

Alert

MDE Moves Forward with Hazardous Substance Reporting Requirements

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In 2008 the Maryland General Assembly passed a law requiring disclosure of environmental due diligence investigations commonly performed as part of commercial real estate transactions. The Maryland Department of the Environment ("MDE") finally proposed the implementing regulations on October 31, 2014. These regulations will force private parties to disclose to the state information previously considered confidential, and also will fundamentally change the environmental due diligence analysis by parties to transactions.

The proposed regulations will obligate a "responsible person" (basically, a property owner) to share with the MDE so-called "Phase II environmental reports" if they indicate the presence of released hazardous substances over very low regulatory thresholds. The law is retroactive, so companies with reports performed in prior years arguably have to disclose them to the state. The regulations are unclear on what MDE will require of the parties once the state reviews the reports, but it is reasonable to assume that in some cases MDE will require the owner to perform some cleanup.

Faced with the new law, parties to commercial transactions will have to reevaluate how they handle environmental due diligence. Sellers of property with "historic" contamination will be reluctant to allow prospective purchasers to perform environmental investigations due to the fear that a Phase II report, once in the hands of MDE, will require environmental remediation. Buyers, on the other hand, may be stymied from performing the "all appropriate inquiries" required to provide certain defenses to Superfund liability, which in turn may preclude lenders from financing transactions due to the lack of diligence and inquiry.

MDE is accepting comments on the now proposed regulations up to December 1, 2014. If you have any questions about the new regulations or desire to discuss how to better structure upcoming transactions, please contact Charles R. Schaller at 443-949-3793 or cschaller@linowes-law.com or James B. Witkin at 301-961-5189 or jwitkin@linowes-law.com.

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