

Environmental Transactions and Brownfields Committee Newsletter

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MESSAGE FROM THE CHAIR

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Redeveloping contaminated properties into new productive uses is no longer a novelty. In many of the most populated areas of the country it is a necessity, playing a critical role in countering suburban sprawl and helping bring new life and vitality to moribund urban centers.

Brownfield redevelopments are no longer limited to parks, retail uses or office buildings; they often include significant residential components, raising the stakes of ensuring protective remediation strategies. The development pressures driving these deals are intricately intertwined with the growing availability of risk-based cleanups, while at the same time scientists are revisiting the remediation standards for acute hazardous substances and warning about the risks of vapor intrusion. Real estate buyers and sellers must navigate these waters while evaluating federal and state innocent purchaser defenses, new due diligence requirements and environmental insurance products, and then incorporate these concepts into real estate contracts, insurance policies and services agreements with consultants.

There has never a better time to be an environmental transactional attorney. The field is vibrant, incredibly broad and never boring. We try to capture some of this

excitement in the programs and materials produced by the Environmental Transactions and Brownfields Committee of the ABA Section of Environment, Energy, and Resources. We also serve as a voice for environmental/transactional lawyers in the national debate on Brownfield Redevelopment issues, from our involvement in the negotiated rulemaking on EPA's new All Appropriate Inquiry standard to our meetings with federal and state regulators on emerging issues.

We hope you find the articles in this newsletter interesting. The topics include evaluations of the sufficiency of the new federal All Appropriate Inquiry standard, analyses of brownfield and contaminated property programs in England and on American Indian tribal lands, a report on New York's vapor intrusion initiative and a discussion on the valuation of contaminated properties. I would like to hear your thoughts and ideas about the newsletter, our CLE programs and our committee. Contact me at reicsson@farerlaw.com.

***ABA Section of Environment,
Energy, and Resources***

**36TH ANNUAL CONFERENCE ON
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**Environmental Transactions and
Brownfields Committee Newsletter
Vol. 9, No. 1, November 2006
Thomas R. Doyle and
Robert R. Gelblum, Co-Editors**

In this issue:

Message from the Chair
Richard Ericsson 1

Cleaning Up Historically Contaminated
Land in England
Valerie Fogleman. 2

When “All” May Not Be Enough
Seth A. Davis 7

Doing Environmental Due Diligence
Jeff Civins. 10

Highlights from *Valuation of Brownfield
Properties*
John A. Kilpatrick, Ph.D., MRICS 13

Brownfields Response Programs in Indian
Country: Protecting the Reservation
Environment
*Richard De Bey, Michelle Rosenthal
and Ashley Peck* 14

New York State’s Soil Vapor Intrusion Initiative
Frank L. Amoroso 17

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**CLEANING UP HISTORICALLY
CONTAMINATED LAND IN ENGLAND**

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Attorneys who advise companies that are considering purchasing land or the shares of companies that own land in England should be aware of English legislation that imposes retroactive liability for clean-up costs. The legislation, which also introduced a program to clean up land that is contaminated by past pollution incidents, came into force on April 1, 2000.

There are three tiers of legislation: Part 2A of the Environmental Protection Act 1990; the Contaminated Land (England) Regulations 2006; and Defra Circular 01/2006, annex 3 of which sets out statutory guidance which is, in effect, a quasi-regulation. Part 2A also applies to Wales and Scotland, which have their own substantially similar regulations and statutory guidance.

In some ways, liability under Part 2A is similar to that under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* Under Part 2A:

- liability for having “caused” contamination is (probably) strict;
- a person may be liable due to its status as the owner or occupier of contaminated land despite not having caused the contamination or even having known about it;
- liability is retroactive; and
- there is no limit of liability for clean-up costs.

There are, however, significant differences between Part 2A and CERCLA. In contrast to mitigated joint and several liability under CERCLA, under which a potentially responsible party (PRP) is jointly and severally liable unless it proves that the harm is divisible, Part 2A imposes a mixture of modified joint and several liability and proportionate liability. An “appropriate person” has no right to bring a

contribution action; Part 2A is specifically designed to avoid such actions. The scope of liability has resulted in a highly complicated liability system under which an enforcing authority must, among other things, fingerprint the substance for which an appropriate person is liable. The result, in marked contrast to CERCLA, is an enforcement-unfriendly program.

Under the program, the 353 municipalities in England have a duty to inspect their areas for contaminated land according to strategies developed by each municipality. When a municipality identifies a contaminated site, it considers whether to make a determination that the site is “contaminated land.” The statutory guidance states that the area of contaminated land should be the smaller of land in which the presence of one or more pollutants has been established or land in separate ownership or occupation.

Land is “contaminated land” if a substance that is in, on or under the land is causing “significant harm” or there is a “significant possibility of significant harm” to a “receptor.” The statutory guidance states that receptors are people, designated ecological areas (such as nature reserves), crops, animals (livestock, pets and animals in which hunting or fishing rights exist) and buildings. Land may also be contaminated land if pollution of surface, coastal or ground water is being, or is likely to be, caused. A significance threshold for water pollution will enter into force when the Department for Environment, Food and Rural Affairs (Defra) issues statutory guidance. If a substance has entirely entered surface, coastal or ground water from the land, the Water Resources Act 1991 applies rather than Part 2A. In 2006, Part 2A was extended to cover radioactive contamination; the only receptor for such contamination is people.

If an area of contaminated land meets criteria in the regulations for certain more seriously contaminated sites, the site is designated as a “special site” and the Environment Agency becomes the enforcing authority. Special sites include sites at which substances are polluting drinking water aquifers and sites that were used for refining oil or manufacturing explosives. Land which is determined to be contaminated land by virtue of radioactive contamination is a special site.

Municipalities have delegated their inspection powers to the Environment Agency in respect of some sites that are likely to be special sites if they are determined to be contaminated land.

After an area of contaminated land has been determined, the enforcing authority identifies each “significant pollutant linkage” on it. A pollutant linkage consists of a substance, a pathway and a receptor. The pollutant linkage is “significant” if harm or the possibility of harm to the receptor satisfies criteria in the statutory guidance. In a somewhat similar manner to CERCLA’s “operable units,” more than one significant pollutant linkage may exist on an area of contaminated land.

The enforcing authority must then identify all the appropriate persons in a “liability group” for each significant pollutant linkage. Part 2A provides that a person who “caused or knowingly permitted” a “substance” to be in, on or under land so that the land is “contaminated land” is liable for its “clean up.” If an enforcing authority has not “found” such a person, known as a Class A person, after a “reasonable inquiry,” the owner or occupier of the land (known as a Class B person) is liable for cleaning up land that it owns or occupies. The financial viability of a Class A person is irrelevant to its ability to be found. A “substance” is broadly defined to mean “any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour”; the substance need not be hazardous.

