **Mixing zones.** [Rec. 50] While the MDEQ agrees that mixing zones are conceptually available to serve as part of a 201 closure, practically, the process has become so difficult to implement that MDEQ cannot use these zones (which are used with new discharges) to evaluate the discharge of contaminants to surface water bodies and in some cases to allow closures to occur by utilizing such mixing zones.

7. **Metrics should be established to measure the MDEQ’s performance.** Recommendation Nos. 14 and 15 support the development of metrics to track and report to the public on the MDEQ’s performance and risk-reduction achievement.\(^7\) We propose that the MDEQ should be obligated to record and report on the numbers of remedial action plans and closure requests submitted to and approved or denied by the MDEQ and the Review Board described above. This data should be available on the internet and reported to the Legislature annually.

8. **MDEQ should not challenge a BEA upon submittal.** The MDEQ has on occasion challenged a BEA upon disclosure. This is beyond the scope of Part 201 and a waste of MDEQ resources unless the MDEQ is attempting to impose liability on the person under Part 201 or making a determination requested by the submitter. We propose clarifying that BEAs submitted for disclosure (and not for determination) are not to be challenged unless the MDEQ is attempting to impose liability on the person under Part 201. This is consistent with the desire to improve cost-effectiveness of program resources in the Final Report and Recommendations.\(^8\)

9. **Lessee-exemption clarification.** Part 201 contains an exemption for lessees of retail, office, and commercial property unless the lessee is responsible for a release. There is some confusion as to whether this exemption remains viable with respect to existing contamination if the lessee engages in hazardous substance use or if the lessee is responsible for a subsequent release. Part 201 should be amended to clarify that the lessee exemption applies with respect to contamination that the lessee did not cause regardless of whether the lessee is responsible for a subsequent release and regardless of the lessee’s hazardous-substance use. This is consistent with Recommendation No. 80, which states that the Part 201 program should retain the causation-based liability standard.\(^9\)

10. **Add liability exemptions for affiliate transfers and liquidators/auctioneers.** It is common in business and lending transactions for a company to transfer ownership of property to one or more affiliated entities. We propose to streamline this process and eliminate potential liability traps for non-liable affiliated parties engaged in property transfers. Further, there is some confusion as to the liability status of liquidators/auctioneers in foreclosure that do not cause a release or exacerbate problems. We propose exempting liquidators/auctioneers from liability under Part 201.

11. **Provide that category "N" BEAs are optional and are not required for liability protection.**\(^10\) Currently, even if an owner or operator will not be engaging in significant

\(^7\) Final Report and Recommendations, pg. 11.
\(^8\) Final Report and Recommendations, pg. 10.
\(^9\) Final Report and Recommendation, pg. 33.
\(^10\) Recommendation Nos. 71-76 suggest the elimination of BEAs. After further discussion and reflection among stakeholders, and particularly lenders, a majority of stakeholders concluded that the BEA program has been very
hazardous substance use at a property, the person must still conduct and disclose to the MDEQ a Category N BEA to receive liability protection for existing contamination on the property. Considering Part 201’s causation-based liability scheme, this requirement makes little sense when the person’s nonuse of hazardous substances is sufficient to establish that the person has not caused any contamination at the property. On the other hand, some persons may feel more comfortable conducting a BEA in that situation. We propose adding an exemption for owners and operators of property when non significant hazardous substance use will occur on the property while maintaining a person’s ability to conduct a Category N BEA at the person’s option. This should lighten the MDEQ’s load allowing them more staff time to focus on the more challenging Category D and S BEAs and on due care issues. It is also consistent with the idea behind Recommendation No. 10, which suggests creating exemptions to reduce the need for MDEQ approvals.\footnote{Final Report and Recommendations, pg. 10.}

12. **Clarify appropriate methods to distinguish a new release from existing contamination in a BEA to simplify the BEA-approval process.** When a person petitions the MDEQ to approve its BEA, the MDEQ’s focus on every hypothetical risk\footnote{See Final Report and Recommendations, Recommendation No. 62, pg. 26.} can make it difficult to obtain the MDEQ’s approval and typically preclude the most desirable outcome. This is especially true for Category S BEAs where a person will be using the same hazardous substances as those contaminating the property. But keeping sites in similar historic use is often most desirable because of zoning and economic patterns. Michigan’s economic base depends on industrial activity. MDEQ’s reluctance to approve Category S BEAs effectively takes most impacted properties out-of-bounds to any sort of industrial development, except when total remediation occurs, which for most sites is cost-prohibitive and non-competitive. We propose to clarify appropriate methods to distinguish a new release from existing contamination to provide more flexibility in pursuing the MDEQ’s approval of a BEA—keeping in mind that an owner or operator always has the burden of distinguishing contamination associated with a new release from existing contamination under Part 201.

13. **Maintain current burden of proof standards.** The Michigan Legislature recognized that the MDEQ should have the obligation to make its case with respect to liable parties rather than placing the burden on a business to prove itself non-liable. However, the shifting of the burden by allowing MDEQ to meet the very low threshold of making a prima facie case is inconsistent with the Legislature's intent and with fundamental fairness.

