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Buying and Selling Contaminated Property in Pa. Land Recycling Act MODEL AGREEMENT CHOICE OF STANDARDS IMPORTANCE OF the PLAN Th

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Over the last few years, agreements between buyers and sellers and the Pennsylvania Department of Environmental Protection for the remediation of contaminated property have become a well-established part of the DEP's land recycling program.

The term "buyer/seller agreement," once familiar only to environmental practitioners, has entered the vocabulary of a wide range of real estate professionals. Buyer/seller agreements have become sufficiently commonplace that the DEP is able to execute them quickly, sometimes according to a timetable established by the buyer and seller. As a result, buyer/seller agreements are likely to be considered by a buyer and seller whenever contaminated property is bought and sold.

Buyer/seller agreements address one of the foremost disincentives to development of contaminated property: the strict liability of a property owner for past as well as current contamination. Pursuant to a buyer/seller agreement, property can be transferred and remediation performed after closing, typically by the seller, or "remediating party," according to a plan approved by the DEP, while the innocent buyer immediately obtains a covenant not to sue from the DEP with regard to existing contamination.

The buyer may be unwilling to acquire the property without a covenant not to sue, and the owner may be unable or unwilling to perform the required cleanup without the proceeds from the transaction. As a result, without a buyer/seller agreement, the property would remain contaminated and underused.

Land Recycling Act

Since 1995, owners and parties cleaning up property have been able to obtain liability protection pursuant to the Land Recycling and Environmental Remediation Standards Act, 35 P.S. Section 6026.101, commonly referred to as Act 2.

In fact, the DEP established a policy of issuing buyer/seller agreements not long before the passage of Act 2. Over time, however, the basic requirements of Act 2 have been merged into buyer/seller agreements. As a result, the remediating party in a buyer/seller agreement will be required to attain one of the three Act 2 standards and, upon DEP approval of a final report demonstrating attainment of the selected standard, all parties participating in the cleanup and the property owner and its assigns and successors will receive liability protection in accordance with Act 2.

In other words, a seller and a buyer of contaminated property could forgo the buyer/seller agreement and instead obtain Act 2 liability protection with little or no difference in the required cleanup. To do so, however, either the seller must conduct remediation prior to closing or the buyer must close without a covenant not to sue.

The liability protection provided by Act 2 is broader than the covenant not to sue provided by a buyer/seller agreement in that it covers third-party claims, in addition to DEP claims, for remediation. Neither, however, covers personal injury or property damage claims.

The essential difference is that with a buyer/seller agreement, the innocent buyer receives a covenant not to sue immediately, so that the buyer can close without the risk of liability for existing contamination and the seller can obtain the benefit of settlement proceeds before being required to perform the cleanup.

The main strategic consideration for a buyer and a seller choosing between a buyer/seller agreement and the ordinary Act 2 process is the value of that immediate covenant compared with the disadvantage of making a commitment to a cleanup.

Model Agreement

Buyer/seller agreements take the form of a consent order and agreement. Since September 1998, the DEP has used a detailed model agreement, which is one reason that such agreements can be negotiated quickly. The instructions to the DEP's model contain a checklist of essential circumstances that must be present for the DEP to approve a buyer/seller agreement. These include the following:

- A contaminated property that a party is willing and has the resources to remediate to an Act 2 standard.
- A buyer that did not cause the contamination and that must complete the purchase prior to completion of the Act 2 process but is unwilling to incur potential liability.
- An environmental assessment and a remediation plan that the DEP has reviewed and determined will most likely result in the attainment of the proposed Act 2 standard.
- If the plan calls for cleanup to a site-specific standard based on engineering and institutional controls, the buyer must be willing to maintain such controls.

The model agreement begins with a series of recitals describing the DEP's legal authority, the property, the parties, the sources and the nature of the contamination, reports that have been prepared and the proposed transaction.

The buyer must represent that it did not cause or contribute to the identified contamination. The model

agreement further provides for a description of the plan, including the selected remediation standard. The remediating party is obligated to attain the selected standard by a certain date, based on a generous estimate of the time required to complete the cleanup; submit a final report demonstrating attainment of the selected standard; and satisfy Act 2's notice requirements.

The seller must record the agreement and, if a site-specific or non-residential standard has been selected, include appropriate deed restrictions in the deed for the property, which the buyer is required to abide by and include in future deeds. The buyer, unless it is also the remediating party, will immediately receive a covenant not to sue, and both parties will receive Act 2 liability protection upon approval of the final report demonstrating attainment.

Parties interested in a buyer/seller agreement should review the model agreement and contact the appropriate regional office of the DEP to begin the process. Ordinarily, the buyer and the seller can advance the process by presenting to the DEP a remediation plan and a version of the model agreement modified to fit the facts relevant to the property being sold.

Since a buyer/seller agreement takes the form of a consent order and agreement, it is enforceable by the DEP, and the buyer and the seller are subject to penalties for its violation. The remediating party, which will be obligated to complete the remediation plan and demonstrate attainment of the selected remedial standard, will be subject to penalties for failure to do so.

Accordingly, before embarking on an agreement, the buyer and the seller must be committed to completing the cleanup and must be confident that the remediation plan they are about to carry out will, in fact, attain the selected remediation standard.

In contrast, Act 2 is a voluntary process. Even after the notices required by Act 2 have been filed, the remediating party can withdraw the notices and will have no obligation under Act 2 to complete the cleanup.

