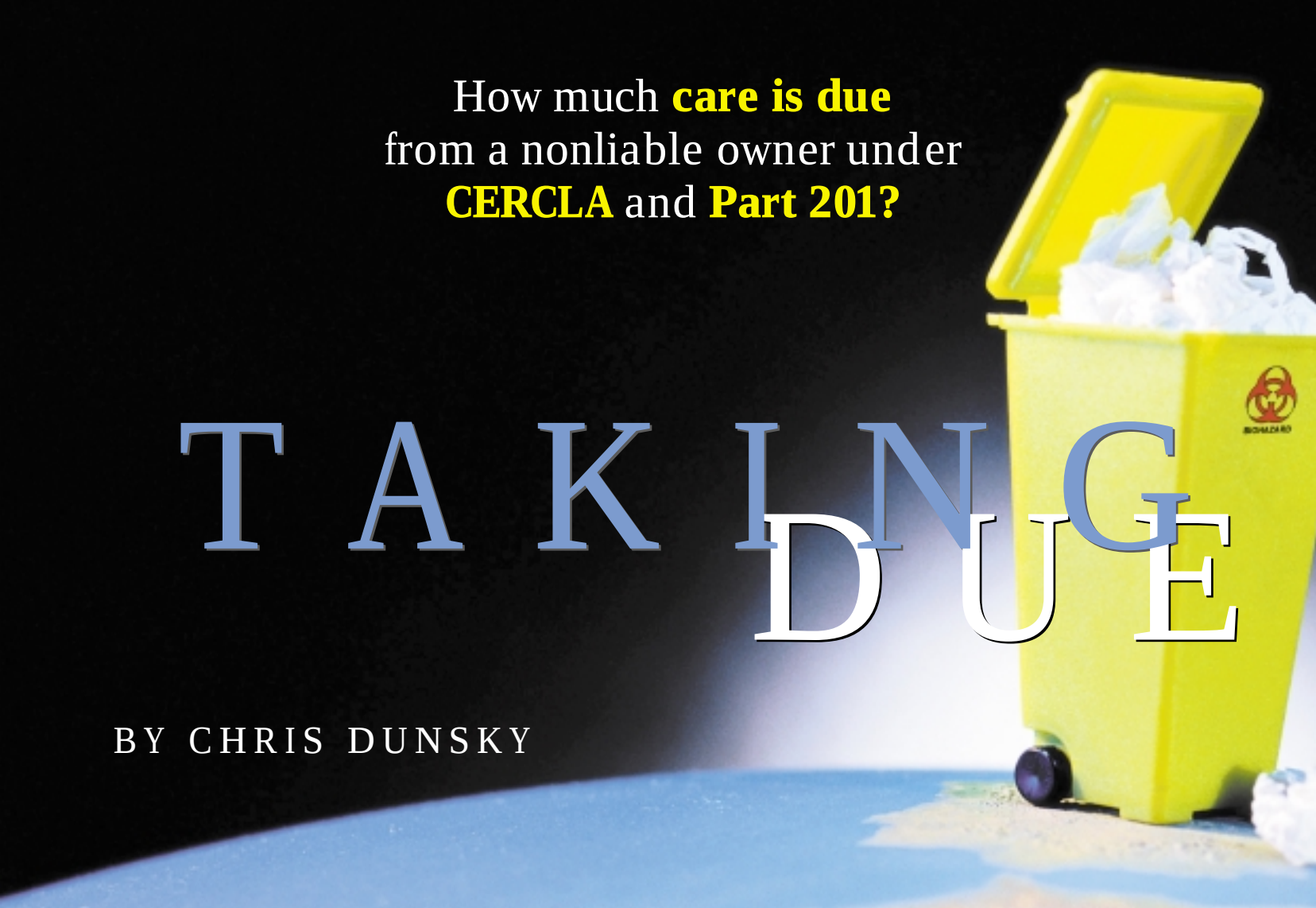
How much **care is due** from a nonliable owner under **CERCLA** and **Part 201?**

TAKING DUE

BY CHRIS DUNSKY



A PERSON WHO OWNS CONTAMINATED PROPERTY IS GENERALLY LIABLE TO REMEDIATE hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 et seq., and Part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 et seq., even if he did not act negligently, and even if the contamination occurred before CERCLA was enacted in 1980. The use of a baseline environmental assessment is a popular way to acquire property in Michigan without becoming liable to remediate existing hazardous substances under Part 201. Although purchasers who conduct baseline environmental assessments are not liable for remediation costs under MCL 324.20126, they must nevertheless exercise due care regarding hazardous substances on their property. MCL 324.20107a. Similarly, owners who are not liable under Part 201 or CERCLA because they were secured lenders, or qualified for the third-party or innocent landowner defenses, are statutorily required to exercise due care with respect to hazardous substances on their properties.

