New York Environmental Laws Affecting Commercial Leasing Transactions

By Larry Schnapf

This is the second of three articles discussing environmental laws affecting commercial leasing transactions. The first installment appeared in the May 2015 issue of the Journal.

New York Inactive Hazardous Waste Disposal Site Law

Under the State Superfund (SSF),[1] the New York State Department of Environmental Conservation (NYSDEC) is authorized to establish a registry of sites contaminated with hazardous waste.[2] The NYSDEC must notify owners of sites that are proposed to be placed on the registry. Owners or operators of sites that are listed on the registry may petition the NYSDEC to have the site de-listed or to have the classification changed. The NYSDEC is required to convene an adjudicatory hearing within 90 days of receiving a de-listing petition and provide at least 30 days' notice of a scheduled hearing. The NYSDEC is required to issue a ruling within 30 days after the hearing.[3]

If the NYSDEC determines that a site poses a "significant threat" to the environment, it may order the owner of the site and/or any other person responsible for the disposal of the hazardous waste to develop a remedial program acceptable to the NYSDEC and to implement the remedial program.[4] However, the NYSDEC cannot issue a cleanup order until after the alleged responsible party is provided with a hearing. Moreover, a party who has been issued an order after an administrative hearing may seek judicial review of that decision.[5] If the NYSDEC cannot identify or locate the responsible person, the agency may implement the remedial action.

Larry Schnapf is the principal of Schnapf LLC and an adjunct professor at New York Law School where he teaches Environmental Issues in Real Estate and Business Transaction. He is author of *Managing Environmental Liability in Transactions and Brownfield Redevelopment*, published by JurisLaw Publishing, serves as co-chair of the NYSBA brownfield task force and is a member of the cabinet of the Environmental Law Section.

The categories of potentially responsible parties (PRPs) under the SSF are similar to those under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) since PRPs include anyone who might be liable under a statutory or common law liability scheme. The SSF has the same third-party and innocent landowner defense, but no bona fide protective purchasers (BFPP) or contiguous property owner (CPO) protections. However, because the NYSDEC does not have authority to seek cost recovery under the SSF, the agency and private parties use CERCLA and common law theories of liability to seek reimbursement of their response costs.

If the NYSDEC determines that contamination at a site poses a significant threat and therefore is eligible for listing, a purchaser/lessor of the site might be able to defer the listing by enrolling the site in the state Brownfield Cleanup Program (discussed below). However, this must be done before a final listing decision is made.

New York Oil Spill Law

Petroleum-contaminated sites comprise the largest category of contaminated sites in New York. Indeed, there are approximately 15,000 to 20,000 new petroleum spills each year in New York. Because of the number of sites that are potentially subject to article 12 of the Navigation Law,[6] the Oil Spill Law may be the most significant source of liability to owners and operators of commercial properties in New York.

The Oil Spill Law prohibits the unpermitted discharge of petroleum into the waters of the state or onto land from which the petroleum might drain into state waters.[7] Dischargers of petroleum are strictly liable without regard to fault for all cleanup and removal costs, as well as direct and indirect damages.[8] The statute does not define the term "discharger" and the courts have broadly interpreted the term so that it has been applied to owners and possessors of land. However, mere ownership of contaminated land is not enough, by itself, to impose liability on a property owner.[9]

The NYSDEC is authorized to clean up discharges of petroleum and may enter contaminated property without first obtaining a warrant or other court order.[10] Usually, the NYSDEC will first offer the alleged discharger an opportunity to implement a cleanup by entering into a short-form Stipulation Agreement (STIP); the party does not admit liability and will not be assessed any penalty. If the discharger declines to enter into the STIP, the NYSDEC may commence formal administrative proceedings to require clean up and collect fines for failure to report or to clean a contaminated site. Frequently, these cases are settled using a traditional consent order but the settling party will have to pay fines, which can be significant.[11]

For more complex remediation projects, the NYSDEC may require the responsible party to enter into a long-form consent order. The long-form order is drafted to address site-specific issues, and its terms are subject to negotiation. While the STIP will address only the cleanup portion of a spill site, the long-form order may address other aspects of the situation, including possible fines and/or penalties.

