

DEPARTMENT OF ENVIRONMENTAL QUALITY

ENVIRONMENTAL RESPONSE DIVISION

ENVIRONMENTAL CONTAMINATION RESPONSE ACTIVITY

(By authority conferred on the department of environmental quality by section 20104 of 1994 PA 451, MCL 324.20104 and Executive Order No. 1995-18, MCL 324.99903)

PART 9. BASELINE ENVIRONMENTAL ASSESSMENTS

R 299.5901 Definitions.

Rule 901. As used in this part:

(a) "Act" means Act No. 451 of the Public Acts of 1994, as amended, being S324.101 et seq. of the Michigan Compiled Laws.

(b) "Administratively incomplete," when used in reference to a petition, means a petition that does not include 1 or more administrative or technical elements required by these rules.

(c) "Baseline environmental assessment" or "BEA" has the same meaning as defined in section 20101(1)(d) of the act.

(d) "Category D BEA" means a BEA that is conducted for a property where the hazardous substances to be considered are different from the hazardous substances that are known or reasonably believed to have previously been released at the property or are present at the property as a result of the decomposition of the substances that were released. Hazardous substances to be considered are those that are anticipated by the submitter to be present, as of the date of completion of the BEA, at the property in a quantity and manner that constitute significant hazardous substance use after ownership or occupancy commences.

(e) "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.

(f) "Category S BEA" means a BEA that is conducted for a property where the hazardous substances to be considered are the same as the hazardous substances that are known or reasonably believed to have previously been released at the property or are present as a result of the decomposition of hazardous substances that were released, except as provided in R 299.5903(9). Hazardous substances to be considered are those that are anticipated by the submitter to be present, as of the date of completion of the BEA, in a quantity and manner that constitute significant hazardous substance use at the property after ownership or occupancy commences.

(g) "Conducted," when used in reference to the date that a BEA is conducted, means the date when all site history research, field work, laboratory analysis, and data interpretation are complete and preparation of the BEA report is substantially complete.

(h) "Date of completion," when used in reference to the date of completion of a BEA, means the date when the BEA report is finalized by the submitter for initial disclosure to the department. The date of completion shall not be more than 15 days after the date required by section 20126(1)(c) of the act or by R 299.5903(8).

(i) "Date of occupancy," except as provided in R 299.5903(8), means the date when a person first becomes an operator of the property.

(j) "Engineering control" means measures or conditions which exist or are created at the property and which are presented in the BEA as an alternative or supplement to environmental data as the means by which a new release can be distinguished from existing contamination.

(k) "Isolation zone" means an area of uncontaminated soil or other media that can be monitored to determine whether a new release has occurred. An isolation zone may be presented in the BEA as an alternative or supplement to environmental data as the means by which a new release can be distinguished from existing contamination.

(l) "Petition" means the form and all required associated materials submitted to the department to request a determination under section 20129a of the act.

(m) "Petitioner" means a person who is seeking liability protection through the process set forth in section 20129a of the act and these rules.

(n) "Section 7a compliance analysis" means a report prepared in compliance with R 299.5915 and submitted under section 20129a of the act that documents how the use of the property by the owner or operator, or both, will assure compliance with section 20107a of the act.

(o) "Significant hazardous substance use" means the use, storage, handling, or management, at any time, of hazardous substances in quantities that exceed those commonly used for typical residential or office purposes. However, significant hazardous substance use does not include any of the following:

(i) Gasoline, oil, or other vehicle fluids that are contained in vehicles traversing or parked at a property on a short-term basis.

(ii) Storage of hazardous substances for retail sale in packaging and in quantities consistent with use by occupants of residential dwellings.

(iii) Storage or management of aboveground storage tanks, barrels, containers, or other receptacles containing hazardous substances that are appropriately identified in the BEA as being abandoned or discarded at the time of purchase, occupancy, or foreclosure.

(p) "Stipulated condition" means a statement included in a BEA or affidavit that defines a condition which is acknowledged by the submitter to be the basis for defining the scope of the evaluation provided in a BEA and the basis for resulting liability protection.

(q) "Submitter" means a person who is seeking, through a petition under section 20129a of the act or through a disclosure under section 20126(1)(c)(ii) of the act, liability protection by conducting and disclosing a BEA.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5903 Use of evaluation of environmental conditions as BEA for certain property; property description; establishing basis to distinguish existing contamination from new release; determination of significant hazardous substance use; inclusion in BEA of data and information from other studies; exemption from liability not invalidated by change in property use or hazardous substance use; time to conduct BEA prepared to establish liability exemption for development of oil or gas resources; applicability of subrule (8); "site preparation activities" defined; sufficiency of BEA completed before March 11, 1999.

Rule 903. (1) An evaluation of environmental conditions may be used as a BEA only for property that is a facility as defined in section 20101(1)(o) of the act.

(2) The rules in this part set forth the requirements for a BEA that describes the condition of property that is being transferred. If the property being transferred is part of a larger facility, then the BEA may describe the conditions on that property and need not address the entire facility. A BEA may address a facility that is only a portion of a property being transferred. If more than 1 contiguous property is being transferred, then each property shall be evaluated separately to determine if it is a facility, regardless of whether the property will be in common ownership after the transfer. A BEA may include 2 or more contiguous properties that will be in common ownership after transfer if each property is demonstrated in the BEA to be a facility. The BEA will provide an exemption from liability only for the property that is specified in the BEA, as required by these rules.

