

for conservative assumptions. Thus, modifications are due out in January 2008 which are expected to be more moderate. However, most enforcement of VI requirements occurs at the state level. Currently, 6 states have VI regulations (New York, New Jersey, California, Colorado, Delaware and Pennsylvania) and 20 states, including Connecticut, have guidance. These are constantly being updated. Thus, there is a lack of conformity in addressing the issue. For example, whereas New Jersey Department of Environmental Protection is approaching the VI issue at sites on a case-by-case basis, New York Department of Environmental Conservation (in conjunction with the NYS Department of Health) has launched a systematic re-opening of the investigation of VI pathways at 430 heretofore legally "cleaned" sites statewide. Alternatively, Connecticut issued *Site Characterization Guidelines* in September 2007 which gives discretion to Licensed Environmental Professionals to determine if soil vapor sampling is necessary at a site.

The new VI regulatory requirements can increase development costs. Not only is the indoor air sampling itself expensive, but because the pathways and effect of VI is far from entirely understood, regulatory agencies often require a multitude of samples per site. Furthermore, because indoor air samples are best interpreted when conducted concurrent to related soil vapor samples and sub-slab sampling, investigation costs are escalated.

In addition to government enforcement, private claims for remediation of VI can be asserted under such State statutes as the New Jersey Spill Act, the Connecticut Clean Water Pollution Court Act (General Statutes § 22a-452) or more narrowly for petroleum contamination vapors under the New York Navigation Law. Claims for exposure to toxic vapors can come through worker's compensation claims. However, third party litigation and "toxic torts" will be dominated by state common law actions such as nuisance, negligence, trespass, property damage and/or diminution of value.

As scary as the specter of VI litigation may sound, plaintiffs must overcome several steep hurdles in order to win their case. Firstly, because there is no one set of standards or minimum contamination levels applicable to all states, litigants will have to determine the standards that govern the jurisdiction. Extensive evaluation of soil and groundwater conditions plus more esoteric studies such as groundwater flow and "fate and transport" modeling may be necessary to provide the necessary weight of evidence to prove a pathway from the toxic chemical to human exposure of the vapor. Then it must be proven that exposure to the chemical vapor was toxic and caused the specific harm claimed.

There are specific evidentiary tests for the acceptance of testimony from expert witnesses in each state, such as the *Daubert* or *Frye* tests and regulatory agencies admit that there is no identified correlation between increased exposure to VI and adverse health. Furthermore, even if a nexus could be demonstrated, the ability to identify a responsible party can be clouded by the presence of background chemicals as well as vapors from building construction and materials. Additionally, unlike environmental statutes that contain provisions for "strict" liability (i.e., without regard to fault), under common law ac-

tions the claimant must prove culpability of the responsible party. In other words, negligence, recklessness or intent to cause harm must be affirmatively demonstrated. Lastly, defense strategies such as expired statutes of liability can also defeat a claim.

There are very few VI cases to date to point to for guidance. In *Ball v. Bayard Pump & Tank*, a Pennsylvania jury rejected that four families suffered health problems from alleged exposure to vapors from a 1998 gas spill. The jury concluded that while vapors did reach three out of the four houses, there was no evidence that the vapors actually entered the homes and caused the alleged autism and leukemia of the minor claimants. However, in this instance, no indoor air tests were ever performed in the homes of the alleged victims. The court did allow into evidence, however, a "hybrid model test" developed by the plaintiffs' expert that used groundwater data to predict air concentrations of toxic vapor in the houses.

Current and future VI issues should be considered when conducting "all appropriate inquiry" of a site targeted for acquisition. A new commercial guideline for VI is to be released imminently from the American Society of Testing Materials, a national organization that has been the authority for environmental due diligence for many years. However, it is important to consult experienced legal counsel and technical assistance on this issue since the conduct of non-required soil vapor data can generate potentially damaging data – which can be inaccurate and controversial. Furthermore, even just the perception of VI can diminish property value and complicate the renegotiation of leases and tenancies. Most VI regulations contain a community outreach component, which should be carefully crafted in order to avoid any potential legal ramifications, as the VI issue causes public confusion and anxiety.

REDUCING GREENHOUSE GAS IN NEW JERSEY

In February 2007 Governor Jon S. Corzine signed Executive Order No. 54, creating a state greenhouse gas emission reduction program aiming to stabilize greenhouse gas emissions to 1990 levels by the year 2020 and to further reduce levels to 80 percent below 2006 levels by the year 2050. Under the Order the New Jersey Department of Environmental Protection must develop a greenhouse gas emission inventory to establish a current baseline, as well as a system for monitoring current levels in order to track progress going forward.

Additionally, last year the New Jersey Board of Public Utilities ("BPU") ordered electric utility companies to increase their sources of electricity from renewable sources such as solar energy and wind power in order to meet the goal of purchasing or producing 4 percent of power from renewable sources by 2008. This achievement goal will increase to 20 percent by the year 2020.

New Jersey is one of the states that is a member of the Regional Greenhouse Gas Initiative ("RGGI"), which is a consortium of northeastern and mid-Atlantic states working cooperatively to reduce carbon dioxide emissions. This group prac-

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tices a "cap-and-trade" program, whereby power plants that exceed a predetermined level of carbon dioxide emissions will be required to pay a fee for each ton of carbon emitted over the limit. These funds are intended to be applied toward energy efficiency, renewable energy and other beneficial projects to limit the amount of carbon dioxide pollution from electric power plants.

