



NEW YORK LANDLORDS REQUIRED TO PROVIDE NOTIFICATION OF INDOOR AIR CONTAMINANTS TO TENANTS

On September 4, 2008, Governor Patterson signed a bill that requires landlords, as of December 3, 2008, to advise tenants, under certain circumstances, of evidence of adverse indoor air quality (IAQ) in their premises. The law applies to owners of both residential or commercial real property, and landlords could be fined as much as \$500 per violation for each day that they are in violation of this requirement. Until now, no system or law was in place to protect tenants from being unknowingly exposed to potential airborne carcinogens in their premises resulting from either the volatilization of subsurface contamination or other sources of indoor air contamination.

The new law amends New York State (NYS) Environmental Conservation Law (ECL) Article 27 - *Collection, Treatment and Disposal of Refuse and Other Solid Waste*, by introducing a new Section 27-2405 - *Tenant Notification of Indoor Air Contamination*. This provision was previously vetoed in 2006 and again in 2007 under Governors Pataki and Spitzer, respectively, allegedly because New York City landlords were fearful about potentially having to contact more than 40,000 tenants.

What Causes Indoor Air Contamination?

Indoor air contamination can be caused by hazardous vapor intrusion of volatile chemicals from contaminated subsurface soil and groundwater into the air spaces of overlying buildings. Dwellings and work spaces can also be contaminated by underground spills of chemicals such as TCE (trichloroethylene), a widely used commercial solvent or PCE or "Perc" (perchloroethylene a/k/a tetrachloroethylene), a common dry cleaning solvent. Petroleum spills from gas stations can also be a source of adverse IAQ.

The NYS Department of Conservation (DEC), which assisted in crafting the law, has focused over the last several years on indoor air contamination as an emerging issue of public concern, as

fumes of these volatile chemicals can have toxic effects on the liver, kidneys, cognitive and reproductive functions and may also be carcinogenic. In fact, new legislation has been introduced (A.11659/S.8724) to require the NYS Department of Health (DOH) to reduce the maximum indoor air quality level for TCE by at least half, since at 5 micrograms per cubic meter (mcg/m³), the current NYS limit is two orders of magnitude higher than the most protective limits set by such states as California, Colorado, New Jersey, whose TCE concentration limits range from .016 to .02 mcg/m³.

Who is Affected by the New Disclosure Law?

The new law affects property owners or their agents who receive indoor air test results from an "Issuer" exceeding NYS DOH or federal Occupational Health and Safety (OSHA) guidelines for IAQ. The test results can include the results of any tests conducted on indoor air, sub-slab air, ambient air, sub-slab groundwater samples and sub-slab soil samples. The new law defines an "Issuer" as a person subject to a legal Order for cleanup pursuant to (i) the hazardous waste site provisions of the ECL; (ii) the portions of the Public Health Law pertaining to hazardous waste sites or (iii) the sections of the Navigation Law regarding petroleum contaminated sites.

An Issuer can also be a municipality, if it is subject to a contract pursuant to a State Assistance Program under the ECL. If such municipality obtains sample results of IAQ exceeding guidelines, it would have to inform affected property owners to notice their tenants of such IAQ contamination, or the municipality may have to notice the tenants directly, if the municipality were itself the property owner. Lastly, "Participants" in the NYS Brownfield Cleanup Program (BCP) are also obligated to notify tenants of laboratory validated adverse IAQ. A "Participant" is defined in the BCP as one "... who either (i) was the owner of the site at the time of the disposal of hazardous waste or discharge of petroleum or (ii) is otherwise a person responsible according to applicable principles of statutory or common law liability..." However, the law does not appear to require "Volunteers" in the BCP (i.e., parties not responsible or affiliated with those responsible for a property's contamination) to notify tenants of adverse IAQ.

It is important to note that the Issuer and the property owner may, but need not be, one and the same party. This creates certain gaps in this law. For example, a property owner may lease a premises to a tenant / operator who has received IAQ contamination results, yet, unless the property owner is informed by that tenant / operator of the adverse IAQ, the owner may not have knowledge of such a condition. Interestingly, although there is an obligation for the property owner to inform its tenants, there is no obligation for the tenant / operator to notify the property owner of IAQ contamination. Likewise, IAQ at a premises may become contaminated from activities on a nearby property, yet there appears to be no obligation under this new law for the nearby property to notify other affected property owners or their agents. *Continued on page 2*

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What Form of Notice Must Landlords Provide?