14. **The cleanup criteria should be streamlined.** Recommendation Nos. 63 and 100 suggest reducing the number of land-use categories to two: residential and non-residential.\footnote{Final Report and Recommendations, pgs. 27 and 36.} We agree with the recommendation.

15. **The least restrictive cleanup criteria should be applied.** Under CERCLA, because they are arguably “applicable,” U.S. EPA must take into consideration and follow
MDEQ cleanup criteria even at sites where U.S. EPA has taken the lead enforcement and oversight role and U.S. EPA's own cleanup standards are less stringent than MDEQ's. This places Michigan property (in such cases) at a disadvantage compared to other states. Further, second-guessing U.S. EPA's cleanup standards is unnecessary.

16. **More flexibility to create site-specific criteria.** Currently, many Part 201 cleanup criteria are out-of-date or of questionable scientific validity. Further, the criteria are, by nature, "generic" -- i.e., they are based on very broad and conservative assumptions about property use that may not apply to a particular property. While Part 201 currently allows for the use of site-specific criteria in place of generic criteria, such use has been made very difficult and does not, for instance, allow a party to take into account the most up-to-date science or practical facts about the property. We propose giving owners and operators more flexibility in using site-specific criteria, including the ability to take into account recent scientific advances and develop presumptive and/or non-numeric site-specific criteria or remedies. This is consistent with Recommendation No. 62, which suggests that the MDEQ review its level of conservatism in decision-making and look to risk reduction so that more sites are remediated.  

17. **Property should not be a “facility” if it meets site-specific criteria approved by the MDEQ.** Currently, contaminated property is considered a "facility" even if the property meets site-specific criteria approved by the MDEQ. Thus, even though the MDEQ has made a site-specific finding that a particular property does not pose an unacceptable risk, the property is still burdened by "facility" status. We propose exempting from the definition of “facility”, properties that meet site-specific criteria approved by the MDEQ. This properly balances the “need to recognize and protect against public health exposures while considering the potential stigmatizing effects on property values” within the definition of “facility” under Recommendation No. 4.  

18. **Exemption from the definition of “facility” for residential properties onto which contamination has migrated.** Part 201 exempts from liability owners of residential properties onto which contamination has migrated. Yet these properties are still burdened with the stigma of being considered a “facility.” We propose exempting these properties from the definition of “facility” but create a requirement that an owner must disclose a copy of a notice the owner receives from a liable person under Part 201 that the contamination is emanating onto the property. Similar to No. 20 above, this is consistent with the idea behind Recommendation No. 4.  

19. **Clarify standard for cost recovery between private parties.** Given MDEQ’s limited resources, private cleanups should be strongly encouraged. To do this, the standard for a non-liable person to recover cleanup costs from a liable person should be easier than the current “necessary” or “in compliance with rules” standards. If a person removes some contamination but not all of it, he should not be prevented from recovering those costs. Further, providing for recovery of attorney fees for a successful remediator will provide greater incentive to conduct cleanups.

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15 Final Report and Recommendations, pg. 9.  
16 Final Report and Recommendations, pg. 9.
20. **Challenging unilateral administrative orders.** Part 201 limits a person’s ability to seek judicial review of an administrative order until the person complies with the order. Therefore, to seek judicial review, a person challenging an order must either comply with the order or wait until the MDEQ brings a lawsuit to require compliance, in which case $25,000/day fines could accrue over a long period of time. In addition, Part 201 contains a highly-deferential standard of review when a person finally is able to challenge an order. This provision is exceedingly unfavorable to businesses and unnecessarily enhances Part 201’s coercive nature. This provision should be amended to permit a person to bring suit to challenge an administrative order as soon as it is issued and require de novo review by the court.

21. **Other proposed changes not requiring amendments to Part 201.**

   a. **Modify the “operational memorandum” process.** The use of operational memoranda has a significant impact on the MDEQ’s administration of Part 201. Operational memoranda were conceived with good intentions to address the multiple questions inevitable in a program as complex as the 201 program, op memos are often barriers to successful remediation. They are developed outside the process established by the Michigan Administrative Procedures Act, which provides for formal public input as well as legislative involvement. Many of the Op Memos effectively set standards that have not been promulgated. While they were intended to serve as internal MDEQ guidance, practically, the op memos serve as exclusive models dictated to the regulated community. Remedial plans and closure requests that do not follow the op memos are typically rejected, regardless of their technical support and merit. At this point, “guidance” becomes regulatory constraint. The process must be opened up with notice to, and opportunity to comment by, the regulated community. MDEQ cannot be allowed to use draft op memos. Further, there should be some avenue to challenge such op memos if they go beyond the legislature’s intent. This issue is best addressed by amending the Administrative Procedures Act rather than Part 201.

   b. **Case-study-evaluation process.** We suggest that MDEQ establish a case-study-evaluation process. A team made up of MDEQ staff and industry could evaluate the successes and challenges faced by those attempting to implement the clean-up. The evaluation should follow existing statutory instruction for requirements and decision timeframes. This process would help highlight policy and process barriers with the MDEQ’s commitment to eliminate them. This should be accomplished outside the scope of any amendments to Part 201.