

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BP PRODUCTS NORTH AMERICA, INC.,  
Plaintiff-Appellant,

UNPUBLISHED  
August 14, 2012

v

DEPARTMENT OF ENVIRONMENTAL  
QUALITY,

No. 295279  
Ingham Circuit Court  
LC No. 08-000096-AV

Defendant-Appellee.

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Before: FITZGERALD, P.J., and MURRAY and GLEICHER, JJ.

PER CURIAM.

The Department of Environmental Quality (DEQ) imposed significant penalties against BP Products North America, Inc. for failing to timely complete statutorily-required reports describing the extent of pollution at various gas station sites and neglecting to supply a viable plan to eradicate the contamination. Contrary to BP's many arguments on appeal, the DEQ acted within its authority granted by the leaking underground storage tank act (LUSTA), MCL 324.21301a *et seq.*, which is part 213 of the natural resources and environmental protection act (NREPA), MCL 324.101 *et seq.*, in relation to seven of the eight contaminated sites involved in this matter. We affirm the circuit court order approving the DEQ's penalty imposition for late reports at those sites. In relation to a former Amoco gas station in Roseville, we reverse the circuit court order affirming the DEQ's imposition of penalties against BP as the DEQ never identified BP as the owner or operator of a site at which an underground storage tank (UST) leak occurred.

**I. FACTUAL AND LEGAL BACKGROUND**

BP was the owner/operator of numerous former Amoco gas stations in Michigan. By 2007, the state was monitoring over 200 former gasoline stations where BP had reported releases from UST systems. BP had not complied with state regulations at approximately 60 percent of those locations. At issue in this case are eight sites at which USTs leaked petroleum, gasoline or other chemicals, contaminating the soil and groundwater. Seven of the leaks occurred before the enactment of the 1995 statute at issue in this case. BP has investigated the contamination at these sites and taken action to remediate the pollution since the dates on which the releases were first discovered. BP has not completed its work and continues to remediate the pollution to the current day.

BP's actions were originally governed by the LUSTA provisions, MCL 299.831 *et seq.*, enacted by 1988 PA 478, which took effect in 1989 (the 1989 LUSTA). The 1989 LUSTA set forth a comprehensive series of actions to be undertaken upon the discovery of a leak. As required by MCL 299.836 of the 1989 LUSTA, BP reported the leaks to the Michigan Department of Natural Resources (DNR), the predecessor to the DEQ,<sup>1</sup> within 24 hours of discovery and took immediate action to mitigate the damage. BP then "promptly perform[ed]" various "abatement measures," such as removing substances from the leaking USTs and removing contaminated soil from the area pursuant to MCL 299.837(1). BP notified the DNR within 20 days regarding its initial abatement actions, MCL 299.837(2), and continued its investigation into the magnitude of the contaminant release, MCL 299.837(3). BP notified the DNR within 45 days of its additional findings, MCL 299.837(4), and provided a work plan to conduct a full investigation, MCL 299.837(6). The DNR had the authority to direct BP to develop a "corrective action plan" (CAP) to remediate any site and was itself required to approve or disapprove any plan submitted by BP within 30 days of receipt. MCL 299.838(1)-(3). The DNR also had the authority to require modifications to the plan after implementation. MCL 299.838(4). In the event BP's actions did not comply with the 1989 LUSTA, the DNR was empowered to issue a "corrective action order." MCL 299.840. From 1989 through 1994, BP operated within this framework, working with the DNR to ensure the adequacy and propriety of its remediative efforts.

BP had not yet completed remediation efforts when the Legislature enacted 1994 PA 451 (the 1995 LUSTA). Pursuant to MCL 324.21307a of the 1995 act, BP hired "qualified consultant[s]" (QCs) to complete the remediation and reporting efforts at each site. The 1995 LUSTA required BP to prepare more reports than were previously expected. BP's QC was required to file an "initial assessment report" (IAR) describing BP's initial remediative actions and describing the location and detailed estimates regarding the leak. MCL 324.21308a(1). BP filed an IAR for the one site at which a leak was discovered in 1997. Similar to the 1989 act, the 1995 LUSTA required BP to create a work plan, "including an implementation schedule for conducting a final assessment report [FAR] . . . to determine the vertical and horizontal extent of the contamination as necessary for preparation of the [CAP]." MCL 324.21308a(1)(c).

The Legislature also enacted MCL 324.21309a, which enumerated for the first time specific elements to include in a CAP. Further, "within 365 days after a release had been discovered," BP's QC was now required to "complete a [FAR]," including a CAP. MCL 324.21311a(1). BP's FARs had to include a description of the extent of the contamination, the details of its CAP, and information regarding the expense and time needed to remediate the

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<sup>1</sup> "The DNR's environmental functions were transferred to the DEQ by Executive Reorganization Order 1995-18, effective October 1, 1995. MCL 324.99903." *Attorney General, ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 656 n 1; 741 NW2d 857 (2007). The DEQ and the DNR were reunited into the Department of Natural Resources and Environment (DNRE) pursuant to Executive Reorganization Order 2011-1, effective March 13, 2011. As all challenged actions occurred in this matter prior to the DNRE organization, we will refer only to the DNR and DEQ in this opinion.

contamination. MCL 324.21311a(1). Only when the work described by the CAP was completed could BP's QC submit a "closure report" to officially end its remediative duties. MCL 324.21312a. BP filed FARs for seven sites and contended that a report was not required for the eighth.<sup>2</sup>

The 1995 LUSTA also required the DEQ to create and implement an "audit program" to "selectively audit or oversee all aspects of corrective actions undertaken under this part to assure compliance with this part." MCL 324.21315(1). If an audit revealed that BP had not completed the steps outlined in its CAP, the DEQ could require BP to provide additional information or take additional corrective actions. MCL 324.21315(2). The DEQ audited all sites at issue, some within two years of BP filing its FAR, but most not until five, eight, and even ten years later. Based on its investigations, the DEQ identified several deficiencies in BP's FARs. The DEQ notified BP of these issues and requested BP to submit amended FARs. BP's efforts were deemed unsatisfactory and the DEQ gave BP another chance before penalties would be levied. Yet, BP never completed the FARs to the DEQ's satisfaction.

As a result of BP's noncompliance, the DEQ imposed combined penalties of \$869,150. MCL 324.21313a of the 1995 LUSTA defined the DEQ's authority to impose these penalties:

(1) Beginning on the effective date of the amendatory act . . . , if a report is not completed or a required submittal . . . is not provided during the time required, the [DEQ] may impose a penalty according to the following schedule:

(a) Not more than \$100.00 per day for the first 7 days that the report is late.

(b) Not more than \$500.00 per day for days 8 through 14 that the report is late.