If the enforcing authority has identified more than one Class A (or B) person in a liability group, it must apply exclusion tests in the order in which they are set out in the statutory guidance. The authority must not, however, apply the tests so as to exclude all persons from a liability group. If, say, the authority has identified five Class A persons and has excluded four by applying the first five tests and the remaining person would be excluded by the sixth and final test, that person is not excluded but is liable for the entire clean-up cost for the significant pollutant linkage. If, say, two persons remain after the authority has applied the exclusion tests, the authority apportions liability between them according to criteria in the statutory

guidance (that is, according to legal rather than equitable criteria). If there is more than one significant pollutant linkage on a site, the authority applies attribution criteria in the statutory guidance to attribute liability between the liability groups for the linkages. (The tests and criteria do not apply to any environmental legislation other than Part 2A.)

The statutory guidance specifies hardship and other considerations that an enforcing authority must consider applying so as to reduce or waive an appropriate person's clean-up costs. If an authority applies such considerations, it must bear the reduced or waived costs; it may not apportion them between other appropriate persons.

The first exclusion test excludes various categories of persons from liability. The persons include lenders who are excluded in respect of specified lending activities. The protection is much weaker than protection for lenders under CERCLA; a mortgagee in possession is a Class B person. A person who contractually consigned waste to a person who "knowingly took over responsibility for its proper disposal or other management" is also excluded from liability if the person consigning the waste did not control the disposal site. This exclusion is, thus, the rough reverse of CERCLA's imposition of liability on generators who arranged for the disposal of hazardous substances.

The main purpose of the remaining five exclusion tests is to transfer liability from persons who "caused or knowingly permitted" contamination to be present in, on or under land in the past to the person who most recently "knowingly permitted" the continued presence of the contamination. The meaning of the term "knowingly permitted" is, therefore, crucial to the implementation of Part 2A. Although the term "caused or knowingly permitted" has been in English environmental legislation for over 150 years, case law has mostly interpreted the meaning of the term "caused," not the meaning of "knowingly permitted."

The most important tests for companies that sell and buy sites are the second and third tests, namely, the "payments made for remediation" and "sold with

information" tests. Under the second test, a person who accepts a reduced price for a contaminated site, on the basis that the purchaser will clean it up, is excluded from liability under Part 2A if various criteria are satisfied. If, however, an enforcing authority cannot find the purchaser (who has failed to clean up the contamination), liability reverts to the seller.

Under the third test, which is a rough reverse of CERCLA's innocent purchaser test, a person who sells a site (or leases a site for 21 years or more) is excluded from liability under Part 2A if, before the sale becomes binding, the seller provides the purchaser with "information that would reasonably allow that particular person to be aware of the presence on the land of the pollutant identified in the significant pollutant linkage in question, and the broad measure of that presence." Simply providing a phase I or phase II environmental assessment to the purchaser is probably not sufficient unless the assessment identifies the precise substance that must be cleaned up. As with the second test, liability reverts to the seller if the authority cannot find the purchaser.

The "sold with information" test is simpler to apply in transactions since 1990 when the purchaser is a "large commercial organisation or public body." As a general rule, such a purchaser is deemed to have information about all the contamination at the site if the seller permitted the purchaser to conduct its own investigations about the site's condition prior to the sale.

After an enforcing authority has notified one or more appropriate persons of their potential liability, there is a period of at least three months during which the authority must consult with the appropriate person(s). If, at any time after the end of the three-month period, the enforcing authority considers that the person(s) will not clean up the contamination, it has a duty to serve a remediation notice requiring them to do so. As a practical matter, most consultation periods exceed three months, with some having exceeded five years.

An appropriate person may appeal a remediation notice on one or more of 23 grounds set out in the regulations. A remediation notice is suspended during

the appeal. The failure to comply with a remediation notice without a “reasonable excuse” is a criminal offence with a fine of up to \$37,310 and an additional maximum daily fine of \$3,731 for industrial, trade or business premises.

The program to clean up contaminated land in England has progressed slowly. As of May 1, 2006, municipalities had determined 525 areas of contaminated land, of which 23 are special sites. As noted above, however, an area may be small. For example, 109 areas of contaminated land are on a housing estate in Manchester.

The program has resulted in 44 contaminated sites (including 15 special sites) being cleaned up without a remediation notice having been served. Significantly, however, only five remediation notices have been served (one of which is for a special site), of which two were withdrawn. Only one remediation notice has been appealed.

The appeal concerns a site in Kent which had been a brick and tile works in the late 1800s and early 1900s. After operations ceased, the site became overgrown marshland; pits that had been excavated became ponds. In the 1960s, the then-owner of the site cleared the vegetation and placed it at the base of the pits which he continued infilling with clay and other inert matter.

In the 1970s, a Mr. Scott applied for planning permission to develop the site for housing and subsequently bought the site. In preparation for the development, a geotechnical report was prepared that stated, among other things, that one of the trial pits that had been excavated as part of the study contained “[b]lack organic matter with bricks, roots, iris leaves and plastic sheeting. Water entering excavation at this level [approximately 10 feet below ground level] and gasses bubbling through it.”

In 1979, Mr. Scott sold the site to Circular Facilities (London) Ltd. (CF), a small company with three directors: the managing director, his wife and their son. Mr. Scott continued the planning application on behalf of CF. In March 1980, the geotechnical report was

received by the planning authority. In April 1980, the authority granted CF approval for the construction of eight houses. By 1985, CF had built and sold all of the houses.

In June 2002, the local municipality, Sevenoaks District Council (SDC), made a determination that the site was contaminated land under Part 2A. SDC concluded that methane and carbon dioxide, which were entering the houses from the decaying vegetation in the pits, posed a significant possibility of significant harm to the houses and their residents due to the propensity of the gases to explode or asphyxiate, respectively. (*Cf. Gallagher v. T.V. Spano Building Corporation*, 805 F. Supp. 1120 (D. Del. 1992) (organic matter that generated methane is not “hazardous substance”).)

SDC notified CF that it was the sole Class A person. SDC concluded that CF had knowingly permitted the continued presence of the vegetation during its development of the site and had introduced the houses and their residents to the site (liability under Part 2A includes having caused or knowingly permitted the presence of a substance (*e.g.*, vegetation) that subsequently undergoes a biological process to become a pollutant (*e.g.*, decay of vegetation resulting in generation of methane and carbon dioxide)). Mr. Scott had died and, therefore, could not be “found.” SDC had concluded that the previous owner of the site was excluded from liability by the sixth exclusion test. That test provides that a Class A person is excluded when another Class A person introduced a pathway or receptor (such as people or houses) to the land such that the land is contaminated land.