(3) A BEA may establish a basis to distinguish existing contamination from a new release through any of the following, if the elements of the BEA comply with the pertinent requirements of these rules:

(a) Environmental data that characterize conditions at the property.

(b) Engineering controls.

(c) Isolation zones.

(d) Stipulated conditions.

(4) The department may issue a written determination, on a case-by-case basis, that the use, storage, or handling of hazardous substances that exceed quantities commonly used for typical residential or office purposes is not significant hazardous substance use. If the department determines

that there is no significant hazardous substance use, then the hazardous substance covered by the determination can be eliminated from further consideration in the BEA.

(5) A BEA submitted by an owner shall consider significant hazardous substance use by the owner and all tenants and operators who, at the time the BEA is completed, are currently in possession of, or are under agreement to take possession of, all or part of the property.

(6) A BEA may include data and information from studies prepared by others or conducted for other purposes if the BEA provides sufficient rationale to demonstrate that the data are reliable and relevant to define conditions at the property at the time of purchase, occupancy, or foreclosure.

(7) If a person has established an exemption from liability by completing a BEA that satisfies the requirements of part 201 of the act and these rules, then a change in property use or hazardous substance use after the date of completion of the BEA will not invalidate the exemption.

(8) For the purposes of a BEA prepared to establish a liability exemption for a person who is a permittee for subsurface oil, gas, storage, or mineral rights under part 615 or part 625 of the act, the period to conduct a BEA shall end 45 days after the date when a permit is issued to the person by the department, unless, in the case of oil and gas development activities regulated under part 615 of the act, notice is provided to the department under R 324.402 not less than 5 days in advance of any site preparation work. If the notice is provided, then the period to conduct a BEA shall end 45 days after the date that the department receives the notice. For the purposes of these rules, notice provided to the department under R 324.402 shall modify the period for completion of a BEA only if it is received by the department not less than 5 days before site preparation activities begin and is sent to the department by a means that provides proof of delivery. Verbal notice under R 324.402 is not sufficient to modify the date on which the 45-day period ends. If an amendment to a permit to drill and operate that changes the permitted location or increases the scope of activities allowed at the permitted location is issued by the department, then the period to conduct a BEA with respect to the revised permit location or new scope of activity covered by the amendment shall end 45 days after the amendment is issued. The provisions of this subrule apply to persons who receive a new permit to drill and operate under part 615 of the act but who do not apply to the transfer of existing permits to drill and operate as provided by R 324.206(6) and (7), where site preparation activities have occurred. For the purposes of this subrule, "site preparation activities" means any change to the landscape, including cutting or removing trees or other vegetation, or any earth changes at the permitted location.

(9) For purposes of compliance with part 9 of these rules, an acquiring agency under 1980 PA 87, MCL 231.51, et seq., and known as the uniform condemnation procedures act, shall not become the owner or operator of a property that is a facility or a portion of a facility until possession of the facility or a portion of the facility has been transferred to the acquiring agency.

(10) A person submitting a BEA may consider only those hazardous substances that are present at the property in excess of applicable residential cleanup criteria in determining whether the BEA will be a category S or a category D. Hazardous substances that are detected at the property, but that are not present in excess of applicable residential criteria, may be dropped from further consideration in the BEA if the BEA contains documentation that there is a reasonable basis, after all appropriate inquiry, including review of property use history and appropriate characterization, to conclude that the hazardous substance in question is not present above applicable residential cleanup criteria.

(11) A BEA which was completed before March 11, 1999, and which does not comply with the requirements of these rules is considered inadequate to establish an exemption from liability if it fails to conform with written instructions for BEAs issued by the department at the time the BEA was completed. Disclosure of such a BEA to the department shall be governed by R 299.5919(10).

History: 1999 MR 2, Eff. Mar. 11, 1999; 2002 MR 24, Eff. Dec. 21, 2002.

R 299.5905 Eligibility to conduct BEA; "date provided by law" defined.

Rule 905. (1) Except as provided in section 20126(2) of the act and subrules (2) and (4) of this rule, a person who becomes the owner or operator of a facility on or after the date provided by law is eligible to conduct a BEA to establish an exemption from liability for existing contamination at a facility.

(2) A person who was the operator of a facility before the date provided by law and who becomes the owner of the facility on or after the date provided by law without interruption in his or her status as either owner or operator is not eligible or required to complete a BEA to establish his or her liability with

respect to contamination at the facility. The liability of a person who was the operator of a facility before the date provided by law and who becomes the owner of the facility on or after the date provided by law without interruption in his or her status as owner or operator shall be determined under section 20126(1)(a), (b), (d), (e), and (f), (3), and (4) of the act, and not under section 20126(1)(c) of the act.

(3) A person who was a lessee at a facility or held another possessory interest in the facility, but was not the operator of the facility, and who becomes the owner or operator of the facility on or after the date provided by law is eligible to conduct a BEA under section 20126(1)(c) of the act. A BEA conducted by the person does not provide an exemption from liability for contamination if he or she is otherwise liable under section 20126 of the act.

(4) Except as provided in subrule (5) of this rule, an owner or an operator of a facility who changes status from operator to owner or owner to operator on or after the date provided by law is not eligible to conduct a BEA when a change in status occurs.