The seller and the buyer are likely to have come to the decision to pursue a buyer/seller agreement by different paths. The seller, of course, would prefer not to deal with the remediation issues and would rather let the buyer take the risk. If the contamination is already known or easily discovered, few buyers will be willing to enter into an agreement of sale on that basis, and a seller taking that approach is likely to obtain a lower price.

The seller could, of course, take advantage of Act 2, complete remediation, demonstrate attainment, obtain liability protection and only then offer the property for sale. By doing so, the seller will be able to offer a "clean" property and remediation will not be a issue in negotiation of either price or the terms of the agreement. Often, however, the seller of contaminated property lacks the funds to perform the necessary cleanup and needs the proceeds from the sale to carry out the cleanup.

Choice of Standards

In addition, the types of remediation standards available under Act 2 often depend on the buyer's intended use of the property. Act 2 provides for different remediation standards depending on whether a property is used for residential or non-residential purposes and allows remediation to a site-specific

standard that relies on measures limiting exposure to contamination.

The remediation may be significantly less expensive if a buyer is willing, for example, to restrict future residential use, use of groundwater, or access to contaminated soil by constructing and maintaining a cap, commonly referred to as institutional or engineering controls. In some cases, the buyer is not only not averse to less expensive remediation, but the buyer's development plans result in partial remediation at no extra cost.

For instance, the buyer's plans may call for building over or removing previously exposed contamination. Unless the seller works jointly with the buyer to develop a remediation plan, the seller cannot take advantage of these cost savings. By the same token, the seller may be unwilling to incur the expense of even a less expensive cleanup without the buyer being committed to purchasing the property.

For the buyer and the seller to proceed on this basis, the DEP must approve the particular engineering or institutional controls the buyer plans to implement consistent with its development plans. Without DEP approval of those controls in the buyer/seller agreement, the buyer and the seller run the risk of performing a cleanup at significant expense that does not ultimately attain the selected remediation standard.

A buyer that is aware of contamination when entering a transaction may make its offer contingent on the seller's entering a buyer/seller agreement prior to or at closing. On occasion, the contamination that will become the subject of the buyer/seller agreement will be discovered during environmental due diligence. When this occurs, the parties must each reassess the deal and in particular their willingness to perform the necessary remediation and to enter into a buyer/seller agreement to accomplish it. Doing so will most likely cause a significant delay in the transaction and necessitate a significant amendment to the agreement of sale.

Importance of the Plan

Typically, it is in the interest of both the buyer and the seller that the agreement of sale specify a remediation plan agreed to by the buyer and the seller for which DEP approval will be sought in the buyer/seller agreement and, in particular, the specific remediation standard proposed to be attained, including any engineering or institutional controls.

From the buyer's perspective, without a specific cleanup plan and standard, it is difficult to know whether the property will accommodate the buyer's intended future use following cleanup.

Although in theory a buyer/seller agreement lacking such specificity would be advantageous to the seller in that it would allow the seller to select the least expensive cleanup available under Act 2, the seller also would not be able to take advantage of the buyer's intended future use. Moreover, having a detailed DEP-approved cleanup plan will allow the seller to obtain a reliable cost estimate. The seller may also be able to obtain additional cost savings by putting the cleanup plan out for bid by multiple consultants or obtain a lump-sum price. A reliable cost estimate is also necessary if the buyer and the seller are to allocate costs between them.

The buyer's foremost concern after closing is likely to be that the seller in fact satisfactorily complete the agreed-upon cleanup. Although the buyer will at that point have a covenant not to sue, the buyer may not be able to develop the property unless the cleanup is complete. That the buyer/seller agreement obligates the seller to the DEP to complete the cleanup provides some protection to the buyer in this regard. In addition, the buyer will typically want to hold back or escrow a portion of the purchase price reflecting an amount exceeding the cleanup cost estimate and maintain a role in the disbursement of those funds to verify conformity to the remediation plan and control costs.

The buyer and seller can also share the cost of the cleanup through a separate agreement, provided that one of them is designated the remediating party in the buyer/seller agreement. The seller's foremost concern after closing will undoubtedly be completing the remediation at the estimate price.

Three Considerations

In summary, a buyer/seller agreement is not advantageous in all circumstances in which a buyer and seller have identified contamination. From the standpoint of timing, it may be possible to accomplish a simple, inexpensive cleanup and obtain Act 2 liability protection without a buyer/seller agreement. Although a more complicated and expensive cleanup may warrant a buyer/seller agreement, the buyer and the seller should reach agreement on three points before determining that obtaining a buyer/seller agreement is their best course of action.

First, the parties should be confident that they have identified all the significant existing contamination on the property so as to minimize the risk of unidentified contamination that will not be covered by the Act 2 liability protection ultimately obtained. This is particularly important for the seller, which will not receive a covenant not to sue from the DEP upon execution of the agreement.

Second, the parties should be confident that the cleanup plan will, in fact, attain the selected remediation standard and is consistent with the buyer's intended use, to ensure that the cleanup will be consistent with the buyer's intended use and so that both parties can take advantage of cost savings potentially resulting from engineering and institutional controls based on that use.

Finally, the parties should prepare a detailed cost estimate for the remediation so that they can be confident they will be able to afford the remediation in the context of the transaction.

Although buyer/seller agreements offer significant benefits, they do not protect the parties from all risks relating to environmental contamination. Act 2 liability protection and the covenant not to sue provided in the buyer/seller agreement are both limited to liability under state law for identified contamination. In addition, the DEP can require additional remediation if the remedy fails or, following completion of remediation, if exposure conditions change from those identified in the final report.

