



## CLIENT UPDATE: ENVIRONMENTAL TESTING IN MASSACHUSETTS ONCE YOU KNOW, WHO DO YOU HAVE TO TELL?



It is common in commercial real estate transactions for a Buyer to request the ability to conduct due diligence when considering the acquisition of an interest in real property. As a Buyer, it is important that a thorough environmental investigation is conducted to determine if there is any actual or potential environmental contamination.

This is particularly important if hazardous

substances have been used on the site historically or if such substances were utilized on nearby property. Buyers want to make sure that the property does not create risks of future liability, claims by third-parties or potential clean-up obligations. While Sellers understand that Buyers require this information before proceeding with the transaction, Sellers often request that any due diligence information, including an environmental testing or reports, be provided to the Seller. This raises significant issues, however, if hazardous substances are identified in or on the property as both federal and state law require owners and operators of the land to notify regulators.

Under Massachusetts statutory law (Massachusetts General Laws chapter 21E section 7) and the related regulations, the current owner or operator is required to notify the Massachusetts Department of Environmental Protection (“MassDEP”) as soon as the owner or operator “has knowledge of a release or threat of release of oil or hazardous material.” The regulation makes it clear that knowledge includes actual

knowledge and prohibits willfull or negligent ignorance or efforts to avoid learning the facts in question. The definition includes a higher standard if the person has specialized training or knowledge.

Once an owner or operator has the requisite knowledge, Massachusetts regulations impose different deadlines on when the information must be provided to MassDEP. For example, an owner or operator is required to notify MassDEP as soon as possible but within two hours when there is a sudden, continuous or intermittent release or threatened release of certain delineated hazardous materials at levels set out in the regulations. Such releases include in particular, if the substance may have entered into surface water, a private drinking supply well or a sanitary sewage system or could likewise pose an Imminent Hazard (as defined in the regulations, two-hour notice is required). In other circumstances, notice to MassDEP must be given within seventy-two hours; such circumstances involve subsurface, non-aqueous phase liquids, releases within a certain perimeter of underground storage tanks that meet certain requirements and releases below certain thresholds set by the regulations. A third category of releases or threats of releases only requires notice to MassDEP within one hundred twenty days after an owner or operator's knowing of the release; such releases are detailed in the regulations. Further, there are some releases or threatened releases do not require notification at all.

Because of the different categories and types of releases, it is important that a Buyer work with a licensed site professional who can educate and inform the Buyer as to the information gained during an inspection. The Buyer may want to consider confidentiality provisions with its licensed site professional as to information obtained during the due diligence period and whether the professional should be hired by the Buyer or Buyer's counsel. The Buyer needs to work with its professional to ensure that the scope of the investigation constitutes "all appropriate" inquiries to prevent future liability if the Buyer acquires title to the property.

From the Seller's perspective, because the duty to notify MassDEP falls primarily on owners and operators, Sellers must work closely with their attorneys in carefully drafting the Purchase and Sale Agreement and

considering the provisions to be included. For example, a Seller may want to include confidentiality and non-disclosure provisions in the purchase and sale agreement. Such provisions must be carefully crafted so as not to hinder Seller's ability to comply with the statutory and regulatory reporting requirements. Further, the Seller and its counsel should consider what due diligence information, data and reports it will receive from the Buyer. As noted above, willful or negligent avoidance of information will not protect the Seller from its notice obligations. The Seller should consult with its counsel to determine what action will be taken if the Buyer's due diligence reveals a release or threat of release to ensure that the Seller acts properly and prudently.

DarrowEverett and its real estate attorneys have extensive experience in commercial real estate transactions, including representing Buyers and Sellers during the due diligence phase of such transactions, and we are available to advise you as you address environmental investigations as part of the due diligence process.

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