CARE

FAST FACTS:

- **Due care is a necessary element of both the third-party defense and the innocent landowner defense under CERCLA.**
- **Environmental contamination usually qualifies as an artificial condition that a court may treat as a nuisance.**
- **Under certain circumstances, a landowner must affirmatively prevent conditions on his property from adversely affecting his neighbors.**

This article briefly traces a landowner's common law duty to exercise due care, reviews how courts have interpreted due care under CERCLA, and reviews the statutory and regulatory scope of due care requirements under Part 201.

Common Law of Nuisance

A landowner is "ordinarily subject to no liability to another merely because he has failed to take positive action to prevent another from being harmed." Restatement (Second) of Torts, § 824. However, under certain circumstances a landowner must affirmatively prevent conditions on his property from adversely affecting his neighbors. A landowner must abate an "artificial condition" on his land if he knows or should know of the condition that causes a nuisance; he knows or should know that those affected by the condition do not consent to it; and he has failed to take reasonable steps to abate the condition or to protect the persons affected by it. Restatement (Second) of Torts, § 839. Environmental contamination usually qualifies as an "artificial condition" that a court may treat as a nuisance. *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992). *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51; 602 NW2d 215 (1999). Thus, a landowner who is aware that environmental contamination on his property is adversely affecting his neighbor must take "reasonable steps to abate the condition," but only if he can do so "without unreasonable hardship or expense." Restatement (Second) of Torts, § 839.

Cases Interpreting Due Care Under CERCLA

Due Care Is an Element of the Third-Party and Innocent Landowner Defenses

The third-party defense to CERCLA liability is available when the release of hazardous substances was "caused solely by… an act or omission of a third party," the owner "exercised due care with respect to the hazardous substance concerned," and the owner "took precautions against foreseeable acts or omissions of" third parties. 42 USC 9607(b)(3).

The innocent landowner defense is available to a landowner who acquired property after a third party disposed of hazardous substances there and either had no reason to know that any hazardous substance was present on it, or inherited the property. 42 USC 9601(35)(A). To qualify for this defense, the landowner must exercise due care and take "precautions against foreseeable acts

or omissions'' of third parties. 42 USC 9601(35)(A), 9607(b)(3). Due care is a necessary element of both the third-party defense and the innocent landowner defense under CERCLA.

No Care Is Usually Not Due Care

In most cases, an owner who takes no action after learning of hazardous substances on his property has failed to exercise due care. *Kerr-McGee Chem Corp v Lefton Iron & Metal Co,* 14 F3d 321, 325 (CA 7, 1994). *Foster v United States,* 922 F Supp 642, 655 (D DC 1996). *Idylwoods Assocs v Mader Capital, Inc,* 915 F Supp 1290 (WD NY 1996). These cases suggest that an owner must take some affirmative action, possibly including remediation, in order to exercise due care.

However, no care can sometimes equal due care. In *United States v 150 Acres of Land,* 204 F3d 698 (CA 6, 2000), the court held that a widow who inherited a farm on which drums had been disposed was entitled to a trial on the innocent landowner defense, where the state environmental agency ignored requests for advice and there was no evidence of trespassing. In *Kalamazoo River Study Group v Rockwell Int'l,* 3 F Supp 2d 799 (WD Mich 1998), the court held that riparian owners were not required to respond to river sediment contaminated with PCBs by others where the riparian owners did not control access to the riverbed and could not prevent the passive migration of hazardous substances downriver.

Cases Where Some Care Is Not Due Care

The obligation to exercise due care may include keeping existing facilities in good condition and continuing operation of a groundwater remediation system installed by other parties. *Westfarm Assocs v Washington Suburban Sanitary Comm'n,* 66 F3d 669 (CA 4, 1995) cert den 517 US 1103 (1996). *CPC Int'l, Inc v Aerojet Gen Corp,* 777 F Supp 549 (WD Mich 1991) aff'd in part and rev'd in part on other grounds, 59 F3d 584 (CA 6, 1995), modified sub nom, *United States v Cordova Chem Co,* 113 F3d 572 (CA 6, 1997).