Accordingly, the buyer may want to negotiate for representations and an indemnification addressing unidentified contamination and federal liability. Protection against the risk of remedy failure can be obtained through an indemnification by the remediating party and, in some circumstances, through insurance. The most effective protection against these risks, however, is likely to be a high degree of confidence that the remediation will, in fact, attain the selected standard.

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New EPA Due Diligence Rule Likely to Increase Disputes

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Currently when an environmental assessment (commonly known as a Phase I) is conducted for a potential purchaser prior to acquisition, there is generally little interaction between that purchaser and the consultant performing the assessment.

The consultant may ask its client to fill out a questionnaire requesting basic information regarding the property being acquired, but in most cases whether the client actually fills out the questionnaire has no influence on whether the consultant will complete and provide the assessment report or whether the consultant is considered to have performed its contractual obligations satisfactorily.

As a result of a new rule promulgated by the Environmental Protection Agency that will become effective Nov. 1, 40 CFR Part 312, for the first time consultants preparing assessment reports will be required to certify that they prepared the assessment in accordance with that rule. They will also be required to identify any required information they were not able to obtain and the significance of that information. The client will be required to provide certain information to the consultant, some of which the client may be reluctant to provide. The consultant's certification, in turn, will in part be dependent on the information the client is required to provide. These new requirements are bound to increase the number of disputes that arise between the client and consultant during assessments and the claims they assert against each other afterward.

Brownfields Amendments

The new EPA regulation was mandated by amendments to the federal Superfund Law passed in 2002. Those amendments were intended to promote development of contaminated properties, commonly referred to as brownfields, in three ways: adding expended defenses for purchasers of contaminated property; creating a bar on enforcement by EPA of cleanup requirements at sites that complete a state

voluntary cleanup program; and providing significantly increased federal funding for investigation and cleanup of brownfields properties.

One of the expanded defenses, referred to as the "bona fide purchaser defense," provides a defense for purchasers of property, subject to certain post-acquisition obligations, who perform "all appropriate inquiry" with respect to the property's environmental condition, even with respect to contamination identified by that inquiry. The regulation coming into effect on Nov. 1 defines what constitutes "all appropriate inquiry."

Existing Standard Practice

For several years the generally accepted standard with respect to environmental due diligence was one developed by the American Society of Testing and Materials known as ASTM 1527. The vast majority of lenders currently insist on the performance of an assessment consistent with ASTM 1527 before extending financing on commercial property. After Nov. 1, the EPA's "all-appropriate inquiry rule" will certainly become the standard practice in the field.

The "all appropriate inquiry rule" does not differ dramatically from ASTM 1527. The same types of information will be gathered by the same means. Rather, some areas will receive added emphasis, some will be defined in more detail and some things that were optional previously will become obligations.

Among the more significant revisions to the existing practice not addressed elsewhere in this article are: a new definition of an "environmental professional" who must supervise the inquiry, based on minimum levels of education and experience; a new limit on the time period the report is considered valid; an added emphasis on conducting interviews; and an expanded coverage period for record searches regarding prior use of the property.

Professional Certification

The remainder of the article will address the new features contained in EPA's that are likely to increase disputes between consultants and clients. The first of these is the requirement that the environmental professional execute a certification. The rule specifically mandates the following language for the certification: "[I, We] have developed and performed the all-appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312."

The requirement to execute this certification and the potential for liability in the event there is any uncertainty about compliance with the rule will undoubtedly make consultants more cautious in their approach to conducting the inquiry. Consultants are likely to feel the need to document their efforts to locate relevant information and to be more diligent in their efforts with the result that assessments take more time to prepare and cost more.

As many assessments are performed in anticipation of a specific closing date, clients are likely to continue to put pressure on consultants to issue assessment reports according to a certain schedule, even if the consultant feels the need to include certain information it may be having difficulty obtaining. Add to the equation the obligation now placed on the client to provide certain information, as described

below, pressure will be applied in both directions; i.e., the client may demand the report to be issued by a certain date while the consultant counters that the report cannot be completed by that date (without data gaps being identified, as described below) because the client has not provided the required information.

Identify Data Gaps

The EPA rule places greater emphasis on identification of missing information and makes it subject to a certification. In addition, the consultant is required to assess the significance of the missing information. As a result, consultants are likely to be more inclined to identify potentially relevant information as a data gap, rather than risk a claim based on improper certification. Some of that missing information may be information the client is required to provide to the consultant.

Clients, for their part, will prefer that data gaps not be identified in the report, both for their own sake and because, if financing is being used for the transaction, the lender will review the report and will be inclined to require that anything identified as a data gap be addressed and the identification of the gap removed from the report. Even when there is agreement among the parties that a data gap exists, there may be disagreement regarding how the report should describe its significance. Disagreements regarding the identification of data gap will likely lead to lengthy negotiations between consultants and clients regarding their characterization and ultimately to more disputes.

Client's Obligations

As a result of the new EPA rule, for the first time clients commissioning an environmental assessment will be required to provide certain information to the consultant performing the assessment. There are three major categories of information the client is required to provide to the consultant: a title search, the relationship of the price to be paid to the value of the property if clear, and any special knowledge of the environmental condition of the property.