(c) Not more than \$1,000.00 per day for each day beyond day 14 that the report is late.

BP appealed the imposition of penalties to the circuit court, arguing that the DEQ could not penalize its "submission of incomplete reports so long as they [were] timely submitted." The circuit court rejected BP's claim as MCL 324.21313a required BP to complete "statutorily detailed requirements for a FAR, which must include an adequate CAP." The court found the penalties to be authorized by law as the submitted FARs omitted many statutory elements. The court also rejected BP's claim that the DEQ unlawfully required it to submit more than one FAR for each site. The court noted that BP "either failed to submit any FAR at all . . . or submitted statutorily incomplete FARs" so "it [was] as if no FAR was submitted at all."

BP challenged the DEQ's retroactive application of the 1995 LUSTA's reporting requirements. The court ruled that the act's retroactivity provision's reference to "this part" and

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<sup>2</sup> BP had not owned a site in Roseville since 1979. It denied liability for a leak discovered in 1995, but "voluntarily" conducted clean-up efforts. Because it denied liability, BP refused to prepare and file reports under the 1995 LUSTA.

exclusion of only “criminal penalties” rendered the reporting requirements retroactive. BP also challenged the DEQ’s “informal” method of applying the 1995 act retroactively without promulgating administrative rules to codify the guidelines. The court concluded that the DEQ was not required to codify its various guiding documents into rules. The court ultimately found that the DEQ had not exceeded its authority and therefore affirmed the imposition of penalties.

BP then sought appeal in this Court. We granted leave “limited to the issues raised in the application,” in *BP Prods N Amer, Inc v Dep’t of Environmental Quality*, unpublished order of the Court of Appeals, entered April 27, 2010 (Docket No. 295279).

We must note that on May 1, 2012, one day before oral arguments were heard in this appeal, the Governor signed a series of public acts into law, which revised various provisions of the LUSTA and took immediate effect. Under the 2012 LUSTA, the Legislature refined the statutory elements of FARs and CAPs. MCL 324.21311a, as amended 2012 PA 110. The 2012 LUSTA is retroactive, MCL 324.21301a, as amended 2012 PA 108, and is therefore applicable to the current appeal.

## II. STANDARD OF REVIEW

This appeal is not from a contested case under the Administrative Procedures Act (APA), MCL 24.201 *et seq.* Rather, it is from the circuit court’s review of an agency decision made without the benefit of an administrative evidentiary hearing. Where an administrative hearing was not held, a reviewing court must determine whether the agency’s decision was authorized by law. Const 1963, art 6, § 28. A decision is not authorized by law where the agency violated or exceeded constitutional or statutory authority, acted without jurisdiction, resorted to unlawful procedures, or acted in an arbitrary and capricious manner. *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 455; 688 NW2d 523 (2004).

We review issues of statutory interpretation *de novo*. *In re Complaint of Rovas*, 482 Mich 90, 97; 754 NW2d 259 (2008). A reviewing court should give an administrative agency’s interpretation of statutes it is obliged to execute respectful consideration, but not deference. *Id.* at 102. The goal of statutory interpretation is to discern the intent of the Legislature based on the language of the statute. “If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written.” *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If a statute is ambiguous, however, judicial construction is permitted. *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 449; 770 NW2d 117 (2009).

## III. THE FAR REQUIREMENTS OF THE 1995 LUSTA ARE RETROACTIVE

BP first challenges the DEQ’s and circuit court’s retroactive application of the 1995 LUSTA by requiring BP to file FARs for sites at which the leaks were discovered before 1995. However, the 1995 LUSTA is expressly retroactive. BP had not completed remediation at any site to which the FAR requirement was applied and was allowed additional time to comply. Accordingly, we discern no error in this regard.

MCL 324.21311a(1) of the 1995 LUSTA provides: “Within 365 days after a release has been discovered, a [QC] retained by an owner or operator shall complete a [FAR] that includes a [CAP] developed under [MCL 324.21309a] and submit the report to the [DEQ] . . . .”

MCL 324.21301a expressly provides that the 1995 LUSTA is retroactively applicable:

(1) This *part* is intended to *provide remedies for sites posing a threat to the public health, safety, or welfare, or to the environment, regardless of whether the release or threat of release of a regulated substance occurred before or after January 19, 1989, the effective date of the [1989 LUSTA], and for this purpose, this part shall be given retroactive application.* However, criminal penalties provided in the amendatory act that added this section only apply to violations of this part that occur after April 13, 1995.

(2) The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application. [Emphasis added.]<sup>3</sup>

MCL 324.21301a(1) announced that “[t]his part,” meaning part 213 (the 1995 LUSTA) “is intended to provide remedies for sites posing a threat to the public health, safety, or welfare, or to the environment” and “shall be given retroactive application.” This plain wording indicates that the Legislature deemed the 1995 LUSTA remedial in nature and intended retroactivity to apply broadly. “[R]emedial statutes are to be liberally construed to suppress the evil and advance the remedy.” *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988). The statement that the 1995 LUSTA is “intended to provide remedies for sites . . . regardless of whether the release or threat of release of a regulated substance occurred before or after January 19, 1989” explicitly asserts the 1995 act’s applicability even to sites whose contamination releases predate the statutory amendments by several years, and which formerly came under the 1989 legislation.

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<sup>3</sup> The Legislature amended the retroactivity provision in 2012 PA 108, effective May 1, 2012:

(1) This part is intended to provide remedies using a process and procedures separate and distinct from the process, procedures, and criteria established under part 201 for sites posing a threat to the public health, safety, or welfare, or to the environment, as a result of releases from [UST] systems, regardless of whether the release or threat of release of a regulated substance occurred before or after January 19, 1989, the effective date of the [1989 LUSTA], and for this purpose, this part shall be given retroactive application. However, criminal penalties provided in this part only apply to violations of this part that occur after April 13, 1995.

(2) The liability provisions that are provided for in this part shall be given retroactive application.

One type of “remedy” provided by the 1995 act is reporting. The owner or operator of a contaminated site is required to submit various reports to the DEQ. This allows the DEQ to monitor the owner/operator to ensure that it has a satisfactory plan to remediate the contamination and is actually making strides in achieving its goals. One such report is the FAR. BP does not claim that it had completed remediation for any of the seven sites with pre-1995 leaks. And the DEQ acted within its authority in requiring BP to submit FARs for all sites.

