

# Environmental Due Diligence in Real Estate Transactions During the COVID-19 Crisis

---

April 23, 2020

## **COVID-19 and Baseline Environmental Assessment Timing**

Real property transactions (purchases, leases and foreclosures) need not be put on hold due to uncertainty surrounding the ability to obtain available environmental liability protections. Because of this uncertainty, the Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) has issued guidance on compliance with the timing for completing and filing of a Baseline Environmental Assessment (“BEA”) during the COVID-19 pandemic disruption.

## **Baseline Environmental Assessment Compliance Timing**

Michigan law<sup>[1]</sup> provides for an exception to meeting the typical deadlines for completing and filing a BEA (with 45 days and 6 months, respectively, after acquiring a property interest). This exception allows a prospective owner or operator to seek a determination from EGLE that the failure to comply with the statutory deadlines for completing and filing a BEA is inconsequential. Receiving such a determination from EGLE allows a new owner or operator who has filed a late BEA to maintain statutory protections from liability for pre-existing contamination.

## **How to Proceed**

Although the COVID-19 pandemic has disrupted and delayed many property transactions, each affected prospective owner or operator (including a foreclosing entity) must request an “inconsequential” determination, and EGLE may only make an “inconsequential” determination on a site-specific, case-by-case basis. EGLE has indicated that any BEA conducted on or after February 1, 2020, should be submitted with a cover letter detailing the desire to seek an inconsequential determination if being completed or filed outside of the statutory timelines. The letter should clearly indicate the failure was due to limitations associated with the executive orders issued by Governor Whitmer related to the coronavirus pandemic.

An EGLE “inconsequential determination” does not change *federal* due diligence timing requirements for the performance of a Phase I Environmental Site Assessment made for the purpose of qualifying for federal environmental liability protections under the Comprehensive Environmental Response, Compensation and Liability Act.

Both EPA and EGLE have also issued policies concerning the use of enforcement discretion during the response to the COVID 19 pandemic - **see our previous alert** for more information.

Please contact the authors or your Miller Canfield attorney with further questions.

*This information is based on the facts and guidance available at the time of publication, and may be subject to change.*

Continued

---

[1] Part 201, Section 20126(1)(c)(ii), and Part 213, Section 21323a(1)(b)(iii) of Michigan's Natural Resources and Environmental Protection Act, 1994, PA 451, as amended.