The sixth circuit established a fairly demanding standard of due care in *Franklin County Convention Facilities Authority v American Premier Underwriters,* 240 F3d 534 (CA 6, 2001). The plaintiff's contractor struck a buried wooden box which split open and spilled creosote and benzene. The plaintiff placed a dam of dirt and debris to control the creosote and benzene and removed the box, its contents, and most of the contaminated soil. Nevertheless, creosote migrated 45 feet through the soil. The sixth circuit held that breaking the box "was accidental and unavoidable, and cannot fairly be attributed to" the plaintiff, but that the plaintiff had failed to exercise due care, because the dam did not prevent the creosote from migrating.

Cases in Which Owners Did Exercise Due Care

Due care obligations can be satisfied where an owner promptly acts, or cooperates with third parties. In *Redwing Carriers, Inc v Saraland Apartments, Ltd,* 875 F Supp 1545 (SD Ala 1995), aff'd in part, rev'd in part, 94 F3d 1489 (CA 11, 1996), the court held that apartment owners exercised due care by contacting authorities as soon as they became aware that hazardous substances were present and did not "significantly worsen" the problem.

In *New York v Lashins Arcade Co,* 91 F3d 353 (CA 2, 1996), an individual who acquired a shopping center at which the state of New York was remediating contaminated groundwater satisfied his due care obligation by regularly taking water samples for analysis, instructing his tenants not to discharge hazardous substances, and periodically inspecting to ensure that his tenants complied. The court held that due care does not include conducting a parallel environmental investigation or paying the state's response costs.

The degree of care a nonliable owner must take to assert a defense to CERCLA liability is highly dependent on the facts. In general, however, prompt action by a landowner will greatly assist in successfully asserting the defense.

Due Care Under Part 201 of NREPA

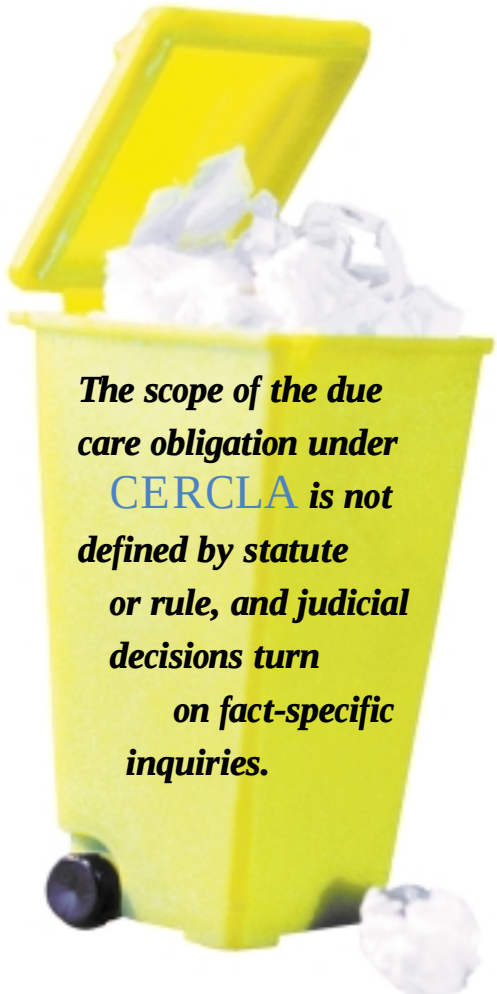
Statute and Rules

Under MCL 324.20107a(1), people who own or operate property they know to contain hazardous substances in concentrations greater than those approved for residential exposure, must prevent exacerbation of the existing contamination; mitigate unacceptable human exposure to hazardous substances, and mitigate fire and explosion hazards; and take reasonable precautions against the reasonably foreseeable acts or omissions of third parties.

The MDEQ has promulgated rules that describe what nonliable owners must do to comply with their due care obligations. Mich Admin Code R 299.51001 to .51021.

Duty to Prevent Exacerbation

The statutory definition of *exacerbation* includes the migration of hazardous substances beyond the owner's property only if the migration is "caused by an activity undertaken by the person who owns or operates the property." MCL 324.20101(n). Natural migration of hazardous substances is by definition not caused by the activities of a property owner; therefore, such natural migration is not exacerbation, and an owner has no duty under MCL 324.20107a(1)(a) to prevent it.



The scope of the due care obligation under CERCLA is not defined by statute or rule, and judicial decisions turn on fact-specific inquiries.