The ownership history of the property was regarded by ASTM 1527 as relevant information, but in fact a title search was rarely included in an assessment report. The reason title searches were not included was largely a function of the timing of the overall due diligence process. Title searches can be helpful to an environmental assessment in two ways.

First they are a means of determining whether a lien, such as is authorized to recover outstanding response costs by the federal Superfund statutes and many state counterparts, has been filed against the property. Such liens are extremely rare, but for obvious reasons their impact can be quite significant. Second, a chain of title may provide insight regarding past operations having the potential to have caused contamination. Although it is currently standard practice to obtain title searches (albeit not necessarily a chain of title) as part of due diligence, they typically are not obtained until the end of due diligence when the buyer is confident the acquisition will proceed. To satisfy the new EPA all appropriate inquiry rule, title searches will instead now need to be conducted at the beginning of due diligence.

The relationship of price to value if clean may be the issue that provokes the most disputes between

clients and consultants. Even when the parties to a transaction acknowledge to each other that the price of the property being assessed was reduced because of environmental conditions, they may be reluctant for others to know. Moreover, when prices are negotiated, unless the seller declares that the price was reduced because of environmental conditions, it is difficult for the buyer to know that the seller agreed to a certain price for that reason.

The buyer only knows what offers it made and the price ultimately agreed to. Would the buyer be obligated to identify a reduced price to the consultant if the buyer was already aware at the time price was negotiated that environmental issues may exist with respect to the property being acquired and took this into account when making the offer, but never directly discussed those issues with the seller? Particularly in the absence of an appraisal, which the new EPA rule does not require, how does the buyer know that the property would be worth more if environmental issues were not present?

Under the new EPA rule the consultant must not only ask the client whether the price has been reduced based on environmental issues, but have enough confidence in the answer to execute the required certification without identifying the lack of information regarding the relationship of price to value as a data gap. In some circumstances the consultant may independently have, or during the assessment may acquire, relevant knowledge that may cause the consultant to question whether the client has been entirely forthcoming.

The consultant wishing to please clients and increase the odds of getting fully paid may accept the client's unhelpful response at face value, not identify a data gap and execute the required certificate, while the consultant motivated to reduce the risk of later claims based on improper certification may confront the client and/or insist on identifying a data gap in the report.

Unintended Consequence

Congress, in mandating the adoption of, and the EPA, in drafting the new all appropriate inquiry rule, intended to create a uniform practice that would facilitate consistent, high-quality and reliable environmental assessments. The new requirements addressed in this article were viewed by the drafters as reasonable means to achieve that end.

When assessing the likely impact of the new all-appropriate inquiry rule, many, including the drafters, have noted that the rule is likely to increase (hopefully marginally) the price and time required to perform environmental assessments. By contrast, few have recognized that the rule is likely to have the unintended consequence of increasing disputes between clients and consultants.

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Addressing Vapor Intrusion During Environmental Due Diligence

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Much has been written during the past several months, including by this author, regarding the United States Environmental Protection Agency's impending all appropriate inquiry rule, and appropriately so.

That rule, which will be effective Nov. 1, will establish a new standard practice for environmental due diligence. While the all appropriate inquiry (AAI) rule will not dramatically change the overall process for due diligence or the types of information to be searched and relied on, it will change several important details regarding how due diligence is performed. It is critical that prospective purchasers of property comply with the new standard or they will jeopardize their ability to assert the bona fide purchaser defense available under federal law and risk their Phase I environmental assessment report being rejected by their lender.

It is also critical, however, that prospective purchasers keep in mind that Phase I environmental assessments do not ordinarily address several important issues for environmental due diligence. This has been true under the prevailing American Society of Testing and Materials (ASTM) 1527 standard, and will continue to be true under the new AAI standard. This is because both the existing and the new standard focus on issues relevant to liability for contamination and establishing defenses to liability; they do not address other environmental issues potentially relevant to the value of the property and the client's ability to develop it as they hope.

Common examples of such issues are radon, asbestos, lead-based paint, wetlands and other protected areas. Many developers and lenders are used to considering these issues during due diligence and include them in their standard scopes for environmental assessments. Another issue that has received increasing attention recently and is likely to soon become a standard part of Phase I assessments in vapor intrusion.

What is Vapor Intrusion?

Certain chemicals when released to soil or groundwater in liquid form at sufficient concentrations will volatize, producing vapors that migrate upward through the soil. If the distance to the surface is short enough, those chemicals may be emitted to the air. If a structure is located above the soil or groundwater contamination, particularly a structure with a basement, the vapors may enter it through cracks or seams. Once vapors enter a basement, typically their path is blocked and they will collect there. If the vapors continue to accumulate, they may reach concentrations that pose a risk to the health of people breathing the air. They may even reach concentrations that pose a risk of fire or explosion.

Vapor intrusion is most typically associated with petroleum compounds, volatile organic compounds such as solvents, and organic waste. Consequently, vapor intrusion is most commonly an issue at or near gas stations, petroleum terminals, storage facilities, refineries, landfills, manufacturers of metal components and facilities where these compounds have been disposed of, both active ones and those that have been closed. Vapor intrusion can even be an issue at facilities where a cleanup was performed without consideration of the potential for vapor intrusion.

