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Environmental LAW

Notifying tenants of indoor air contamination

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On Dec. 3, New York State's groundbreaking legislation on "Tenant Notification of Indoor Air Contamination" will become effective, requiring landlords to disclose the results of environmental testing to tenants and prospective tenants. (Chapter 521 of the Laws of NY of 2008).

The requirement is broader than the word "indoor" in the statutory title suggests, and includes sampling conducted on sub-slab air, sub-slab soil, sub-slab groundwater, and indoor air samples. The statute's primary thrust is to provide information on contaminants that impact indoor air quality by migration from a subsurface source through vapor intrusion.

It adds Sect. 27-2405 to the New York State Environmental Conservation Law (ECL) and requires property owners or their agents who have received indoor air contamination test results that exceed NYS Department of Health (DOH) or federal Occupational Safety and Health Administration indoor air guidelines to provide tenants and occupants with proper notice (ECL 27-2405(2)). Test issuers include the state's Department of Environmental Conservation, municipalities with contracts under the New York State Environmental Restoration Project program and "persons subject to orders" under the state's Navigation (oil spill cleanup) and hazardous waste laws (ECL 27-2405(1)(b)).

Interestingly, issuers also include "participants" in the state's Brownfield Clean-up Program (BCP), but not "volunteers" under that program, once again distinguishing between the standards to which the two groups will be held (ECL 27-2405(1)(b)(ii)).

"Participants" in the BCP are those who are liable, as owners or operators of a contaminated site at the time of disposal, or otherwise responsible for the contamination. "Volunteers" are cooperative parties who either are not liable or have acquired liability post-contamination through property ownership.

A landlord must provide a fact sheet and timely notice of any public meetings required to discuss test results (ECL 27-2405(2). Generic fact sheets are being developed by the NYS DOH, which will identify the contaminant found, reportable regulatory detection levels, possible health risks and information sources. If requested, the test results and any closure letter issued must be supplied within 15 days of receipt of the results. Currently, the DOH Web site lists only fact sheets for tetrachloroethene (PCE or PERC), trichloroethylene (TCE) and radon, with general fact sheets on soil vapor in-trusion and exposure information (www.health.state.ny.us/envi-ronmental/indoors/vapor_intru-sion/fact_sheets/index).

The law also requires pre-agreement notification to prospective tenants of properties with existing engineering controls in place (such as a ventilation systems) to mitigate indoor air contamination or that are subject to ongoing monitoring under a remedial program.The first page of any rental or lease agreement must contain the following notice, in at least a bold, 12-point type: "NOTIFICATION OF TEST RESULTS The property has been tested for contamination of indoor air: test results and additional information are available upon receipt" (ECL 27-2405(3)).

Both the U.S. Environmental Protection Agency and the state have issued guidance for evaluating vapor intrusion and including them in remediation projects. The "Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils" may be found on the EPA's Web site; state guidance is available on the DEC's Web site under "vapor intrusion," along with other helpful information.

Counsel should take note that since issuance of its guidance, the DEC also has been requiring vapor intrusion evaluations at sites that previously have been remediated or received "no further action" letters. Property owners who acquired such sites post-remediation may have difficulty obtaining cooperation to perform or fund the evaluation from the party originally responsible for the clean-up. Attorneys who are negotiating purchase agreements for remediated properties should provide for survival of responsibility for that contingency in the agreement.

One question left unanswered in the new law is its retroactive application: Are regulators likely to infer that landlords should be providing previous test results to current tenants? Without specific statutory guidance, we can only wait and see.

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