Some cases have held liable as dischargers owners who unwittingly purchased property with abandoned underground storage tanks (USTs) that had previously leaked.[12] The leading case on liability of lessors under the Navigation Law is *State v. Green*.[13] This case involved a discharge of oil from a 275-gallon aboveground storage tank (AST) owned by a tenant at a mobile home park. In holding the lessor liable for the cleanup costs, the N.Y. Court of Appeals ruled that a landowner could be liable as a discharger where it had both control over activities occurring on the property and reason to believe that its tenants would be using petroleum products. The Court found that the owner of the trailer park had through its lease the ability to control potential sources of contamination on its property, including the maintenance of a 275-gallon AST, and that the owner's "failure, unintentional or otherwise, to take any action in controlling the events that led to the spill or to effect an immediate cleanup renders it liable as a discharger."

In *State of New York v. Speonk Fuel Inc.*,[14] the Court of Appeals reaffirmed that liability may be imposed on property owners not just for active conduct, but also based on their "*capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill.*"[15] As a result, the court found Speonk liable as a discharger because it knew about the spill, but failed to clean it up.

A number of appellate courts have held lessors liable for tanks operated by their tenants under a "capacity to control" analysis even in the absence of any evidence that the lessor caused or contributed to the discharge.[16] Other courts have found that lessors may be owners of the USTs since they become trade fixtures, usually after tenants have vacated the premises. Many of these cases tend to involve former gas stations.[17] At least one court has held lessors liable even when they were not aware of the existence of the USTs or failed to remediate the contamination after purchasing the property and discovering the contamination.[18]

Dischargers are required to report any unauthorized spills of petroleum within two hours of discovery to the NYS Spill Hotline.[19] The NYSDEC spill reporting regulations also impose reporting obligations on the owner or operator of the facility where the spill occurred, as well as the person who was in actual or constructive control of the petroleum.[20]

A "faultless landowner" who is liable as a discharger simply because of its status as the owner of the property impacted by the discharge may seek contribution.[21] Innocent parties may also seek reimbursement from the Oil Spill Fund. However, lessors or tenants who are considered dischargers may not obtain reimbursement from

the Oil Spill Fund even if they paid more than their fair share of the cleanup costs. Claims for reimbursement must be made within three years after discovery of the damage and no later than 10 years after the incident.[22]

The Navigation Law also authorizes the state to file a lien against the land where the discharge took place when the Oil Spill Fund incurs costs to clean up or remove a discharge or makes payment to satisfy claims asserted by injured parties and a landowner fails to make payment within 90 days of a demand. The lien is a non-priority lien that does not subordinate previously perfected security interests.[23]

Petroleum Bulk Storage Act

The Petroleum Bulk Storage Act (PBSA)[24] complements the Oil Spill Law. Like the federal UST program, owners and operators of USTs and ASTs with a combined storage capacity of 1,100 gallons of petroleum are required to register their tanks and to comply with certain design and operational standards and requirements, as well as closure requirements.[25]

For purposes of determining if a property is subject to the PBSA program, heating oil tanks that have capacities of less than 1,100 gallons are not counted. Thus, a property with three 500-gallon heating tanks would not be subject to the PBSA, even though the total storage capacity of the tanks is 1,500 gallons.

The PBSA imposes reporting obligations on "any person with knowledge of a spill, leak or discharge" of petroleum that exceeds 25 gallons or creates sheen on nearby surface water.[26] While this reporting obligation was traditionally viewed as applying only to parties who own or operate facilities that store more than 1,100 gallons of petroleum, an administrative law decision extended the reporting obligation to environmental consultants.[27] Reporting obligations for smaller facilities are governed by the Oil Spill Law.

If the NYSDEC suspects or believes that a UST is leaking, it may order the owner to perform a tightness test. If the owner fails to conduct the test within 10 days, the NYSDEC may conduct the test and seek reimbursement of its reasonable expenses.[28]

USTs that are temporarily out of service (30 days or more) must be drained of product to the lowest draw-off point. Fill lines and gauge openings must be capped or plugged, and inspection and registration must continue. Those tanks that are permanently out of service must be emptied of liquid, sludge and vapors. The USTs that are permanently out of service must then either be removed or, if left in place, tanks must be filled with solid, inert material such as sand or concrete slurry. The NYSDEC must be notified 30 days prior to filling or removal.

