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Insider View

Clearing contaminants is now other people's business

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Cleaning up contaminated real estate is nothing to be ashamed of, but it is nothing to brag about either. While most of those who are remediating property do not intend to advertise it, they are being forced to share their doings with those around them.

Recent amendments to the Massachusetts Contingency Plan regulation, the state's program that governs the reporting and cleanup of oil and hazardous material releases in Massachusetts, now require those responsible for cleaning up contaminated property to notify third parties of their activity in certain circumstances. Public involvement, as it is called in the regulation, was always part of the cleanup process and generally included publishing a legal notice at selected milestones in the project and sending written notices to the chief municipal officer, such as the mayor, and the local board of health.

However, the state Department of Environmental Protection, which manages the Waste Site Cleanup program, felt that not all the right people were being informed -- particularly those who may be directly affected by the pollution. So, the department added additional public involvement requirements. The amendments became effective on April 3, 2006.

One new requirement is for mandatory sharing of environmental results on samples collected and tested from third-party property. In the past, sharing test results did not always occur for one of a number of likely reasons: There was no formal access agreement, the responsible party doing the testing did not want to admit that they may be polluting their neighbor's land, or the third party did not want to discover pollution that they may have caused themselves. The Massachusetts Contingency Plan now requires those performing response actions to issue test results to the owner of the third-party property regardless of agreements made, making them liable for release notification under the MCP.

Another new requirement is notifying third-party property owners when their land is included in the project area. The project area, or disposal site, as it's defined in the MCP, is larger than the area of land that may require actual cleanup. It includes that area defining the edge of pollution. Inclusion can be based on testing performed directly on the property or by inference. For example, the property is sandwiched between the parcel where the release occurred and a public road where the same

pollution was found by testing. Notification advises the affected landowners that their properties are part of the disposal site and includes a summary of findings.

Finally, written notice is now required to those affected individuals where immediate response actions are to be performed that address an imminent hazard or critical exposure pathway as defined in the regulation. Until now, notification was not required, and such actions typically involved assessment, soil excavation or limited groundwater treatment. Affected individuals are those who may experience a significant impact to health, safety or welfare from the contamination. Notification must be made to the owner and operator at the property where the immediate response actions will be performed and request that the notice be posted for view where employees and multitenant occupants are present.

Everyone has a right to know if their health or their real estate is being affected by pollution, and these new public involvement requirements are reasonable in that regard. To some, they are overdue. The concern by those performing the cleanup, however, is how those being notified will respond. Many in the regulated community and some regulators are concerned that it is an invitation for litigation that could delay cleanup. The new rules have only been in effect for about six months, so it's too early to tell.

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