

Commentary

The new Environmental Reporting Law

Comment period ends soon on MDE's proposed regulations, which set very low thresholds

A new Maryland law requiring certain property owners to disclose to the state information about the environmental condition of their properties will soon go into effect.

On Oct. 23, the state published draft regulations to implement the law known as House Bill 977, which was enacted by the General Assembly in its 2008 legislative session and signed into law by the governor. The state is accepting comments on the regulations through Nov. 23.

Under the proposed regulations, property owners whose soil or groundwater is contaminated with extremely low levels of certain chemicals (in some cases less than one part per billion) would have to file a report with the Maryland Department of the Environment within 48 hours of learning of the contamination. If businesses or property owners have reports in their files — no matter how old — concerning historic contamination, they would have to notify the state immediately once the regulations become final.

Background

The reporting law, which attracted little notice or debate in the General Assembly, was influenced in part by the publicity generated by the story of Swann Park in South Baltimore. The park, with its popular ball fields, was located on the site of a former Allied Chemical pesticide factory which closed in 1976.

Years later, Allied's successor, Honeywell International, turned over documents dating back to the 1970s that showed high levels of arsenic at the park. The Baltimore Sun covered the story in depth, and the Baltimore Health Department closed the park in April 2007. Honeywell has been performing remediation at the park since then.

The General Assembly enacted HB 977 in an effort to compel parties with reports similar to Honeywell's to disclose that information. Specifically, the law

requires a "responsible person" who possesses sample results indicating the release of a hazardous substance into the environment above levels established by MDE to

report the finding "immediately" to MDE.

Although the definition of responsible person is lengthy and complex, it clearly includes the current property owner and the owner at the time the substances were released. A contract purchaser of property, however, would not fall under the new law, as long as it does not take title to the property. The definition also excludes

most lenders, and environmental consultants who perform site assessments.

Although the law became effective on Oct. 1, the statute required MDE to issue regulations adopting the reporting threshold levels by June 30. Since those regulations were just issued, MDE has indicated the state will not begin enforcing the law until the regulations are finalized.

The threshold levels

The proposed regulations establish the thresholds above which reporting is required for hundreds of specific chemicals. In a word, the threshold levels are extremely low.

Benzene is a volatile organic chemical compound that is used as a solvent and is present in gasoline; it is very commonly found in groundwater. The proposed reporting level for benzene in groundwater is 0.41 parts per billion. To provide a standard of reference, under the Federal Safe Drinking Water Act, the Environmental Protection Agency establishes acceptable levels for various substances in the nation's drinking water supplies, known as the maximum contaminant levels. For benzene, this level is 5 parts per billion. In other words, water suppliers in Maryland (such as the City of Baltimore Department of Public Works, or the Washington Suburban Sanitary

Commission) are permitted to provide water that contains benzene up to a concentration of 5 parts per billion — an amount commonly compared to five drops in an Olympic-sized swimming pool. Under the proposed MDE regulations, a property owner would have to report a concentration of benzene that is less than one-tenth of the amount legally permissible in tap water.

Similarly, for the common dry cleaning solution known as perc, the reporting level in groundwater is 1.1 parts per billion, while the drinking water standard is, like benzene, 5 parts per billion. For some substances, the reporting threshold is close to the lowest level at which laboratories can reliably measure those chemicals.

The draft regulations also establish extremely low threshold levels for substances found in soil. For arsenic, which is found naturally in soil in Maryland at average concentrations ranging from 3.6 to 11 parts per million, the reporting threshold for properties that may be used for residential purposes is 3.9 parts per million.

Reporting procedures

In addition to the draft regulations, MDE issued a draft of the Notification Form that property owners would have to use under the new law. While the statute simply states that the responsible party must "report" the finding to the state, the form requires the party to state "under penalty of law" that the documents being submitted were prepared "in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted," and that the information is, to the party's knowledge, "true, accurate and complete."

Since environmental reports are typically performed by third-party consultants, and in some cases the reports in a company's files may have been obtained from third parties (such as prior owners), the reporting parties may have discomfort providing those certifications.

For companies covered by the new law, including real estate developers, the law presents a number of challenges. Over the past several decades, many property owners obtained Phase II environmental reports (the reports that include sampling results) prior to purchasing or financing commercial properties. Especially in an

area such as Baltimore city, with a long industrial history, many sites have some low level of historic contamination. That contamination has not prevented development, and the MDE has not required it to be cleaned up. However, under the new law, reports on those properties would have to be provided to the state, and will become public record documents.

For developers performing due diligence, and for other parties to real estate transactions, the law will require a new type of analysis. Typically, sellers will ask potential purchasers for copies of their due diligence materials, if the purchaser walks from the deal. Given the new reporting requirements, sellers will think twice about whether they want to "possess" a study that may impose an immediate reporting requirement. Purchasers may balk at acquiring properties for which such reports have been filed, or for which new testing has revealed conditions that will require reporting. Lenders, who abhor uncertainty, may postpone making loans until the state makes a decision whether it will take action against a given property.

Finally, it is unclear what the MDE will do with the reports it receives under the new law. Unfortunately under-funded and understaffed, like other Maryland agencies, MDE is struggling to deal with its current caseload. It is not certain whether the agency will be able to pass judgment quickly on which properties actually need to be remediated. If MDE cannot, properties may sit in limbo, marked with an environmental Scarlet Letter.

While Swann Park may have called out for a legislative response, the General Assembly cast a very wide net, which the draft MDE regulations have further widened. The unintended consequence of the law may be to stifle the development and cleanup of environmentally impacted properties in Maryland.

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