(5) A person who has been the owner or operator of a facility, who then is neither the owner or operator of the facility for a time, and who again becomes the owner or operator of the facility shall, if he or she wishes to establish liability protection for contamination attributable to intervening owners or operators, conduct a BEA under section 20126(1)(c) of the act. A BEA conducted by the person does not provide an exemption from liability for contamination if he or she is otherwise liable under section 20126 of the act.

(6) A land contract vendor who, on or after the date provided by law, regains possession of a facility as a result of default by a land contract vendee and who wishes to establish an exemption from liability under section 20126(1)(c) of the act for contamination that exists at the time the land contract vendor regains possession shall conduct a BEA within 45 days after the land contract vendor possession of the facility. The BEA shall be prepared in accordance with the requirements of part 201 of the act and these rules. A BEA conducted by a land contract vendor that regains possession of a facility as a result of default by the land contract vendee does not provide an exemption from liability for contamination if the land contract vendor is otherwise liable under section 20126 of the act for that contamination. If the land contract vendor institutes summary proceedings to regain possession of the facility following a default in the land contract and a writ of restitution is issued and executed, the date the writ of restitution is executed shall constitute the date the land contract vendor regained possession of the facility.

(7) For the purpose of this rule, "date provided by law" means March 6, 1996, with regard to underground storage tank systems regulated under part 213 of the act, and June 5, 1995, with respect to all other facilities or portions of facilities.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5907 Minimum technical standards for categories of BEAs.

Rule 907. (1) This rule sets forth the minimum technical standards for each category of a BEA. All elements from the minimum technical standards for the appropriate category of a BEA shall be included in a BEA, except as provided in R 299.5909. In addition to the specific elements required for each category of a BEA, as set forth in subrules (2), (3), (4), and (5) of this rule, a submitter shall conduct all appropriate inquiry into the previous uses of the property, including a search of pertinent government records, consistent with good commercial or customary practice and describe the results of the inquiry in the BEA.

(2) A category N BEA shall include all of the following:

- (a) A legal description and scaled map or survey depicting the property.
- (b) The property tax identification numbers or ward and item numbers for parcels that are included, in whole or in part, as property covered by the BEA.
- (c) The names and chemical abstract service numbers, when a chemical abstract service number is available, of all hazardous substances known to have been released at the property.
- (d) The basis for the conclusion that the property is a facility.
- (e) Identification, by general or specific location, of known contamination on the property, including the environmental media affected.
- (f) Identification of all of the following that are known to be present at the property after a reasonable inspection of the property and review of pertinent government records:
  - (i) Abandoned or discarded aboveground storage tanks or surface impoundments that contain hazardous substances.

- (ii) Underground storage tanks that contain hazardous substances.
  - (iii) Abandoned or discarded barrels, containers, and other receptacles that contain hazardous substances.
  - (iv) A general description of the contents of any aboveground or underground storage tank, surface impoundments, barrel, container, or other receptacle identified under paragraphs (i), (ii), and (iii) of this subdivision, and any specific information known to the submitter about the contents.
  - (v) An estimate of the volume of the contents of each aboveground or underground storage tank, surface impoundments, barrel, container, or other receptacle identified under paragraphs (i), (ii), and (iii) of this subdivision, unless it is impractical to make an estimate. If it is impractical to estimate the volume of the contents of tanks, barrels, surface impoundments, containers, or other receptacles at the facility, then the BEA shall include an explanation of why it is impractical.
  - (g) Photographs that depict important features of the property and visually evident releases, including abandoned and discarded containers, unless it is impractical to provide photographs or photographs would not provide useful information about the property. Photographs shall be accompanied by all of the following information:
    - (i) The actual or approximate date the photograph was taken.
    - (ii) A description of what the photograph illustrates.
    - (iii) The location where the photograph was taken.
    - (iv) The name of the person who took the photographs.
  - (h) A specific statement that there will be no significant hazardous substance use at the property and that this stipulated condition is the basis for being able to distinguish existing contamination from a new release.
- (3) A category D BEA shall include all of the following:
- (a) A legal description and scaled map or survey depicting the property.
  - (b) The property tax identification numbers or ward and item numbers for parcels that are included, in whole or in part, as property covered by the BEA.
  - (c) The names and chemical abstract service numbers, when a chemical abstract service number is available, of all hazardous substances that will be used or otherwise be present as a result of operations at the property in a quantity that constitutes significant hazardous substance use. Identification solely by trade name, reliance on material safety data sheets that list unidentified or unspecified substances as an ingredient in a product, or other imprecise identification of hazardous substances is acceptable only if the information is adequate to allow a new release to be distinguished from existing contamination.
  - (d) The names and chemical abstract service numbers, if chemical abstract service numbers are available, of all hazardous substances known to have been released at the property or to be present as a result of the decomposition of hazardous substances that were released.
  - (e) The basis for the conclusion that the property is a facility.
  - (f) Identification of all of the following that are known to be present at the property after a reasonable inspection of the property and review of pertinent government records:
    - (i) Abandoned or discarded aboveground storage tanks or surface impoundments that contain hazardous substances.
    - (ii) Underground storage tanks that contain hazardous substances.
    - (iii) Abandoned or discarded barrels, surface impoundments, containers, and other receptacles that contain hazardous substances.
    - (iv) A general description of the contents of any aboveground or underground storage tank, surface impoundments, barrel, container, or other receptacle identified under paragraphs (i), (ii), and (iii) of this subdivision, and any specific information known to the submitter about the contents.
    - (v) An estimate of the volume of the contents of each aboveground or underground storage tank, surface impoundment, barrel, container, or other receptacle that is identified under paragraphs (i), (ii), and (iii) of this subdivision, unless it is impractical to make an estimate. If it is impractical to estimate the volume of the contents of tanks, barrels, containers, or other receptacles at the facility, then the BEA shall include an explanation of why it is impractical.
    - (g) Photographs that depict important features of the property and visually evident releases, including abandoned and discarded containers, unless it is impractical to provide photographs or photographs would not provide useful information about the property. Photographs shall be accompanied by all of the following information:
      - (i) The actual or approximate date the photograph was taken.