On Nov. 5, 2002, SDC served a remediation notice on CF after SDC had failed to reach agreement with CF on remedial works. On Nov. 25, 2002, CF appealed the notice to the Sevenoaks Magistrates Court on several grounds, some of which it did not pursue at trial. The two grounds that were pursued were that SDC: (1) “unreasonably determined [CF] to be the appropriate person who is to bear responsibility for any thing required by the notice to be done by way of remediation”; and (2) “unreasonably failed to determine that some other person in addition to [CF] is

an appropriate person in relation to any thing required by the notice to be done by way of remediation.” Contaminated Land (England) Regulations 2000, regs. 7(1)(c)-(d) (now Contaminated Land (England) Regulations 2006, regs. 7(1)(c)-(d)).

In June 2004, the Sevenoaks Magistrates Court concluded that CF knowingly permitted the continued presence of the vegetation and gases. The court stated, among other things, that the managing director was the controlling mind of CF and that he was “either in an ‘informal’ partnership with Mr. Scott or he used Mr. Scott as an agent of the company.” The court further concluded that CF “must have been aware of the organic matter and the gas” and that SDC had correctly excluded the previous owner from liability.

On May 10, 2005, the High Court allowed CF’s appeal that it had not knowingly permitted the continued presence of the vegetation and gases. The court ordered a re-trial of the case. *Circular Facilities (London) Ltd. v. Sevenoaks District Council* [2005] EWHC 865, [2005] All E.R. (D) 126 (HC). The court stated that, in view of the managing director’s denial during the trial that he knew that the geotechnical report existed when CF developed the site, the magistrates court should have made a clear finding that it was rejecting his evidence and given the reasons for its conclusion. The High Court concluded that the magistrates court’s judgment was unclear as to the basis on which the court had concluded that CF and/or the managing director had knowledge of the contents of the report. The High Court awarded costs against SDC (under English law, the losing party must pay the prevailing party’s legal fees and other costs). The case subsequently settled after leave to appeal to the Court of Appeal had been granted.

Circular Facilities illustrates the uncertainty surrounding the meaning of the term “knowingly permitted.” As indicated above, the High Court concluded that the magistrates court’s opinion was unclear as to how knowledge had been imputed to CF. The court did not consider constructive knowledge, with the result that it is still unknown whether the term “knowingly permitted” includes such knowledge.

In particular, *Circular Facilities* illustrates the difficulty of proving liability under Part 2A. The crucial events in the case occurred 25 years before the trial, by which time key witnesses (including Mr. Scott and the architect) had died. In England, parties do not have discovery powers and obligations in magistrates courts (which typically hear criminal cases). Since Aug. 4, 2006, appeals of municipality remediation notices are to the Secretary of State for the Environment, Food and Rural Affairs, who is the appellate authority for appeals of Environment Agency notices. There are, however, no discovery powers and obligations in appeals to the Secretary of State. Further, there is no statutory right of appeal against the Secretary of State’s decision. The losing party may, however, seek judicial review of the decision in the High Court. The grounds for challenging a decision in a judicial review action are illegality, irrationality and procedural impropriety.

Circular Facilities does not bode well for the continued enforcement of Part 2A. Although municipalities have a duty to inspect their areas for contaminated land, they are likely to be reluctant to make determinations and, thus, bring sites into the program if they consider that appropriate persons will challenge liability. Although municipalities may apply for funding from the central government to clean up sites, there is no dedicated fund such as the Superfund. In addition, an enforcing authority’s legal fees and other costs (and, if the authority loses, an appropriate person’s legal fees and other costs), come out of its general budget. The Environment Agency is inspecting 128 sites on behalf of municipalities; the agency is funded for such works by a grant in aid from the central government.

Despite its slow progress, the introduction of Part 2A has resulted in many companies cleaning up contaminated sites in order to avoid enforcement of the program (which includes listing of the site on a remediation register from which, unlike the Superfund program, a site cannot be deleted) against them. Voluntary clean ups may, however, decline following *Circular Facilities* if it appears to companies that municipalities and the Environment Agency are not vigorously enforcing Part 2A. A corollary of this is that

the public works nature of the program is likely to increase. Some municipalities are already using government money to pay for clean-ups instead of enforcing Part 2A's liability provisions.

The slow enforcement of Part 2A to date does not, however, mean that companies can ignore the legislation. Retroactive liability for cleaning up contamination from past pollution incidents in England will, almost certainly, not be repealed. In enacting Part 2A in 1995, the UK government made the decision that the private sector rather than the taxpayer would bear such clean-up costs. As U.S. experience with CERCLA shows, such decisions are difficult to reverse even if political will exists—and it does not exist in England. Thus, if the UK government decides that Part 2A is ineffective, the inevitable outcome will be amendments to make the legislation more enforcement friendly.

Valerie Fogleman's book "Environmental Liabilities and Insurance in England and the United States" was published by Witherbys in 2005. Valerie advised Sevenoaks District Council on the case described in this article.

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WHEN "ALL" MAY NOT BE ENOUGH

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Introduction

On Nov. 1, 2005 the Environmental Protection Agency (EPA) published in the Federal Register its final regulations interpreting the standard of "all appropriate inquiries" (AAI) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). These regulations (found at 70 Fed. Reg. 66,070), which formally go into effect on Nov. 1, 2006, are the first pronouncement by a governmental agency on the sufficiency of environmental due diligence in property transactions, and are expected to be regarded even before their effective date as the government standard for pre-transaction environmental review. Yet, the promulgation of final standards for AAI could well lull prospective buyers into a false sense of security, in that normal prudence, considering liabilities beyond those under CERCLA that are not addressed by AAI, has required and will continue to require that fuller and broader based environmental investigations be conducted as part of due diligence.

The Development of AAI

The phrase "all appropriate inquiries" entered the environmental lexicon in 1986, when Congress amended CERCLA with the Superfund Amendments and Reauthorization Act (Pub. L. No. 99-499, 100 Stat. 1613, "SARA"). SARA added a new section 101(35)(B) to CERCLA, creating the "innocent landowner" defense. This defense was a Congressional response to criticism that CERCLA had wrongfully imposed liability on landowners who had merely acquired property that had been contaminated by someone else. To claim the defense the would-be innocent landowner was required to show that he "did not know and had no reason to know" of the contamination prior to purchase, and that he had conducted, prior to the purchases, "all appropriate inquiries" into prior ownership and uses of the acquired property consistent with good commercial or customary standards and practices.

In practice, however, the innocent landowner defense turned out to be far from a panacea. Very few litigants were able to establish the defense, largely because they were unable to show that they had undertaken “all appropriate inquiries.” In analyzing that language, courts generally applied a sort of Catch 22 reasoning—that if contamination could have been discovered it should have been discovered, and if the purchaser did not undertake enough investigation to discover it, then he had not conducted “all appropriate inquiries.”

