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Proposed amendments to the Mass. contingency plan and implications to the real estate industry - by Frank Ricciardi

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The Massachusetts Department of Environmental Protection (MassDEP) recently presented a summary of the proposed amendments to the Massachusetts Contingency Plan (MCP) regulations (310 CMR 40.0000) at a recent meeting of the Environmental Business Council (EBC) of New England. In this article we review the proposed amendments and discuss the potential impacts to the real estate industry and projects in Massachusetts.

The MCP is the set of regulations for the management of impacted soil and groundwater at sites that contain releases of oil and/or hazardous materials at regulated levels. These sites are defined in the MCP as “Disposal Sites.” Understanding the MCP and how sites have been managed through the assessment and closure process is important for redevelopment. For property acquisition and for sites being redeveloped on contaminated land, or brownfields, the management of impacted soil and groundwater and potential migration of contaminants into occupied buildings, utility conduits, public water supplies can affect many real estate projects.

Per- and Polyfluoroalkyl Substances (PFAS):

- **Draft Amendment:** MassDEP is considering establishing reportable concentrations (RCs) and Method 1 cleanup standards for the remediation of PFAS-impacted sites. RCs would be set at concentrations where PFAS may trigger human health/environmental risk and require notification to MassDEP. The Method 1 cleanup standards will establish risk-based standards to identify the concentrations of PFAS that can exist at a site and that will not pose significant risk to humans or the environment.
- **Potential Affect:** As discussed in my last NEREJ article on October 5, important considerations for the real estate industry include identification of sites where emergency response to fires using PFAS-containing foams as well as sites where these compounds may have been used in products. These sites may result in increased liability for property owners, especially if located near water supplies or water bodies. Importantly, PFAS is not regulated by CERCLA and is not currently a

scope consideration under an ASTM Phase I Environmental Site Assessment. However, given the rapidly evolving regulatory framework nationwide and the potential for liability and to impact off-site property, prospective purchasers and/or owners should either ask the question of their environmental consultants during this phase to evaluate the potential for PFAS as part of their due diligence, or understand that while PFAS was specifically excluded from their Phase I Scope of work, there is a potential that in the future PFAS could impact their liability and property values.

Gardening

- Draft Amendment: MassDEP will provide further guidance and details on best management practices for gardening and how to evaluate potential risk/pathways for contaminants. A qualitative assessment approach for evaluating this potential pathway will also be provided.
- Potential Affect: Residential property owners/lessees will have more information on how to evaluate and manage potential contaminant migration pathway related to gardening. This will allow owners to manage risk through a simplified assessment approach to evaluate if different garden/management practices can avoid potential exposure to contaminants.

Exposure Point Concentrations (EPCs)

- Draft Amendment: The MCP defines EPC as the concentration of oil or hazardous material in a specific medium which a human or environmental receptor may contact at an Exposure Point. MassDEP is updating the methodologies to determine EPCs to evaluate potential risk to human health.
- Potential Affect: This amendment is to update and potentially simplify the calculation of EPCs and evaluation of potential risk at a Site. The simplified approach will help real estate professionals evaluate their potential liability for property transactions and for future property management.

Imminent Hazards (IH)

- Draft Amendment: MassDEP will update the concentrations of contaminants in surface soil that may represent an Imminent Hazard. An IH is a specific definition that poses risk over a short time period and which requires immediate response to mitigate that IH condition. MassDEP will also clarify some ambiguity on identifying Imminent Hazards.
- Potential Affect: IH conditions on properties are detrimental to property values and the attractiveness of the property for resale. Sometimes IH conditions exist at a site and are addressed only by limiting access. The proposed changes may affect sites that currently have an IH and depending on the changes in the definition, may also create an IH condition at a site. Real estate professionals should be aware of these changes and the potential for IH conditions on their properties, or at sites that they may be interested in acquiring.

Risk-Assessment Standards

- Draft Amendment: The risk-assessment cleanup standards (Method 1, 2, and 3 and Upper Concentration Limits) will be updated reflecting more recent scientific/technical information on toxicity and chemical exposure.

- **Potential Affect:** Anytime cleanup standards are updated, there may be a potential for sites to be “reopened” under the MCP or closed out if the revised toxicity data shows there is less risk than previously thought. Recently, the toxicity information for the chlorinated solvent, trichloroethene, or TCE, was revised as the toxicity values were increased. This revision resulted in the reopening of sites that may not have considered certain exposure pathways such as TCE vapor intrusion into occupied spaces and which had been previously closed. Understanding these changes is important for real estate professionals who have properties build in brownfields in their portfolio.

Other Proposed Amendments

In addition to those changes discussed above, several other MCP amendments are proposed to be consistent with other MassDEP programs/regulations including Notices of Activity and Use Limitations at CERCLA (Superfund) Sites, underground storage tank tightness testing, sites with radioactive material or where remedial additives were used, and delineation of drinking water areas. These changes may or may not have an effect on certain properties and their path to regulatory closure.

Notably, MassDEP is emphasizing that MCP closure should consider the impact of climate change on future conditions at the disposal site. This may include the use of climate models to evaluate future site conditions and referral to Executive Office of Environmental and Energy Affairs (EOEEA) policies and guidance on climate change/impacts.

The effect of these amendments on the real estate industry will need to be assessed and discussed such that relevant comments can be provided to MassDEP. The schedule for the proposed MCP amendment review and promulgation currently extends through March 2019 but this may be extended pending public comment. Stay tuned!

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