The performance and operating standards for regulated USTs under the PBSA program are considerably more extensive than those for ASTs. However, the rules for classifying a tank as a UST or AST are quirky. A tank located in a building basement or on a below-grade floor that is encased in a vault that does not have any "weep holes" or a manway, so that the tank cannot be observed, will be considered a UST. Owners and operators of such tanks would be subject to the full panoply of UST requirements under the PBSA regulatory program, such as periodic tightness testing. Thus, it is particularly important to ensure that tanks in commercial buildings are properly registered.

Nassau, Suffolk, Rockland, Westchester and Cortland Counties have been authorized by the NYSDEC to administer the program for tanks located in those areas. Because these counties may have more stringent requirements than the state, owners and operators should contact the county to learn of specific local requirements.

> Petroleum-contaminated sites comprise the largest category of contaminated sites in New York.

The NYSDEC PBSA program has some odd rules for heating oil tanks as well. Regulated PBSA tanks that are out of service for more than one year must undergo closure. However, unlike the federal UST program, the NYSDEC PBSA program does not require an environmental assessment to close heating oil tanks. The tank has to be cleaned out and visually inspected for holes but soil or groundwater samples are not ordinarily required to achieve closure of heating oil tanks unless there is visual evidence of a leak. Thus, it is possible that a heating oil tank that was closed in place and obtained regulatory closure by the NYSDEC may have impacted the property. Accordingly, it is advisable for purchasers and prospective tenants of property with abandoned heating oil tanks to review the closure documentation to see if sampling was conducted. In the absence of such documentation, the purchaser should consider conducting its own sampling since the purchaser could be strictly liable under the state Navigation Law if an abandoned tank that was closed in place has impacted the environment.

Brownfield Cleanup Program

The Brownfield Cleanup Program (BCP) is the state's voluntary cleanup program.[29] Applicants may include current property owners, prospective purchasers, devel-

opers and tenants. There are two types of applicants and the applicant category influences the potential scope of the cleanup.

A "volunteer" is an applicant that is not responsible for the contamination. This could include purchasers, new tenants and developers. It could also include existing owners or tenants provided that they did not cause or contribute to the contamination. Applicants that would be considered "responsible parties" would be accepted as "participants." The key distinction between a "volunteer" and a "participant" is that the volunteer is required only to clean up on-site contamination, while participants have to remediate off-site, as well as on-site, contamination. The ability to confine the cleanup to the brownfield site is an extremely important benefit since it not only limits the cleanup costs but also helps eliminate uncertainty about the ultimate costs of cleanup since parties can develop worst-case scenarios on the volume of soil that would have to be removed from a site.

An important benefit of the BCP is that applicants receive a no further action letter known as a Certificate of Completion (COC), after they complete a NYSDEC-approved cleanup. The COC contains a covenant not to sue from the State of New York that runs with the land and will also provide contribution protection.

The tax credits available under the BCP (discussed below) were scheduled to expire at the end of 2015. The looming sunset meant that existing applicants had to obtain a COC by the end of the year to be able to claim the BCP tax credits.

After several unsuccessful efforts, Governor Andrew Cuomo and the Legislature were able to reach an agreement on sweeping reforms to the BCP as part of the 2015–2016 budget agreement.[30] The legislation, which took effect on July 1, extended the BCP for 10 years, curtailed the tax credits available to applicants and amended the definition of a brownfield site. The changes to the calculation of the tax credits and eligibility for certain tax credits do not apply to applicants that were accepted into the BCP prior to the July 1 effective date.

Under the 2015 amendments, current applicants will be grandfathered under the existing BCP tax credit framework, provided they comply with one of the following COC deadlines: Applicants who were accepted into the BCP prior to June 23, 2008, must obtain their COCs by December 31, 2017, while applicants accepted after that date and before the July 1 effective date of the changes will have until December 31, 2019, to receive COCs.

Applicants that receive a notice of acceptance between July 1, 2015 and December 31, 2022, will have until March 31, 2026, to obtain their COCs. Existing applicants who fail to obtain COCs by the applicable date for their project will not be terminated but will be treated as though they were accepted after July 1 and will be subject to the new tax credit framework.

What Is a Brownfield Site?