The FAR penalty provision is also retroactive. Both the 1995 and the 2012 acts exclude only criminal penalties from their retroactive scopes. Nothing in MCL 324.21313a indicates that its penalties are criminal in nature. Compare MCL 324.21324 (a person who knowingly makes a false or misleading report “is guilty of a felony” and may be fined up to \$50,000). MCL 324.21323(1), as amended 2012 PA 112, specifically delineates the Section 21313a fines as “civil” and authorizes the attorney general to “commence a civil action seeking” payment. Accordingly, the DEQ has the authority to penalize BP for failing to complete a FAR by the post-1995 deadline even where the leak occurred prior to the 1995 LUSTA’s effective date.

#### IV. BP MUST INCLUDE ALL STATUTORY ELEMENTS IN ITS FAR TO “COMPLETE” IT

BP challenges the DEQ’s determination that its FARs were incomplete and the imposition of penalties on that basis. MCL 324.21311a of the 1995 LUSTA sets forth a nonexhaustive list of elements a FAR must include:

(1) Within 365 days after a release has been discovered, a [QC] retained by an owner or operator shall *complete* a [FAR] that includes a [CAP] developed under [MCL 324.21309a] and submit the report to the [DEQ] on a form created pursuant to [MCL 324.21316]. The report shall include, but is not limited to, the following information:

(a) The extent of contamination.

(b) Tier II and tier III evaluation, as appropriate, under the RBCA<sup>4</sup> process.

(c) A feasibility analysis. The following shall be included, as appropriate, given the site conditions:

(i) On-site and off-site corrective action alternatives [CAAs] to remediate contaminated soil and groundwater for each cleanup type, including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances.

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<sup>4</sup> The RBCA is “the American society for testing and materials (ASTM) document entitled standard guide for risk-based corrective action applied at petroleum release sites . . . .” MCL 324.21303(c).

(ii) The costs associated with each [CAA] including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances.

(iii) The effectiveness and feasibility of each [CAA] in meeting cleanup criteria.

(iv) The time necessary to implement and complete each [CAA].

(v) The preferred [CAA] based upon subparagraphs (i) through (iv) and an implementation schedule for completion of the corrective action.

(d) A [CAP].

(e) A schedule for [CAP] implementation.

(2) If the preferred [CAA] under subsection (1)(c)(v) is based on the use of institutional controls regarding off-site migration of regulated substances, the [CAP] shall not be implemented until it is reviewed and determined by the [deq] to be in compliance with this part. [Emphasis added.]<sup>5]</sup>

The statute requires BP to “complete” a FAR. “Complete” is both a verb and an adjective. As a verb, it means “to make whole or entire,” “to make whole or complete,” and “to bring to an end; conclude.” Random House Webster’s Unabridged Dictionary (2d ed), p 418; American Heritage Dictionary (2d college ed), p 301. As an adjective, it means “having all parts or elements; lacking nothing; whole; entire; full” and “having all necessary or normal parts, components, or steps.” Random House Webster’s, p 418; American Heritage Dictionary, p 301. See also *People v Dagwan*, 269 Mich App 338, 344-345; 711 NW2d 386 (2005). We agree with the DEQ’s assessment that, under the statute, BP had to do more than simply submit a FAR to “complete” it. Rather, BP had to make the report complete by ensuring that it contained all necessary information.

We further note that to “complete” a FAR, an owner/operator must “complete” a CAP as it is a statutory element of the final report. See MCL 324.21311a(1)(d). CAPs have their own list of statutory requirements that must be met in order to be completed. MCL 324.21309a.<sup>6</sup> Accordingly, if BP did not complete a FAR and the attendant CAP with all the statutory elements, it failed to comply with the requirements of MCL 324.21311a. Pursuant to MCL 324.21313a(1), “if a report is not completed . . . during the time required,” the DEQ may

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<sup>5</sup> 2012 PA 530, effective May 1, 2012, describes the required elements of a FAR in greater detail and makes the statutory list conclusive. As this appeal does not include any challenges to BP’s compliance with the 2012 FAR requirements, we need not recite its provisions in this opinion.

<sup>6</sup> MCL 324.21309a was also amended by 2012 PA 108, but the revisions are not at issue on appeal.

penalize an owner/operator. We discern no error in the DEQ's decision to penalize BP where the FAR, or the included CAP, omitted statutorily required elements despite timely submission.

#### V. BP'S QC IS NOT THE ARBITER OF FAR COMPLETENESS

BP contends that its QC, as an expert designated by the DEQ, is the sole arbiter of the necessary corrective actions and the completeness of its reports. This statement is inconsistent with both current and past statutory language. Pursuant to the 1995 LUSTA, a QC was defined as "a person on the list of qualified [UST] consultants prepared pursuant to [MCL 324.21542]." MCL 324.21302(b). MCL 324.21542(1), repealed by 2012 PA 113, defined the criteria for a QC to be placed on the DEQ's list and provided that "the [DEQ was] not responsible or liable for the performance of the [QCs]." Moreover, MCL 324.21304(1) of both the 1995 and 2012 acts specifically provides, "Actions taken by a [QC] pursuant to this part do not limit or remove the liability of an owner or operator except as specifically provided for in this part." MCL 324.21302(f) of the 2012 LUSTA now defines a "consultant" as "a person that meets the requirements set forth in" MCL 324.21325. Section 21325 outlines the professional standards for a QC, but again, in no way suggests that a QC fills the DEQ's supervisory role. According to the plain language of the statutes, the QC is a mere agent of the owner/operator and BP may not avoid penalties simply because its QC deemed its reports complete.

#### VI. THE DEQ MAY AUDIT A FAR TO DETERMINE WHETHER IT IS COMPLETE

Pursuant to MCL 324.21315, the DEQ is permitted to audit contaminated sites for compliance with the 1995 act. Sometimes those audits reveal deficiencies in an owner/operator's FAR. Contrary to BP's contention, the DEQ may then require the owner/operator to bring its FAR into compliance or face penalties.

BP suggests that any information gleaned from an audit relates to contamination or activities occurring after the FAR is completed and therefore cannot be used to assess the FAR. Under BP's theory, the DEQ would be required to approve any FAR that appears complete on its face. This would prevent the DEQ from verifying the information in the FAR before making a decision and would give owner/operators free reign to falsify reports. Such a system is untenable.

By analogy, imagine that the Internal Revenue Service (IRS) had to determine whether to impose penalties against tax payers based solely on the forms submitted. The IRS could detect typographical and mathematical errors, but would have no way to verify suspicions of wrongdoing before penalizing individuals. If the IRS assessed penalties without investigating, it would face the risk of taking a person's property without just cause. If the IRS conducted an investigation first and discovered wrongdoing, it would be unable to penalize that lawbreaker. So too with the DEQ's assessment of FARs. The DEQ can on first review determine if an owner/operator has completely omitted a statutory element from the document. However, absent investigation, the DEQ is powerless to determine whether the owner/operator accurately described the extent of the contamination and presented an action plan with a chance of success. Only after investigation can the DEQ determine if the information and plans within a FAR are accurate and complete.