If a property owner obtains test results from an Issuer indicating that a given property has indoor air contamination levels in excess of applicable DOH or OSHA guidelines, property owners or their agents must (i) give tenants a Fact Sheet that identifies each contaminant present of concern as well as the legal limits for that contaminant; (ii) provide tenants with general health information regarding IAQ; (iii) inform tenants of health risks associated with exposure; and (iv) provide tenants with the means to obtain more information (e.g., direct them to contact their State or County Health Department). While the DOH is in the process of developing generic Fact Sheets that will presumably supply this required information, they are “months away” from completion, according to the DEC. Accordingly, it is important that property owners and landlords contact their attorneys to help them draft appropriate tenant notices should they be needed. Landlords also need to provide timely notice of any public meetings required to be held to discuss the test results and provide copies of test results and/or closure letters within fifteen (15) days of any tenant request.

If a property owner is subject to monitoring pursuant to an ongoing remediation program or for which IAQ mitigation has already been installed - such as a vapor barrier or a sub-slab depressurization unit - the owner or its agent must provide prospective tenants with a Fact Sheet and, upon request, test results, before the tenant signs a binding lease or rental agreement. Furthermore, the first page of the lease or rental agreement must provide the following language in at least 12-point boldface font: “NOTIFICATION OF TEST RESULTS – THE PROPERTY HAS BEEN TESTED FOR CONTAMINATION OF INDOOR AIR: TEST RESULTS AND ADDITIONAL INFORMATION ARE AVAILABLE UPON REQUEST”.

What Property Owners and Lessees Need To Do

Now more than ever, lessees of commercial property should conduct environmental due diligence of any properties and affirmatively inquire if the property is subject to any environmental enforcement they are seeking to lease action or Order by the DEC or DOH before executing any binding agreement. In addition, their attorneys should require representations and warranties from the landlord regarding safe environmental conditions, including IAQ issues. Lessees should also negotiate clauses that give them the right to terminate the lease, abate the rent and/or expressly allocate the risk and cost of consequential damages (i.e., business interruption, loss or diminution of property value and bodily injury) based on hazardous indoor or subsurface environmental conditions later discovered during the term of the lease.

Landlords will have to include the aforementioned warning provision in new leases, if they qualify as being affected by this new law. Property owners should be cautioned against voluntarily submitting to IAQ testing, or endeavor to protect the findings of such testing, if possible, by structuring the testing to be conducted under attorney-client privilege. Property owners and their agents should also consult environmental counsel to draft cogent and compliant notice forms to tenants.

Finally, both owners and lessees should consider purchasing environmental insurance to provide an independent source of financial recovery for indoor and other site-specific environmental conditions as these liabilities are typically excluded from general liability policies. Make sure to specifically negotiate as part of the policy the ability to be defended by environmental counsel of your

own choosing in the event of a claim, since the technical and legal issues arising from these complicated risks are sometimes beyond the experience and reference of ordinary insurance panel counsel.

AMENDMENTS TO NYS BROWNFIELD CLEANUP PROGRAM ALTER TAX CREDITS BUT NOT ELIGIBILITY CRITERIA

On June 23, 2008, amendments were finally passed to New York's Brownfield Cleanup Program (BCP) to clarify program benefits and to hopefully make the application of those benefits more equitable. Prior administrations had pushed for BCP reform because they were concerned that the program was too costly and was providing tax credits for projects that did not need the incentives, or for which the tax incentives were disproportionate to the cost of cleanup. Accordingly, the new amendment adds an increase to the “site preparation” credit which is directly associated to cleanup, but imposes a cap on the “tangible property” credit component relating to development costs.

