



Who's Paying the Price? The Legacy of the Part 201 Program in Michigan

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Executive Summary

In Michigan, contaminated sites are regulated under the Part 201 program. Part 201 is administered by the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to investigate and oversee cleanup efforts.

An important concept underpinning this regulatory framework is liability. Determining which actors can be held responsible for cleanup costs and activities is essential to functioning of the Part 201 program. In cases when a responsible party cannot be identified, cannot afford cleanup costs, or is exempt from liability, the state of Michigan assumes responsibility and uses state funds to conduct the cleanup process. Without strict, status-liability, it is possible for owner and operators to avoid paying for contamination cleanup, thus shifting the burden to taxpayers.

However, this was not always the case. Between 1991 and 1995, the state had one of the strongest remediation laws in the country, with strict liability and cleanup standards for polluters. Under this regime, polluters were responsible for a portion of the cleanup cost. With this system in place, the state raised approximately \$100 million between FY 1991 and 1996.¹ Adjusted for inflation, the average yearly appropriation would be worth \$43.7 million today: almost equivalent to the \$52.5 million in public funds appropriated for the Part 201 program in FY 2023.

Exploring the Part 201 Program

Part 201 is triggered once an owner or operator of a site become “aware” of the contaminated release. Unless contaminant concentrations exceed the cleanup criteria set by EGLE RDD, no action is taken. Liable parties are not required to disclose their activities to the EGLE, meaning that some releases likely go unreported. However, those that do report to EGLE are required to:

- Implement source control or removal measures to remove or contain hazardous substances.
- Pursue response activities necessary to achieve specified cleanup criteria.

After implementing a remedial action plan, the polluter fulfills these requirements.

Part 201 in Practice:

1

Identification

Regulations triggered when a contaminant is found to be above the allowable limit.



2

Notification

EGLE notifies the responsible party (usually the owner/operator) that they must investigate and remediate the release.



3

Investigation

The responsible party investigates to determine risk to human health and the environment.



4

Planning

The responsible party develops a remedial action plan. This plan outlines the conditions of the site and the cleanup actions the responsible party will take.



5

Cleanup

The responsible party implements specified cleanup activities. This can include the use of institutional controls, rather than full remediation.



6

Resolution

The responsible party reports that their plan has been implemented. EGLE then verifies this document.



Legacy Challenges, Present-Day Problems

Program funding has stagnated.

Before the reorganization of Part 201 in 1995, strict liability and cleanup provisions allowed the state to identify responsible parties and require remedial action. As a result, private funds represented a significant portion of the program's operating costs, while public appropriations were used to remediate sites where owners could not be identified.

Because amendments passed in 1995 loosened liability requirements and carved out further exemptions, the program became heavily reliant upon funds appropriated by the legislature. The Clean Michigan Initiative (CMI), a \$675 million general obligation bond, was introduced in 1998 to provide for various environmental protection programs. Since its introduction, \$236 million CMI funds have been appropriated for environmental remediation and redevelopment.² As a result, the Part 201 program has been heavily reliant upon the CMI fund for the last two decades.

However, as of September 2021, all funds expended or designated for environmental remediation had been utilized, meaning funds will no longer be available.²

While there was an increase in public spending between 1995 and 1998 to offset a lack of private revenues, in recent years program funding has regressed to approximate levels before 1995.

Figure 1 highlights the annual appropriations from FY 1991 to 2023, adjusted for inflation (2022\$).