- (ii) A description of what the photograph illustrates.
  - (iii) The location where the photograph was taken.
  - (iv) The name of the person who took the photographs.
  - (h) Identification, by general or specific location, of known contamination on the property, and the environmental media affected.
  - (i) Environmental data or other information to demonstrate that the hazardous substances identified in subdivision (c) of this subrule have not been released at the facility or documentation showing why the submitter does not reasonably believe that 1 or more hazardous substances identified in subdivision (c) of this subrule have ever been present at the property, or both. Those hazardous substances need not be characterized in detail.
  - (j) For BEAs being submitted under section 20129a of the act, an explanation of how the body of information in the BEA can be used, and why it is sufficient, to distinguish a new release from existing contamination.
- (4) A category S BEA shall include all of the following:
- (a) A legal description and scaled map or survey depicting the property.
  - (b) The property tax identification numbers or ward and item numbers for parcels that are included, in whole or in part, as property covered by the BEA.
  - (c) The names and chemical abstract service numbers, when a chemical abstract service number is available, of all hazardous substances that will be used or otherwise be present as a result of operations at the property in a quantity that constitutes significant hazardous substance use. Identification solely by trade name, reliance on material safety data sheets that list unidentified or unspecified substances as an ingredient in a product, or other imprecise identification of hazardous substances is acceptable only if the information is adequate to allow a new release to be distinguished from existing contamination.
  - (d) The names and chemical abstract service numbers, if chemical abstract service numbers are available, of all hazardous substances known to have been released at the property or that are present as the result of decomposition of hazardous substances that were released.
  - (e) Photographs that depict important features of the property and visually evident releases, including abandoned and discarded containers, unless it is impractical to provide photographs or photographs would not provide useful information about the property.
- Photographs shall be accompanied by all of the following information:
- (i) The actual or approximate date when the photograph was taken.
  - (ii) A description of what the photograph illustrates.
  - (iii) A description of the location where the photograph was taken.
  - (iv) The name of the person who took the photographs.
  - (f) The basis for the conclusion that the property is a facility.
  - (g) Identification of all of the following that are known to be present at the property after a reasonable inspection of the property and review of pertinent government records:
    - (i) Abandoned or discarded aboveground storage tanks or surface impoundments that contain hazardous substances.
    - (ii) Underground storage tanks that contain hazardous substances.
    - (iii) Abandoned or discarded barrels, containers, and other receptacles that contain hazardous substances.
    - (iv) A general description of the contents of any aboveground or underground storage tank, surface impoundments, barrel, container, or other receptacle identified under paragraphs (i), (ii), and (iii) of this subdivision, and any specific information known to the submitter about the contents.
    - (v) An estimate of the volume of the contents of each aboveground or underground storage tank, surface impoundment, barrel, container, or other receptacle that is identified under paragraphs (i), (ii), and (iii), unless it is impractical to make an estimate. If it is impractical to estimate the volume of the contents of tanks, surface impoundments, barrels, containers, or other receptacles at the facility, then the BEA shall include an explanation of why it is impractical.
  - (h) Identification and quantification of each hazardous substance that is part of the known existing contamination at the property if the hazardous substance will be used at the facility. Statistical analyses may be presented to characterize the mass of hazardous substances that are part of existing contamination, if mass calculations are pertinent in distinguishing a new release from existing contamination.

(i) For all hazardous substances that will be used at the facility, documentation of the extent of existing contamination for hazardous substances known to have been released, and general projections about the fate of contamination, including all of the following:

(i) Information about significant property features that influence contaminant migration.

(ii) Identification of known sources of hazardous substance releases on the property.

(iii) Documentation of the vertical and horizontal extent of hazardous substance concentrations at the property above residential cleanup criteria.

(j) Information to confirm the presence of, quantify, and delineate the horizontal and vertical extent of, contamination with respect to any hazardous substance that has potentially been released on the property. Statistical analyses may be presented to characterize the mass of hazardous substances that are part of existing contamination, if mass calculations are pertinent in distinguishing a new release from existing contamination. Identification of hazardous substances subject to this subdivision shall be based on a thorough review of the property use to assess the likelihood that hazardous substances not addressed by subdivisions (h) and (i) of this subrule have been present on the property. Documentation showing why the submitter reasonably believes that 1 or more hazardous substances identified in subdivision (c) of this subrule have not ever been present at the property and the basis for the conclusion shall be included in the BEA and those hazardous substances need not be characterized in detail. Investigation for substances covered by this subdivision shall include areas of likely release based on historical information. Areas that should be considered for investigation include the following:

(i) Spills.

