

# **Chapter XI**

## **ENVIRONMENTAL LAW:**

### **A BRIEF OVERVIEW FOR THE CONSTRUCTION CONTRACTOR**

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#### **I. Introduction**

Environmental laws increasingly impact the construction industry throughout the state of Michigan and the nation. Environmental restrictions on construction-related activities can potentially impact every aspect of construction including bidding, the progress schedule, delay claims, differing site conditions, discovery and disposal of unforeseen hazardous material, and even project completion. Many owners now seek to transfer the cost and even the liability for compliance with environmental laws to contractors in the contract documents. Although the full impact of environmental regulation on a construction project is not likely to be fully controllable by the contractor, a working knowledge of some of the issues which may arise on the part of the contractor may make the difference between a successful project and a complicated unpaid claim for extras or a backcharge.

The broad scope of environmental regulation on a construction site makes it impossible to address every potential issue. Further, the nature of environmental regulation is that it constantly changes along with the politics and science which drive it. As a result, it is important for contractors which regularly work with hazardous materials or on contaminated or environmentally sensitive sites to maintain current knowledge of the applicable environmental regulations, or at least know where to find the information they need. For those contractors who cannot dedicate staff to keep current on regulatory developments, they should consider maintaining a regular relationship with an attorney or other professional for consultation on an as needed basis.

Fortunately, the U.S. Environmental Protection Agency ("EPA") and the Michigan Department of Environmental Quality ("MDEQ") maintain web sites which can answer some environmental questions, and point a contractor in the right direction on most others. This outline will make reference to helpful internet locations wherever possible for current environmental information.

#### **II. NOTIFICATION OF SPILL/RELEASE AND THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT**

In December of 1984, a major chemical release by a United States chemical company in Bhopal India killed more than 2,000 people and injured thousands more. In response, Congress passed the Superfund Amendments and Reauthorization Act ("SARA"), which included a new law known as the Emergency Planning and Community Right to Know Act ("EPCRA").<sup>1</sup> EPCRA expanded the role of the federal government into areas of emergency planning and notification. EPCRA required appointment of a State Emergency Response Commission ("SERC") in each state, which implements EPCRA in each state. The identity of a state's SERC may be obtained from the EPCRA hotline at 1-800-424-9346. The current Michigan SERC contact is: Bonnie Fighter, State Emergency Response Commission, EMD/MI Dept. of State Police, 4000 Collins Road, P.O. Box 30636, Lansing, MI 48909-8136. EPCRA also required formation of Local Emergency Planning Committees ("LEPC"), which include local police, fire, civil defense, public health, transportation, and environmental professionals. The current Michigan SERC and local LEPCs are reported at the EPA's web site.<sup>2</sup>

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<sup>1</sup>42 U.S.C. §11001-11050.

<sup>2</sup><http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/index.htm>.

Any facility receiving any of a group of listed chemicals<sup>3</sup> at or above its threshold planning quantity must notify the SERC and LEPC within sixty days after the first receipt of a shipment or production of the substance at the site. The facility owner must also notify the LEPC of a facility representative who will participate in the emergency planning process.<sup>4</sup> Employers must also maintain a Material Safety Data Sheet ("MSDS") for hazardous chemicals stored or used in the workplace. MSDSs for many hazardous chemicals have already been prepared and may be found through the OSHA website.<sup>5</sup>

If a spill or release of potentially hazardous material occurs, contractors should at a minimum report the spill using the PEAS system in Michigan by calling 1-800-292-4706 and the National Response Center at 1-800-424-8802. If there is a threat to human health or safety, the contractor should call 9-1-1 or the local fire department and the State Police Operations Division at (517) 336-6604. A written follow-up notice must also be submitted to the SERC and LEPC "as soon as practicable" after the spill or release. *See* 40 C.F.R., Part 355. The follow-up notice must include information concerning the spill or release, as well as the response actions taken.

If a spill or release occurs that is not properly reported, a contractor may receive a Letter of Warning ("LOW") or other written notice of violation for a spill or release. Generally these types of notices will request further information from the contractor in order for the governmental authority to determine whether enforcement action should be taken or a penalty assessed. It is extremely important to use great care in responding to written correspondence from the USEPA or MDEQ concerning a potential environmental violation. Any statements made in response may be considered an admission of liability by the contractor, and a properly worded response can prevent or minimize enforcement activity in some cases.

Unexpected contaminated soils discovered during excavation are not uncommon on a construction site. If a contractor is working on a site designated as a "facility" pursuant to the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA")<sup>6</sup>, soil should never be transported off-site without proper testing and characterization of the soil. If the soil is being taken to a landfill, additional testing will often be required by the landfill prior to accepting the soil. Transporting soil off-site may result in contamination to the site receiving the soil, resulting in remedial CERCLA liability for the contractor.

