

NEW YORK LEGISLATION REQUIRES DISCLOSURE OF AIR CONTAMINATION REPORTS, EFFECTIVE IN DECEMBER

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Starting later this year, property owners may need to notify their tenants and other occupants about certain air contamination reports affecting their property.

The requirement may arise if a property owner receives a report showing that air in the building has, or may have, concentrations of volatile organic compounds (“VOCs”) that exceed governmental guidelines (referred to in this summary as an “air contamination report”). Typically such reports would arise as part of an environmental investigation or cleanup. VOCs would include, for example, chlorinated solvents such as trichloroethylene (“TCE”) and perchloroethylene (“perc” or “PCE,” often used in dry cleaning). VOCs can arise wherever solvents were used.

The new law, Chapter 521 of the Laws of 2008, becomes effective on December 3, 2008, as an amendment to Title 24 of New York’s Environmental Conservation Law (“ECL”). Existing ECL provisions already required responsible parties remediating a site under the state Superfund program or some other remedial programs to give landowners copies of air contamination reports. The ECL did not take the next step of requiring property owners to disclose those reports to tenants and occupants. The new ECL section now takes that next step.

The new legislation sounds relatively innocuous, but – as is so often true -- issues and some unfortunate recent history lurk beneath the calm surface.

Some History: Vapor Intrusion and VOC Contamination

The new statute responds to recent experiences in New York with a phenomenon known as vapor intrusion, which occurs when VOC vapors migrate from the ground upwards or sideways through soil into buildings. In extreme cases, these vapors can accumulate to levels that create immediate safety hazards (such as explosions), illnesses, or aesthetic problems (such as odors). More typically, however, when VOC vapors do migrate into buildings, the levels are much lower, creating the more insidious risk of chronic health problems arising from long-term exposure.

Until recently, the State’s Department of Environmental Conservation (“DEC”) focused primarily on soil and groundwater contamination. DEC did not regard vapor intrusion as a significant potential risk unless VOC contamination occurred directly next to an occupied building

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or directly below its foundation. Therefore, DEC remediation programs usually focused on reducing soil or groundwater contamination, or at least eliminating pathways by which such contamination could reach people.

The regulatory landscape changed a few years ago. After DEC had determined that certain cleaned-up sites would not pose a health risk, DEC was surprised to discover significant levels of VOCs in residences near those sites. By 2005, DEC estimated that VOCs may have caused similar problems for up to 750 sites in the state. DEC therefore announced that for any VOC-contaminated site then being investigated or remediated, DEC would require an evaluation of vapor intrusion risks. In performing or requiring that evaluation and deciding when to require remediation, DEC follows the policies of the state's Department of Health ("DOH").

DEC is now systematically reviewing hundreds of VOC-contaminated sites that were pronounced "clean" before 2003. In that review, DEC looks for possible vapor intrusion problems. To the extent DEC finds them, DEC may not only require additional remediation, but may also require responsible parties to give nearby property owners air contamination reports. Under the new statute, those nearby property owners would then face disclosure obligations.

Scope of Disclosure Obligations

The new disclosure statute does not distinguish between residential and commercial property, hence seems to apply to both. The definition of "test results" applies not only to actual indoor air sampling results but also to sample results from sub-slab air, ambient air, sub-slab groundwater samples, and sub-slab soil. DOH uses very conservative thresholds to determine when concentrations of VOCs require further action. Based on these other sample results, DOH and DEC may require disclosure even without requiring or receiving any air contamination reports. Moreover, indoor air test samples be misleading, because they may detect indoor air contamination arising from other chemicals used in the building, such as paint, carpeting, or cleaning supplies, rather than from genuine environmental issues.

The new disclosure obligation applies to any "test results" that a property owner receives from an "issuer," defined as a party subject to a consent order under the state Superfund program or an order or agreement under the Navigation Law; a "participant" under the Brownfields Cleanup Program ("BCP"); a municipality operating under an ECL Title 56 Environmental Restoration Program contract; or a party subject to Public Health Law Title 12-A.

The disclosure obligation does not seem to arise, however, if a property owner receives air contamination reports from a party identified as a "volunteer" under the BCP or DEC's previous Voluntary Cleanup Program.

Under the new statute, within 15 days after a property owner receives an air contamination report from an "issuer," the property owner must give all tenants and occupants: (a) fact sheets, to be prepared by DOH, about the contaminants at issue; (b) notices of resources providing more information; and (c) timely notice of any public meetings required to be held to discuss the air contamination report. If a tenant or occupant requests a copy of the air contamination report or notice of any closures, the property owner must provide it within 15 days.

If a property has an “engineering control” in place to mitigate indoor air contamination, or a monitoring program as part of a continuing remediation program, the property owner must give prospective tenants the same information as existing tenants. The property owner must do this before a prospective tenant signs any “binding lease or rental agreement.”

To make sure the property owner complies, any property owner subject to the disclosure obligation now must include a disclosure notice in their “rental or lease agreement.” This notice must appear in at least 12-point bold face type on the first page. It must read as follows: “NOTIFICATION OF TEST RESULTS The property has been tested for contamination of indoor air: test results and additional information are available upon request.”