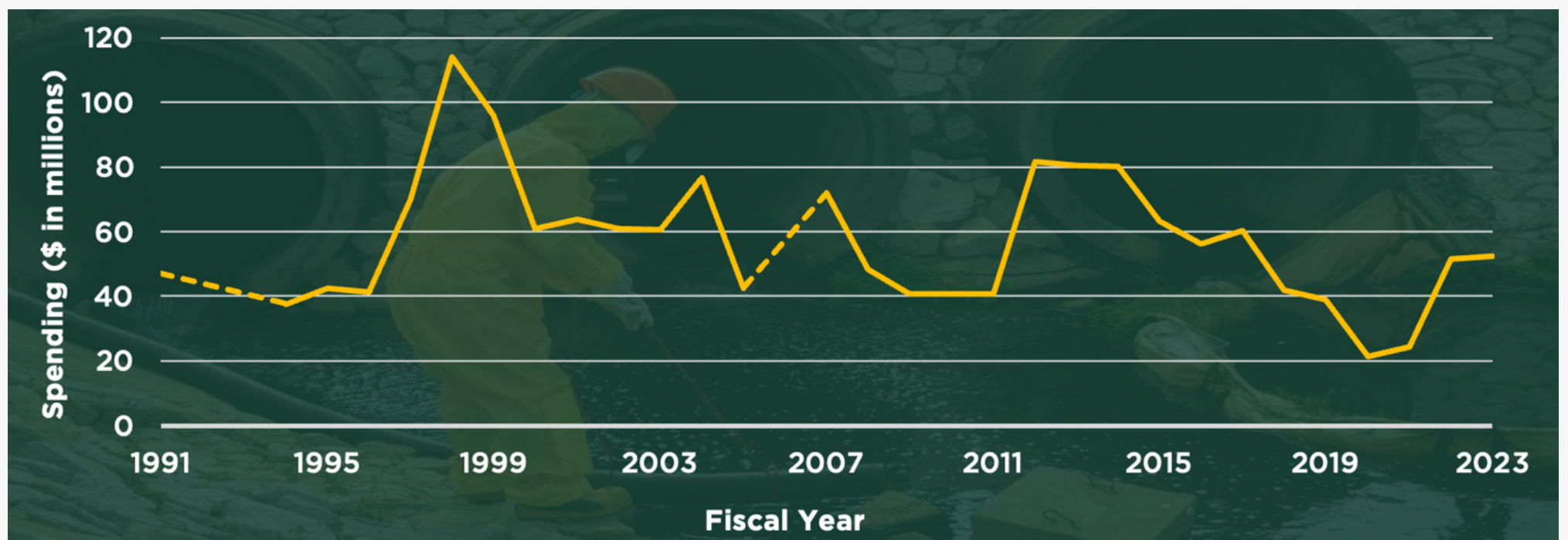
Before the loosening of liability restrictions, state funds had previously only made up around 55% of total remediation costs.³ Today, that number is far greater. As a result, the state is operating with a reduced financial capacity, likely leading to a situation where contaminated sites are remediated slowly or not at all. This is compounded by the fact that all authorized CMI funds have either been exhausted or designated for spending, which necessitates a need to find alternative sources of funding.

Number of sites has increased threefold.

As funding has stagnated, the number of contaminated sites has increased by a factor of 3. In 1991, there were 5,070 contaminated sites regulated under the Act 307 program. This is contrasted by a 14,005 sites in 2022, a 176% increase.⁴ However, a direct comparison is difficult to make considering changes made to program criteria, as the threshold for site inclusion was heightened, meaning that the number of contaminated sites would likely be far greater today if pre-1995 standards were applied.



Figure 1. Part 201 Appropriations, FY 1991-2023.