(ii) Seepage lagoons.

(iii) Floor drains.

(iv) Dry wells.

(v) Septic tank and tile field systems.

(vi) Buried wastes.

(vii) Underground storage tanks.

(k) For BEAs being submitted under section 20129a of the act, an explanation of how the body of information in the BEA can be used, and why it is sufficient, to distinguish a new release from existing contamination.

(5) If an underground storage tank is known to be present at a property where a BEA is conducted, then the BEA shall specifically state whether the underground storage tank will be used to contain a hazardous substance after the earliest of the date of purchase, occupancy, or foreclosure. The category of BEA required shall be determined in the following manner:

(a) If the underground storage tank will be used to contain a hazardous substance, then a category S or category D BEA shall be conducted as appropriate to the circumstances.

(b) If the underground storage tank will not be used to contain a hazardous substance, then a category N BEA may be conducted if a category N BEA is otherwise appropriate to the circumstances at the facility and if the underground storage tank is emptied within 45 days of the earliest of the date of purchase, occupancy, or foreclosure, or within the time frame allowed for completion of the BEA under R 299.5903(8), or, if the property has been condemned by the state or a local unit of government, within 45 days after the state or a local unit of government has possession of the portion of the property where the underground storage tank is located. The department may, at its discretion, extend the 45-day period for emptying an underground storage tank under extenuating circumstances. Extenuating circumstances that may be considered by the department in granting an extension include, but are not limited to, the presence of deteriorated structures that make removal of the underground storage tank unsafe and severe weather conditions that interfere with removal of the underground storage tank. A request for extension of the 45-day period to empty an underground storage tank under this subdivision shall be made in writing by the owner or operator and received by the department before the expiration of the 45-day period.

(c) For the purpose of this subrule, use of an underground storage tank does not include the storage of hazardous substances for 45 days or less after the earliest of the date of purchase, occupancy, or foreclosure or for another period allowed under subdivision (b) of this subrule if the underground storage tank is emptied within the period.

(d) The requirements of this subrule are in addition to any other requirements of state or federal laws and regulations applicable to underground storage tanks and do not limit the obligation of an owner or operator under any other state or federal law or regulation with respect to an underground storage tank.

(6) For the purpose of this rule, the term "known" refers to information known, at the time the BEA is conducted, to the submitter of the BEA and his or her agents, including the environmental professional who prepares the BEA.

(7) A BEA report shall follow a format specified by the department. The department may specify different formats for BEAs that are submitted with petitions and BEAs that are disclosed under section 20126(1)(c)(ii) of the act.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5909 Engineering controls and stipulated conditions.

Rule 909. (1) Alternative approaches may be used to satisfy certain provisions of the minimum technical standards in conjunction with, or in place of, some of the information required by R 299.5907. Alternative approaches are acceptable only if they provide or contribute to a reliable means of distinguishing between existing contamination and a new release. The purpose and function of all engineering controls, isolation zones, and stipulated conditions shall be clearly defined in the BEA.

(2) Subject to the limitations set forth in subdivision (b) of this subrule and in subrules (3), (4), and (5) of this rule, either of the following can be included in a BEA, if the BEA, taken in its entirety, satisfies the requirements of section 20101(1)(d) of the act:

(a) Engineering controls, isolation zones, or other features that provide a verifiable means of assuring that any release that occurs after purchase, occupancy, or foreclosure will be spatially separated from existing contaminated media, will be detected, and can be responded to in a timely manner so as to prevent commingling with existing contamination. A BEA that includes engineering controls, isolation zones, or other similar features shall include, at a minimum, the information required by R 299.5907(2).

(b) For BEAs that are submitted with a petition, the BEA may include 1 or more of the following stipulated conditions specified in the affidavit from the petitioner:

(i) The petitioner acknowledges that the BEA does not provide sufficient environmental data with respect to a specific hazardous substance, and that the petitioner acknowledges that the BEA does not provide an exemption to strict liability with respect to response activity required to address a release of the hazardous substance at the property.

(ii) The petitioner acknowledges that the BEA does not provide sufficient environmental data with respect to certain areas of the property, and that the petitioner acknowledges that the BEA does not provide an exemption to strict liability with respect to response activity required to address contamination in those areas of the property.

(3) If a BEA relies on engineering controls or other similar features to prevent commingling of a new release with existing contamination, then the BEA shall include stipulated conditions in an affidavit from the petitioner or submitter acknowledging that if there is a failure of an engineering control or similar feature identified in the BEA and if a release occurs as a result of the failure, then the BEA does not provide an exemption to liability for response activity necessary to address contamination resulting from the failure. The stipulated conditions in the affidavit shall also state that the burden of distinguishing the release attributable to the failure of the engineering control from existing contamination shall be borne by the petitioner or submitter according to section 20129 of the act. The content of stipulated conditions used in conjunction with an engineering control or other similar feature may be modified from the affidavit statement on a case-by-case basis, with the approval of the department, to fit the facts and circumstances of a particular case.