The new statute means that any property owner who receives an air contamination report from anyone should consult counsel to see whether the new disclosure requirements apply. As a practical matter, the requirements should encourage property owners to resolve any air quality problems quickly, if they can, so the property owner can stop disclosing them to prospective tenants. The Legislature may have had this in mind.

By its terms, the new statute requires disclosure of any “air contamination” reports – not just reports about vapor intrusion involving VOCs. Some environmental consultants have therefore suggested that the law also applies to air contamination reports arising from asbestos, lead-based paint, radon, and mold. But the new statute resides within ECL Title 24, and the original sponsor’s memo for Title 24 suggests the Legislature enacted Title 24 specifically in response to vapor intrusion problems associated with VOCs.

In addition, DEC’s regulatory definition of “contaminant” refers only to petroleum and hazardous wastes. If the state has ordered a property owner to remediate asbestos debris or radon waste, then the new disclosure requirement could conceivably extend to these pollutants. But the Superfund program excludes naturally-occurring radon, asbestos-containing materials, and lead-based paint that remain part of a building. Thus, as a practical matter, these issues seem unlikely to trigger air contamination reports from issuers that would require disclosure.

It seems reasonable to conclude that the new disclosure obligations apply only to VOC-related air contamination reports. But the words of the statute paint more broadly. A conservative property owner, or its counsel, may not want to read the statute as limiting itself to VOC air contamination reports.

Contamination Reports Previously Received

The statute becomes effective on December 3, 2008. Without doubt, it applies to any air contamination report that a property owner receives on or after that date. But what if a property owner received air contamination reports in 2007, or 2001, or 1985?

The statute does not indicate whether property owners need to dig through their files to look for old air contamination reports. A fair reading suggests, however, that the statute applies only to information a property owner first receives on or after the effective date of the statute, December 3, 2008. By its terms, the statute applies to any property owner to whom air contamination reports “have been provided.” If the information was “provided” more than 15

days before the effective date, the property owner could not comply with the notification obligation. Assuming that the Legislature did not intend to impose an unperformable obligation, it is probably fair to conclude that the new disclosure requirements disregard “old” air contamination reports.

As further support for this view, the legislative summary of the new law speaks prospectively, stating that “this bill would require individuals, municipalities and the Department of Environmental Conservation that conduct testing” to take certain actions. This language suggests that the law applies only to air contamination reports a property owner receives on or after the effective date.

The new law does not require property owners to conduct their own tests or to perform any retesting. In cases where test results did not use actual indoor air samples but instead were extrapolated using modeling based on soil or groundwater samples, a property owner may (but also may not) want to take samples to confirm that air within the building complies with applicable guidelines.

The new disclosure statute does not seem to apply if a property owner unilaterally discovers air contamination problems (unless it qualifies as an “issuer”), such as from public records or transactional due diligence. Of course, the property owner might have disclosure obligations under common law principles or other environmental laws. Moreover, a violation of the new statute might serve as evidence of a breach of duty in a negligence action against the property owner.

Interaction With Other Law; Penalties

When the new statute applies, it probably imposes disclosure obligations that go beyond the common law. Those disclosure obligations to tenants may also vary from a property owner’s obligations under environmental law to report contamination to government agencies. For example, environmental law typically requires such a report only for hazardous substances that exceed a “reportable quantity.” The new statute, in contrast, seems likely to require a property owner to disclose contamination that might not rise to a reportable release (e.g., historical contamination newly discovered, as opposed to an actual discharge), yet could potentially require disclosure for VOC concentrations that exceed government guidelines.

Vapor intrusion problems often arise because of contamination on other nearby sites. Those problems could be serious enough to trigger air contamination reports, thus forcing a property owner to disclose air quality problems for which the property owner has no responsibility. To avoid liability to its own tenants, the property owner might need to take remedial measures to prevent vapors from migrating into its building. A property owner could try to recover the costs of these measures from a responsible party in a contribution or cost recovery action.

A property owner may also want to try to treat some or all cleanup costs as operating expenses for purposes of operating expense escalations in its leases. Whether tenants will agree to that concept may represent another issue entirely, one that goes beyond this summary.

The ECL does not give property owners any remedy for loss of rent, property damage, or toxic tort claims that might result from nearby contamination. Those issues remain the province of ordinary common law principles.

A property owner that violates the new disclosure requirement could face the general criminal or civil penalties of ECL §§ 71-4001 and 4003. If the indoor air contamination is determined to create an imminent and substantial endangerment, the property owner could face injunctive relief as well as fines of up to \$2500 for each violation and \$500 per day for each day it continues. If the property owner becomes a responsible party under the state Superfund law, the violations could cost as much as \$37,500 per day.

Conclusion and Overview

The new statute, particularly when placed in its historical context, reminds property owners of just how many environmental problems and surprises can travel with ownership of real property – even real property that was believed to be “clean.”

Aside from the burden of cleaning up an environmental mess, property owners must now also bear the burden of announcing the problem to their tenants and possible tenants. This requirement cannot possibly come as good news for landlords already facing a worsening marketplace and an unexpected, and possibly substantial, cleanup expense.