The newly revised definition of a brownfield site is now any real property with contamination that requires remediation. An applicant must demonstrate that a site has contamination in excess of applicable NYSDEC standards based on the reasonably anticipated use of the property. Applicants will have to include at least a Phase 2 assessment (e.g., soil or groundwater samples) to establish the presence of contamination requiring remediation. It is unclear if the applicant or the NYSDEC will be the final arbiter of what is the reasonably anticipated use.

Sites may be accepted into the BCP where the contamination is from a source on the property or where the groundwater beneath the property or contaminated vapors in the soil are migrating from an off-site source. However, the applicants of such sites will not be eligible for the tangible property tax credits, though they will be able to claim the site preparation tax credit (discussed below).

Sites will not be eligible for the tangible property tax credit where the property was previously remediated under a NYSDEC remedial program, and the site could be developed for its then-intended use. It is unclear how this provision will be interpreted in circumstances where, for example, a prior cleanup achieved a commercial level of cleanup and the applicant would like to enroll the site in the BCP to perform an unrestricted residential cleanup to support a multi-family development.

Sites that are already subject to an enforcement order are not eligible for the BCP. This prohibition does not apply to petroleum-contaminated sites with STIPs. Effective July 1, sites that were on the state Registry of Inactive Hazardous Wastes Sites (state Superfund list) or were under the federal Resource Conservation and Recovery Act (RCRA) may be eligible for the BCP where the site is owned, or under contract to be purchased at the time of the application, by a volunteer, and the NYSDEC has not identified a responsible party with the ability to pay for the investigation or cleanup of the site. The new RCRA exemption should be particularly useful for abandoned RCRA-regulated properties in upstate or western New York, as well as downsized RCRA-regulated facilities, by allowing portions of these sites subject to RCRA permits to be sold to developers.

Brownfield Tax Credits

In addition to liability protections, the BCP offers the most generous tax credits in the country. The Brownfield Tax Credits (BCTs) are refundable, so to the extent that the credits exceed the applicant's tax liability, the credit is treated as a tax overpayment and the state will issue a check. Applicants can claim three types of tax credits.

The first tax credit is known as the Site Preparation Cost (SPC) credit. Applicants accepted into the BCP prior to July 1, 2015, are entitled to two categories of SPC credits. The first category includes those costs necessary to qualify the site for a COC, while the second category

includes those costs incurred to prepare the property for development. Thus, for grandfathered sites, the SPC includes not only cleanup costs but also demolition, soil excavation, scaffolding, support of excavation and dewatering expenses. Depending on the cleanup track achieved, applicants may claim between 28% and 50% of their SPCs and five years of groundwater remediation costs.

Because of the perception that excess SPCs were being claimed for excavation and foundation costs unrelated to contamination (e.g., excavating clean dirt to make room for subgrade parking), the 2015 amendments to the BCP program severely curtailed the eligible SPCs to only those expenses necessary to implement a site investigation or remediation, or to otherwise qualify for a COC. These changes apply to applications accepted on or after July 1. For example, if a site has five feet of contaminated soil but the soil is excavated to a depth of 15 feet to accommodate the development, it is conceivable that the state Department of Taxation and Finance (DTF) will take the position that only the expenses related to excavating the first five feet of contaminated soil will be eligible for SPC treatment. Furthermore, eligible SPCs will include only foundation costs required as to construct a cover system (e.g., engineering controls).[31]

The change in the SPC definition will not only reduce the amount of SPC tax credits that an applicant may claim, but it will also serve to reduce the SPC cap for a site since the costs used to calculate the 3x cap will be reduced.

The amendments also clarify that costs for abatement of asbestos-containing building materials, lead-based paint or PCBs in existing buildings qualify for the SPC tax credit. In addition, SPCs can be claimed for up to five years after issuance of a COC for costs of implementing institutional and engineering controls, an approved site management plan, and an environmental easement.

The second, and arguably the most generous, BTC that is available is the qualified tangible property (QTP) tax credit, which ranges from 10% to 24% of the value of the improvements constructed on the brownfield site, subject to a cap of $35 million or three times the site preparation costs, whichever is less. For sites accepted after July 1, applicants will be eligible for an extra 5% for affordable housing projects as defined by the NYSDEC, sites located in Environmental Zones (En-Zones),[32] sites located within a Brownfield Opportunity Area (BOA) where the development conforms to the plan for a BOA certified by the Department of State, and sites used primarily for manufacturing activities. Applicants (or their transferees) will have up to 120 months after the issuance of a COC to place a building into service (i.e., obtain a Certificate of Occupancy) and claim the QTP credit.

