



COMMERCIAL REAL ESTATE INSIGHT & NEWS

The Bowditch & Dewey Real Estate Blog

Who is required to notify MassDEP of a release of oil or hazardous material?

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When negotiating real estate transactions where environmental due diligence is proposed, this question is often asked: Who is required to notify the Department of Environmental Protection (“MassDEP”) if a release of oil or hazardous material is discovered above MassDEP reportable concentration levels during the Buyer’s site investigations? Here is the short answer:

Under G.L. c. 21E, § 7, and regulations at 310 CMR 40.0331, the current owner or operator is required to give notice to MassDEP “as soon as he has knowledge of a release of threat of release of oil or hazardous material.” The “as soon as having knowledge” requirement is modified by MassDEP regulations that require notice within 2 hours, 72 hours or 120 days, depending on the nature of the contamination and certain site conditions and “knowledge” is defined in the regulations as not only “actual knowledge,” but “willful avoidance” of learning about the fact or facts in question 310 CMR 40.0300 and 40.0006.

Licensed Site Professionals (“LSPs”) have no obligation under G.L. c. 21E or the Massachusetts Contingency Plan (“MCP”) to notify MassDEP of a release of oil or hazardous materials. See 310 CMR 40.0303.

Separate from G.L. c. 21E and the MCP are LSP Rules of Professional Responsibility. Under these Rules, LSPs are required to notify MassDEP of a release in limited circumstances where (1) an imminent hazard has been identified, (2) his or her client has been notified of a need to notify MassDEP of the imminent hazard, and (3) the client has not provided such notice.

This requirement, however, is not applicable to pre-acquisition environmental due diligence activities. The LSP's limited notification requirement under the Rules of Professional Conduct arises only when a LSP is providing "professional services" as that term is defined in 309 CMR 2.02. "Professional services" are not provided where, as is the case in most real estate transactions, an environmental professional is performing environmental due diligence investigations on behalf of a prospective buyer.

Have a question? Call or e-mail Bob Cox at (508) 926-3409 or rcox@bowditch.com