PART 9. BASELINE ENVIRONMENTAL ASSESSMENTS

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 of 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).

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.