In order to curtail some applicants' claiming costs of artwork and furniture for hotels or rental property, the 2015 amendments limit QTPs to tangible property with a useful life of at least 15 years. QTP-eligible costs now expressly include demolition and foundation costs that are not included in the SPC component, as well as costs associated with non-portable equipment, machinery and associated fixtures and appurtenances used exclusively on the site, regardless of their depreciable life for federal income tax purposes.

The 2015 BCP amendments eliminate the QTP as an "as of right" credit for BCP sites in New York City. After July 1, applicants for NYC sites have to satisfy one of the following criteria to be eligible for the QTP credit:

- at least half of the site is located in an En-Zone;
- the property is an "affordable housing" project;
- the property is "upside-down" – the projected remediation costs are at least 75% of the appraised value of the property at the time of the application. The appraised value must be based on an "as if" hypothetical assumption that the property is not contaminated. It should be noted that while there are a variety of ways to calculate property value (e.g., income stream, cost to repair and comparison sales), the law does not specify which approach is to be used; or,
- the property is "underutilized."

The definition of an "affordable housing" project was not defined in the statute. Instead, the NYSDEC was required to propose a definition, which was published in the June 10 issue of the *State Register*. Unlike the "underutilized" definition, the NYSDEC was not required to adopt the "affordable housing" definition by a specific date. Although the definition has not been finalized, the NYSDEC did not receive significant adverse comments to its proposed definition. Applicants of affordable housing projects may elect to use the proposed definition if they want a determination that they qualify for the "affordable housing" gate.

The term "underutilized" was also not defined in the legislation. Instead, the NYSDEC was required to publish a definition in the *State Register* by July 1, 2015, after consultation with New York City and the business community, and the rule had to be adopted by October 1, 2015. The NYSDEC's proposed definition was very narrow and the agency received numerous negative comments. As a result, the agency is in the process of revising the underutilized definition.

While the NYSDEC is making eligibility determinations for NYC sites, the agency cannot yet make any determination if the project qualifies for the underutilized gate since the definition has not been adopted. In other words, an applicant may be accepted into the BCP but it will not learn if it qualifies for the underutilized gate until the NYSDEC finalizes its rule. Since the NYSDEC failed to adopt the underutilized definition by the October 1 deadline, it is quite possible that the QTP changes are not in effect and that the QTP remains "as of right" for NYC sites.

The final tax credit available for post-COC groundwater monitoring costs is at the same percentage of the SPC credit. This credit may be claimed annually for the five-year period following the issuance of the COC.

Prior to the 2015 amendments, BCP applicants had been eligible to receive two additional types of tax credits: (1) credits against eligible real property taxes based on the number of jobs at a brownfield site and (2) environmental remediation insurance credits. These two credits are no longer available for sites accepted after July 1. However, grandfathered applicants can still claim them.

The potential for BCP eligibility raises a number of issues in commercial leasing transactions.

BCP Eligibility and Commercial Leasing

The potential for BCP eligibility raises a number of issues in commercial leasing transactions. The challenges are different for a new lease, where the parties contemplate submission of a BCP application, as opposed to an existing lease, where the tenant may want to take advantage of the BCP to help finance building renovations or expansions.

The first question is, Who can claim the tax credits? Remember that only the party that actually incurs eligible costs and is named on the COC may claim the BCP tax credits. The lessee would be the logical party for submitting the application if it is going to be incurring the costs of the project.

However, as explained below, because the applicant has to obtain the consent and cooperation of the property owner at several stages in the BCP process, the lessor may have leverage to seek to participate in the BCP tax credits. The lessor can participate in the BCP tax credits; this can be accomplished in a number of ways. The parties can submit a joint application so that both the lessee and lessor sign the Brownfield Cleanup Agreement (BCA). If the lessee has already submitted the BCP application and executed the BCA, the lessor can be added to the BCA by filing a BCA amendment – but only before the COC is issued. Finally, the application could be submitted by a joint venture of the lessor and lessee, or by an entity in which the lessor owns or purchases membership interests.