Since even governmental agencies have only recently begun to consider the potential for vapor intrusion, there are many properties that fall in this category. Where the potential for vapor intrusion has been identified, the risk of harm is often relatively easy to address. As with radon, the key is to prevent the accumulation of vapors at dangerous levels. Short of remediating the soil and/or groundwater contamination from which the vapors emanate, vapor intrusion can be addressed by installing barriers and vents around subsurface structures or venting the air within them. If the potential for vapor intrusion is recognized at the time of the design and construction of the subsurface structure installed such devices it is relatively easy and inexpensive. Obviously doing so in an existing structure is more difficult and expensive.

Remediation Policies

To date, vapor intrusion has been addressed almost entirely in the context of remediation of subsurface soil and/or groundwater contamination. Whereas in the past remediation was considered complete when the appropriate concentrations were attained in the contaminated media, today it is likely that the party conducting remediation will be required to determine the potential for vapor intrusion (often referred to as a pathway) and, if necessary, implement the types of remedial measures described above, before the overall site remediation will be considered complete.

The EPA adopted a vapor intrusion policy in 2002 and several states, including Pennsylvania, New Jersey and New York, have since followed suit. These are all policies; i.e., there is no independent statutory or regulatory requirement for the vapor intrusion pathway to be considered and no governmental agency can institute an enforcement action against a property owner or remediator for failing to address vapor intrusion. There is also no requirement that sites where cleanups were completed before these policies were instituted be evaluated for the potential of vapor intrusion. Rather, the property owner/remediator will not be able to obtain agency approval of the cleanup they are conducting without addressing the vapor intrusion pathway. In a situation where a cleanup must be

conducted in order to redevelop the property this may be tantamount to a requirement.

The state policies have many similarities, but a few important differences. All identify a distance from a subsurface source of volatiles, typically 100 feet, as a trigger of evaluation of the vapor intrusion pathway. All, except New York, establish risk-based screening levels based groundwater and soil gas results. All, again except New York, allow for a risk-based approach to remediation, meaning that the general type of use of the structure and occupancy of basements are considered in determining target remediation levels. All require evaluation of preferential pathways and regard a winter sampling event to be a worst-case scenario.

New York, compared to other states, places a greater emphasis on actual indoor air sampling results rather than allowing use of soil and groundwater screening levels and modeling. Both New York and New Jersey require sampling for a longer list of compounds than other states.

Due Diligence

To date very little attention has been paid to the potential need to address vapor intrusion during environmental due diligence. However, considerable momentum is building in support of an effort to make evaluation of the vapor-intrusion pathway part of customary due diligence. A recent experience illustrates why in some circumstance doing so is prudent.

A client was considering purchasing a large suburban office complex. The Phase I report the client commissioned did not identify any recognized environmental conditions and the client was ready to complete acquisition. However, the Phase I report identified a former government facility adjacent to and upgradient of the property that had created a large plume of solvents in groundwater.

As part of its investigation the government agency in charge placed a monitoring well at the far downgradient boundary of the property being considered for acquisition. Analysis of samples from that identified levels of a solvent that were well in excess of the applicable remediation standard. Investigation was continuing and it was expected that additional monitoring wells would be placed on the property in question.

The Phase I report did not identify the solvent plume as a recognized environmental condition, because the responsible agency was obligated to complete any necessary cleanup. Since the property was connected to public water, the report concluded that the plume posed no risk to the property and did not recommend any further investigation. The Phase I report did not address the potential for vapor intrusion whatsoever.

Pursuant to both existing practice and the AAI rule the conclusions in the Phase I report were appropriate. The client could have proceeded with the acquisition, based in part on the Phase I, only to later discover hazardous levels of vapors resulting from the solvent plume in the basements of the office buildings. As owner of the property, the client would potentially have been liable for any damages suffered by occupants of the building and likely would have needed to incur the expense of installing venting systems to dissipate the vapors to safe levels.

Fortunately, the client requested that its consultant evaluate the vapor-intrusion pathway. The consultant was able to model the vapor levels likely to occur in the basements of the office buildings based on available data and conclude that no risk existed. The analysis was quick and inexpensive. As a result, the client was able to proceed based on real information.

Impending ASTM Standard

Because of scenarios such as this one, the ASTM has established a task group to develop a standard for assessing vapor intrusion in the context of property transactions. It is hoped that a draft will be available later in 2006 and a final standard during 2007. The focus of the task group will be to "establish where there is reasonable probability vapor intrusion presents an environmental risk and liability, and then provide guidance for alternative courses of action."

The goal of ASTM is to develop a reasonable approach that does not impose an undue cost burden or materially increase the time required for an assessment, while identifying genuine issues through a screening process like those developed for the state policies described above.

Such an ASTM standard will undoubtedly be of great assistance to clients and consultants conducting Phase I environmental assessments of properties potentially containing subsurface volatile contamination. In the meantime, it is important for prospective purchasers to keep in mind that neither the existing ASTM standard nor the pending EPA AAI standard address several issues potentially relevant to the value of and ability to develop property. In particular, if based on former and adjacent uses the potential for subsurface volatile contamination is present, it is important to evaluate available information to determine whether a risk of vapor intrusion exists.

If the potential for subsurface volatile contamination is present, but the Phase I report does not address the vapor intrusion pathway, the client would be well served to ask the consultant to evaluate it. Often a simple, quick and inexpensive analysis will allow the client to avoid or address a potentially significant liability.

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Environmental-Use Restrictions And Buyer's Due Diligence

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As environmental-use restrictions have become more popular in recent years, it has become more common for sellers and buyers to need to deal with them in the context of transactions.

Increasingly, buyers need to decide whether they can live with a use restriction before proceeding with a purchase. While environmental practitioners are quite familiar with such restrictions, clients frequently are not.