Even if a site is not a "facility", or had a clean preconstruction Environmental Site Assessment ("ESA"), unanticipated subsurface contamination may result in significant delays and additional expenses. Impacted soil and/or ground water can be identified in the field from the following characteristics:

- Staining or unusually colored soil.
- Sheens on soil or ground water.
- Unusual odors from soil or ground water.
- Unusual or industrial fill materials.
- Buried debris or refuse.
- Buried containers or tanks.

These are some observable characteristics of reportable wastes under CERCLA and its state law counterpart, known as Part 201. A chemical analysis should be performed concerning any suspected material so that it may be properly characterized and proper notifications made. It should be noted that unexpected

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<sup>3</sup>Chemicals listed on the extremely hazardous substances list which is subject to reporting are listed on the EPA's web site: <http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/epcraOverview.htm>.

<sup>4</sup>40 CFR part 355.

<sup>5</sup> <http://www.osha-slc.gov/SLTC/hazardcommunications/index.html#MSDS's>.

<sup>6</sup>42 U.S.C. §9601-9675.

subsurface contamination generally is only discovered after at least a portion of the material has been excavated and moved, even if only a few feet to a pile next to the excavation. This type of activity will generally be sufficient to constitute a "release" for which appropriate notifications are required. As a result, when suspicious material is discovered, the most prudent action is to contact the owner and appropriate governmental authority immediately and refrain from further disturbing the site until proper characterization occurs. The contractor should also make appropriate notifications under its contract for any delay or differing site conditions claim which may result from the contamination.

The legal framework requiring the notices described above are contained in CERCLA and the EPCRA. CERCLA section 103(a) requires a person in charge of a vessel or facility to immediately notify the National Response Center as soon as the individual has knowledge of the release of a hazardous substance in reportable quantities. Reportable quantities vary depending upon the substance. In general, the CERCLA reporting requirement is implicated where the following activity has occurred: (1) a release; (2) the substance released is listed as a CERCLA hazardous substance; (3) the release has been made into the environment (such as excavation placed on a pile next to the hole); (4) the release was from a vessel or facility; (5) the release was in reportable quantities for that substance; and (6) the release is not excluded under CERCLA reporting requirements.<sup>7</sup>

It should be noted that petroleum related materials are generally excluded from the definition of hazardous substance under CERCLA, but benzene is specifically listed as a hazardous substance under the Clean Air Act.<sup>8</sup> As a result, only the EPCRA reporting requirements apply to petroleum related materials.

EPCRA Section 304(a) requires the owner or operator of a facility at which a hazardous chemical is produced, used, or stored to notify the SERC and LEPC for all releases of hazardous substances and extremely hazardous substances in greater than reportable quantities. The EPCRA release reporting requirements are similar to those in CERCLA in that they require: (1) a release; (2) release from a facility that uses, produces, or stores hazardous chemicals; (3) the substance must be listed on the CERCLA list or on the EPCRA list of extremely hazardous substances; (4) the released material must have gone off-site with the potential to affect human health and the environment; (5) the release must be in excess of the reportable quantity for that substance; and (6) the release must not be excluded under CERCLA reporting requirements.

CERCLA and EPCRA release reporting notifications must occur immediately after an individual has knowledge of the release. The term "immediate" is not defined by the statute, but EPA guidance suggests that emergency notifications should occur within one hour of the release. Additionally, EPCRA, as discussed above, requires a written follow-up emergency notice as soon as practicable after the release.<sup>9</sup> A form available for this purpose can be obtained from the EPA's web site, or the SERC. The MDEQ has also developed a generic written report form for releases subject to the EPCRA and state law. The report form is available on MDEQ's web site and from many MDEQ's offices.

Penalties for failing to comply with reporting requirements can be substantial. EPCRA Section 325 allows civil and administrative penalties ranging up to \$10,000-\$75,000 per violation, including daily penalties for reporting failures.<sup>10</sup> Criminal penalties of up to \$50,000 or 5 years in prison apply to any person who knowingly and willfully fails to provide an emergency release notification.<sup>11</sup>

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<sup>7</sup>42 U.S.C. §9601.

<sup>8</sup>54 Fed Reg 33418 (August 14, 1989).

<sup>9</sup>42 U.S.C. §11004(c).

<sup>10</sup>42 U.S.C. §11045.

<sup>11</sup>42 U.S.C. §11045.

### **III. SOIL EROSION AND SEDIMENTATION**

Non-Point Source (“NPS”) pollution has become a focus of regulatory efforts at the state and federal levels in recent years. NPS pollution is pollution that does not come from a discrete, identifiable source such as the end of a pipe. NPS pollution generally comes from larger surface areas or from more complex processes, such as storm water runoff, snowmelt, pesticide runoff from farming operations, or bacteria from faulty septic or sewer systems.<sup>12</sup> Soil erosion or sedimentation runoff from construction sites is the most common source of NPS concern for contractors.