Since a Phase 2 assessment will have to be included in the BCP application, a new tenant considering applying to the BCP will have to negotiate the right to collect soil and groundwater before it takes possession of the premises. If acceptance into the BCP will be a condition to entering into the lease, this work may have to be scheduled several months before the commencement date of the lease because of the time it takes for an application to be accepted by the NYSDEC.

If the cleanup does not achieve an unrestricted residential standard, the NYSDEC will require the use of institutional and engineering controls. These controls will be memorialized in an environmental easement that must be executed and recorded by the lessor. The environmental easement must be recorded before the NYSDEC issues its COC. If the lessor refuses to execute or record what amounts to use restrictions on its fee, the lessee/BCP applicant will have to implement a more costly unrestricted cleanup to obtain a COC. Thus, the lease should contain a covenant requiring the lessor to cooperate and execute any documents required by the NYSDEC in connection with the BCP.

When the applicant does not own the land, the NYSDEC will require that the applicant have access to the site to implement all requirements of the BCP. The tenant can demonstrate access by either having the access set forth in the lease or through a separate access agreement. Obviously, the standard environmental contingency clause that prohibits the tenant from notifying the NYSDEC of the sampling results will be inadequate. For existing leases and long-term ground leases that were executed before the potential for a BCP application was contemplated, a separate access agreement is likely the easiest route for satisfying this requirement.

There is an important cautionary note about including the property owner on the application or the BCA. If the NYSDEC considers the lessor to be a responsible party, this could expand the scope and complexity of the cleanup. The reason is that if an application is jointly submitted by a "volunteer" applicant (i.e., the tenant) and a participant (property owner), the application will be treated as one submitted by a participant and the BCA would identify the applicants as participants. As explained previously, this means that the applicants would have to address any off-site contamination that may be emanating from the site. Thus, the lessor status should be considered and discussed with the NYSDEC before including the lessor in the application or on the BCA.

Of course, the reverse situation could also occur where there is a purchaser but also an existing lessee who would be considered a participant – likewise, if a seller wants to participate in a proposed brownfield application by a purchaser.

BCP-EZ Program

The BCP-EZ program is directed toward the swift remediation of lightly contaminated sites. The BCP's remediation requirements mandate extensive public participation, which often leads to longer project completion

times and substantially higher costs. While this can be a reasonable tradeoff in exchange for generous BTCs, some may, for various reasons, prefer to instead obtain the liability protection provided by COCs. Because of this, the BCP amendments authorize, but do not require, the NYSDEC to establish a streamlined cleanup program for parties that are willing to waive tax credits – the BCP-EZ program. Cleanups under this program must still satisfy set minimum requirements, but the NYSDEC is permitted to waive certain public participation requirements and, under certain circumstances, allow applicants to petition for more permissive cleanup standards. The NYSDEC hopes to promulgate rules for the BCP-EZ in 2016. It is anticipated that the Voluntary Cleanup Program (VCP), administered by the New York City Office of Environmental Remediation (OER), will serve as the BCP-EZ program for NYC sites. The OER VCP will be discussed in the next installment of this series.

Hazardous Waste Program Fee Waiver

Urban fill material often contains metals and other contaminants that are unrelated to any on-site spills but are associated with the source of the fill material (e.g., coal ash). New York State law imposes a program fee on parties that generate and dispose of hazardous waste,[33] some of which can be substantial, running into the hundreds of thousands of dollars. The program fee is in addition to the costs for disposing of the hazardous fill material.

The hazardous waste program fee was intended to incentivize manufacturers to reduce the use of hazardous substances in their operations. However, the NYSDEC has applied the fees to parties that have excavated contaminated urban fill material that qualifies as hazardous waste. While there was an exemption for cleanups conducted under the SSF program or the BCP, many projects excavating fill material had not enrolled in any NYSDEC remedial programs when they learned the soil had to be managed as hazardous waste, since they thought the site was not contaminated. As a result, they unexpectedly found themselves having to pay a significant program fee. In addition, sites remediated under the OER VCP or "e" designation program were not covered by those exemptions.[34] The 2015 amendments extend the hazardous waste program fee for waste generated in connection with cleanups enrolled in OER VCP. However, the waiver does not apply to sites generating hazardous waste as part of cleanups to comply with the "e" designation program.

