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ENVIRONMENTAL ADVISORY - UPDATE

Tennessee Requires Notice of Discoveries of Historical Contamination (May 20, 2008) (Updated July 31, 2008)

On June 7, 2008, the Tennessee Water Quality Control Board's new regulation went into effect requiring owners or prospective purchasers of property to notify the Tennessee Department of Environment and Conservation (TDEC), Division of Water Pollution Control of the discovery of groundwater contamination. Accordingly, Tennessee joins Florida, Georgia, North Carolina and South Carolina, among southeastern states with laws requiring notification of the discovery of historical contamination under at least certain circumstances.¹

More particularly, new rule 1200-4-3-.12(2) provides:

Owners or prospective purchasers of property used for commercial or industrial purposes who test the ground water or perched water on the property shall notify the commissioner of any contamination of such water if it is currently used as potable water and it exceeds general use criteria or if an environmental professional engaged by such owner or prospective purchaser reasonably concludes that it poses some other substantial risk to health or safety, including but not limited to, situations in which vapors released from the water are causing an explosion hazard or a

¹ This update focuses on regulations implicated by the discovery of historical contamination where the nature of the specific release event is unclear. Where the release in question is a known spill event, the analysis under federal and state law generally considers whether the amount released exceeds reportable quantities for the specific chemical in question and, in cases involving surface water, whether it produces sheens or violations of in stream water quality standards.

current inhalation hazard quotient of greater than 1 or a cancer risk of greater than 1×10^{-6} .

Tennessee's rule raises a number of knotty questions for parties considering whether to give notice. Important issues include deciding how to determine whether the impacted ground water is currently used as potable water, what methods should be employed to determine if vapors pose the requisite degree of risk, and whether notification is required where the contamination is not in ground water used as potable water but where it may nonetheless pose a substantial inhalation hazard or cancer risk.

Of special note is the rule's inclusion of "prospective purchasers of property used for commercial or industrial purposes" in the class of parties required to notify. In many states with notice provisions that only capture the current owner or other persons legally responsible for the contamination, local practices have developed where potential buyers sometimes agree to withhold the results of their environmental sampling during due diligence in the event they decide not to buy the property, thereby arguably shielding the current owner from information that might otherwise trigger a notice obligation.

Brief research for this Advisory located no reported cases ruling on the merits of this sort of "hear no evil, see no evil" arrangement between prospective buyers and seller. Regardless, of whether or not this elective ignorance strategy might work elsewhere, the authors of Tennessee's new rule appear to have decided not to leave it open to question.

At a minimum, Tennessee's new rule adds to the already complex patchwork of state-by-state notification obligations triggered by the

discovery of pre-existing contamination. As the table below makes apparent, even just within the southeastern United States, whether a given set

of facts requires notice depends on where it happens.

	Who Must Give Notice	Event Triggering Duty to Give Notice	When Due	Citation
Alabama	n.a.	n.a.	n.a.	n.a.
Florida	Person responsible for site rehabilitation and their authorized agents and representatives	Discovery of contamination in any medium beyond the property boundaries of site undergoing rehabilitation	10 days	F.A.C. 62-780.220
Georgia	Property owner	Discovery of hazardous substances above notification concentrations	30 days	R.391-3-19-.04
North Carolina	Current owners and operators and other responsible parties	Discovery of an inactive hazardous substance or waste disposal site	90 days	N.C.G.S. § 130A-310.1(b)
South Carolina	Monitoring well owner	Receipt of analytical data	30 days	S.C. Code Ann. Regs. R 61-71
Tennessee	Owners and prospective purchasers	Contamination in groundwater		Rule 1200-4-3-.12(2)

To date, instances where environmental agencies have taken action upon discovering that a party failed to comply with applicable notice requirements are rare. Although these rules do not appear to have been a major enforcement priority to date, failure to comply theoretically could expose parties to significant penalties. Perhaps even more significant, it is possible to imagine circumstances where the failure to give notice might open the door to tort liability.

Consider, for example, a prospective purchaser from somewhere outside Tennessee looking to buy Tennessee property. Imagine the out-of-state party performs a quick single-sample Phase II assessment that finds the target property grossly contaminated. Having no interest in buying a contaminated site in another state, the prospective buyer simply decides to walk away without even thinking about notice obligations. Imagine further that a new homebuyer shortly thereafter purchases neighboring property that likewise proves to be grossly polluted by the same plume of contamination. It would not be hard to foresee that homeowner asserting a tort claim alleging

that, had the prospective purchaser followed the law and made the contamination public, the homebuyer would not have bought the polluted property.

This is an update of our previously published Advisory 2008-002 (May 20, 2008), which is superseded and replaced by this edition.

For further information about notice obligations upon discovery of historic contamination, or the cleanup or redevelopment of contaminated properties, please feel free to contact any of the attorneys at Kazmarek, Geiger & Laseter LLP. Further information about the firm is available at our web site:

<http://www.kglattorneys.com>