At the state level, soil erosion and sedimentation is subject to regulation under the Soil Erosion and Sedimentation Control section of the Natural Resources and Environmental Protection Act, known as “Part 91.”<sup>13</sup> Under Part 91, a contractor which performs a “Regulated Activity” must obtain a permit from the appropriate county or municipal enforcing agency, unless it is subject to one of the limited exemptions under Part 17, discussed below.<sup>14</sup> In general, any construction activity which results in an “earth change” (essentially any cut and fill activity), that either disturbs an acre or more of land, or occurs within 500 feet of a lake or stream is regulated. In order to obtain a permit, the enforcing agency may require a deposit or surety bond in an amount sufficient to assure installation and completion of the protective measures required under the law. The applicant must also submit a Soil Erosion and Sedimentation Control Plan which includes the following information:

- a site map
- a soils survey or written description of the soil types
- details for the proposed earth change, including a description and timeline for the work, and all temporary and permanent soil erosion and sedimentation control measures.<sup>15</sup>

The permit application must be acted upon within 30 days, and this potential delay should be factored into any construction schedule. If a contractor is determined to be in violation, it must comply with the requirements of any notice of violation within 5 days or be subject to the full enforcement provisions of the law. Penalties include an injunction shutting down the project, fines ranging from \$2,500 - \$25,000 per day, the costs and attorneys fees of the enforcing agency, as well as other remedies.<sup>16</sup>

The administrative regulations provide for certain limited exemptions from Part 91. A permit is not required for these activities:

- a beach nourishment project under MCL 324.32501 *et seq.*
- normal road and driveway maintenance, such as grading or leveling, that does not increase the width or length of the road or driveway and will not contribute sediment to lakes or streams.
- an earth change of a minor nature that is stabilized within 24 hours of the initial earth disturbance and that will not contribute sediment to lakes or streams.
- installation of oil, gas, or mineral wells under permit from the supervisor of wells if the owner-operator is in compliance with the conditions of Part 91.

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<sup>12</sup>The EPA has a section of its website devoted to NPS issues at <http://www.epa.gov/owow/nps>.

<sup>13</sup>MCL 323.9010, *et seq.* Administrative Rules have been promulgated at Admincode R 323.1701, *et seq.* (known as “Part 17” rules).

<sup>14</sup>Admincode R 323.1705.

<sup>15</sup>Admincode R 323.1703.

<sup>16</sup>MCL 323.9121, 323.9120 and MCL 323.9113.

-a county or municipal enforcing agency may grant a permit waiver if the owner submits an affidavit that the earth change will disturb less than 225 square feet and will not contribute sediment to lakes or streams.

#### **IV. STORM WATER PERMITS**

Storm water runoff is regulated under the Clean Water Act as part of the National Pollutant Discharge Elimination System (“NPDES”) permit process. Stormwater includes such items as rainwater and snowmelt, which contains particles and sediment from construction and other activities. In Michigan, the MDEQ has been delegated authority to implement the stormwater permit program. The State of Michigan released its final administrative rules under its Phase II Stormwater Permit Program on May 7, 2003.

Rule 323.2161 addresses stormwater discharge permits. Under the Rule, any person who discharges stormwater subject to regulation under §402(p) of the Clean Water Act must apply for and obtain a national permit, if the person engages in certain regulated activities. Stormwater discharges from a site of construction activity are expressly included within the definition of regulated activities.<sup>17</sup> The term "construction activity" is defined as a man-made earth change or disturbance in the existing cover or topography of land for which a national permit is required under 40 CFR §122.26(a)(2000) and which meets any of the following criteria:

- Five acres or more in size and defined as a construction activity pursuant to the provisions of 40 CFR §122.26(b)(14)(x)(2000).
- One acre or more in size and defined as a small construction activity pursuant to the provisions of 40 CFR §122.26(b)(15)(2000).
- Less than 1 acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb 1 acre or more.<sup>18</sup> The term "construction activity" includes clearing, grading and excavating activities.

The municipal or local government permittee must develop, implement, and enforce a stormwater management program (“SMP”) which includes the following requirements directly related to construction activities:

- A procedure to notify the Part 91 permitting entity and the MDEQ when soil or sediment is deposited to the municipal storm sewer system from a construction activity in violation of the Act;
- A procedure to ensure adequate allowance for soil erosion and sedimentation controls on preliminary site plans, as applicable;
- A procedure for receipt and consideration of complaints or other information submitted by the public.<sup>19</sup>

Contractors should familiarize themselves with the local SMP before commencing work which may result in a discharge to a municipal stormwater sewer. The permitting entity (the local governmental authority) must also designate a program to address post-construction stormwater runoff from new development and re-development projects that disturb one or more acres, including projects less than 1 acre that are part of a larger common plan of development or sale, that discharge into a regulated water body. The post-construction program must include an ordinance or other regulatory mechanism to address post-construction runoff from new development and re-development projects to the extent allowable under

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<sup>17</sup>Admincode R 323.2161(1)(b).

<sup>18</sup>Admincode R 323.2102(h).