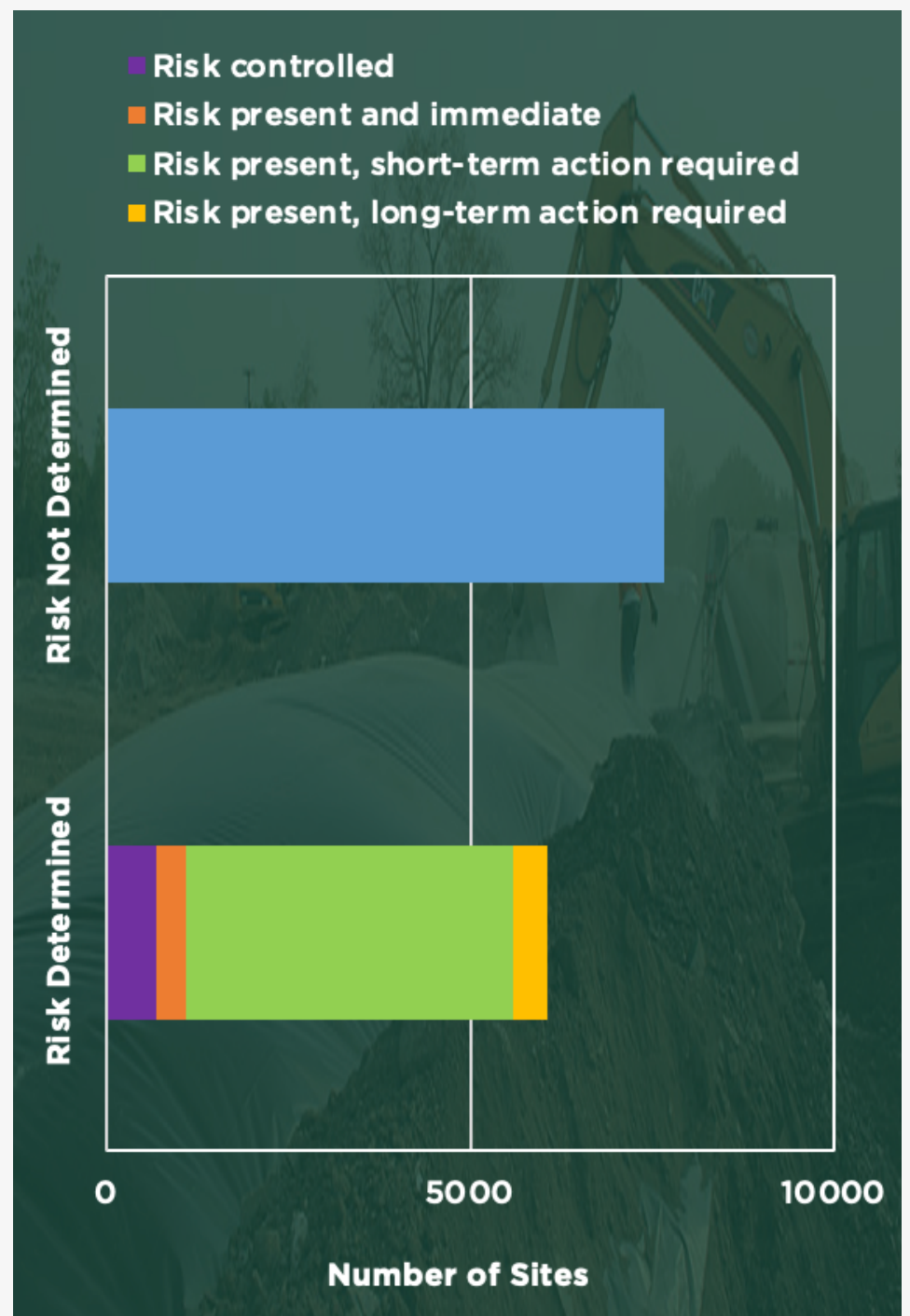


Information about sites is lacking.

Before 1995, the Michigan Department of Natural Resources (MDNR) was required to submit two lists to the legislature detailing environmentally contaminated sites. The first identified all known sites in order of relative risk, outlining whether a site required further evaluation and if any interim response activity was ongoing. The second outlined sites in order of risk where response activities will be undertaken by the state. However, after 1995, it was only necessary for the Michigan Department of Environmental Quality (MDEQ) to submit a list to the legislature of sites where public funds were being received.

At time of writing, the Michigan Department of Environment, Energy, and Great Lakes (EGLE) has limited public-facing information on the status of sites. Furthermore, the majority of data is limited in its applicability to determining risk. For the sites displayed on EGLE's online data portal, 56% of sites do not have a determined risk level.⁴ As shown in **Figure 2**, information regarding ongoing remediation, funding, and specific priority score are not available. This lack of data availability makes it difficult to ascertain the true extent of Michigan's contaminated sites problem, making solutions harder to prescribe.

Figure 2. Part 201 Site Classification.