We note that with the enactment of 2012 PA 108, amending MCL 324.21315(1), the DEQ must now decide whether it will conduct an audit within 90 days of receiving a FAR or closure report. The DEQ then has 180 days to complete the audit and an additional 14 days to inform the owner/operator of the results. If the DEQ does not meet this timeline, the FAR or closure report is deemed approved. MCL 324.21315(4). The 2012 amendments to the audit provisions do not apply in this case, however, as the newly enacted MCL 324.21315(2) limits its retroactivity to FARs and closure reports filed within the six months preceding the statutory amendment.

## VII. THE DEQ MAY NOTIFY BP OF FAR DEFICIENCIES AND EXPECT COMPLIANCE

After the DEQ conducts its audit, the DEQ may notify an owner/operator of any deficiencies in its FAR and demand compliance. By doing so, the DEQ is not requiring “additional” FARs, nor is it punishing the owner/operator for events occurring after the FAR. Rather, it is requiring the owner/operator to revise its original FAR to bring it into compliance.

MCL 324.21315(3) specifically contemplates that further action may be required following an audit:

If an audit conducted under this section does not confirm that corrective action has been conducted in compliance with this part or that cleanup criteria have been met, the [DEQ] may require an owner or operator to do either or both of the following:

(a) Provide additional information related to any requirement of this part.

(b) Retain a [QC] to take additional corrective actions necessary to comply with this part or to protect public health, safety, or welfare, or the environment.<sup>[7]</sup>

In relation to this appeal, the DEQ demanded no more than it was permitted under the statute. By demanding BP’s compliance with various FAR and CAP provisions, the DEQ required BP to “[p]rovide additional information related to [a] requirement of [the LUSTA].” MCL 324.21315(3). That DEQ officials may have used the terms “new” or “additional” FARs in their requests is not dispositive.

## VIII. THE DEQ’S OPERATIONAL MEMORANDA WERE MERE GUIDES

BP also contends that it was penalized by the DEQ for failing to complete FARs for the pre-1995 leaks within a timeframe improperly imposed by the DEQ. Following the enactment of the 1995 LUSTA’s retroactive FAR provisions, DEQ officials created a “dovetail chart,” setting deadlines for owners/operators to submit FARs for sites at which such reports were not

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<sup>7</sup> The 2012 LUSTA audit provisions clarify that the DEQ may require an owner/operator to revise and resubmit its FAR. MCL 324.21315(7), as amended by 2012 PA 108. As noted, however, the revised audit provisions have only limited retroactivity.

previously required. BP incorrectly asserts that the DEQ was required to promulgate this chart into an administrative rule.

Whether a statement issued by an administrative agency in connection with its enforcement responsibilities constitutes a rule, or a mere interpretive statement or guideline, presents a question of law, which we review de novo. *Rapistan Corp v Michaels*, 203 Mich App 301, 306; 511 NW2d 918 (1994), citing *Cardinal Mooney High Sch v Mich High Sch Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Section 7 of the APA defines a rule as “an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.” MCL 24.207. The statute excepts from the definition of a “rule”:

A form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory. [MCL 24.207(h).]

Explaining the exception, this Court has noted, “Where an agency policy interprets or explains a statute or rule, the agency need not promulgate it as a rule even if it has a substantial effect on the rights of a class of people.” *Faircloth v Family Independence Agency*, 232 Mich App 391, 404; 591 NW2d 314 (1998). Subsection (h) would not, however, obviate the need for formally promulgated rules if the agency policy established substantive standards of implementation under a broad grant of authority to administer a program. *Id.*

The Attorney General has offered some guidance for this issue:

The operational memoranda [OMs] developed by the [DEQ] to provide direction to staff, guidance to the regulated community, and consistency when enforcing the [NREPA] are not “rules” requiring promulgation under the procedures provided for in the [APA]. Accordingly, they do not have the force and effect of law and are not legally binding on the public or the regulated community. [OAG, 2008, No 7223, (December 22, 2008) (citations omitted).]

As OMs lack the force of law, the DEQ “may not use the failure to comply with its [OMs], procedures, guidance documents, and written correspondence as the basis for suspending or revoking a [QC’s] certification.” *Id.* By this reasoning, neither can the DEQ use a failure to comply with its OMs as the basis for imposing penalties against an owner/operator. Opinions of the Attorney General are not binding on this Court, but may instruct this Court as persuasive authority. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 301; 662 NW2d 103 (2003). The statements above offer valuable persuasive guidance, which we adopt as our own.<sup>8</sup>

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<sup>8</sup> As of May 1, 2012, the Legislature actually enacted the content of the Attorney General Opinion into law. See MCL 324.21327(1), as amended by 2012 PA 113:

Here, the DEQ did not penalize BP for failing to comply with the dovetail chart. Rather, BP failed to comply with the 1995 LUSTA FAR requirements. With the 1995 enactment of the FAR requirements, BP was obligated to complete such a report. The dovetail chart merely allowed additional time for owner/operators to prepare FARs for sites at which UST leaks were discovered before 1995. BP did not abide by the extended deadlines permitted under the dovetail chart and failed to timely “complete” a FAR for any of the sites. By this same logic the DEQ was not required to promulgate the dovetail chart into an administrative rule. Regardless of the chart, the LUSTA FAR requirement was retroactive and BP would have been required to submit the report. The DEQ’s chart merely informed the public about how to comply with the new statutory requirements.

BP also challenges the application of the DEQ’s OM Nos. 7 and 13. OM No. 7 provides guidelines for “identification, reporting, and recovery of free product” at contaminated sites. OM No. 13 “is intended to provide guidance in determining whether monitored natural attenuation is a feasible and effective method of corrective action” at particular sites. BP does not explain how either OM sets forth a rule beyond what the act itself authorizes. BP also does not explain how it was penalized for violating the OMs rather than the LUSTA. We will not search the lengthy OMs to make BP’s arguments for it. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

BP concedes that the DEQ has the general authority to create “worksheets” to calculate penalties under the LUSTA, but complains that the DEQ improperly and inconsistently applied the worksheet. This particular argument exceeds the scope of the specifically limited arguments over which we granted leave to appeal. Accordingly, we need not review it. See *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 324; 503 NW2d 758 (1993). BP then contends that the DEQ has given OM No. 5 the power of an administrative rule by incorporating its provisions into the penalty calculation worksheet. Again, BP has not explained its basis for deeming the OM to be more than a mere instruction or guideline and we therefore decline to review this claim. *Toler*, 193 Mich App at 477.