<sup>19</sup>Admincode R 323.2161a(3)(d).

state or local law. Contractors should contact the local governmental authority concerning these programs before undertaking construction activity.

The Administrative Rules also require a national permit for stormwater discharge from construction activity.<sup>20</sup> Construction activity impacting five or more acres of land must comply with the filing requirements outlined below. Small construction activities disturbing 1 to 5 acres are automatically deemed to have a national permit and do not have to meet the filing requirements. In order to obtain a national permit, a construction permittee must do the following:

- A. File with the MDEQ a Notice of Coverage form before beginning construction activity. The Notice of Coverage must include the following information:
  1. A copy of the individual soil erosion and sedimentation control permit for the site as issued to the construction permittee.
  2. Acknowledgment by the construction permittee that any discharge that is made pursuant to the provisions of the rule shall be in compliance with Part 31 and the rules promulgated thereunder.
  3. A location map and a description of the nature of the construction activity.
  4. The location of the proposed discharge and identification of the receiving water.
  5. The total area of the site and the area of the site that is expected to undergo construction activity during the life of the project.
  6. Name and certification number of a certified stormwater operator responsible for inspection of the construction activity in accordance with the Administrative Rules.
  
- B. Provide a valid signature of the construction permittee or authorized representative on the Notice of Coverage. If the construction permittee is a partnership, association, corporation, industry, municipality, state agency, or interstate body, the valid signatory for the Notice of Coverage shall be determined by Rule 2114.<sup>21</sup>

A construction permittee that has authorization to discharge under a national permit must comply with the following provisions:

1. Not directly or indirectly discharge wastes such as discarded building materials, concrete truck washout, chemicals, lubricants, fuels, litter, sanitary waste, or any other substance at the construction site into the waters of the state in violation of Part 31.
2. Be in compliance with a soil erosion and sedimentation control permit for the site.
3. Properly maintain and operate the soil erosion control measures.
4. Have the soil erosion control measures under the specific supervision and control of a stormwater operator who has been certified by the MDEQ.
5. Cause the construction activity to be inspected by a certified stormwater operator once per week, and within 24 hours after every precipitation event that results in a discharge from the site, and ensure that any needed corrective actions are taken. A log of the inspections and corrective actions shall be maintained on file by the construction permittee for review and shall be retained by the construction permittee for a period of three years from the date of the inspection or corrective action.

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<sup>20</sup>Admincode R 323.2190.

<sup>21</sup>For a corporation, a principal executive officer of at least the level of vice president or his or her designated representative. For a partnership, a general partner, for a sole proprietorship, the proprietor, and for municipal entities a principal executive officer. Admincode R 323.2114.

6. Provide facilities and comply with reporting procedures for containment of any accidental losses of oil or other polluting materials.
7. Dispose of solids, sediment, filter backwash, or other waste that is removed from or results from the treatment or control of stormwater in compliance with applicable state laws and regulations and in a manner that prevents any waste from entering waters from the state.
8. Allow the MDEQ to enter upon the site at any reasonable time before the expiration of the authorization to discharge for the purpose of inspecting conditions relating to pollution of any waters or determining compliance with law.
9. Upon request, make available for public inspection or provide to the MDEQ all reports or logs prepared pursuant to the Rule.
10. File a revised Notice of Coverage before any expansion of the construction activity or change in the soil erosion control measures that require a change in the soil erosion and sedimentation control permit.<sup>22</sup>

Most of the above requirements are subject to variation depending on the local enforcing agency involved. The Notice of Coverage ("NOC") form is available on the MDEQ website<sup>23</sup> or from a local enforcing agency. A Notice of Termination ("NOT") must be submitted in order to terminate permit coverage. The NOT form, also available on the DEQ website, should be submitted when disturbed soils have been stabilized, erosion and sedimentation control measures have been removed, stormwater discharges have been eliminated, or the permittee no longer owns the site. After March 10, 2003, small construction activities resulting in 1-5 acres of disturbed soil are automatically deemed to have a national permit authorizing discharge of stormwater and are not required to meet the filing requirements outlined above.<sup>24</sup>

The stormwater permit program is relatively new and continues to undergo challenges and changes as the program matures. While the myriad of requirements may appear complex, most of the requirements have been reduced to standard form language by local enforcing agencies, making the permit process somewhat uniform. Close communication with the enforcing agency during the permitting process is the best method to ensure a successful application process. Contractors may also wish to have the permit requirements reviewed by an environmental professional to ensure that they comply with the provisions of state and local law.

## **V. ENVIRONMENTAL SITE ASSESSMENTS AND BASELINE ENVIRONMENTAL ASSESSMENTS/BROWNFIELD DEVELOPMENT**

Brownfield development of formerly contaminated sites requires consideration of numerous factors including financing, tax issues, zoning, construction, and hazardous material regulation. Contractors must become aware of the extent, location, and type of potentially hazardous material located on the site, and respond appropriately when hazardous materials or other contamination is encountered.