Exacerbation also includes "a change in facility conditions that increases response activity costs," if the change in conditions was "caused by an activity undertaken by a person who owns and operates the property." MCL 324.20101(n). Thus, an owner may exacerbate conditions, for instance, if he constructs a building such that remediation of contamination is more difficult.

A nonliable owner who exacerbates conditions becomes liable only for response activity costs and natural resources damages that are "attributable to any exacerbation of existing contamination." MCL 324.20107a(2).

Duty to Mitigate Unacceptable Exposures

MCL 324.20107a(1)(b) requires nonliable owners to undertake response activity "needed to mitigate unacceptable exposure to hazardous substances" and to "allow for the intended use of the facility in a manner that protects the public health and safety." Determining what constitutes an "unacceptable exposure" usually requires scientific analysis of risks from various exposure scenarios.

The due care rules limit the responsibilities of nonliable owners, even with regard to significant environmental problems like fire and explosion hazards and hazardous substances in discarded containers. Rules 1009 and 1001 require that nonliable owners prevent releases in injurious quantities from discarded or abandoned containers; take reasonable and prudent measures to ensure that the deterioration of buildings and structures does not damage any container that contains hazardous substances; stop the release of any hazardous substance from a container that results from the owner's failure to properly manage it; and prevent or eliminate any unacceptable exposure to hazardous substance released from a below-ground container.

Rule 1015 requires a nonliable owner to notify the MDEQ of any discarded or abandoned container that contains a quantity of hazardous substances that may become injurious to health, safety, or the environment, but not necessarily to remove such a container. Rule 1019 requires a nonliable owner to notify the fire department of a fire or explosion hazard and take reasonable and prudent steps to "mitigate or eliminate" the hazard. If initial steps to mitigate a fire or explosion hazard do not permanently abate it, the owner must provide written notice to the MDEQ, including a description of remaining conditions that may require additional action.

Rule 1013 describes actions that will satisfy a nonliable owner's obligation to "mitigate unacceptable exposures." Rule 1013(3) provides that an exposure to hazardous substances is unacceptable "if concentrations of hazardous substances to which persons may be exposed exceed" the relevant land-use based criteria. A nonliable owner may be required to fence a site to prevent trespassers from being exposed to hazardous substances and may be required to take response actions to ensure that workers will not be exposed to hazardous substances exceeding industrial use criteria.

Nonliable owners have limited due care obligations regarding contamination that has migrated or is migrating off-site. Rule 1017 does not require a nonliable owner to mitigate an exposure that occurs off-site, but only to notify MDEQ so it can respond appropriately.

Duty to Take Reasonable Precautions Against Acts or Omissions of Third Parties

MCL 324.20107a(1)(c) requires nonliable owners to "take reasonable precautions against the reasonably foreseeable acts or omissions of a third party." The due care rules do not elaborate on this requirement. Under some circumstances, a property owner may need to install a fence or take other actions to prevent trespassing. If vandals spill a drum of solvents left by the previous owner, a nonliable current owner may be liable to remediate the spill if he failed to take reasonable precautions to prevent such vandalism.

Effect of Part 201 on Common Law

A person who obtains MDEQ approval of a baseline environmental assessment under MCL 324.20129a(1) "is not liable for a claim for... equitable relief under part 17, part 31, or common law resulting from contamination identified in the petition or from contamination existing on the property on the date on which ownership or control of the property was transferred to the person." MCL 324.20129a(5). In addition, MCL 324.20142 provides that a person who is exempt from liability under Part 201 "is not subject to a claim in law or equity for the performance of response activities under part 17, part 31, or common law." However, this section does not bar "tort claims unrelated to performance of response activities," or "tort claims related to the exercise or failure to exercise responsibilities" under MCL 324.20107a.

While these two sections of Part 201 may have modified Michigan nuisance law so that a nonliable owner who complies with an MDEQ-approved due care plan is not liable in nuisance for equitable relief or money damages attributable to hazardous substances released by previous owners, the owner remains liable at common law if the owner fails to comply with due care responsibilities.

Conclusion

A nonliable owner must exercise due care with respect to hazardous substances on contaminated property. The scope of the due care obligation under CERCLA is not defined by statute or rule, and judicial decisions turn on fact-specific inquiries. The scope of due care requirements under Part 201 is defined in the statute and MDEQ regulations. A prudent purchaser of contaminated property, or an innocent landowner who discovers that his property is contaminated, must be careful to comply with the due care requirements of both statutes to avoid liability for remediation of the contamination. ✦

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