#### IX. BP’S LIABILITY CANNOT BE EXCUSED WHERE IT TOOK NO ACTION TO GAIN ACCESS TO OTHERS’ PROPERTY TO ASSESS CONTAMINATION DAMAGE

BP challenges the DEQ’s authority to penalize it for failure to adequately define the parameters of the polluted areas where the contaminants had migrated into neighboring properties on which it had no right to conduct analysis and remediation. However, that an owner/operator may have to access and remediate damage on the property of others is expressly contemplated in the 1995 LUSTA.

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A guideline, bulletin, interpretive statement, [OM], or form with instructions published under this part shall not be given the force and effect of law by the [DEQ] and is considered merely advisory. The [DEQ] shall not rely upon a guideline, bulletin, interpretive statement, [OM], or form with instructions to support the [DEQ’s] decision to act or refuse to act. A court shall not rely upon a guideline, bulletin, interpretive statement, [OM], or form with instructions to uphold the [DEQ’s] decision to act or refusal to act. [MCL 324.21327(2).]

The statutory FAR requirements include setting forth “[o]n-site and *off-site* [CAAs] to remediate contaminated soil and groundwater . . . .” MCL 324.21311a(1)(c)(i) (emphasis added). The statutory IAR provisions mandate an owner/operator to include “[a]n estimate of the horizontal and vertical extent of on-site and *off-site* soil contamination.” MCL 324.21308a(2)(b)(xx) (emphasis added). MCL 324.21308a(1)(b)(xxiv) (emphasis added) further provides, “If the on-site assessment indicates that *off-site* soil or groundwater may be affected, report the steps that have been taken or will be taken including an implementation schedule *to expeditiously secure access to off-site properties* to complete the delineation of the extent of the release.” This requirement for a plan to secure access to offsite properties suggests that an owner/operator may sue under the act for that access.<sup>9</sup>

BP therefore has failed to show that the FAR requirements do not extend to investigating the spread of contamination into neighboring parcels, or that BP’s concerns over obtaining such offsite access should immunize it from penalties for failure to satisfy attendant FAR requirements.

## X. METHOD OF ENFORCEMENT

BP contends that the DEQ should not have imposed financial penalties under the late-report penalty provision. Rather, if BP was not meeting the DEQ’s demands so long after the FARs had been submitted, BP argues that the DEQ should have issued an administrative order pursuant to MCL 324.21319a(2):

The [DEQ] may issue an administrative order to an owner or operator requiring that person to perform corrective actions relating to a facility, or to take any other action required by this part. An order issued under this section shall state with reasonable specificity the basis for issuance of the order and specify a reasonable time for compliance.

Then, if BP did not comply, the DEQ could have imposed a civil fine of up to \$25,000 each day. MCL 324.21319a(4)(a).

We agree that the DEQ could have utilized administrative orders in this case. Under the 2012 LUSTA, with its shortened time limits to review FARs and impose late-report penalties, the DEQ will likely rely on § 21319a more in the future. However, nothing in the 1995 LUSTA

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<sup>9</sup> The DEQ also cited MCL 324.20135a as a possible method to secure access to neighboring properties. However, MCL 324.21301a(1), as amended by 2012 PA 108, makes clear that the LUSTA “is intended to provide remedies using process and procedures separate and distinct from the process, procedures, and criteria established under part 201 . . . .”

precluded the DEQ from deciding that BP's FARs were incomplete and imposing penalties under § 21313a.<sup>10</sup>

## XI. APPLICATION

### A. Site 5039 – Michigan Avenue in Kalamazoo

BP discovered a UST leak at this site in 1991. BP immediately worked to remediate the resultant pollution. Following the enactment of the 1995 LUSTA, BP prepared and submitted a FAR to the DNR in 1997. Three years later, in July 2000, BP submitted a CAP addendum, updating the list of current and proposed remediation activities for the site. In July 2003, BP submitted another CAP addendum to the DEQ, but identified the document as a "FAR" on the cover sheet. BP then asserted that "natural attenuation"<sup>11</sup> would be "the most viable and cost-effective method" of continued remediation.

On November 17, 2005, the DEQ sent BP an audit letter. The DEQ had reviewed the documents submitted by BP from 1997 through 2003 and determined that "the site classification" listed on BP's 2003 "FAR cover page" was incorrect. The DEQ asserted that BP could not downgrade the site classification until it reduced "contaminant concentrations" in shallow soils to an acceptable level and proved that "explosive vapors" had not accumulated "in nearby utility systems." The DEQ contended that BP's indicated "groundwater flow direction" was "poorly characterized and contradictory" so "delineation of the downgradient extent of contamination (which is a required element of the FAR) is not complete." See American Society for Testing & Materials, *Standard guide for risk-based corrective action applied at petroleum release sites*, available for purchase at <<http://www.astm.org>> (accessed July 25, 2012) (RBCA Guide), § 5.3 ("The user is required to identify . . . potentially significant transport pathways [for example, groundwater . . .]."). In relation to BP's CAP, the DEQ claimed that BP had not constructed a sufficient number of monitoring wells in the direction of the contaminant flow. See MCL 324.21309a(2)(c) (CAP must include a detailed monitoring plan). The DEQ noted that BP had selected "natural attenuation" as its remediative method but failed to include plans for continued monitoring and CAAs in the event its plan was unsuccessful. See *id.*; MCL 324.21311a(c) (the FAR feasibility analysis must include CAAs). Moreover, the DEQ determined that natural attenuation was not a viable plan for the site. See RBCA Guide, Table 1 (natural attenuation is only viable when there is "[n]o demonstrable long-term threat to human health or safety or sensitive environmental receptors"). The DEQ also cited BP's failure to

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<sup>10</sup> BP claims for the first time in its appellate brief that MCL 324.21313a is unconstitutionally vague. This Court granted leave limited to the issues raised in the application. As BP did not include this issue in its application, we decline to review it.

<sup>11</sup> "Natural attenuation" is the "[r]eduction in mass or concentration of a compound in groundwater over time or distance from the source of constituents of concern due to naturally occurring physical, chemical, and biological processes, such as; biodegradation, dispersion, dilution, adsorption, and volatilization." - American Society for Testing and Materials, 2003." United States Geologic Survey, available at <[http://toxics.usgs.gov/definitions/natural\\_attenuation.html](http://toxics.usgs.gov/definitions/natural_attenuation.html)> (accessed July 25, 2012).

measure vertical contamination of the soil and groundwater. MCL 324.21311a(1)(a) (FAR must describe the “extent of contamination”). Accordingly, the DEQ notified BP that “the FAR and CAP [were] statutorily incomplete.” On February 13, 2006, when promised revisions were not forthcoming, the DEQ penalized BP.