Prior to construction on a former industrial site, it is likely that some type of environmental assessment has been undertaken by the owner. The contractor should request copies of any environmental assessments performed on the property in order to identify known areas of contamination for appropriate handling. There are three basic types of environmental assessments under Michigan law as follows: (i) Phase I Environmental Site Assessment ("ESA"); (ii) Phase II ESA; and (iii) Baseline Environmental Assessment ("BEA"). The Phase I ESA is a nonintrusive assessment usually consisting of a historical analysis of former use of the property and a walk through of the site in order to identify any apparent

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<sup>22</sup>Admincode R 323.2190(2).

<sup>23</sup>Www.deq.state.mi.us/swq/.

<sup>24</sup>Admincode R 323.2190(1).

areas of contamination. The Phase I ESA is intended to identify Recognized Environmental Conditions ("RECs"). If an REC is identified, a Phase II ESA is usually ordered. The Phase I ESA will generally not reveal subsurface contamination.

A Phase II ESA usually includes collection of soil and/or groundwater samples. Analytical testing is conducted by a state approved lab and the results are compared to the MDEQ Part 201 Generic Residential Clean Up Criteria. If soil or groundwater impact is detected at concentrations above the MDEQ Part 201 Generic Residential Clean Up Criteria, the site is deemed a "facility." Designation as a facility will implicate the clean up and liability scheme under Part 201 of NREPA, as well as the federal CERCLA statute.

In order to allow development of a brownfield "facility," Michigan law offers some protection to the new developer through completion of a Baseline Environmental Assessment ("BEA"). The BEA process was established to limit the potential liability of a new purchaser or developer of a former industrial site in order to encourage such development. The purpose of the BEA is to determine the existing, or baseline, level of contamination of a site. If the proper procedure is followed, the new owner or developer will receive a limitation of potential liability for existing contamination, and will be liable only to the extent it contributes to pollution over and above the baseline amount.

BEAs are submitted to the MDEQ for purposes of disclosure, or for a determination of adequacy. If submitted for disclosure only, the BEA may subsequently be challenged for adequacy and if found to be inadequate, the owner/developer may lose the protection of the statute. The concept of adequacy involves a determination of whether existing contamination may be distinguished from future contamination. In order to take full advantage of the protections of the statute, whenever possible it is best practice to request a determination of adequacy from the MDEQ.

Additionally, a Section 7a Compliance Analysis ("CA") or "Due Care Plan" may be submitted in conjunction with a BEA. The owner/developer may request a determination by MDEQ of the adequacy of the CA along with the BEA. A Due Care Plan typically includes elements of the CA but is not submitted to the MDEQ. The Due Care Plan and CA generally include the following information:

- An evaluation of any potential exacerbation of existing contamination.
- An evaluation of activities on the site which may result in exposure to contaminants.
- A summary of precautions to be taken to prevent exposure by third parties.
- A summary of existing hazardous substances at the site.
- A summary of the proposed use of the property.
- A plan for any response activities, if necessary.

The purpose of the CA and Due Care Plan is to establish a set of parameters which, if followed, may provide a presumption that any subsequently discovered contamination was not caused or contributed to by the new owner.

Special funding alternatives, including tax increment financing and income tax credits are available for brownfield sites. Tax credits of up to one million dollars against the Michigan Single Business Tax are available in some instances, as well as other benefits. These programs are usually coordinated through a local Brownfield Redevelopment Authority.

## **VI. RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA")**

RCRA, 42 U.S.C. §6901, *et seq.*, establishes a "cradle to grave" system for storage, transportation, and disposal of "hazardous waste." The criteria to qualify as a RCRA "hazardous waste" are provided at 40

CFR §261(D). Certain types of "solid waste" which do not meet the criteria as "hazardous" are also regulated under the statute.

Generators, transporters, and disposers of hazardous waste and solid waste are subject to regulation under the statute. Most often, construction contractors encounter the act during the transportation of hazardous waste to or from a construction site, or the disposal of such waste, sometimes unwittingly in an improper location. This may occur when regulated waste is dumped in the wrong place, or when hazardous material is moved from location to location on a job site. Employees, particularly drivers and others responsible for moving materials on job sites, should be instructed in proper transportation and disposal techniques. Additionally, the telephone numbers for the National Response Center and the Michigan PEAS system should also be posted in all trucks which may handle hazardous or solid waste subject to the Act.

If a hazardous waste is discovered or suspected on a construction site, the contractor should immediately notify the owner, or in the case of a spill, notify the NRC and PEAS system. Only a licensed waste transporter may move regulated waste. In order to be licensed, a contractor or other individual must obtain an EPA identification number, and the hazardous or solid waste must comply with the national manifest system under the Act. The manifest system is a system intended to document the movement of hazardous and solid waste from its generation to the point of its ultimate disposal. At each step in the life of the material, its position must be noted on a manifest form. The form is known as a "Uniform Hazardous Waste Manifest" form, which is contained in the appendix to 40 CFR §262. A permit should be obtained prior to transportation or disposal of hazardous waste as well. The permitting process can be coordinated through the MDEQ, which maintains forms and guidelines to facilitate the process.