(4) If a BEA relies on an isolation zone as a means of detecting a new release, then the BEA shall include a stipulated condition in an affidavit from the petitioner or submitter acknowledging that if hazardous substances are detected in the isolation zone, then the BEA does not provide an exemption to liability for response activity necessary to address the contamination. The stipulated condition in the affidavit shall also state that the burden of distinguishing a new release that has migrated beyond the isolation zone from existing contamination shall be borne by the petitioner or submitter according to section 20129 of the act. The content of stipulated conditions used in conjunction with an isolation zone or other similar feature may be modified from the affidavit statement on a case-by-case basis, with the approval of the department, to fit the facts and circumstances of a particular case.

(5) The department may, on a case-by-case basis, approve of other stipulated conditions as part of a BEA petition. Stipulated conditions other than those provided for in subrules (2), (3), and (4) of this rule



and R 299.5907(2)(h) shall not be acceptable as part of a BEA if the department determines that the stipulated condition is to be used wholly, or in large measure, in place of a technical requirement that can be complied with in a manner that is cost effective and practical. Stipulated conditions that are predicated on no hazardous substance release occurring are unacceptable for category S and category D BEAs.

(6) The form of all affidavits required under this rule shall be specified by the department.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5911 Seeking department determination for exemption from liability; required forms and affidavits; department processing of petitions.

Rule 911. (1) If a person wishes to petition the department under section 20129a of the act for a determination that the person meets the requirements for an exemption from liability under section 20126(1)(c) of the act then the person shall use a form specified by the department.

(2) Each person who seeks a determination under section 20129a of the act shall submit a separate petition, unless the petitioners are joint owners of the property as tenants in common, tenants in entirety, or joint tenants. The exception for tenants in common, tenants in entirety, and joint tenants applies only when each person will be conducting the same activities at the property and have identical relationships to the property.

(3) A petition submitted under section 20129a of the act and these rules shall also be accompanied by the following affidavits:

(a) An affidavit in support of a petition for a BEA determination and optional determination of compliance with section 20107a of the act. The form of the affidavit shall be specified by the department. The affidavit shall be signed by the petitioner or a person legally authorized to bind the petitioner.

(b) An affidavit from an environmental professional in support of a petition for a BEA. The form of the affidavit shall be specified by the department. The affidavit shall be completed by the environmental professional who was the author of, or who supervised the preparation of, the BEA.

(4) If a petitioner seeks a determination by the department that the proposed use of the facility will satisfy the person's obligations under section 20107a of the act, then the petitioner shall provide a section 7a compliance analysis that complies with the requirements of R 299.5915. The petitioner shall also provide an affidavit of an environmental professional in support of a petition for a determination of compliance with section 20107a of the act. The form of the affidavit shall be specified by the department. The affidavit shall be completed by the environmental professional who was the author of, or who supervised the preparation of, the section 7a compliance analysis.

(5) The department may return to the petitioner as administratively incomplete, and without making a determination, a BEA that does not include all elements required by these rules. If the department intends to return a BEA without review or determination because it is administratively incomplete, then the department shall do so within 15 business days after

receipt of the petition. Return of an administratively incomplete BEA by the department does not alter the deadlines for completion and disclosure of the BEA that are set forth under part 201 of the act and these rules.

(6) The department may provide comments on a BEA, form, affidavit, or other material associated with the BEA in a verbal and brief written communication before issuing a determination. This communication shall be directed to the contact person identified by the petitioner on the petition form or to the petitioner.

(7) If a petitioner submits information to respond to the comments made through the process provided for in subrule (6) of this rule, then the department shall make a determination within 15 business days of receipt of the additional materials. If materials that respond to the comments are not received by the department within 15 business days of the contact made under subrule (6) of this rule, or within a time that the department and the petitioner mutually agree upon, then the department shall issue a determination that the person does not meet the requirements for an exemption under section 20126(1)(c) of the act. If, after being informed of department comments under subrule (6) of this rule, the petitioner wishes to receive a determination without submitting materials to respond to the comments, then the department shall issue the determination as required by section 20129a of the act, within 15 days of being informed of that decision by the petitioner or the petitioner's contact person identified on the petition form.

(8) If the department does not respond to a petition within 15 business days after the petition is received by the department, either by issuing a determination or providing comments according to the process described in subrule (6) of this rule, and if the delay in the department's response prevents the petitioner from curing deficiencies in the BEA within the time frames allowed by these rules, then the time allowed for the petitioner to cure any deficiencies shall be the time that would have been available to the petitioner if the department had responded on the fifteenth business day.

(9) If any of the following deficiencies are not cured by the petitioner within the time allowed under part 201 of the act and these rules, then the department may either issue a determination that the person does not meet the requirements for an exemption from liability under section 20129a of the act or, at the option of the department, inform the petitioner that the deficiency prevents the department from issuing a determination that a person meets the requirements for an exemption from liability under section 20129a of the act:

(a) A required form or affidavit is not submitted with the petition.

(b) A required form or affidavit lacks a complete response to a required element, including proper notarization, signatures, and information about the property or the petitioner. The petitioner shall respond to an inapplicable question on a form or affidavit by stating "not applicable."

(c) The text of a required form or affidavit is altered from the standard text, unless the department has authorized the petitioner or affiant to modify the standard text.

(d) The fee required by section 20129a of the act and R 299.5913 of these rules has not been paid. If the department informs the petitioner that it will not issue an affirmative determination because of the deficiency, the department shall treat the BEA as a disclosure under section 20126(1)(c)(ii) of the act.