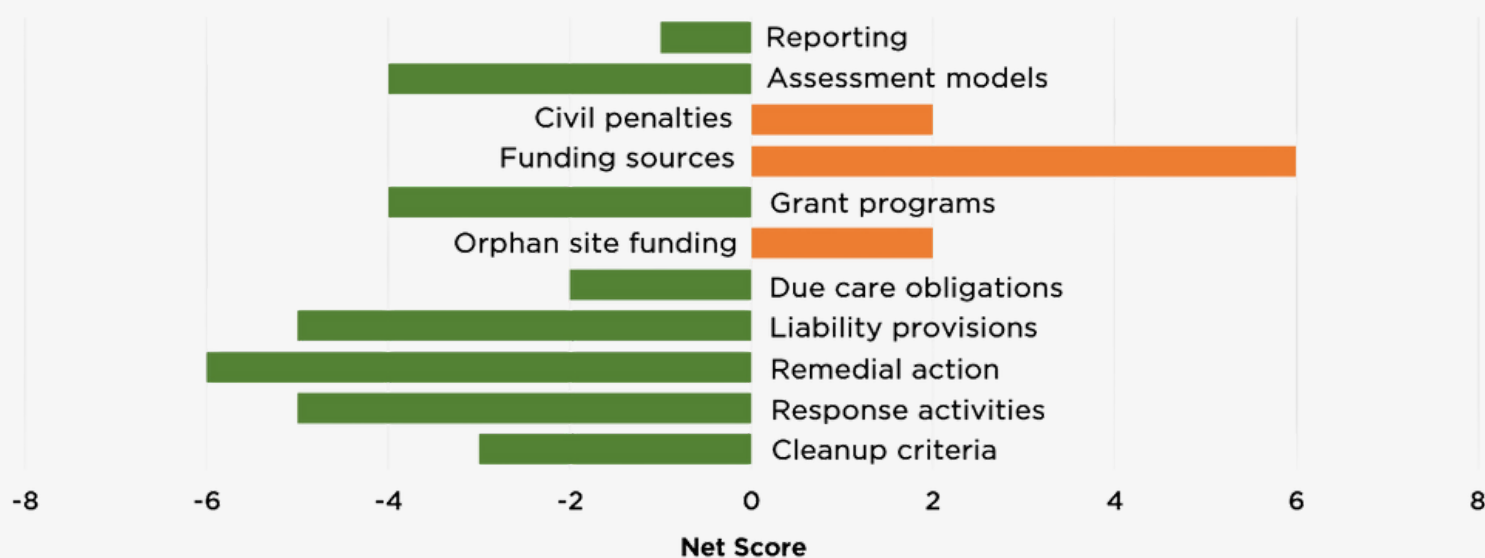
Part 201: Strangled by Restrictive Amendments

Between 1990 and 2018, provisions relating to program funding and municipal grants were expanded, likely in an attempt to pay for program costs following the loosening of polluter pay. In addition to the CMI fund, the Brownfield Redevelopment Financing Act allowed taxpayers owning eligible property in brownfield redevelopment zones to take a credit equal to 10% of the cost of investments in eligible property. Meanwhile, the Community Pollution Prevention Fund was created to make grants to local units, health departments, and regional planning agencies for pollution prevention purposes.⁵

Notably, liability provisions, cleanup requirements, due care obligations, and reporting requirements were altered in a way that made it more difficult to establish liability, exact payment, and/or force the remediation of contaminated sites. Most influentially in 1995, owners and operators without direct links to contaminated releases could not be held liable. Cleanup standards, which had been previously based on risk-based criteria, were instead altered to be based on land-use categories. Due care obligations, which refers to necessary actions to mitigate human exposure to contamination, have been loosened. As of 2012, persons can submit documentation demonstrating their compliance, and it is unclear whether EGLE seeks to ensure this information is accurate. Finally, subsequent changes in reporting requirements have weakened our understanding of site locations and contaminant conditions. In fact, in 2010, legislative list, scoring, and risk assessment model requirements were repealed and no longer required.

Figure 3 highlights the net scores for select Part 201 components. For a methodological overview and the complete analysis, see **Appendix**.

Figure 3. Component Net Scores, 1991-2018.