Although the RCRA statute consists largely of paper work requirements, contractors should be careful to insure compliance. Penalties include substantial fines and criminal enforcement. Even moving hazardous waste from one area on a construction site to another at the same site may result in liability, so contractors are well advised to refrain from moving hazardous material once it is identified until the material is properly packaged, labeled, manifested and permits are issued.

## **VII. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT ("CERCLA")**

CERCLA, 42 U.S.C. §9601, *et seq.*, creates a liability framework for past activities which result in contamination. It differs from the RCRA statute in that RCRA involves present and future contamination, whereas CERCLA deals with clean up of past pollution. The CERCLA statute establishes a liability scheme designed to encourage clean up of polluted sites. Initially, the Act was intended to provide a funding mechanism for clean up of these sites. However, as a practical matter, the statute is now used primarily to impose liability on those parties designated under the statute as potentially responsible for the pollution.

The CERCLA statute identifies four categories of persons designated as "potentially responsible parties" ("PRPs"). These PRPs are described as follows:

1. The current owner or operator of a vessel or facility from which there is a release or threatened release of a hazardous substance.
2. Past owners or operators of a facility at which hazardous substances were disposed of.
3. Persons who arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person (known as "generators").
4. Persons who accept hazardous substances for transport to disposal or treatment facilities from which there is a release or threatened release of a hazardous substance.<sup>25</sup>

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<sup>25</sup>42 U.S.C. §9607(a)(1-4).

PRPs may be held liable for the cost of removal or remediation action consistent with the National Contingency Plan, damages for injury to, destruction of, or loss of natural resources, including the costs of assessing such damage, as well as the costs of any health assessment or study, together with interest on those amounts recovered.<sup>26</sup> Under this system, liability is generally held to be strict. This means that liability may be imposed without regard to the fault of the PRP. For instance, the current owner of a contaminated site is designated as a PRP under the statute, irrespective of whether they actually contributed to the contamination. This strict liability scheme has been modified in Michigan by adoption of the Baseline Environmental Assessment ("BEA") program and brownfield legislation discussed above.

CERCLA also authorizes private parties to commence actions for clean up costs consistent with the National Contingency Plan.<sup>27</sup> This provision has had the effect of tremendously increasing the likelihood that litigation will occur concerning contaminated sites. Not only can a PRP or the government sue to enforce a clean up obligation, citizen suits are also authorized, which have given rise to a cottage industry in environmental litigation by various environmental groups.

A broad range of remedies are available to the government to enforce a clean up obligation under the statute. The government may seek an injunction requiring the property owner or other PRP to undertake clean up activity, or the government may simply issue an administrative order to require clean up.<sup>28</sup> Penalties for failure to comply with an administrative clean up order include a civil penalty of up to \$25,000 per day. In general, a spill or release must be reported immediately to the NRC and in Michigan to the PEAS system. Due to the nature of construction, this immediate obligation often falls upon the contractor who is on-site when the spill or release occurs. The contractor must keep in mind that the CERCLA definition of spill or release can include excavation of contaminated material, as well as more obvious examples such as puncturing a pipe or underground tank containing hazardous material. Once a potential spill or release is identified, proper notification should occur immediately, as discussed in Section II above, and reasonable measures should be taken to prevent exacerbation of the spill or release.

The CERCLA statute also allows limited forms of contractual indemnity and risk allocation for CERCLA liability. This may take the form of an indemnity clause in a construction contract under which the contractor agrees to hold an owner harmless for any liability which may arise under CERCLA at the construction site. These types of provisions have generally been upheld by courts as between the contracting parties, although the government is entitled to seek enforcement against any PRP it chooses. Contractors should carefully review their contract documents to determine the scope of the environmental liabilities they are undertaking, particularly if the site is known to contain contamination. Wherever possible, a contractor may wish to include an indemnity clause favoring the contractor for any environmental liabilities.

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<sup>26</sup>42 U.S.C. §9607(a).

<sup>27</sup>42 U.S.C. §9607(a)(4)(B).

<sup>28</sup>42 U.S.C. §9606(a).