By the time of the DEQ’s audit, eight years had passed since BP submitted its FAR. Had this leak been detected after December 1, 2011, the DEQ’s delay would have resulted in constructive approval of BP’s report. See MCL 324.21315(2), as amended 2012 PA 108. However, under the 1995 LUSTA, the DEQ was not statutorily required to act within a certain timeframe.

BP contends that the DEQ was estopped from rejecting its FAR in 2005, as it lulled BP into a false sense of security with its extended silence.

An equitable estoppel arises where (1) a party by representation, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. [*Hughes v Almena Twp*, 284 Mich App 50, 78; 771 NW2d 453 (2009).]

A state agency “as well as individuals may be estopped by its acts, conduct, silence, and acquiescence.” *Oliphant v Frazhe*, 381 Mich 630, 638; 167 NW2d 280 (1969); see also *Wiersma v Mich Bell Tel Co*, 156 Mich App 176, 184; 401 NW2d 265 (1986). In Michigan, however, a law enforcement agency may be estopped from enforcing the law only under “exceptional circumstances.” *Pittsfield Twp v Malcolm*, 375 Mich 135, 147; 134 NW2d 166 (1965). In the zoning sphere, for example, this Court has denied a party’s claim of equitable estoppel when the municipality provided merely “[c]asual private advice,” not official counsel, regarding the complicity of the party’s plans. *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 576; 425 NW2d 180 (1988).

Moreover, equitable estoppel is difficult to prove when one party relies upon the other’s silence to its detriment.

For estoppel by silence, the party standing by and concealing its rights must have, by its conduct, shown such gross negligence as to have encouraged or influenced the opposite party, who was wholly ignorant of its adversary’s claim, to act to the latter’s disadvantage. An essential element of estoppel is that a party knowingly permitted the opposite party to act to its own disadvantage. [*S Macomb Disposal Auth v Mich Muni Risk Mgt Auth*, 207 Mich App 475, 477; 526 NW2d 3 (1994).]

The record disproves that BP “was wholly ignorant” of the DEQ’s concerns with its remediation efforts. The DEQ never actually approved BP’s FAR. Rather, BP’s actions were part of ongoing negotiations and monitoring to correct pollution at 200 sites around the state. The DEQ noted significant omissions from BP’s submitted FAR and CAP. Under these circumstances, we cannot conclude that BP reasonably and justifiably relied on the DEQ’s silence to its disadvantage.

## B. Site 5440 – East Lansing

BP detected UST leaks at this site in November 1989 and October 1991. Based on BP's submitted reports, the DNR audited the site in January 1994, and recommended additional remediative actions. Following the enactment of the 1995 LUSTA, BP prepared and submitted a CAP to the DNR. On August 3, 1995, the chief of the DNR's UST division notified BP "that appropriate cleanup levels ha[d] been achieved for all known areas of soil impacted by this release, and that corrective actions have been completed and no further action is necessary." Yet, BP did not file a closure report. It continued remediative efforts and even submitted a FAR to the DEQ. BP asserted in the FAR that the contaminants were "localized to the immediate vicinity," "pose[d] no immediate threat to potential receptors," and therefore required no active remediation. BP continued monitoring the site and independently decided in 1998 that additional remediative measures were required. Based on its additional findings, BP submitted a CAP addendum in July 2000.

On February 23, 2006, the DEQ issued an audit letter to BP, indicating that BP "has had documented free product on the site for approximately eight years." The DEQ asserted that BP's remediative measures were "showing only moderate success" and "[a] permanent solution should be utilized to recover the product that remains on and off site." See MCL 324.21311a(1)(b)(i) (a feasibility analysis must include "alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances"). The DEQ further noted that the contaminant plume had migrated offsite, placing residential property at risk, and BP had not defined the parameters of the stream. The DEQ directed that "[t]his acute hazard must be assessed and evaluated immediately" and "an acceptable FAR, including a feasibility analysis and a [CAP]" were still required.

BP responded by describing the methods that it was already taking to remedy the problems. BP indicated that it was attempting to gain access to neighboring properties to evaluate the migration of the contaminants. By July 2006, BP had gained access to properties to the east, but had discovered additional contaminant migration from the south central portion of the site. BP requested additional time to gain access to southerly neighboring properties.

On August 15, 2006, the DEQ denied BP's extension request and penalized BP for failing to submit a completed FAR. BP responded by submitting an "interim" FAR, selecting "soil vapor extraction combined with air sparging"<sup>12</sup> as the remediation method but delaying a "full

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<sup>12</sup> "Soil vapor extraction"

reduces concentrations of volatile constituents in petroleum products adsorbed to soils in the unsaturated (vadose) zone. In this technology, a vacuum is applied through wells near the source of contamination in the soil. Volatile constituents of the contaminant mass "evaporate" and the vapors are drawn toward the extraction wells. Extracted vapor is then treated as necessary . . . before being released to the atmosphere. The increased air flow through the subsurface can also stimulate biodegradation of some of the contaminants, especially those that are less volatile.

delineation” of the contaminant plume until it could gain access to its southern neighbor’s property. In the months that followed, that neighbor refused both BP’s and the DEQ’s access requests. Even so, the DEQ continued to assess penalties against BP for its failure to comply.

Again, the DEQ was not statutorily prohibited from auditing this site and imposing penalties against BP despite the nearly ten-year delay in conducting an audit. And, despite the DNR’s 1995 statement suggesting that “corrective actions [had] been completed,” BP clearly knew that free contaminants remained on the site given its continued remediative efforts. We cannot conclude that BP justifiably believed that its description of the extent of pollution or chosen remediative efforts after 1995 were sufficient. It never fully described the extent of the contamination as required by MCL 324.21311a(1)(a). Accordingly, the DEQ was not estopped from rejecting the FAR or imposing penalties.

### C. Site 5430 – Okemos

BP discovered a UST leak at this site in June 1989. It began immediate remediation efforts and filed several reports and work plans under the 1989 LUSTA. In 1993, the DNR notified BP that its recently filed “site investigation work plan” was “inadequate and not approved.” The DNR rejected BP’s first revised work plan. BP submitted a second revised plan and continued remediation efforts without complaint from the state. As BP had not completed remediation efforts, it submitted a FAR on September 17, 1996. BP indicated its intent to use “enhanced fluid recovery”<sup>13</sup> to remediate the pollution and to engage in monthly monitoring.