Site Preparation Tax Credit

Under the prior law, a taxpayer who received a Certificate of Cleanup (“COC”) from DEC could claim a tax credit in an amount between 10% and 22% of their site preparation costs, depending on whether the taxpayer was an individual or corporation, the property was located in a NYS Environmental Zone, or the cleanup qualified as a Track 1 (unrestricted residential) cleanup. Under the 2008 amendment, an applicant is now able to claim up to 50% of its site-prep costs, depending on the kind of cleanup that is performed. Applicants that implement a cleanup that allows for unrestricted use will be able to claim a tax credit for 50% of their site preparation costs. For projects that achieve the Track 1 (restricted residential) soil cleanup objectives, the applicable percentage for the site prep costs will be 40%, but will drop to 28% if the project achieves only Track 4 cleanup standards (industrial). For projects that achieve the soil cleanup objectives for commercial uses, the applicable percentage will be 33%, but will drop to 25% if the cleanup only achieves the Track 4 industrial objective. For soil cleanups that achieve the objectives for industrial end-use, the applicable percentage will be 27%, but will drop to 22% if the cleanup only achieves the Track 4 objective. The site preparation cost percentage will be set forth in the COC issued by the NYSDEC.

Changes to the Qualified Tangible Tax Credit

For the qualified tangible property tax credit, the prior law provided that an applicant was able to qualify for a tax credit in an amount between 10% and 22% of the value of the improvements constructed on the brownfield site. Taxpayers were also allowed a credit under prior law of between 10% and 22% of the value of certain depreciable assets (as well as residential condominiums) placed in service on a brownfield site for which a COC was issued. Under the new law, the tangible property credit component is calculated as under prior law, but is subject to a limit that is the lesser of \$35 million or three times the amount of site prep costs and the on-site groundwater remediation credit component. However, for sites that are used primarily for manufacturing activities, the legislation increases the qualified tangible property tax credit to the lesser of \$45 million or six times the amount of site prep and on-site groundwater remediation

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credit components. If the site is located in a brownfield opportunity area (BOA) and the project is consistent with the BOA goals and priorities established by the municipality where the BOA is located, the applicable percentage for the qualified tangible property component will be increased by 2%.

Clarification of Transferability of Tax Credits

The legislation also makes an important clarification on the transferability of the tax credits to reflect modern real estate practice. The prior law allowed COCs to be transferred only if the entire interest in the site was sold. However, since sophisticated brownfield projects often involve the conveyance of partial ownership interests, under the new legislation the COC now “runs with the land” and may be transferred or assigned where less than full title to a brownfield site is conveyed.

New Reporting Requirements

The 2008 amendments also impose new reporting requirements on DEC and BCP applicants. The DEC is required to issue an annual report that will, among other things, disclose the amount of the tax credits earned by the applicant. However, if the taxpayer is a member of a partnership, limited liability corporation or Subchapter S corporation, the report will only disclose the tax credit earned by the entity and will not provide any individual-specific information. Beginning in 2009, all BCP applicants will be required to submit a Brownfield Credit Report to the DEC annually for 11 years following the execution of the brownfield cleanup agreement. The report must disclose the actual or estimated amounts of state and local taxes generated by the project, including the businesses and employees operating at the brownfield site as well as real estate taxes on behalf of the site.

Impact on Brownfield Projects

For those sites that are admitted into the BCP, the impact of tax credit changes will depend on project-specific factors, such as the size of the development, the ratio of cleanup costs to total project costs, and the applicable percentage that will be applied to the project for the qualified tangible property tax credit. Since the definition of brownfield site was not changed, eligibility criteria for sites is still strict.

A possible reaction from developers to the new BCP may be to maximize the amount of eligible site preparation costs. This is because the applicable tax credit for site prep costs has been increased and because the site prep costs serve as the base from which the “3X” (or “6X”) multiplier is applied. Under the prior law, the applicable percentage was identical for all of these credit components, so the credit structure did not motivate taxpayers to re-characterize costs into one category or another. Now, site owners will have to identify costs that are remedial in nature and yet also result in the creation of a depreciable asset, and then determine whether those costs should be classified as site prep costs (assuming they meet the statutory definition) or as costs capitalized into the tax basis of qualified tangible property. Tax counsel should work alongside environmental counsel, consultants, and engineers in advising brownfield redevelopment clients as they plan their remedial actions.

