STATE OF MICHIGAN

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NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT:	The agricultural release exception and due care obligations.
HAZARDOUS SUBSTANCES:	

Despite the applicability of the agricultural release exception in Section 20101(1)(pp)(iv) of Part 201, MCL 324.20101(1)(pp)(iv), a property where a hazardous substance, such as pesticide, has been deposited, disposed of, or otherwise comes to be located, would still constitute a "facility" within the meaning of Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), where the other required elements of the statutory definition of "facility" are met, and an owner or operator who knows the property is a "facility" must comply with the due care obligations listed in Section 20107a of Part 201, MCL 324.20107a.

Opinion No. 7321 April 4, 2023

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You have asked if a property where a hazardous substance has come to be located through the past use of pesticides, in accordance with the so-called "agricultural release exception" in Section 20101(1)(pp)(iv) of Part 201 of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.20101 *et seq.*, may constitute a "facility" within the meaning of Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), such that an owner or

operator who knows the property is a "facility" must comply with the due care obligations listed in Section 20107a of Part 201, MCL 324.20107a.

BACKGROUND

Part 201 of the NREPA addresses the remediation and redevelopment of sites contaminated with hazardous substances. In enacting Part 201, the Legislature found and declared:

> (a) That there exist in this state certain facilities containing hazardous substances that pose a danger to the public health, safety, or welfare, or to the environment of this state.
>
> (b) That there is a need to provide for a method of eliminating the danger of environmental contamination caused by the existence of hazardous substances at facilities within the state.
>
> (c) That it is the purpose of this part to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state. [MCL 324.20102.]

Factual information supplied with your request indicates that, in the past, properties such as fruit orchards used lead arsenate pesticides to control insects. In areas where the lead arsenate pesticides were used, lead and arsenic concentrations generally exist in soil at levels higher than that of naturally occurring metals. The high concentrations are residual and remain in soil long after the lead arsenate pesticides have been used. The concentrations of lead and arsenic can depend on how long the property was an orchard, how much of the lead arsenate pesticides was used, and how the lead arsenate pesticides were handled or stored. Lead and arsenic are "hazardous substances" under Part 201. See MCL 324.20101(1)(x)(ii);

40 CFR § 302.4. Long-term exposures to soils impacted with lead and arsenic may harm human health.

Under Section 20101(1)(pp)(iv) of Part 201, MCL 324.20101(1)(pp)(iv) of NREPA, the application of pesticides in accordance with label directions and generally accepted agricultural and management practices at the time of the application is not a "release" of a hazardous substance. You have asked whether a property where lead and arsenic have come to be located in high concentrations through such pesticide use may nonetheless constitute a "facility," within the meaning of Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), such that an owner or operator of the property must exercise due care under Section 20107a of Part 201, MCL 324.20107a.

ANALYSIS

Your question raises an issue of statutory interpretation. "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360–361 (2018). The statute's language must be "read in the context of the entire legislative scheme" and "in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained." *Potter v McLeary*, 484 Mich 397, 411 (2009). If the language of a statute is clear and unambiguous, the Legislature is presumed to have intended the meaning it plainly expressed, and

further construction is neither necessary nor permitted. *People v Laney*, 470 Mich 267, 271 (2004).

I. The statutory text.

Your question centers on three provisions of Part 201 in the NREPA: the definition of "release," the definition of "facility," and the due care obligations imposed upon the knowing owner or operator of a "facility."

First, Section 20101(1)(pp) of Part 201, MCL 324.20101(1)(pp), defines the term "release" as follows:

> "Release" includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of a hazardous substance into the environment, or the abandonment or discarding of barrels, containers, and other closed receptacles containing a hazardous substance.

Section 20101(1)(pp), MCL 324.20101(1)(pp)(i)–(vii), then lists seven specific circumstances that do not constitute a "release," including the following:

> (iv) If applied according to label directions and according to generally accepted agricultural and management practices at the time of the application, the application of a fertilizer, soil conditioner, agronomically applied manure, or pesticide, or fruit, vegetable, or field crop residuals or processing by-products, aquatic plants, or a combination of these substances.

This carve out from the definition of "release" is often referred to as the "agricultural release exception." It is unnecessary to analyze the lawfulness of this provision to answer the question you have asked.

Second, Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), defines the term "facility" as follows:

> "Facility" means any area, place, parcel or parcels of property, or portion of a parcel of property where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been released, deposited, disposed of, or otherwise comes to be located.