The DEQ audited the site in 1998. The DEQ requested that BP submit a new work plan with a goal of completely describing the vertical and horizontal extent of the pollution damage. BP submitted a new plan and occasionally updated its remediation efforts. In a letter dated February 16, 2006, the DEQ notified BP that it was not in compliance with the 1995 LUSTA because it failed to cite “a permanent solution to the free product.” The DEQ complained that BP had not completely delineated the parameters of offsite contaminant migration and failed to submit an acceptable FAR. BP updated its CAP in response and the DEQ acknowledged the likely viability of the selected action. However, the DEQ rejected BP’s request for an extension

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[United States Environmental Protection Agency, available at <<http://www.epa.gov/oust/cat/SVE1.HTM>> (accessed July 25, 2012).]

“‘Air sparging’ is most often used together with soil vapor extraction.” It

reduces concentrations of volatile constituents in petroleum products that are adsorbed to soils and dissolved in groundwater. This technology . . . involves the injection of contaminant-free air into the subsurface saturated zone, enabling a phase transfer of hydrocarbons from a dissolved state to a vapor phase. The air is then vented through the unsaturated zone. [*Id.*, available at <<http://www.epa.gov/oust/cat/airsparg.htm>> (accessed July 25, 2012).]

<sup>13</sup> In “enhanced fluid recovery,” one uses a vacuum to “remove separate phase hydrocarbons . . . floating on the water table in the subsurface.” Ecovac Services Innovative Remedial Solutions, <<http://www.ecovacservices.com/technology.html>> (accessed July 25, 2012).



to secure access to neighboring properties to more completely delineate the extent of the contamination. Thereafter, the DEQ began assessing penalties against BP.

BP has known since 1998 that it insufficiently described the migration of contaminants off its property. For eight years, BP failed to adequately remedy the situation. The DEQ at no time left BP under the impression that its report or actions complied with the 1995 LUSTA. We discern no error in the DEQ's imposition of penalties under these circumstances.

#### D. Site 9776 – Rockford

BP discovered a UST leak on this site in October 1989. Within six months, it presented an initial abatement report and a proposed investigation plan to the state. In 1991, BP submitted updated work plans describing its proposed method to determine the extent of the contamination and to remedy the problem with “soil vapor extraction.” The DNR approved the 1991 work plans as well as further investigative and remediative work in 1993. In 1994, BP increased its remediation efforts, removing contaminated soil and groundwater from the site, extracting pollutants, and returning the clean soil and water to the ground.

On April 19, 1995, the DNR audited the site for LUSTA compliance. It concluded that “the downgradient groundwater contamination ha[d] been defined by OW [observation well]-19. The vertical extent of groundwater contamination ha[d] been defined by OW-18.” On November 21, 1995, the DEQ again specifically stated that “the extent of contamination has been defined.” On August 28, 1996, BP communicated to the DEQ its belief that its prior reports met the new FAR requirements and asked the DEQ to notify it if it disagreed. The DEQ made no response.

Finally, on May 6, 2004, the DEQ notified BP that it had again audited the site and determined that BP's CAP was insufficient. Specifically, the DEQ noted that the “extent of groundwater contamination and free product have not been defined as required in [MCL 324.21311a(1)(a)]” and the “lateral extent of groundwater contamination has not been defined” to the west, north, south, and southeast. The soil “at the former [UST] . . . excavation floor” was so saturated with contaminants that it could leach into the groundwater and migrate offsite. The DEQ rejected BP's plan of relying upon natural attenuation because of this soil saturation. Moreover, the DEQ noted that BP lacked an “appropriate contingency plan” and the level of contaminants remaining after 14 years of remediation was unacceptable. The DEQ stated that BP was required to submit a FAR, including an acceptable feasibility study because “this site has essentially not been delineated since the release occurred in 1990.” BP complied under protest. BP also complied with the DEQ's request to install additional offsite monitoring wells to the south and west of the site. The DEQ ultimately imposed penalties against BP for failing to submit a statutorily complete FAR. The DEQ relied upon BP's “history of non-compliance” with the LUSTA, “failure to complete site delineation and submit required reports” despite repeated notifications, and the fact that “[c]orrective actions for this site have languished far too long.” The DEQ highlighted BP's claims that it had tried to gain offsite access for the past three years and yet was inexcusably unsuccessful in those attempts.

First, BP was required to submit a FAR for this site as remediation had not been completed as of the 1995 effective date of the FAR provision. It is irrelevant that the DEQ did not demand a FAR until 2004. The DEQ did not penalize BP retroactive to 1996 when its FAR

should have been submitted. And the DEQ gave BP time to comply with its 2004 demand. Therefore, BP was not prejudiced by the DEQ's belated enforcement of the FAR requirement.

Second, BP's FAR did not comply with statutory requirements. Despite the DEQ's 1995 statements that the extent of contamination had been defined at that time, BP's subsequent inefficient approach allowed the contaminants to accumulate. BP had not taken adequate action to document the parameters of the contamination field since that time and BP's description in its 2004 FAR was incomplete and in violation of MCL 324.21311a(1)(a). Moreover, BP had not selected a remediation solution to permanently and significantly reduce the pollution as required by MCL 324.21311a(1)(c)(i). Accordingly, the DEQ was within its right to impose penalties against BP for failure to complete its 2004 FAR.

#### E. Site 5953 – Grand Rapids

BP first discovered this UST leak when it closed the gas station operation in 1986. BP asserts that the level and extent of the contaminant release from its UST has been difficult to determine because of an earlier leak at a neighboring Texaco gas station. In 1989, the DNR approved an extensive remediation plan under which BP has removed over 1.4 million gallons of contaminated groundwater. The DNR subsequently approved an updated remediation plan in 1994. In a January 1995 report, BP defined the extent of the contamination at that time.

On September 30, 1996, BP submitted a FAR to the DEQ, indicating that “under the new [RBCA] process” described in the 1995 LUSTA “natural attenuation was the preferred remedial alternative.” BP followed that method along with semi-annual monitoring for the next eight years. On March 18, 2004, the DEQ notified BP that it had audited the site and found free product. The DEQ requested additional reports, which BP provided. On May 6, 2004, the DEQ notified BP that it had reviewed the additional requested reports, along with the submitted FAR and CAP. The DEQ found the FAR noncompliant because the “extent of groundwater contamination and free product have not been defined” and the “lateral extent” of contamination 15 to 35 feet below ground was “shown to be expanding.” The level of contaminants in the groundwater was deemed harmful to potential consumers. Additional offsite monitoring wells were needed to the southeast, south, west, and northeast. Moreover, the monitoring wells onsite had all been destroyed and were not replaced. Contaminants in shallow groundwater were discovered to be dangerously close to the city's sewer system. The DEQ further asserted that natural attenuation “has not shown to be an appropriate corrective action since it will not significantly reduce the volume, toxicity and mobility of the regulated substance” given the contaminant concentration. Accordingly, the extent of contamination had not been described as required by MCL 324.21311a(1)(a), BP had not selected feasible corrective actions or CAAs as required by MCL 324.21311a(1)(c), and there was an inadequate monitoring plan pursuant to MCL 324.21309a(2)(c).