PERMIT EXTENSION ACT BECOMES LAW IN NEW JERSEY

On September 6, 2008, Governor Corzine signed into law the Permit Extension Act of 2008 (Act) which will have a broad impact on development projects throughout New Jersey. The Act sets forth a tolling and extension period for many types of state, county and local development permits and approvals from January 1, 2007 through July 1, 2010. The legislation provides for an automatic extension of up to six months for approvals or permits that would otherwise expire during the tolling period, or within six months thereafter, but under no circumstances will any extensions run beyond December 31, 2010.

Exceptions to the Act include permits granted under the Flood Hazard Area Control Act; certain permits issued pursuant to the Pinelands Protection Act; certain coastal center designations pursuant to the Coastal Area Facility Review Act; permits granted within certain “environmentally sensitive areas” as defined by the Act; certain permits or approvals granted by the Department of Transportation; and administrative consent orders issued by the Department of Environmental Protection (DEP). In addition, the tolling/extension period does not affect any other extensions which a party would otherwise be allowed to request after the tolling period.

Given the broad range of development permits and approvals included within the scope of the Act, as well as its many exceptions, approvals for both pending and ongoing development projects should be reviewed by counsel on a case-by-case basis.

EPA INCENTIVES TO NEW PROPERTY OWNERS TO CONDUCT “CLEAN START” AUDITS

This summer, the federal Environmental Protection Agency (EPA) launched a new interim policy offering incentives to new owners who correct environmental violations at recently acquired regulated facilities. Under the interim policy, new owners may receive lesser penalties than long-time owners, thereby giving new owners the opportunity to make a ‘clean start’ by correcting environmental problems that began under the previous owner’s watch.

Under the current EPA Audit Policy, the Agency offers reduced penalties to companies that self-audit their facilities, promptly disclose and correct any violations discovered, and take steps to prevent future violations. Under the interim policy, an owner who acquires a new facility may get additional penalty reductions by disclosing an even greater range of violations. The EPA encourages companies with newly acquired facilities to examine compliance of their new facilities, correct environmental problems that began before acquisition, make changes to ensure they stay in compliance, and reduce the emission of pollutants going forward.

Since 1995, more than 3,500 companies at nearly 10,000 facilities have used the EPA audit policy to disclose and resolve violations, most of which involved recordkeeping and reporting. With these new incentives, the EPA hopes to encourage new owners to disclose violations that, once corrected, will yield significant environmental benefit and direct pollution reductions.

For information on the new owner disclosure approach and incentives, go to www.epa.gov/compliance/incentives/auditing/newowners-incentives.html.

EPA SEEKS PUBLIC COMMENT ON PROPOSAL TO ADD HAZARDOUS PHARMACEUTICAL WASTE TO UNIVERSAL WASTE RULE

To help provide a streamlined system for disposing of hazardous pharmaceutical waste that protects both public health and the environment, the federal EPA is proposing to add hazardous pharmaceutical waste to the Universal Waste Rule. The proposed rule encourages generators to dispose of pharmaceutical waste that is now classified as non-hazardous under the Resource Conservation and Recovery Act as universal waste.

The proposal will also facilitate the collection of personal medications that are classified as household hazardous waste so they can be more properly managed. The proposed rule applies to pharmacies, hospitals, physicians' offices, dentists' offices, outpatient care centers, ambulatory health care services, residential care facilities, and veterinary clinics, as well as other facilities that generate hazardous pharmaceutical waste. It does not apply to pharmaceutical manufacturing or production facilities.

Currently, the federal Universal Waste Rule includes batteries, pesticides, mercury-containing equipment, and lamps. Universal wastes typically are generated in a wide variety of settings including industrial settings and households, by many sectors of society, and may be present in significant volumes in non-hazardous waste management systems.

Comments on the proposed rule must be submitted to the EPA by February 2, 2009. Information on the proposed rule is at: <http://www.epa.gov/epawaste/hazard/wastetypes/universal/pharm.htm>

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If you have any questions regarding articles in the GWT Environmental Bulletin, or other environmental issues, please contact Environmental Practice Chair, Suzanne M. Avena, Esq., at (516) 393-2229 or savena@gwtlaw.com

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