## **VIII. ASBESTOS, LEAD, RADON, AND PCB**

Asbestos is a mineral which was formerly used in a variety of applications for everything from insulation to automobile brakes. Although now recognized as a hazardous substance due to its association with cancer and lung damage, it was once regularly used in construction in sheet form and as a spray on application. The US EPA and the federal Occupational Safety and Health Administration ("OSHA") have both issued regulations governing the removal and handling of asbestos. The US EPA regulations are found at 40 CFR §61, et seq. The OSHA regulations are found at 29 CFR §1926.58, et seq. In general, these regulations require that a person engaged in demolition or renovation of a construction site with asbestos provide prior notice of such activities on a form known as a "Notification of Demolition and Renovation" form, which is reproduced at 40 CFR §61.145. The regulations further require that asbestos containing material be removed prior to demolition or renovation activity.<sup>29</sup> The regulations are very specific with respect to the method by which asbestos must be removed and disposed of.<sup>30</sup> In general, asbestos removal should not be attempted except by an experienced asbestos removal contractor. Employers at sites containing asbestos must also comply with OSHA regulations at 29 CFR §1926.58. These regulations require the employer to establish a negative-pressure enclosure before commencing work and a decontamination area to insure that employees are not contaminated at the site, along with other requirements.<sup>31</sup>

Lead is a substance which was also used heavily at construction sites in water pipes, lead based paint, and other applications. Because lead is now recognized as a hazardous substance, its use in construction is now circumscribed by regulation. See 40 CFR §141.43. Lead is now prohibited in any pipe, solder, or flux used in the repair or installation of any public water system or plumbing that provides water for human consumption. Lead is also prohibited for use in paint intended for residential application.

Radon is a naturally occurring gas, usually found at the subgrade. It is particularly prevalent in certain areas in the northeastern United States, and has also been found in basements in Michigan. Recent energy efficient construction techniques designed to prevent heat loss in the winter also tend to exacerbate radon problems since they often prevent dissipation of the radon gas. The radon problem was addressed in the Indoor Radon Abatement Act, 15 U.S.C. §2661, et seq. in 1988. Pursuant to the Act, the US EPA has issued "Model Standards and Techniques for Control of Radon in New Residential Buildings," which provides guidance for construction techniques which will minimize radon exposure.

Polychlorinated biphenyls, known as PCBs were widely used as cooling liquids in a variety of industrial applications until the 1970's, when it was recognized as a hazardous substance. PCBs are still used today in certain electrical applications. PCBs are presently regulated under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2601, et seq. Items containing PCBs in certain threshold concentrations will be subject to TSCA. These regulations are primarily concerned with storage, transportation and disposal of PCB. For example, the regulations require that a storage facility containing PCBs include a roof and walls sufficient to prevent rain and water from reaching the affected items, there must be a floor with continuous spill curbing and no drain valves, joints, or other openings which would permit PCB to escape if spilled.<sup>32</sup> Stored PCB items must be examined for leaks at least every 30 days and immediately transferred to a non-leaking container if a leak is found. Spills of PCB material should be reported to the National Response Center in the same manner as other spills of hazardous material. Additional reporting requirements may also apply depending on the location of the spill and its size.<sup>33</sup>

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<sup>29</sup>40 CFR §61.145(c).

<sup>30</sup>40 CFR §61.150.

<sup>31</sup>29 CFR §1926.58(b).

<sup>32</sup>40 CFR §761.

<sup>33</sup>For example, additional reporting requirements are set out at 40 CFR §761.125(a)(1).

## **IX. WETLANDS AND THE CLEAN WATER ACT**

Wetlands are regulated under §404 of the Clean Water Act.<sup>34</sup> The United States Army Corps of Engineers has been delegated the responsibility for issuing permits for the discharge of dredged or fill material into the waters of the United States under §404. The Army Corps of Engineers also issues permits under §10 of the Rivers and Harbors Act,<sup>35</sup> which requires a permit for excavation or placement of fill into the navigable waters of the United States. The State of Michigan has concurrent jurisdiction over wetlands in Michigan. The MDEQ regulates Michigan wetlands under §303 of the Natural Resources and Environmental Protection Act ("NREPA").<sup>36</sup>

Not all wetlands are subject to regulation. In general, certain requirements as to size and location must be met in order to qualify as a regulated wetland. Under NREPA, regulated wetlands are as follows:

1. Wetlands contiguous to the Great Lakes or Lake St. Clair, inland lakes or ponds, or rivers.
2. Wetlands more than 5 acres in size, even if not contiguous to a water body.
3. Wetlands less than 5 acres in size which have been determined by MDEQ to be essential to the preservation of natural resources.
4. In addition to size and location requirements, a wetland must also exhibit certain wetland characteristics. The US EPA has developed a Wetland Delineation Guidance document which describes wetland characteristics. These include the following:
  - a. Wetland hydrology (usually defined by rising and falling water levels).
  - b. Existence of hydrophytic vegetation (wetland vegetation such as cattails or tall grass).
  - c. Anaerobic soil conditions (a specific type of soil condition which promotes growth of wetland vegetation).<sup>37</sup>

The US Army Corps of Engineers also uses Wetland Delineation Guidance to characterize wetlands using factors which are not entirely consistent with those used by US EPA.<sup>38</sup> Usually, the owner or developer will have conducted a wetlands inventory of a construction site prior to construction activities. However, a contractor should be prepared to take appropriate action if there is a question as to whether wetlands exist on a construction site. The person actually dredging or filling a wetland without a permit may incur liability even if that person is not the owner of the property. Contractors should make appropriate inquiry if the existence of wetlands is suspected. If there is no wetlands inventory or hydro geologic survey included in the bidding documents on a project, a contractor should make some inquiry prior to disturbing the soil. Environmental consultants are available with the expertise to determine whether a specific area is a wetland based on EPA or Army Corps of Engineers' guidance. Alternatively, many counties have prepared a wetland inventory which may be obtained from the relevant county clerk. MDEQ has also prepared a Wetland Identification Manual, which is available online.<sup>39</sup>

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<sup>34</sup>33 U.S.C. §1344.