Recommendations

Since 1995, the Part 201 program has undergone a legislative contraction as key regulatory components have been restricted. This is impacted the way that liability is determined, cleanup requirements are assigned, and remediation efforts are facilitated. It is likely that the legislative legacy of the Part 201 program exacerbates current challenges of a lack of site information, stagnating cleanup spending, and an increasing number of contaminated sites. Without adequate regulatory controls, it becomes much more difficult to identify, investigate, act upon, and finalize the remediation of sites.

To address these shortcomings, I recommend the following policy changes:

01 Strengthen monitoring and reporting requirements through statutory changes and capacity improvements.

To increase accountability and follow-through amongst polluters, responsible parties must be obligated to disclose their remediation activities to EGLE. The department must be provided with the funding and staffing capacity necessary to categorize sites by risks and compile statutorily obligated, annual reporting on all sites—regardless of state ownership.

02 Expand liability and reduce allowable exemptions.

A strict, status-liability scheme, which is utilized by the federally managed Superfund program, should be adopted. Liability would be imposed regardless of fault or intent, without the need for regulators to prove negligence or responsibility on the part of responsible parties.

03 Limit the utilization of institutional controls over full remediation.

Site conditions and the danger hazardous substances pose should be considered in impact valuations conducted by regulatory bodies before institutional controls are pursued.

04 Alter cleanup criteria, shifting away from land-use categories.

Land-use categories can be problematic for remediation efforts because they can limit the types of activities or land uses that are allowed on a contaminated site.

05 Develop a new fund for remediating contaminated sites.

Since CMI funds are diminished, and because these “orphaned sites” constitute a large portion of Part 201 sites, a new general obligations bond or trust fund is necessary. To fund this initiative, revenues should be raised from highly polluting industries within the state, such as the automotive, chemical, oil and gas, mining, and agricultural sectors.

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Appendix

Methodology

To evaluate the legislative legacy effects of the Part 201 program, three types of criteria were selected:

1. Remediation criteria: provisions relating to the cleanup of sites.
2. Legal criteria: approaches to liability, property interests, and civil action.
3. Administrative criteria: items influencing program operations, including funding, modeling, and oversight bodies.

In total, thirty-three components were compared against thirty-five public acts passed between 1990 and 2018. For each, legislative changes were evaluated relative to 1990. To quantify the expansive or restrictive nature of these changes, a -1 to 1 scale was used. -1 indicated a restrictive legislative change, while 1 was for expansive legislative changes. 0 was used in cases where the effect was neutral, or if there was no legislative change present for the particular component.

Restrictive legislative changes are considered those that narrowed the regulatory scope of the Part 201 program. In this situations, the reach of the program is limited through exclusionary measures undermining the remedial, legal, and administrative capacities of enforcement agencies. On the other hand, expansive legislative changes are understood as those which increased the reach of the program, such as by offering more enforcement mechanisms or increasing the applications in which mechanisms can be used. **Table 1** highlights the net result for each criterion, examining the legislative history of the Part 201 program between 1991 and 2018

Table 1. Net Scores for Evaluated Criteria.

Category	Criterion	Net Score
Remediation Criteria	Definition of hazardous substances	-3
	Definition of facility	-3
	Cleanup criteria	-3
	Owner/operator response activities	-5
	Remedial action	-6
	Aquifer cleanup	-3
	Zoning of properties	0
	Carcinogen risk level	-1
	Contaminated groundwater	-4
	Soil ex-situ remediation	1
	Baseline Environmental Assessment	-2
Legal Criteria	Claims for damages	-1
	Liability and exemptions	-5
	Liability costs/liens	-1
	Public notice	0
	Due care obligations	-2
	Transfer of property interests	-3
	Consent agreement	0
	Civil actions	-1
	Restrictive covenants	0
	Covenant not to sue (CNTS)	-1
	Civil penalties	2
Administrative Criteria	Legislative intent	-1
	Financial resourcing for response activities	-1
	Risk/assessment/cleanup criteria models	-4
	Funding sources	6
	State orphan share remediation costs	2
	Science Advisory Council	-1
	Office of Environmental Cleanup Facilitation	-1
	Citizens Review Board	-1
	Administrative orders	-2
	Grant programs	-4
	Reporting requirements	-1