At the same time, buyers, sellers and lenders in the market place were developing their own practices for dealing with potential liabilities for site contamination in sales of property and businesses. The accepted practice was to conduct a pre-purchase site review involving review of records and, generally but not necessarily, a site visit, known as a “Phase I,” followed, if the results of the Phase I so indicated, by a “Phase II” study, which would involve sampling of soils or ground water. Concerns over a lack of uniformity in protocols for performing Phase Is led the American Society for Testing and Materials (ASTM) to adopt in 1993 (after several years of discussion, studies and drafts) a “Standard Practice” for a “Phase I Environmental Site Assessment” (ASTM Standard E 1527). Even so, the question remained: if the ASTM standard was the accepted standard in industry, would it still satisfy the statutory requirements of “all appropriate inquiry”?

In 2002 Congress again tried to make more defenses to CERCLA liability available, in enacting the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118, 115 Stat. 2356, the “Brownfields Amendments”). This law added a number of new defenses, two of which, the “contiguous property owner” (CERCLA Section 107(q)) and “bona fide prospective purchaser” (CERCLA Sections 107(r) and 101(40)) require a showing that all appropriate inquiries were conducted. But more importantly, Congress for the first time tried to deal with the question of how “all appropriate inquiries” would be defined.

CERCLA Section 101(35)(B) was amended to include some broad interim standards for properties

purchased before May 31, 1997, to apply ASTM’s Standard E1527-97 to properties purchase after that date, and to require the EPA, by Jan. 11, 2004, to

“by regulation establish standards and practices for the purposes of satisfying the requirement to carry out all appropriate inquiries...”

It should be pointed out that EPA’s issuance of final regulations on Nov. 1, 2005, was far from their worst performance under pressure of a Congressional deadline. Indeed, the final rule was issued following an unusual and prolonged negotiated rule-making process, involving a broad range of interested parties and groups (including this ABA Section, represented by the former chair of the Environmental Transactions and Brownfields Committee), and the issuance of an extensive proposed regulation on Aug. 26, 2004.

AAI and Due Diligence

The great interest in the promulgation of the final AAI regulations and concentration on their contents has led many to look at AAI as a true standard. While indeed we have, for the first time, an environmental checklist with a governmental imprimatur, AAI is a standard only so far as the three particular CERCLA defenses are concerned, and then, only to the extent—still to be determined in actual practice—to which those defenses will successfully be claimed. There are a host of environmental issues that AAI does not address, and a host of potential liabilities from which lawyers still must shield their clients. A lawyer who counsels a client that following AAI or doing a Phase I will suffice as transactional due diligence could well be making a serious mistake.

AAI only deals with certain defenses under CERCLA. Whether the standard will apply with the same force to state laws dealing with hazardous substance remediation is not certain. Liability for cleaning up offsite contamination—which can well be passed on to or assumed by the buyer in a corporate transaction—is not addressed. Violations of environmental laws are not addressed. Future or pending environmental regulations that might increase a facility’s operating costs or even jeopardize its continued operations are

not addressed. Toxic tort liability is not addressed, nor is any other kind of liability for third-party claims under environmental statutes. These are major concerns for buyers of property or businesses, and have traditionally formed the core of properly performed due diligence.

AAI is a good start—an essential step towards possibly claiming a CERCLA defense, and a good recipe for identifying potential problems with on-site contamination. But AAI is only a start. Proper due diligence, both from the perspective of proper legal advice and responsible environmental stewardship, requires examination of all issues of potential environmental liability—regulatory compliance with all applicable environmental laws, past off-site waste management practices, cost of continued compliance, possible future compliance issues, toxic tort liability and more. A client or lender who only wants a basic Phase I or merely wants to comply with AAI will have to be pushed to do more. And while AAI provides a predictable formula for the review minimally necessary for the CERCLA defenses, the rest of pre-transaction due diligence must always be tailored to the particular needs of the specific transaction, taking into consideration the financial and environmental status and past performances of the parties involved.

Not So Fast

In every transaction, the buyer will need to consider which elements of traditional environmental due diligence must still be performed in order to identify potential environmental liabilities that AAI will not cover. Briefly, any counsel to a buyer should consider the following:

Compliance. What environmental laws and regulations apply to the facility, and is the facility in compliance with them? Are all necessary permits in place and can they be transferred to the new owner? Is the facility operating in compliance with its current permits? Are changes contemplated in those permits with which the facility may have difficulty complying? What is the facility's current compliance status and how is it viewed by the environmental agencies that regulate it? Is the facility under any consent decrees or administrative orders that would affect its operation? Are there any

pending or threatened enforcement actions or citizens suits? What is the anticipated cost of bringing the facility into compliance or assuring that it remains in compliance?

Offsite Contamination. Have hazardous substances or wastes been sent offsite? Is the seller involved in any remediations under CERCLA, or has it been named as a potentially responsible party at any sites? Are there connections with other facilities that could be future targets for federal or state cleanup? Have potential liabilities at all these sites been properly valued? Please note that following recent court decisions there is new vitality to the basic concept that there is a difference between stock and asset deals. *See, e.g., New York v. National Services Industries*, 352 F.3d 682 (2d Cir. 2003). The “substantial continuity” test, which made buyers of business assets liable for most offsite Superfund liabilities as if they had purchased stock, is applied much less frequently, and it may indeed be possible to buy an asset without inheriting its attendant offsite CERCLA liabilities.

Future Regulations. A representation or warranty that a facility is currently in compliance with applicable regulations can sometimes be worth as much as the Titanic's seaworthiness leaving Southampton. A buyer needs to know about pending or contemplated regulations and how they will affect the operations of the property he is acquiring. Often regulatory agencies announce their strategies for issuing regulations in the future well ahead of their effective dates, and such future regulations, and their impacts, can often be identified. No buyer wants to buy a facility that is able to operate on the date of the contract of sale but will have to shut down shortly thereafter. Similarly, changes in reissued operating permits can often be anticipated. The due diligence should, in short, be looking forward, rather than just taking a snapshot of the present or reviewing the past.

Third-Party Claims. Beyond liability for violations of law, the purchase of industrial or contaminated property can lead to exposure to claims from neighbors or other affected individuals for personal injury or property damage. Enforcement matters can often transform into such claims, as can material

releases or odor complaints. And if the buyer is acquiring stock, or liabilities for past company practices, the entire operating history of the company will have to be reviewed.

AAI, in short, may be “all” that is “appropriate” for one particular set of environmental concerns. AAI will rarely be “all” that is necessary, prudent or advisable to protect the transactional client from the full range of potential liabilities under environmental laws.

This article was adapted from article submitted at the ABA Section of Environment, Energy, and Resources’ 35th Conference on Environmental Law, Keystone, Colorado, March 11, 2006.



