

**Summary of Meeting with Stakeholders
Controlled Hazardous Substance Notification Regulations
August 30, 2012**

Attendees:

Maggie Withorp, Gordon Feinblatt

Tim Henderson, Rich & Henderson

Tom Lingan, Venable

Randy Lutz, Saul Ewing

Mitch McCalmon, MDE

Jim Carroll, MDE

Todd Chason, Gordon Feinblatt

Amy Edwards, Holland & Knight

Jim Thornhill, McGuire Woods LLP

Horacio Tablada, MDE

D'Arcy Talley, OAG

1. Introduction

MDE opened the meeting and stated that the purpose of the meeting was to receive input from stakeholders on their concerns with the proposed Controlled Hazardous Substance (CHS) notification regulations. He noted that the agenda would only focus on the CHS notification regulations and an internal proposal to integrate all list of sites into a single Brownfield Master Inventory. MDE did state that there would be no discussion regarding the proposed amendment of the VCP statute as MDE still was discussing this matter internally.

2. Areas of Concern

A. Notification Form:

- *Volume of Information:* In the opinion of the stakeholders, the volume of information requested by the form would require a significant level of effort from any person filling the form out. One stakeholder stated that the amount of information was far greater than that which is normally found in a Phase I or Phase II Environmental Site Assessment.
- *Responsible Person Certification:* The stakeholders expressed concern that the form requires a person to legally affirm that he or she is a "responsible person". In their opinion, such a requirement would make it difficult to obtain any such certification as many property owners are reluctant to affirm that they are a responsible person. The stakeholders commented that the form should state that the person signing the notification is a "potentially responsible person". It was also suggested that other terms be considered, including "operator" or "current owner".
- *Indication of Release versus Release:* One stakeholder noted that the law requires a person to notify the Department about the indication of a release. The form only states that a person is reporting about a release. The stakeholder requested that the form be re-examined in light of the language of the statute and be made consistent.
- *Simplified Reporting:* The stakeholders requested that MDE simplify the reporting form to a single page and suggested that the reporting process be bifurcated into two stages.

The first stage would be a simple notification that a person has environmental data that exceeds the notification standard. This report would be submitted within 48 hours. The second stage would be the submission of more detailed data that could occur over a longer period of time. There was no specific discussion of the length of time by which a person would submit data for the second stage.

B. Reporting Standards:

- *Level of Proposed Notification Standards:* The stakeholders commented that the notification standards are very low and that this will result in almost all property owners who conduct environmental assessments submitting notification reports. MDE noted that the notification standards are based on the U.S. EPA Region 3's risk-based screening levels that have been adjusted to 10E-5 (which is consistent with other Maryland environmental statutes). The stakeholders noted that MDE should adjust the reporting standards to a higher threshold and suggested that it should consider 10E-4. In addition, MDE was asked whether it considered Pennsylvania's cleanup criteria as or evaluated Massachusetts notification standards. MDE noted that Delaware established its own notification standards and had consulted with MDE regarding its approach. MDE added that it will compare Delaware's notification standards to MDE's proposed notification standards.
- *Naturally Occurring Substances:* The stakeholders objected to the requirement that persons claiming that the presence of hazardous substances must submit the notification first to MDE to determine whether the claim is legitimate. MDE noted that there have been instances in which consultants have claimed that certain hazardous substances are naturally occurring but have been found to be merely a dodge to avoid cleanup actions. The stakeholders noted that this was a concern and suggested that it a simplified notification to MDE, along with the assertion that the hazardous substances identified are naturally occurring, may be a more feasible approach to this issue.
- *Limit Reporting to Identified Recognized Environmental Conditions / Contaminants of Concern:* A stakeholder requested that if MDE only require investigation of contaminants of concern that are associated with recognized environmental conditions identified in a Phase I and/or Phase II environmental site assessment.

C. Economic Impact and Other Issues

- *Impact on Real Estate Industry and Property Sales:* The stakeholders commented that the proposed regulation has the potential to create barriers to the purchase and sale of real property. One issue raised is that sellers will be more likely to restrict a buyer's ability to conduct intrusive testing of a property. It was posited that most buyers (and their lenders) will require a Phase II environmental site assessment and most sellers will restrict physical testing of property. Under this scenario, there may be a reduction in the number of property transactions and a greater willingness to "fence and defend" properties.
- *Noncompliance:* One stakeholder commented that MDE should be concerned that there will be a high degree of noncompliance with this law. The stakeholders noted that many persons will argue that they are not "responsible persons" under the CHS statute and

therefore will not submit a notification. A stakeholder also commented that the law and regulations will create unrealistic requirements and public expectations regarding the environmental condition of properties within Maryland.

- *Retroactivity*: It is unclear to what extent there would have to be a search of historic files, etc. If there was a vague or general recollection- is that enough to trigger an affirmative obligation to search files for information. Stakeholders distinguished a "vague recollection" vs. activity such as a sale or re-finance which could possibly result in the discovery of an old report, etc.
- *MDE Enforcement*: Stakeholders also raise question of MDE's enforcement discretion. Can the regulated community be "forced" to turn over information, or forced to retroactively search for and locate historic information? How will MDE determine when and if to take enforcement action?
- *MDE Response Time*: One stakeholder observed that there was no specified timeline for MDE to respond to the notification. This stakeholder requested that MDE consider incorporating deadlines into the requirements to address concerns that may arise from the regulated community.
- *Delay Public Submittal*: A stakeholder requested that MDE not submit the regulations for publication until after next year's legislative session.

Addendum:

A stakeholder who was invited to the meeting but unable to attend offered the following written comments for MDE's consideration and explanation. The stakeholder noted that certain members of the regulated community perceived that the proposed regulations created duplicative reporting requirements. Although MDE has noted in past meetings with stakeholders and attempted to allay such concerns through drafting exceptions that attempt to eliminate duplicative reporting, the stakeholder sought assurance that this is MDE's intent. The stakeholder requested that MDE affirm that it does not intend to duplicate existing obligations and that these regulations would apply if a release occurred that was not otherwise reportable pursuant to permit or other requirements.

- *.02-2 Site Discovery and Reporting*
 - (B)(1) – The stakeholder observed that this entire paragraph seems to contradict MDE's statements that it does not want to create duplicative reporting requirements. Although the stakeholder understands the (B)(2) recognizes the exceptions but the language of (b)(1) is very explicit. The stakeholder recommends that (b)(1) be rewritten to more clearly acknowledge the exceptions that are listed later in the regulations.
 - (C)(3) and (4) – The stakeholder noted that deleting the word "previously" in each section would clarify that reporting pursuant to a permit, another law or regulation or under federal reporting requirements satisfied the reporting requirements under these regulations.

- *BioSolids*: The stakeholder requested that MDE clarify that any person managing "biosolids" through the land application program is exempted from these regulations and does not create obligations for reporting if they are operating pursuant to the land application permit.