(10) A person who submits a BEA to the department under this rule satisfies the requirement under section 20126(1)(c)(ii) of the act that the person disclose the results of a BEA to the department.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5913 Fee for review of BEA and section 7a compliance analysis.

Rule 913. (1) The fee prescribed by law for review of a petition shall accompany a petition submitted for department review under section 20129a of the act. The fee shall be paid by a check or money order payable to: "State of Michigan."

(2) There is no fee for a BEA disclosed under section 20126(1)(c)(ii) of the act if the disclosure is not accompanied by a petition.

(3) If a petition and fee are received by the department and either the petition states that the property is not a facility or the department determines after review of the BEA that the BEA does not provide sufficient information to demonstrate that the property is a facility, then the department will retain the payment.

(4) Payment of the fee for BEA petition review entitles a petitioner to all of the following services:

(a) Review of, and a determination regarding, the initial BEA and other required materials.

(b) One review of, and a determination regarding the adequacy of, revisions to the BEA or other required materials if the initial determination identifies any deficiencies in the BEA or other petition documents.

(c) Review of, and a determination regarding, the initial section 7a compliance analysis if the petitioner exercises his or her option to seek a determination of compliance with the requirements of section 20107a of the act and review of a plan for response activity, if a plan is proposed, to assure compliance with section 20107a of the act.

(d) One review of, and a determination regarding, a revised section 7a compliance analysis and a plan for response activity, if relevant, if a revised analysis is prepared in response to deficiencies identified in the initial determination.

(5) If additional iterations of the BEA or section 7a compliance analysis or a plan for response activity are submitted for department determination, then the petitioner shall pay an additional statutory fee in the same amount as the initial fee, unless the department determines that payment of an additional fee is not required because of the minor nature of any remaining deficiency. Payment of the additional fee shall be made in accordance with the requirements of this rule for the initial fee.

(6) The department shall not issue determinations in response to submittals beyond the first revisions, as described in subrule (4) of this rule, that are not accompanied by the fee. The submittals may be retained in department files.

(7) If a check is returned for insufficient funds, then the petitioner shall be given 21 days in which to make the proper payment. The 21-day period shall commence on the date the department sends notice, by certified mail, return receipt requested, of the demand for payment. If proper payment is not made within 21 days, then the department may do any of the following:

(a) If the BEA review and determination was not complete, retain the BEA as a disclosure under section 20126(1)(c)(ii) of the act.

(b) If the BEA review was complete and the BEA is inadequate to satisfy the requirements of part 201 of the act and these rules, issue a determination that the criteria for obtaining an exemption from liability have not been met.

(c) If an affirmative BEA determination has been issued, rescind that determination and retain the BEA as a disclosure under section 20126(1)(c)(ii) of the act.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5915 Section 7a compliance analysis; submittal; content; format; explanation of omitted information required.

Rule 915. (1) A person who is seeking a determination from the department that his or her proposed use of the facility will satisfy the person's obligations under section 20107a of the act shall prepare and submit a section 7a compliance analysis to the department.

(2) A section 7a compliance analysis may be submitted for a determination under section 20129a of the act only in conjunction with a petition regarding a BEA. The section 7a compliance analysis may be submitted with the BEA or as a subsequent submittal if it is submitted within 6 months from the time that the BEA is complete.

(3) If a person submits a section 7a compliance analysis separately from a petition, then the section 7a compliance analysis shall be accompanied by a copy of the relevant petition form for the facility.

(4) A section 7a compliance analysis shall include the following elements, as appropriate to the facility:

(a) Hazardous substance information, including all information regarding previous and proposed hazardous substance use at the property that is relevant for the section 7a compliance analysis.

(b) Detailed characteristics of property use, including a description of current and proposed property use.

(c) Plan for response activities, if response activities are necessary for a person to satisfy his or her obligations under section 20107a of the act.

(d) Evaluation and demonstration of compliance with section 7a obligations, including an evaluation of the information provided in response to the requirements of the other subdivisions of this subrule that discusses and demonstrates how the proposed use satisfies a person's obligations under section 20107a(1)(a), (b), and (c) of the act.

(5) A section 7a compliance analysis shall be assembled and presented in a format specified by the department.

(6) If information is omitted because it is not relevant for the facility, then the section 7a compliance analysis shall include a discussion that explains which elements were omitted and why they are not relevant to the facility.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5917 Submittal of information to cure deficiencies in BEA or section 7a compliance analysis; required forms and affidavits; timing.

Rule 917. (1) Data or information collected after the end of the 45-day period in section 20126(1)(c) of the act or after the expiration of an extension of the 45-day period as provided for in R 299.5903(8) may be submitted to cure a deficiency in a BEA identified by the department in response to a petition submitted under section 20129a of the act under the following circumstances:

(a) If it is necessary to collect additional samples to cure the identified deficiency, data from the samples will be accepted only if the owner or operator has not conducted business activities involving significant hazardous substance use at the property. If additional samples are taken

after the 45-day period in section 20126(1)(c) of the act or after an extension of the 45-day period as provided for in R 299.5903(8) has expired, then an affidavit shall be included with the data stating that the owner or operator had not conducted business activities that involved significant hazardous substance use at the property. The department shall specify the form of the affidavit that is to be used.