Environmental Transactions
and Brownfields
Committee Newsletter

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The Environmental Transactions and Brownfields Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the one of the editors: Thomas R. Doyle at tdoyle@pierceatwood.com or Robert R. Gelblum at rob.gelblum@ncmail.net.

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DOING ENVIRONMENTAL DUE DILIGENCE

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Knowledgeable real estate professionals understand that environmental contamination not only affects the value of property, but also may create liability that far exceeds that value. They may understand too that the federal Superfund statute is the primary source of that liability, imposing on landowners responsibility for investigating and remediating contamination on their property irrespective of whether they caused it. As a result of that understanding, knowledgeable real estate professionals know to obtain a “Phase 1” environmental report as part of their pre-acquisition due diligence. The Environmental Protection Agency’s (EPA’s) “All Appropriate Inquiries (AAI)” rule, which becomes fully effective on Nov. 1, 2006, will change how Phase 1’s are performed and the type of information they produce. The question is whether and to what extent AAI should be undertaken.

The concept of AAI arose from the so-called innocent purchaser defense of Superfund. As enacted in 1980, Superfund imposed liability on so-called potentially responsible parties, which includes present owners and operators of contaminated properties, subject to certain defenses. The most pertinent defense for landowners was the third party defense: if the defendant could show, among other things, that the contamination was solely attributable to the act or omission of a third party and that the act or omission did not occur in connection with a contract with that defendant. The concept of “contractual nexus,” however, was often ignored by courts.

To be sure “innocent purchasers” were protected, Congress amended Superfund to provide a defense to a present landowner, even if there were a contractual nexus, provided the landowner could show, among other things, that it was innocent—that it did not know and had no reason to know the contamination was present. The prerequisite of “had no reason to know” was embodied in the concept of AAI and, when Congress again amended Superfund in 2002, it

provided guidance to EPA to flesh out by regulation what the concept meant and added two new transaction-related defenses—bona fide prospective purchaser and contiguous landowner—that also required AAI.

Until Nov. 1, 2006, prospective purchasers may use either the new rule or current practice. Under current practice, a so-called ASTM Phase 1 (E 1527-00), comprising a checklist of pertinent inquiries, is satisfactory; the new rule, embodied in a new ASTM standard (“E 1527-05”), injects a significant degree of subjectivity on the part of the environmental professional conducting AAI.

Key elements of the new rule include the following minimum requirements:

- the investigation be supervised by a qualified “environmental professional”—a defined term;
- specialized knowledge of the party commissioning the investigation be documented, *e.g.*, as to the relationship of purchase price to value of property if not contaminated, commonly known or reasonably ascertainable information about the property, and the degree of obviousness of the presence of the contamination;
- data gaps and information reviewed to address those gaps be identified, and comments be provided on the significance of those gaps to the environmental professional’s ability to identify conditions indicative of releases or threat of releases;
- shelf life and updates requirements be met, *i.e.*, the investigation be conducted no later than one year prior to taking title and certain aspects of it, such as onsite inspection, be conducted no later than 180 days prior to that date.

The changes effected by the new rule raise a number of practical concerns. The lack of a prescribed checklist and the requirement for a data gap evaluation create

uncertainty as to whether a particular assessment has met the performance-based standard. The “freshness” requirement may affect the timing and logistics of transactions involving multiple properties and therefore the feasibility of conducting AAI. The interview requirement not only creates additional uncertainties regarding whether AAI has been performed, but also raises issues with regard to the ability of the parties to a transaction to maintain confidentiality. But beyond these concerns, there are significant reasons why purchasers should not blindly conduct AAI and instead should consider each particular transaction in light of their own risk management objectives.

EPA’s AAI Rule identifies the procedures a prospective purchaser must follow to satisfy only one of the prerequisites to taking advantage of the transaction-related defenses (innocent landowner, bona fide prospective purchaser, and contiguous landowner) under Superfund. To prevail in a Superfund enforcement action, the purchaser also must show compliance with certain continuing obligations, including taking reasonable steps with respect to hazardous substances on the property to stop and prevent releases and prevent and limit exposure. So, to take advantage of the transaction-related defenses, the defendant may have to spend a lot of money to address the release.

Another significant concern with the AAI prerequisite in particular and the transaction-related defenses in general is that they become relevant only with respect to Superfund liability; they do not protect against liability under other federal laws, including other federal environmental laws, state environmental laws, or the common law such as trespass, negligence and nuisance. Moreover, although ASTM investigations do address petroleum-related contamination, they do not provide protection against liability relating to that type of contamination, because petroleum is not within the universe of hazardous substances addressed by Superfund. Moreover, because the transaction-related defenses apply only to purchases of land, they provide no protection in stock acquisitions or mergers.

Not only do the defenses that AAI makes available provide limited protection, the investigation that AAI

contemplates does not address numerous concerns that should be addressed as part of a meaningful environmental due diligence. Additionally, because AAI is focused on assets acquisitions, it does not address concerns relating to stock acquisitions and other transactions with the potential for successor liability, such as liabilities associated with formerly owned or operated properties and offsite disposal. For these reasons, a sophisticated purchaser in a transaction involving real estate will look at the unique circumstances of their particular transaction to insure all potential significant environmental concerns are addressed and will not focus only on AAI.

If there is the potential for successor liability—as in a merger, the prudent purchaser will consider past as well as present liabilities and offsite as well as onsite liabilities. For properties with ongoing operations, the prudent purchaser also will want to conduct a compliance assessment, to be sure the facilities are in compliance with pertinent requirements, including having all necessary permits. For properties that are to be developed, the purchaser will want to identify pertinent land use restrictions, including, for example, those relating to endangered species, wetlands, protected watersheds and aquifers, and flood plains, to determine how those might affect future development.

Where the properties contain buildings, the prudent purchaser will want to focus on lead paint, lead in potable water, PCBs and asbestos, in addition to hazardous substances and petroleum-related contamination. The prudent purchaser will also want to look at indoor air quality, including the potential for mold.

In sum, especially for pure real estate transactions, purchasers will want to consider AAI. All things being equal, the various transaction-related defenses of Superfund are worth taking advantage of. But the availability of those defenses should be weighed against the associated burdens, such as issues relating to timing, confidentiality and cost and the requirement to stop releases, and the limitations of AAI should be taken into account. Sophisticated parties to real estate transactions, understanding the relevance of AAI and the innocent purchaser and other transaction-related

defenses, will not blindly apply AAI, but instead will design and implement a program to generate and process pertinent data that help identify all pertinent environmental concerns.

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HIGHLIGHTS FROM VALUATION OF BROWNFIELD PROPERTIES

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Author's Note: The January 2006 update to Lexis-Nexis Matthew Bender's Valuation Law and Practice saw a wholesale revision of Chapter 29, "Valuation of Brownfield Properties." This article summarizes some of the highlights of that revision.