At one end of the spectrum, the buyer's property redevelopment plans may be part and parcel of a remediation plan for the property that includes a use restriction and the new development to be built by the buyer will serve as the control measure required by the restriction.

At the other end of the spectrum, the buyer may only become aware during due diligence, or even after closing, of a restriction that prevents or significantly limits planned development of the property.

Wherever the property is situated along this spectrum, it is critical that the buyer evaluate in detail how the restriction will affect their plans for the property.

Use restrictions reflect the exposure reduction theory of environmental remediation. If exposure to contamination is eliminated or sufficiently reduced, according to this theory, residual contamination can remain in place and need not be actively remediated, even if the level of remaining contamination exceeds otherwise applicable remediation standards. Relying on a use restriction, rather than conducting remediation to reduce the level of contamination to attain an applicable remediation standard, typically has significant cost advantages for the party performing the remediation. As a result, many sites are remediated relying on use restrictions, and thereafter redeveloped, that otherwise would not be remediated due to the high cost of doing so.

The most common examples of use restrictions are a prohibition on the use of groundwater, and a requirement for an impermeable cap over soil contamination, together with a prohibition on disturbance of the subsurface. At many properties these use restrictions are easy to implement, and do not significantly adversely affect development of the property or the property's value. In urban areas public water is likely to be available so that there is no need to use groundwater in any event.

The fact that the property sits on top of contaminated groundwater makes little difference to its use or value. Buildings, paving for parking lots and clean topsoil with landscaping, all common elements of property redevelopment, serve nicely as caps over soil contamination.

Caps become problematic for the developer, however, if large-scale subsurface work is required in the very area where the residual soil contamination is located. Even where development plans fit well with the use restriction, the buyer needs to be aware that it will have the burden of explaining the need for the use restriction to lenders and future purchasers and is likely to be required to manage the property in a way that is consistent with the use restriction for as long as they own the property. For instance, whenever excavation of the subsurface occurs the buyer will need to either verify that the excavation is outside the area of residual soil contamination or manage any excavated soil consistent with the type and level of contamination it contains and re-install the affected area of the cap.

State Requirements Vary

Over the last 10 to 20 years most states with environmental remediation programs, including Pennsylvania and New Jersey, have come to accept exposure elimination as a remediation principle. Most specifically provide for "site-specific" cleanups or "risk-based" cleanups as an alternative to cleanups that achieve listed soil and groundwater remediation standards. Nearly all such state programs require that a plan for "site-specific" or "risk-based" cleanup be approved prior to implementation.

States vary as to the details of implementation, however. In Pennsylvania, while the cleanup plan must be approved and the use restriction must be described in the cleanup plan, the actual language of the restriction need not be approved nor must recording of the restriction with the deed for the property be verified by the state. In contrast, New Jersey provides form deed restrictions, requires approval of the documents and recording with the deed and submission of periodic maintenance certificates thereafter.

As an indication of the popularity of use restriction, as of September 2005 a total of 424 cleanup plans submitted to Pennsylvania pursuant to its voluntary cleanup program at least in part relied on use restrictions.

Evaluate a Cleanup

Despite the increasing popularity of use restrictions, many prospective purchasers assume that once they determine that a cleanup has been completed and approved, no further due diligence is necessary. On many occasions I have been told by a prospective buyer (who in many instances no doubt has been told this by their seller) something to the effect that the seller has obtained a no further action letter, so

there are no environmental issues to be addressed. Unfortunately, it is not that simple. There, of course, is no way to know how often buyers proceed on this basis without consulting with environmental counsel.

It is critical that the buyer evaluate how the cleanup, in particular the cleanup standard attained, any risk or exposure assumptions used and any use restrictions the cleanup relied on, will affect their planned use of the property. Otherwise the buyer may discover that the liability protection obtained based on the cleanup will not apply to the property following redevelopment or that the use restrictions relied on will interfere with the buyer's intended redevelopment.

For example, if the cleanup was performed to a nonresidential standard and the buyer is contemplating residential development, the buyer will need to conduct additional cleanup, probably at its cost, and will not have the benefit of the liability protection obtained by the seller unless it does so. Similarly, a use restriction may prevent the buyer's plans to construct a playground, or storm water retention basin or dig a basement where a cap and residual contamination are located and excavation is prohibited, again unless additional cleanup is performed.

On the other hand, if the seller and buyer have coordinated their activities, residual soil contamination will only be located in areas where the buyer plans to build slab-on-grade foundations or parking lots.

Of course, in order for a buyer to account for a use restriction in its development plans, it must be aware that the use restriction is in place or is planned. It should be rare that a seller fails to inform a buyer of a use restriction the seller itself has instituted or will institute. It is not so difficult, however, to imagine a buyer who is several links down the ownership chain from the other who instituted the restriction purchasing property without knowledge of the restriction.

Recording of Restrictions

For this reason, use restrictions typically are included in the deed for the property. Certainly it is to the advantage of the owner who instituted the use restriction that compliance with the restriction be maintained by subsequent owners. To the extent the restriction is violated the liability protection the owner obtained based in part on the use restriction will be jeopardized and the owner will be vulnerable to remediation claims.

Nevertheless, it is not uncommon for use restrictions contained in an approved cleanup plan not to make their way into the deed. Typically this occurs simply due to lack of follow-through - the people working on the cleanup plan don't tell the people preparing the deed.