(b) If additional samples are not required to cure the deficiency, then the use of hazardous substances does not impair the opportunity to cure the deficiency and an affidavit regarding this issue is not required.

(2) Sample data and information gathered within the 45-day period may be submitted any time within the 6-month period provided for in section 20129a of the act to initiate the BEA petition review.

(3) All resubmittals prepared to cure deficiencies in the initial BEA shall also be submitted to the department within the 6-month period provided for in section 20129a of the act if a department review is requested. If the sample data are collected within the time frames allowed by these rules and submitted within 6 months of completion of the initial BEA, then the department shall review the revised BEA and other petition documents and issue a determination regarding the revised BEA petition if requested by the petitioner.

(4) The 6-month period allowed for submittal of any BEA and section 7a compliance analysis shall be counted from the time an initial BEA is complete, not from the time additional data or information is prepared.

(5) The following procedure shall be followed when submitting materials to cure a deficiency in a BEA or other petition documents:

(a) Information shall be submitted to the department's district office that serves the property.

(b) Information shall be accompanied by a letter which describes the purpose of the submittal and which summarizes how the BEA or other petition documents, or both, have been revised. This letter shall include the petition number assigned by the department to the original petition.

(6) The department will not prepare an acknowledgment of receipt of the materials specified in subrule (5) of this rule, but shall, upon request, provide a receipt for the materials that are hand-delivered.

(7) A person who submits a request for a determination of compliance with section 20107a of the act in conjunction with a BEA determination shall submit his or her completed section 7a compliance analysis and, if required, plan for response activity that will result in compliance with section 20107a of the act within 6 months from the date of completion of the initial BEA.

(8) Materials submitted under subrule (7) of this rule shall be accompanied by a copy of the original petition that was submitted with the BEA and a cover letter stating which one of the following conditions applies:

(a) The submittal provides information to cure deficiencies in the section 7a compliance analysis.

(b) The section 7a compliance analysis request is in conjunction with a prior request for determination under section 20129a of the act.

History: 1999 MR 2, Eff. Mar. 11, 1999.

R 299.5919 Disclosure of BEA under section 20126(1)(c)(ii) of act; forms; timing.

Rule 919. (1) A person who wishes to effectuate and maintain liability protection afforded by section 20126(1)(c) of the act is required by section 20126(1)(c)(ii) of the act to disclose the results of a BEA to the department and subsequent purchasers or transferees. The requirement to disclose the results of the BEA to the department is satisfied if the person follows the relevant procedures in this rule.

(2) Disclosure shall be made to all persons who will become the owner or operator of the property that was the subject of the BEA, unless there is information which demonstrates that the property in which interest is being transferred is not a facility at the time of the transfer of interest.

(3) A person who wishes to effectuate and maintain liability protection afforded by section 20126(1)(c) of the act shall disclose the contents of the BEA to the department not later than 8 months after the earliest of the date of purchase, occupancy, or foreclosure.

(4) The BEA shall be submitted to the department with a form specified by the department for this purpose.

(5) A person who wishes to maintain liability protection afforded by section 20126(1)(c) of the act shall disclose the contents of the BEA to a subsequent purchaser before consummating the sale of the property, consistent with the requirements of subrule (2) of this rule.

(6) A person who wishes to maintain liability protection afforded by section 20126(1)(c) of the act shall disclose the contents of the BEA to a subsequent transferee before conveying interest in the property, consistent with subrule (2) of this rule.

(7) For the purposes of subrules (5) and (6) of this rule, the requirement to disclose the results of the BEA to a subsequent purchaser or transferee may be satisfied by providing a summary of the BEA and, if requested by the person to whom an interest is being transferred, the full BEA report and related materials submitted to the department under subrules (3) and (4) of this rule. If a summary of a BEA is provided to satisfy the requirements of this rule, then the summary shall include, but is not limited to, all of the following information:

(a) The reason that the property is a facility.

(b) The category of BEA that was conducted for the property, and the reason that that category of BEA was conducted.

(c) The general nature and extent of contamination at the property revealed by the BEA.

(8) If the BEA is disclosed to the department not later than 8 months after the latest of the date of purchase, occupancy, or foreclosure, then the owner's or operator's liability exemption shall be effective on the date of purchase, occupancy, or foreclosure and shall remain in effect if the owner or operator complies with subrules (5) and (6) of this rule.

(9) A person who obtained liability protection under section 20126(1)(c) of the act by complying with subrules (3), (4), (5), and (6) of this rule, but who subsequently fails to comply with subrule (5) or (6) of this rule, is not exempt from liability as of the date of noncompliance with subrule (5) or (6) of this rule.

(10) A person who wishes to effectuate and maintain liability protection afforded by section 20126(1)(c) of the act and who has not disclosed to the department the contents of a BEA that was complete before March 11, 1999, shall complete his or her disclosure not later than September 11, 1999.

(11) If a person has conducted a BEA within 45 days of purchase, occupancy, or foreclosure, but has not yet disclosed the BEA to the department and less than 6 months has elapsed since the date of completion of the BEA, then liability under section 20126(1)(c) of the act shall be established only after a determination has been made as to whether the requirements for an exemption from liability under section 20126(1)(c) of the act would be met if the BEA had been disclosed.

History: 1999 MR 2, Eff. Mar. 11, 1999; 2002 MR 24, Eff. Dec. 21, 2002.