In the past, the valuation function has typically been viewed as serving two purposes: appraisal and due diligence. With more aggressive postures taken by brownfield developers in recent years, the valuation function has also served to find hidden value opportunities at the adaptive re-use planning stage.

One of the key issues is determination of the highest-and-best-use (HBU) of the property. In a traditional appraisal model, the HBU is a single value, constituting the maximally productive use of the site out of all of the uses which are legally, physically and financially acceptable. In the evaluation of a brownfield, however, the HBU is usually a moving target, with multiple land use options suggesting multiple remediation alternatives. Stigma and post-remediation value vary according to remediation level, prognoses for future risks and other market factors. As such, a cost/benefit analysis conducted at the beginning of the project, before adaptive re-use decisions are etched in stone, will often find that some alternatives are infeasible, some are more feasible than others, and there may be more than one maximally profitable use of the site.

In 2002, the Appraisal Standards Board issued Advisory Opinion 9 (AO-9), "Guidance for Valuation of Contaminated Property," which includes the appraisal of brownfields. Among other things, this opinion clarifies the relationship between physical experts (*i.e.*, engineers and others conducting environmental audits) and the valuation experts. Appraisers and others in the valuation field rely on the credibility of environmental determinations made by

these physical experts as *assumptions* or *hypothetical conditions* in the conduct of the valuation analysis.

As the full implications of the All Appropriate Inquiries rule go into effect, there will be an echo effect on real estate valuation via the implications of AO-9. Specifically, the quality and nature of due diligence information coming out of the environmental assessment function will require a more detailed examination of a property's environmental stigma, both in the pre- and post-remediation state. Coupling this with the potential for alternative remediation levels, the value estimate may have multiple levels, and some remediation solutions may prove financially infeasible and others feasible, given the differing post-remediation values.

Analysts valuing brownfields need to take care in identifying comparable transactions, both pre- and post-remediation. Many brownfield transactions are not arms-length, and often include non-realty property (*e.g.*, plant and machinery), non-market financing (*e.g.*, brownfield grants or sub-market loans) or other dispensations (*e.g.*, streamlined permitting by local governments). Also, value implications of certain site characteristics may change after remediation. For example, large industrial sites often suffer from an "excess land" problem. Land area needed to support the industrial use is valuable, while adjacent property, which may have been acquired to facilitate the plant location decision, is effectively worthless in the pre-remediation state. However, if the property is adaptively re-used to a higher use after remediation, the excess land may prove valuable under differing use regimes.

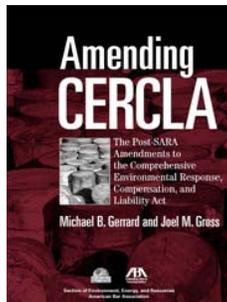
The *discounted cash flow* (DCF) model is most frequently used for feasibility studies and valuation of prospective development. It has the added advantage of ease of use for sensitivity analyses. However, the DCF is highly dependent on the estimation of the amount and timing of future cash flows and the choice of discount rates. Using market extraction to estimate discount rates from unimpaired comparable properties fails to take into account the increased risk associated with brownfield projects. A *risk-adjusted discount rate* is preferred, since it accounts for risk and stigma in the valuation analysis.

The valuation process can be a value-adding proposition in a number of ways. Obstacles or limitations to maximizing value are identified early on. Correlations among these limitations can be analyzed to aid in optimizing the remediation plan. Since the optimum remediation strategy is identified via a value-maximization analysis, the appropriate post-remediation development partners can be identified early and can bring needed expertise to the table. A multi-phase valuation allows the brownfield developer to put a dollar sign in front of the value of the site at every prospective step of the process and thus have multiple “opt-out” scenarios and options during the entire lifetime of the project.

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BROWNFIELDS RESPONSE PROGRAMS IN INDIAN COUNTRY: PROTECTING THE RESERVATION ENVIRONMENT

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Indian Tribes hold the unique status of independent sovereign nations within the United States. As such, Tribes have an obligation to protect the health and welfare of all persons who either reside on or do business within the exterior boundaries of the reservation (Reservation Population). Tribes also possess the inherent sovereignty to develop, implement and enforce their own Tribal environmental laws and regulatory programs to protect the quality of the air, lands, waters and natural resources that lie within the boundaries of the reservation (Reservation Environment). Protecting the health of the Reservation Population and the quality of the Reservation Environment are central themes that, in turn, provide for Tribal subsistence and the preservation of traditional cultural, economic, social and spiritual aspects of Tribal life.

Indian reservations are of limited geographic scope and are the permanent land base for both present and future generations. Tribes are disproportionately impacted by the degradation and contamination of lands and natural resources within the Reservation Environment. Congress has recognized this need, and today a number of the major federal environmental statutes recognize and encourage Tribes to exert their civil regulatory authority in Indian Country, which is defined broadly to include all of the territory within the exterior boundaries of a reservation, including land owned by non-Indians in fee simple.

Tribal Jurisdiction in Indian Country

The 562 federally-recognized Indian Tribes, Bands, and Alaskan Native Groups within the United States have jurisdiction over 55.7 million acres of land held for them in trust, as well as extensive land owned in

fee, by both Tribal members and non-members. While some Reservations are large, remote land bases that consist primarily of Tribally-owned land, other Reservations are smaller, located near urban population centers and include parcels of non-member-owned fee land within their boundaries. Because state civil regulatory law does not generally apply in Indian Country, this “checkerboard” pattern of land ownership can create challenging jurisdictional issues and conflicts.

Although Tribes possess “attributes of sovereignty over both their members and their territory,” *United States v. Mazurie*, 419 U.S. 544, 557 (1975), the U.S. Supreme Court has ruled repeatedly that Congress retains plenary power over Tribes. As a consequence, the Court has held that absent express authorization or delegation by a federal statute or treaty, Indian Tribes may exercise civil adjudicative and regulatory authority over the conduct of non-members on non-member fee lands within the exterior boundaries of their Reservations where one of the following two tests is satisfied: (1) non-members enter consensual relationships with the Tribe or its members; or (2) the non-member’s conduct has a *direct effect* “on the political integrity, the economic security, or the health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544, 565-566 (1981) (emphasis added). For this reason, federal courts have consistently upheld the application of Tribal environmental regulations to non-Indian-owned fee land within the Reservation environment when hazardous substances are present and have or may have a direct effect on the health and welfare of the Reservation Population.