As referenced above, New Jersey has addressed this problem by requiring that the Department of Environmental Protection approve the actual deed restriction as part of the cleanup plan. Many other states, including Pennsylvania, do not have such a requirement. In those states there is a real risk of buyers unwittingly acquiring property where a cleanup relying on a use restriction had been conducted and thereafter conducting activities there resulting in exposure to residual contamination.

Moreover, to the extent there is uncertainty regarding whether use restrictions will be enforced

property, owners may be reluctant to perform a cleanup based on a use restriction and, given the alternative of a much more expensive cleanup, may therefore decide not to perform a cleanup at all.

Obviously the scenario described above would be a bad situation for all concerned, including the public. It is also easily avoidable. The National Conference of Commissioners on Uniform State Laws has drafted a Uniform Environmental Covenants Act, which provides a framework for implementation and enforcement of environmental use restrictions and eliminates any lingering uncertainty as to their enforceability.

A version of the Uniform Environmental Covenants has been introduced in the Pennsylvania state legislature. It would require that Pennsylvania Department of Environmental Protection (PADEP) approve any restriction that is relied on as part of a remediation plan and give PADEP authority to enforce restrictions. It would also require PADEP to establish and maintain an environmental covenant registry.

Ensuring that environmental use restrictions are disclosed and enforced should encourage private parties to rely on them still more in the future and thereby encourage more cleanups.

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N.J.'s Global Warming Statute: What Will Be Its Practical Impact?

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There has been a great deal of activity with respect to global warming among states during the last few years intended to fill the perceived gap resulting from the lack of action on the issue at the federal level.

That trend appears likely to accelerate following the decision of the U.S. Supreme Court in *Massachusetts v. Environmental Protection Agency*, ruling that carbon dioxide emissions can be regulated pursuant to the federal Clean Air Act and compelling the United States Environmental Protection Agency to evaluate whether carbon dioxide and other greenhouse gasses are pollutants that endanger public health and welfare and therefore require such regulation.

In the wake of *Massachusetts*, in addition to developing their own programs states attempting to put pressure on the USEPA to establish with respect to greenhouse gas emissions the same type of administrative machinery that presently exists for other Clean Air Act pollutants. New Jersey reasserted its position as a leader among states with respect to addressing global warming by adopting the Global Warming Response Act on June 18. This article will summarize this act, compare it to the other recent state and regional activities regarding global warming, with focus, in particular, on measures intended to reduce greenhouse gas emissions from individual facilities.

In view of the actions by several states and regional organizations and the fact that greenhouse gas emissions are already regulated in Europe, most observers, including many major American corporations that emit greenhouse gases, have concluded that requirements compelling reductions in levels of greenhouse gas emissions, similar to those already applicable to emissions of other pollutants, are inevitable. It is unclear, however, whether such requirements will be imposed primarily through action at the federal level, which is the typical pattern for regulatory action to reduce our pollution, or at the state or regional level.

The focus of most measures enacted by states to date has been monitoring emissions of greenhouse

gases, setting emission reduction targets, encouraging reduced fuel and energy consumption increased use of renewable energy and market-based "cap and trade" emission reduction programs. The question of how the emission reduction targets are to be achieved is for the most part not addressed. New Jersey's new Global Warming Response Act, by contrast, takes the first tentative step toward imposing the same type of technology requirements and emissions limitations that are the primary means of reducing emissions of other air pollutants. Time will tell whether the New Jersey act will be a trailblazer in this regard or serve primarily to prod action regarding greenhouse gas emission reductions by the EPA.

Prior to adopting the Global Warming Response Act, New Jersey was one of the original participants in the Regional Greenhouse Gas Initiative, which began in 2003. The nine original members of Regional Greenhouse Gas Initiative consisted of all states north and east of New Jersey. Subsequently Maryland has joined Regional Greenhouse Gas Initiative and Pennsylvania, the District of Columbia and eastern Canadian provinces have observer status.

The members of Regional Greenhouse Gas Initiative have entered into a memorandum of understanding regarding developing a multistate cap-and-trade program for greenhouse gas emissions. Initially this program will address carbon dioxide emissions from power plants in the participating states.

How an individual source of pollutants achieves the reductions necessary to meet its allocation is left up to it, and, in particular, it may do so by purchasing credits from facilities with greenhouse gas emissions below their allocated level. The Regional Greenhouse Gas Initiative's memorandum of understanding establishes a regional budget for carbon dioxide emissions from power plants having a rated capacity of at least 25 megawatts. That annual budget is then divided among the member states, with each state being responsible for allocating the budgeted amount among its facilities. Regional Greenhouse Gas Initiative has developed a model rule for a cap-and-trade program to be adopted by its members.

More recently, in early 2007 six western states, California, New Mexico, Oregon, Washington, Arizona and Utah, established a Western Regional Climate Action Initiative. As part of the initiative those western states have agreed to set a regional greenhouse gas emission reduction target, establish a market-based system, such as a cap-and-trade program, covering multiple economic sectors as a means of meeting the selected target, and establish a greenhouse gas registry and tracking system.

California has long been a leader among states in addressing global warming. Among the measures California has adopted, in addition to being part of the West Regional Global Action Initiative, are setting greenhouse gas emission target; passage of a state law requiring reduction of greenhouse gas emissions from new vehicles; creation of greenhouse gas inventory and registry; and adoption of a renewable energy portfolio standard calling for 20 percent of power generation by renewable fuel by 2017.