NYS BROWNFIELDS BILL TO FOCUS MORE TAX DOLLARS ON CLEANUP

On June 5, 2007 Governor Eliot Spitzer proposed legislation to restructure and improve the State's Brownfield program. If adopted by the State Legislature, it would redirect state tax dollars to provide real incentives for cleanups of Brownfield development sites in order to create "shovel ready" land across the State for development purposes.

Brownfield sites are those whose redevelopment or reuse may be complicated by the presence or potential presence of toxic contamination. The contamination is typically not severe enough to warrant a more robust clean up under the Superfund law, but poses health and environmental risks if development occurs without some remediation.

The original NYS Brownfield Act created in 2003 included tax incentives to reimburse Brownfield redevelopers for site preparation, remediation costs, the creation of jobs, the placement of environmental insurance, but most significantly the costs of actual construction on these formerly contaminated sites. This approach, unfortunately, resulted in over generous rewards for ordinary building costs as opposed to cleanup costs, with no cap on the amount of credits that a project could earn. New York City developers were disproportionately rewarded for building costs at sites that were minimally polluted, while smaller more contaminated sites upstate New York and Long Island were either overlooked or couldn't afford to pay increasing legal costs to push them through the log-jam of required agency and community reviews. Accordingly, the cost to the State for just the first 25 sites to enter the program significantly exceeded original projections.

In order to stem a potential drain on the State treasury, the NYS Department of Environmental Conservation ("DEC") thereafter modified the eligibility criteria for sites, which resulted in preventing entry of lightly to moderately contaminated sites into the program. However, qualifying entry of properties based on a subjective determination on whether redevelopment was "complicated" or not by the existing or perceived pollution put DEC in the position of having to make social and economic decisions that it is ill-equipped to make. It also resulted in long delays in the eligibility determination process.

The new legislation would offer a more balanced approach to Brownfield cleanup and more squarely follow the spirit of the law versus the inequities that exist under the current legal mechanisms. Instead of merely giving tax credits for the construction of buildings on cleaned-up sites as well as other costs unrelated to cleanup, the new law would give 100% dollar-for-dollar tax credit to the full cost of Brownfield remediation for

volunteers (and 25% for parties responsible for the pollution). Secondly, it would reward more aggressive cleanups with higher tax credits. Thus, parties would be encouraged to undertake more rigorous cleanup to higher standards. The tax credit for development costs is now at 10% irrespective of the level of cleanup. This credit would now be available on a sliding scale which would be 100% for Track 1 (unrestricted) cleanup, 50% for Track 2 (residential), 25% for Track 3 (commercial) and 0% for Track 4 (industrial). Whereas, now the tax credit for redevelopment is unlimited, thus creating unintended windfalls to large developers, the proposed legislation limits the construction tax credit to no more than the cleanup tax credit, and attaches a cap of \$5 million.

To qualify for these tax credits, participating parties will now have expanded reporting requirements, and will have to provide the State with more accurate data on anticipated and actual costs of remediation and development on a more frequent basis. Additionally, parties responsible for creating or contributing to the contamination at a site will have to pay a greater percentage of the cleanup costs. More community input will be necessary regarding reuse plans.

It is hoped that these reforms will reinvigorate participation in the NYS Brownfield program by offering solutions to previous obstacles. Parties that have remediation plans approved by the DEC and actual remediation underway will be governed by the existing tax credit structure. However, these proposed new provisions would apply to sites receiving approval of Remedial Action Work Plans or transfers of Certificates of Completion on or after July 1, 2007. Although no action was taken on the proposed legislation as of the adjournment of the legislative session on June 21, 2007, it is hoped that this matter will be promptly re-addressed when the State representatives return.

CONNECTICUT WATER QUALITY PROGRAM GETS EPA AWARD

An innovative program to reduce nitrogen discharges into the Long Island Sound has resulted in the State of Connecticut winning EPA's first Blue Ribbon Water Quality Trading Award. The award highlights programs which have achieved environmental and economic benefits.

Every summer the bottom waters of the western half of the LI Sound experience hypoxia, or very low levels of dissolved oxygen. Extensive monitoring has identified the excess discharge of nitrogen from human activities as the primary pollutant causing this phenomena. In 2001 the EPA along with both the States of Connecticut and New York set aggressive targets to significantly reduce the amount of nitrogen discharged into the Sound. By 2006 the point source nitrogen load from 106 sewage treatment plants in both states was reduced by nearly 25 percent. Connecticut's strategy of allowing nitrogen-trading among its 79 treatment plants was able to provide an environmental benefit at a cost savings, by giving municipalities the flexibility to trade among themselves whether to upgrade facilities or market credits to meet their permit limits.

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New York Office: 111 Great Neck Road, Great Neck, NY 11021; (516) 393-2200
New Jersey Office: 411 Hackensack Avenue, Hackensack, NJ 07601; (201) 883-1030
Connecticut Office: 350 Bedford Street, Suite 406A, Stamford, CT 06901; (203) 316-0483

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