BP responded that it would more fully delineate the contamination parameters after consulting with Texaco and gaining access to additional offsite locations. The DEQ determined that BP “ha[d] failed to avail itself of the means for gaining such access” in a timely fashion and penalized BP. Given the extent of noncompliance in BP's FAR and its failure to adequately remedy those issues, the DEQ had the authority to penalize BP. We discern no error in this regard.

#### F. Site 0155 – St. Johns

In 1990, BP discovered a UST leak at this site. Over the following years, BP engaged in “bi-monthly bailing . . . to remove the free product.” On August 13, 1996, BP submitted a FAR to the DNR. By October 7, the newly formed DEQ had already audited the site and notified BP that it had not adequately defined the horizontal and vertical extent of the groundwater contamination as required by MCL 324.21311a(1)(a). BP responded that it had defined the migration of contaminants to the north, east and west of the property, but not to the south because there were two gas stations and utility facilities located in that direction. BP and DEQ officials met on January 21, 1997, to discuss the FAR deficiencies. BP alleges that the parties agreed the report was complete. In a February 14, 1997 letter, BP’s QC responded to the DEQ’s disciplinary referral of his company for failing to submit a compliant FAR. In that letter, the QC stated, “In our January 21, 1997 meeting with Jim Milne (the PM for this site), all parties agreed that the submittal was complete and no outstanding issues remain[ed].” We note, however, that Jim Milne’s meeting notes that were placed into the record reflect no such agreement.

BP continued to remediate the site and regularly amended its CAP and reported to the DEQ. In 2006, the DEQ notified BP that it had conducted another audit and found BP to be out of compliance with the 1995 LUSTA. Although the remediation method was showing success, the DEQ wanted BP to find a permanent solution to recover larger amounts of leaked petroleum. See MCL 324.21311a(1)(c)(i). The DEQ again asserted that offsite contamination migration had not been sufficiently described. The DEQ thereby asserted that BP’s FAR was unacceptable. BP responded that it was engaged in ongoing negotiations to gain access to a nearby Rite Aid property to install offsite monitoring wells and submitted what it coined “a second FAR” in September 2006. The DEQ deemed the report incomplete and began assessing penalties as of the 2006 FAR submission date.

Contrary to BP’s appellate brief, there is no evidence beyond the QC’s unsupported assertion that the DEQ actually approved BP’s FAR. More importantly, the QC’s letter was not sent under circumstances that likely would have resulted in a determinative response whether the DEQ approved BP’s FAR. In the letter, the QC objected to its disciplinary referral; it was not seeking confirmation of approval of its client’s FAR. There is no record indication whether the DEQ ultimately chose to discipline the QC. Even if the DEQ abstained from disciplinary action, this does not necessarily mean that BP’s FAR was complete or that any DEQ official told BP that it was. Further, BP never fully delineated the extent of contamination at this site. BP never placed monitoring wells in the direction of the Rite Aid pharmacy. Accordingly, the DEQ had the statutory authority to impose penalties.

#### G. Site 5780 – Main Street in Kalamazoo

BP discovered a UST leak at this site in 1997. It submitted its FAR to the DEQ on January 20, 1998, five days beyond the 365-day deadline. BP stated its intent to utilize natural attenuation combined with a monthly removal of free product found on the land. It did so for the next eight years.

The DEQ audited the site in December 2005. The audit revealed several deficiencies in BP’s FAR, including an inadequately verified and monitored groundwater flow direction; the

failure to fully delineate the extent of groundwater and soil contamination; the failure to submit soil boring and well log information; the failure to identify and mitigate fire, explosion, and vapor hazards; a lack of an adequate monitoring plan; and the failure to suggest a feasible remediation plan for the most saturated soil areas. By February 13, 2006, BP had not addressed the issues raised in the audit letter and the DEQ imposed penalties.

Despite its delay in auditing the site, the DEQ was within its authority to penalize BP for its failure to complete the FAR by remedying the noted deficiencies. The DEQ committed no legal error in this regard.

#### H. Site 5374 – Roseville

The situation at the Roseville site is unique from the others. BP has not owned the site since 1979. When the station closed, the USTs were removed. A different oil company discovered contamination on the Roseville site as it monitored pollution migration from its gas station located to the north. The DEQ deemed BP potentially liable for the Roseville contamination. BP did not accept liability but voluntarily submitted a work plan to evaluate site conditions and agreed to further remediative efforts. The DEQ repeatedly stated its “belief” that BP was liable for the contamination based on its discovery of a high concentration of gasoline in the soil near the location of the earlier removed USTs. However, the DEQ never definitively resolved the issue or formally determined that BP was liable for the damage.

In 2004, the DEQ notified BP that it was not in compliance with the 1995 LUSTA because it failed to submit a FAR. BP contested its duty to submit a FAR because the DEQ never formally adjudged it liable for the contamination. BP nevertheless agreed to submit a FAR at an unknown future date dependent on its acquiring access to neighboring properties. Ultimately the DEQ warned BP that penalties would be imposed on February 1, 2007, and actually assessed fines a month later.

We agree with BP that the DEQ improperly assessed penalties in relation to this site. Pursuant to MCL 324.21311a(1), only a QC “retained by *an owner or operator*” must complete a FAR. (Emphasis added). An “owner” is:

A person who holds, or *at the time of a release* who held, a legal, equitable, or possessory interest of any kind in [a UST] system or in the property on which [a UST] system is located including, but not limited to, a trust, vendor, vendee, lessor, or lessee and who is liable under part 213. [MCL 324.21303(c), as amended 2012 PA 160 (emphasis added).]

An “operator” is “a person who is presently, or was *at the time of a release*, in control of, or responsible for, the operation of [a UST] system and who is liable under part 213.” MCL 324.21303(b), as amended 2012 PA 160 (emphasis added).

The DEQ never actually decided that BP was an owner or operator of the former gas station site at the time of a release. Rather, the DEQ deemed BP “potentially liable,” repeatedly stated its “belief” that BP was liable, and asked BP to confirm its liability. BP continued to deny that any leak occurred on the site and denied its liability as an owner or operator. As the DEQ never named BP as an “owner” or “operator” as defined under the LUSTA, BP had no duty to

complete a FAR under MCL 324.21311a(1). Accordingly, the DEQ's decision to penalize BP was not authorized by law. See Const 1963, art 6, § 28. We therefore reverse the circuit court's order affirming the DEQ's imposition of penalties in relation to the Roseville site.

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald  
/s/ Christopher M. Murray  
/s/ Elizabeth L. Gleicher