In addition, a California Climate Action Team, composed of representatives from state agencies with authority for environmental and energy matters, has been created to, among other things, evaluate and develop emission reduction measures to meet the targets and report on progress toward meeting them. Most of California's initiatives are contained in the California Global Warming Solutions Act, enacted in

September 2006. That act requires the California Air Resources Board to approve a scoping plan by Jan. 1, 2009, for achieving maximum technologically feasible and cost effective reductions in greenhouse gas emissions by 2020 and adopt regulations by Jan. 1, 2011, setting greenhouse gas emission limits applicable to individual facilities and requiring specific emissions reduction measures to achieve the target.

Consistent with the measure adopted to date by other states and regional cooperative organizations, the New Jersey act focuses to a large extent on emission reduction targets, emissions monitoring and energy standards. Many aspects of the New Jersey act parallel initiatives adopted by California.

First, the act sets emission reduction targets. By Jan. 1, 2020, the level of greenhouse gas emissions must be reduced to a level equal to the level of greenhouse gas emissions that occurred in 1990.

By Jan. 1, 2050, the level of greenhouse gas emissions must be below 80 percent of the level established for 2006. The facilitate meeting these targets, within one year of the act's passage the New Jersey Department of Environmental Protection is required to establish inventories of the 2006 and 1990 levels of greenhouse gas emissions. In addition, the N.J. DEP is required to establish by Jan. 1, 2009, a monitoring and reporting program for greenhouse gas emissions, pursuant to which all significant sources of such emissions will be required to monitor and report their existing emissions and the level of their emissions annually thereafter. The N.J. DEP will also be required to adopt rules regarding reporting of greenhouse gas emissions by the fossil fuel production and handling, electricity generation and gas industries.

Second, by June 30, 2008, the N.J. DEP is required to prepare a report recommending the measures necessary to reduce the greenhouse gas emissions to achieve the 2020 target level and by June 20, 2010, report recommending measures necessary to achieve the 2050 target level. While the New Jersey act's requirement is to prepare a report, rather than adopt regulations, as is the case with the California act, this deadline is two and one-half years earlier than California's. The requirement to recommend emission reduction measures will be discussed further below.

The remaining actions required by the act are assigned to the New Jersey Board of Public Utilities (BPU) and relate to promoting energy efficiency and parallel measures adopted in other states.

The BPU is required to establish a disclosure form for energy suppliers regarding its mix of fuels and its greenhouse gas emissions to appear on each customer's bill. Clearly, it is hoped that armed with this information, consumers will choose energy sources emitting lower levels of greenhouse gasses. Second, the BPU is required to adopt and "emissions portfolio standard" for energy suppliers, that shall require specified levels of renewable energy usage. The standard is also required to address means of mitigating "leakage."

The BPU is also required to develop a net metering standard for energy suppliers that will offer metering at rates that are not discriminatory to small generators of renewable forms of energy. Finally, the efficiency portfolio standard may require each utility to implement efficiency measures that reduce usage in New Jersey by 2020 to a level that is 20 percent below the usage otherwise projected.

The N.J. DEP has one year from the New Jersey act's passage to recommend measures to reduce greenhouse gas emissions sufficient to achieve a level in 2020 equal to what the level had been in 1990. This is indeed a daunting task. In this regard New Jersey, as a result of the act, will not only be a leader in the field, but will be breaking new ground in at least two respects. The act contains no guidance regarding what these measure might be or how they should be developed.

The inventory of 2006 and 1990 emissions that the act requires the N.J. DEP to develop will not be completed until these recommendations are due.

Consequently when identifying particular measures N.J. DEP will not have the benefit of knowing its numerical target. While the technology of greenhouse gas emission reduction is beyond the scope of this article and it an in-depth discussion of it beyond the capability of this author, suffice it to say that work has only recently begun on developing technology to capture and sequester greenhouse gasses, particularly carbon dioxide, and that such technology has not yet been demonstrated in practice to be reliable.

N.J. DEP will also need to perform its evaluation without reference to regulation or guidance published by the EPA, since EPA had made a conscious decision not to designate greenhouse gasses as an air pollutant and accordingly has not developed the regulations and detailed guidance documents that it has for the "pollutants" it has designated pursuant to the federal Clean Air Act.

Preparing such documents even for a more typical air pollution regulatory situation, let alone a cutting edge one such as this, is a task state environmental agencies are rarely able to take on. Except in very limited circumstances, when a state imposes an emission limitation or technology standard on a source of air pollution it does so relying on requirements developed by the EPA or a modified version of those requirements, or at the very least materials prepared by EPA provide context for the state's selection of requirements.

The prospect of New Jersey writing emission limitations or technology standards wholly on their own, without the background and context provided by EPA documentation must make facility operators in those states somewhat nervous.

Depending on how regulatory practice with respect to greenhouse gas emissions evolves, however, the scenario described above may never occur. It is important to keep in mind that the New Jersey act only requires a report recommending measures to reduce greenhouse gas emissions. Certainly one of the primary purposes of the report is to influence the ongoing debate regarding how to address the pollutants thought to cause global warming.

While such requirements are likely inevitable and facility operators would be wise to anticipate them, and evaluations such as will be required by the act undoubtedly accelerate their development, their actual adoption is still some time in the future. But once the EPA, in the wake of *Massachusetts*, turns its attention to emission reduction measures for greenhouse gasses, it may find that some of the groundwork has already been laid by New Jersey.

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