Developing Tribal Brownfields Response Programs

Brownfields properties are prevalent in Indian Country, often due to failed economic development and efforts to take advantage of inexpensive land subject to historically lax enforcement of federal environmental regulations. Funding under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq* (CERCLA) can provide Tribes with the resources to clean up and

redevelop contaminated lands for use by individual Tribal members or to promote a Tribe’s economic development. Brownfields redevelopment is of particular importance to Tribes which have only a finite amount of developable lands for commercial or industrial use. Developing, implementing and enforcing Tribal brownfields programs also enables Tribes to assert their sovereignty through the exercise of their civil regulatory authority while protecting the health of the Reservation Population and the quality of the Reservation Environment.

CERCLA was amended in 1986 to provide that Tribes are to be treated “substantially the same” as states, thus applying the state brownfields provisions to Indian Tribal governments. When Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) in 2002, it authorized \$50 million for state and Tribal brownfields grants through 2006. Since then, the Environmental Protection Agency (EPA) has worked collaboratively with Tribes as partners and co-implementors of Tribal Brownfields Response Programs (BRPs), thereby creating a strong, balanced relationship between the Federal government and Tribal programs. For many Tribes, federal funding is the only way to obtain the necessary resources to build environmental programs, including Tribal BRPs.

While there is no “one right way” to develop a Tribal BRP, working with an Indian Tribe necessitates an in-depth understanding of the Tribe’s unique culture, particular needs, policy goals and objectives, and familiarity with federal Indian law. While a few Tribes already have substantial environmental departments in place with staff members skilled in relevant areas, others may have very limited departments that will need to be more fully developed. Knowing a Tribe’s strengths and limitations and its relationship with local and state agencies is necessary to building a successful program.

It is also important for the Tribe to develop the appropriate legal infrastructure to support program operation. This will likely involve the enactment of Tribal laws and ordinances suited to local conditions and not inconsistent with existing federal programs. To

this end, several Tribes have adopted Hazardous Substances Control Acts (HSCAs) that are based on CERCLA and comparable state laws to provide for the cleanup of sites contaminated by hazardous substances and to prevent the creation of future hazards due to the improper disposal of hazardous substances. Tribes may also adopt related policies and administrative procedures to provide for program implementation. Additionally, Tribes may wish to enact their own Administrative Procedures Act to provide for due process of law and the uniform implementation of Tribal policy goals and objectives.

Tools for Developing Tribal Brownfields Response Programs

Once the Tribe has developed the necessary legal and regulatory infrastructure, additional tools can be used to implement and enforce a BRP, including the development of a Tribal BRP Guidance Manual tailored to reflect a Tribe's particular goals and objectives. This manual, which may include a step-by-step approach to program implementation and enforcement, may also include a discussion of the program's legal authority. In addition, the manual may provide protocols for site discovery, investigation, hazard assessment and remedial investigation, proposed methods for selecting and implementing cleanup actions, and guidelines for ensuring proper public notice and participation. Tribes can also develop a voluntary compliance program and associated guidance manuals to encourage potentially liable parties to voluntarily clean up and utilize brownfields located within the Reservation Environment in compliance with Tribal policies and standards.

Examples of Successful Tribal Brownfields Response Programs

Tribes across the country have utilized the Brownfields Amendments to protect their Reservations. In 2002, the Leech Lake Band of Ojibwe (Band) in northern Minnesota adopted its HSCA as a matter of Band law, and initiated its BRP in 2003. Since then, the Band has developed a comprehensive BRP Guidance Manual, which it is using to direct its program implementation

and enforcement activities at a variety of contaminated sites, including one involving an oil pipeline spill where the Band is working collaboratively with the polluter and the U.S. Geological Survey. The Band has also established a Voluntary Cleanup Program to encourage potentially liable parties to identify, investigate, and clean up sites impacted by hazardous substances in a voluntary and cooperative manner.

By comparison, the Confederated Tribes of the Colville Reservation (Colville) in Washington, an early pioneer in the development and implementation of Tribal environmental law, was involved in the cleanup of on-Reservation brownfield sites even before passage of the Brownfields Amendments. In 2001, after adopting its own HSCA, the Colville worked through its Colville Tribes Enterprise Corporation (CTEC), forged a unique relationship with EPA, and entered into a joint enforcement order as a means to address contamination at a brownfields site on fee land within the Reservation. Indeed, were it not for the involvement of EPA and the Colville Offices of Environmental Trust and their joint regulation of CTEC, the site would not have been redeveloped.

By exercising their civil regulatory authority to address the presence of hazardous substances, these Tribes and others are taking a leading role in protecting the health of their Reservation Populations and the quality of the Reservation Environment, while preserving their land base and way of life for current and future generations.

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NEW YORK STATE'S SOIL VAPOR INTRUSION INITIATIVE

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Trichloroethylene (TCE) is a volatile organic compound (VOC). It is a common industrial degreaser that has been frequently used as a paint stripper and an ingredient in paints, varnishes and in typewriter correction fluid. Elevated levels of TCE have been detected in some 2000 Superfund sites across the country, including more than 400 in New York State. Until recently, TCE contamination has been treated by regulators as primarily a groundwater problem. However, advances in understanding of the process by which gases from VOCs migrate from contaminated groundwater and soil into buildings and structures has piqued governmental interest. When VOCs infiltrate indoor air, it is called "soil vapor intrusion."

The New York State Department of Health defines soil vapor intrusion as "the process by which volatile chemicals migrate from a subsurface source into the indoor air of buildings."¹ Human health effects from inhalation of VOCs that may enter buildings or residences over or near contaminated groundwater or soil is the subject of growing concern. Recently, the National Academy of Sciences issued a report entitled, "Assessing the Human Health Risks of Trichloroethylene: Key Scientific Issues," July 2006. The report noted that "the evidence of carcinogenic risks and other health hazards from exposure to TCE has strengthened since 2001."²

In response to this mounting evidence, New York State has made the evaluation of the soil vapor intrusion pathway a top priority. The New York State Departments of Environmental Conservation (NYDEC) and Health (NYDOH) are working together to implement jointly a comprehensive program to evaluate the potential public health risks posed by soil vapor intrusion into residential and commercial buildings. NYDOH has recently finalized its Guidance document relating to investigations of the soil vapor pathway.³ NYDOH's Final Guidance provides the

procedural framework for investigating and mitigating targeted sites. NYDOH has concentrated its attention on chlorinated VOCs, with the primary chemical of concern being TCE.

The NYDOH Final Guidance has been issued amid a controversy over how to predict the likelihood of VOC contamination from groundwater and soil entering air inside buildings. Some believe that the level of concentration of VOCs attenuates and will be at lower concentrations inside buildings than it is in the soil or groundwater. Others, including NYDOH, contend that the migration of soil vapor is subject to different influences than groundwater contamination and therefore is not predictable. Thus, the only way to know whether soil vapor contaminants have migrated into a structure is to conduct indoor air sampling. One rule of thumb posited by an Environmental Protection Agency (EPA) official suggests that buildings 100 feet horizontally from a groundwater contamination plume should be assessed for soil vapor intrusion.⁴ NYDOH lists nine categories of environmental factors and six categories of building factors that must be considered in evaluating the level of soil vapor intrusion. These include soil and weather conditions, fractures in bedrock, the presence of clay, preferential pathways such as utility sewer lines, the type and condition of the building foundation, and the type and operation of heating and ventilation systems. Environmental scientists are working hard to bolster their respective views on these issues.