<sup>35</sup>33 U.S.C. §403.

<sup>36</sup>MCL 30301, et seq.

<sup>37</sup>US EPA Wetland Delineation Guidance is available on the EPA's website, [www.epa.gov/owow/wetlands/](http://www.epa.gov/owow/wetlands/).

<sup>38</sup>The Army Corps of Engineers Guidance is available at [www.saj.usace.army.mil/permit/87manual.pdf](http://www.saj.usace.army.mil/permit/87manual.pdf).

<sup>39</sup>[www.deq.state.mi.us/lwm/grt\\_lakes/wetlands/idmanual.htm](http://www.deq.state.mi.us/lwm/grt_lakes/wetlands/idmanual.htm).

Once the existence of wetlands are established or suspected, a contractor should check with its upstream contractor or owner to determine whether a wetland permit has been issued. The Army Corps of Engineers and MDEQ have prepared a joint permit application, which is available online.<sup>40</sup> Additionally, many types of minor activities affecting wetlands are subject to a "nationwide permit," meaning that the activity may be undertaken without applying for a specific wetland permit. Examples of these types of activities include survey activities, utility line discharges, bank stabilization, temporary recreational structures, placement of scientific measuring devices, certain minor discharges, oil spill clean up, certain activities on single family housing property, installation of boat ramps, etc. Restrictions and limitations apply to each of the "national permits," and a contractor should carefully review the "national permit" at issue to insure compliance.

## **X. MOLD**

Toxic mold litigation has become a growth industry among plaintiff's attorneys. Thousands of commercial and residential claims have been filed, some resulting in significant liability. Mold generally requires moisture and a food source to grow. Cellulose based materials such as sheet rock and wallpaper found in many construction projects can supply the food source. Moisture may come from numerous potential sources including leaky roofs, pipes, drains, windows, door seals, improper foundation construction or drainage, or even condensation from heating and air conditioning units. Energy efficient construction techniques may increase the problem by trapping moisture which might otherwise evaporate.

In litigation, one class of potential defendants has been the individuals responsible for design and construction of the building at issue, including the contractor, architect, engineer, and their subcontractors. Mold growth in windows, siding, and H-VAC systems has made manufacturers of these products and services particularly targeted.

The highest profile cases thus far have involved insurance coverage for mold infestation. In Ballard v Fire Insurance Exchange,<sup>41</sup> the owner of a large home discovered mold infestation from a bathroom leak. The homeowners moved from their home on the advice of their expert and sued for property damage, personal injury, mental anguish, bad faith, fraud, deceptive trade practices, and other claims. Although several counts were dismissed before the trial, the jury ultimately awarded plaintiffs over \$32 million (including \$12 million of punitive damages). The Texas Court of Appeals subsequently reduced the award to just over \$4 million.<sup>42</sup>

Much of the unease in the construction industry over mold litigation results from the lack of accepted standards for construction and remediation of mold. In response, the EPA has produced guidelines for remediation contractors.<sup>43</sup> Federal mold legislation has also been introduced which would require promulgation of new construction standards and remediation standards, as well as a National Toxic Mold Hazard Insurance Fund.<sup>44</sup> Despite this activity, no federal laws have yet been passed. A number of states, including Michigan, have also begun addressing the issue of mold litigation.

## **XI. CONCLUSION**

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<sup>40</sup>[www.lre.usace.army.mil/functions/rf/html/jointa2.pdf](http://www.lre.usace.army.mil/functions/rf/html/jointa2.pdf).

<sup>41</sup>Case No. 99-05252 (Texas District Court, 2001).

<sup>42</sup>Allison v Fire Insurance Exchange, 2002 WL 31833440 (Texas Appeal, December 19, 2002).

<sup>43</sup>Indoor Environments Division, Office of Air and Radiation, US EPA, Mold Remediation in Schools and Commercial Buildings, EPA 402-K-01-001 (2001).

<sup>44</sup>United States Toxic Mold Safety and Protection Act of 2002, H.R. 5040, 107th Cong. (2002).

Environmental laws and regulations present potential pitfalls for contractors and others involved in the construction process. Quick identification of environmental issues and proper notification of spills and releases is the surest method of minimizing adverse impact from unforeseen contamination on a site, or an inadvertent violation of law or regulation. Contractors should be committed to keeping up to date on recent developments in this area of law, and should also seek to maintain a relationship with an environmental professional for appropriate consultation when need arises.