Section 20101(1)(s), MCL 324.20101(1)(s)(i)–(vi), then specifies that a property is not a "facility" where any of the following six conditions are satisfied:

> (i) Response activities have been completed under this part or the comprehensive environmental response, compensation, and liability act, 42 USC 9601 to 9675, that satisfy the cleanup criteria for unrestricted residential use.
>
> (ii) Corrective action has been completed under the resource conservation and recovery act, 42 USC 6901 to 6992k, part 111, or part 213 that satisfies the cleanup criteria for unrestricted residential use.
>
> (iii) Site-specific criteria that have been approved by the department for application at the area, place, parcel of property, or portion of a parcel of property are met or satisfied and hazardous substances at the area, place, or property that are not addressed by site-specific criteria satisfy the cleanup criteria for unrestricted residential use.
>
> (iv) Hazardous substances in concentrations above unrestricted residential cleanup criteria are present due only to the placement, storage, or use of beneficial use by-products or inert materials at the area, place, or property in compliance with part 115.
>
> (v) The property has been lawfully split, subdivided, or divided from a facility and does not contain hazardous substances in excess of concentrations that satisfy the cleanup criteria for unrestricted residential use.
>
> (vi) Natural attenuation or other natural processes have reduced concentrations of hazardous substances to levels at or below the cleanup criteria for unrestricted residential use.

Third, Section 20107a of Part 201, MCL 324.20107a, requires that "[a] person who owns or operates property that he or she has knowledge is a facility" must do "all of the following with respect to hazardous substances at the facility:"

> (a) Undertake measures as are necessary to prevent exacerbation.
>
> (b) Exercise due care by undertaking response activity necessary to mitigate unacceptable exposure to hazardous substances, mitigate fire and explosion hazards due to hazardous substances, and allow for the intended use of the facility in a manner that protects the public health and safety.
>
> (c) Take reasonable precautions against the reasonably foreseeable acts or omissions of a third party and the consequences that foreseeably could result from those acts or omissions.
>
> (d) Provide reasonable cooperation, assistance, and access to the persons that are authorized to conduct response activities at the facility, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response activity at the facility. Nothing in this subdivision shall be interpreted to provide any right of access not expressly authorized by law, including access authorized pursuant to a warrant or a court order, or to preclude access allowed pursuant to a voluntary agreement.
>
> (e) Comply with any land use or resource use restrictions established or relied on in connection with the response activities at the facility.
>
> (f) Not impede the effectiveness or integrity of any land use or resource use restriction employed at the facility in connection with response activities.

The required actions listed in Section 20107a are commonly referred to as "due care obligations."

II. A property may be a facility, and a knowing owner or operator of the facility may be subject to due care obligations, even if a release exception applies.

Unlike the due care obligations, some obligations under Part 201 are dependent upon the threat or occurrence of a "release." The effect of the agricultural release exception is that, when it applies, there is no "release," and these obligations do not arise. MCL 324.20101(1)(pp)(iv). For example, Section

20126 of Part 201, MCL 324.20126(1)(a)–(b), imposes liability for response activity costs upon an owner or operator of a facility who "is responsible for an activity causing a release or threat of release." Because liability under that provision is triggered only when there is the threat or occurrence of a "release," an owner or operator would not ordinarily be liable when the agricultural release exception applies.

Other Part 201 obligations, however, are not dependent upon the threat or occurrence of a "release." The due care obligations listed in Section 20107a, MCL 324.20107a, are a prime example. Due care obligations apply whenever a person "owns or operates property that he or she has knowledge is a facility." MCL 324.20107a. In other words, due care obligations are triggered not by the threat or occurrence of a "release," but by knowledge that a property is a "facility."

The statutory text unambiguously defines "facility" to not only include properties where a hazardous substance was "released," but to also include any property:

> where a hazardous substance in excess of the concentrations that satisfy the cleanup criteria for unrestricted residential use has been *released*, *deposited, disposed of, or otherwise comes to be located*. [MCL 324.20101(1)(s) (emphasis added).]

That the Legislature defined the term "release" and chose not to limit the definition of "facility" to properties where a "release" occurred provides a strong indication of the Legislature's intent. The Legislature could have limited the definition of "facility" to only properties where a hazardous substance has been "released." However, the Legislature instead chose to use the broader phrase

"released, deposited, disposed of, or otherwise comes to be located." MCL 324.20101(1)(s). The use of this broader definition indicates that a property may be a "facility" even where there was no "release," and that obligations triggered by a property's status as a "facility" may apply even where other obligations triggered by the threat or occurrence of a "release" would not.

Michigan case law and traditional canons of statutory interpretation support this interpretation. The Michigan Court of Appeals has recognized that the language of Part 201 "evidences an intent to broadly define 'facility' to encompass virtually any location that contains hazardous substances." *In re Approximately Forty Acres in Tallmadge Twp*, 223 Mich App 454, 462 (1997). Indeed, if a property were not a "facility" because the hazardous substances at the site did not result from a "release," the words "deposited, disposed of, or otherwise comes to be located" would be mere surplusage. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999) (explaining that, when interpreting a statute, "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute").

It is my opinion, therefore, that despite the applicability of the agricultural release exception in Section 20101(1)(pp)(iv) of Part 201, MCL 324.20101(1)(pp)(iv), a property where a hazardous substance, such as pesticide, has been deposited, disposed of, or otherwise comes to be located, would still constitute a "facility" within the meaning of Section 20101(1)(s) of Part 201, MCL 324.20101(1)(s), where the other required elements of the statutory definition of "facility" are met, and an

owner or operator who knows the property is a “facility” must comply with the due care obligations listed in Section 20107a of Part 201, MCL 324.20107a.

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