On a practical level, this controversy will be played out in the field. NYDEC has issued a Program Policy regarding the "re-opening" of so-called Legacy Sites, *i.e.*, State Superfund sites where chlorinated VOCs were detected and remedial decisions were made prior to 2003.⁵ Using a grading matrix based on a number of factors including levels of concentrations and soil characteristics, NYDEC has established a list of Legacy Sites targeted for soil vapor investigation/mitigation. NYDEC has sent letters to potentially responsible parties (PRPs) in conjunction with closed Superfund sites where VOC groundwater contamination had previously been identified. Claiming authority under reopener provisions in consent orders pertaining to those sites, these NYDEC letters are seeking to require former PRPs to conduct soil gas

investigations at the Legacy Sites. As of October 2006, NYDEC has reported that there has been investigation/mitigation at some 207 out of 421 Legacy Sites. Because of the potential for Legacy Sites to be reopened, consent decrees and administrative consent orders previously entered into with NYDEC should be reviewed carefully to see if reopener language might expose owners, developers and other parties interested in a Legacy Sites to additional obligations.

The New York regulatory agencies have also been requiring that PRPs conduct, soil gas investigations at sites involving Resource Conservation Recovery Act Corrective Action, State Superfund, Voluntary Cleanup, Brownfields, Environmental Restoration and petroleum spills. The specter of reopening a site for additional investigation and imposing further remediation is a concern for owners and former owners of affected properties. Additionally, indoor air sampling at an occupied building or in residences downgradient of a site may create friction with tenants and may give rise to false positives and lead to other legal or public relations concerns. New York State has recently enacted a notification law that requires PRPs and Brownfields participants who perform soil vapor testing to provide test results to owners and others with interests in real property within 30 days after the test results have been validated.⁶

Another point of contention is that the agencies are treating the NYDOH Vapor Intrusion Guidance as law, even though it is only a guidance document. The state is insisting on testing of soil gas to determine whether there is a potential for danger to human health by virtue of the intrusion of soil gas into buildings that are located over contaminated soil or groundwater. This initiative requires notice to be sent to downgradient impacted property owners.⁷ In addition, NYDEC has recently reissued its revised Part 375 Superfund Program Regulations that expressly provide, *inter alia*, that remedial plans be consistent with Guidance documents.⁸

There are significant legal issues surrounding the state's activities with respect to soil vapor intrusion. Among these are: By what legal authority are the agencies acting? May the state operate pursuant to a Guidance

document rather than going through the formal regulation adoption process governed by the State Administrative Procedure Act? Can NYDEC incorporate the NYDOH Guidance by means of NYDEC's new Part 375 Regulations? Does prior VOC groundwater contamination constitute grounds for exercising reopeners with respect to completed remediations at former Superfund sites? What levels of various VOCs in addition to TCE will trigger an investigation? Or, mitigation? How will the state determine appropriate action levels for various VOCs? What role will the regulated community have in determining action levels for different VOCs? Does the NYDOH Final Guidance apply in situations where no further action letters have been issued? Does the NYDOH Final Guidance apply in a situation where remediation was accomplished pursuant to a Voluntary Cleanup Agreement? What effect does the NYDOH Final Guidance have on the Brownfields program?

It is not clear how New York State's initiative will interplay with existing indoor air quality standards and exposure limits in the workplace as set forth in the Occupational Safety and Health Act (OSHA").⁹ The state is apparently taking the position that the newly developed standards supersede OSHA permissible exposure levels with respect to chemicals that are not regularly used in the work place. An elevated in-plant air reading with respect to a chemical not routinely used there will be considered an involuntary exposure and not subject to OSHA limits. Furthermore, it remains to be seen how the criteria set forth in the NYDOH Final Guidance might be used as a basis for personal injury and/or property damage claims.

The State Legislature has entered the fray with its report entitled "Vapor Intrusion of Toxic Chemicals: An Emergency Public Health Concern" (Jan. 2006).¹⁰ Among the more dramatic aspects of the Report are its recommendations: (1) that NYDOH and NYDEC adopt standards for TCE that are much lower than that proposed by NYDOH and would be protective of public health to the highest degree, and (2) that there be a "presumption" that where there is a finding of the presence of VOCs in the soil or groundwater, there must be mitigation. Part of the motivation for this latter recommendation is the recognition by the assembly that

investigation of soil gas often costs as much as the costs of installing and operating mitigation systems.

If history is a teacher, the resolution of these issues will unfold over the upcoming months and years in all branches of government, with the courts playing an important role as the inevitable challenges to agency and legislative action are asserted.

Notes:

1. "Final Guidance for Evaluating Soil Vapor Intrusion in the State of New York," New York State Department of Health (Oct. 2006) ("Final Guidance").
2. "Assessing the Human Health Risks of Trichloroethylene: Key Scientific Issues." Committee on Human Health Risks of Trichloroethylene, National Research Council (2006).
3. See Final Guidance, n.1.
4. Walter Mugdan, "Vapor Intrusion: The Next Big Thing," NYSBA, *THE N.Y. ENVTL. LAW.*, Vol. 26, No. 2 (Spring 2006).
5. Carl Johnson, "DER-XX/Evaluating the Potential for Vapor Intrusion at Past, Current, and Future Sites," New York State Department of Environmental Conservation, DEC Program Policy, State of New York (Apr. 11, 2006) Cal. No. 1232, 7301-A (Nov. 22, 2004).
6. Laws of 2006, Ch. 707, Environmental Conservation Law, 27-2401 *et seq.*
7. Final Guidance, at 5.5.
8. Subpart 375-1 General Remedial Program Requirements (Revised June 14, 2006).
9. 29 U.S.C. § 651 *et seq.*
10. Assemblyman Thomas P. DiNapoli, Chairman New York State Assembly Committee on Environmental Conservation, "Vapor Intrusion of Toxic Chemicals: An Emerging Public Health Concern," (Final Report Jan. 2006).

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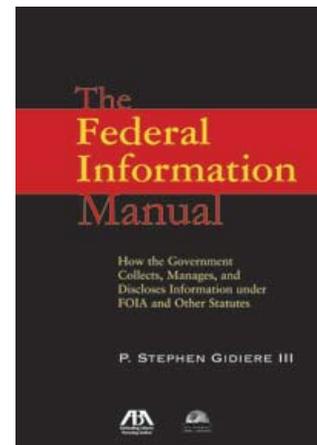
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