Vapor Intrusion Disclosure Law

Vapor intrusion refers to the vertical or lateral migration of volatile organic compounds (VOCs) from soil or groundwater into buildings. In extreme cases, these vapors can accumulate at levels that create immediate safety hazards (such as explosions), illness, or aesthetic problems (such as odors). More typically, however, when VOC vapors migrate into buildings, the levels are much lower, creating the more insidious risk of chronic health problems arising from long-term exposure. The contaminants that typically pose a risk of vapor intrusion are chlorinated solvents, like those used in dry cleaners; benzene from gasoline; naphthalene from heating oil; and mercury.

Urban fill material often contains metals and other contaminants that are unrelated to any on-site spills but are associated with the source of the fill material.

Historically, the NYSDEC focused primarily on soil and groundwater contamination and did not regard vapor intrusion as a significant potential risk unless VOC contamination occurred directly next to an occupied building or directly below its foundation. Therefore, the NYSDEC remediation programs usually focused on reducing soil or groundwater contamination, or at least eliminating pathways by which such contamination could reach people.

The regulatory landscape changed a few years ago after the NYSDEC discovered significant levels of VOCs in residences near a number of contaminated sites. The NYSDEC subsequently announced that it would re-evaluate up to 721 sites across the state where cleanups had been considered complete. In addition, both the NYSDEC and the New York State Department of Health (NYSDOH) have issued guidance on evaluating the vapor intrusion pathway.

Title 24 of the ECL[35] requires responsible parties remediating a site under the state Superfund program or another remedial program to give landowners copies of air contamination reports. Originally, this law did not require property owners to disclose those reports to tenants and occupants. In 2008, the law was amended to require landlords to disclose to existing and prospective tenants "test results" received from responsible parties indicating levels in excess of NYSDOH or federal Occupational Safety and Health Administration (OSHA) guidelines for indoor air quality. The disclosure statute does not distinguish between residential and commercial property.

Within 15 days of receiving an "air contamination report" from the responsible party, the property owner must provide a fact sheet (generic fact sheets are to be

developed by NYSDOH) identifying the contaminant of concern and a means to obtain more information, as well as timely notice of any required public meetings to be held to discuss such results. In addition, if a tenant requests a copy of the test results and any closure letter, the property owner must provide the documents within 15 days of receipt of such request.

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

In addition, a property owner subject to the disclosure obligation must include a disclosure notice in rental or lease agreements for the location and must include the following language in 12-point boldface type on the first page of any lease or rental agreement:

> NOTIFICATION OF TEST RESULTS The property has been tested for contamination of indoor air: test results and additional information are available upon request.

A property owner that violates the disclosure requirement could face general criminal or civil penalties provided by the ECL. If the indoor air contamination is determined to create an imminent and substantial endangerment, the property owner could face injunctive relief as well as fines of up to $2,500 for each violation and $500 per day for each day it continues. If the property owner becomes a responsible party under the state Superfund law, the violations could cost as much as $37,500 per day.

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

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

To avoid liability to its own tenants, the property owner might need to take abatement measures to prevent vapors from migrating into its building. When the vapors are migrating from an off-site source or the current owner is not considered a responsible party, the owner will not typically be required to remediate the contaminated soil or groundwater but simply to have a vapor venting system installed to capture the fumes and redirect them into the outside air. These venting systems can be relatively inexpensive if installed as part of new construction. Retrofitting an older building can be more challenging and expensive, though. If the responsible party is subject to a federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or SSF order, it will often be required to install the venting system. For voluntary cleanups, though, the property owner would have to install the system and then decide if it wants to try to recover the costs from a responsible party in a CERCLA contribution or cost-recovery action, or common law theory. Alternatively, the owner could try to treat the costs of the venting system as operating expenses for purposes of operating expense escalations in its leases. Whether tenants will accept that may represent another issue entirely.

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1. N.Y. Environmental Conservation Law (ECL) §§ 27-1301 *et seq*.

2. There are five classifications of sites on the SSF list: The sites are to be classified as follows: Class 1 (poses an imminent danger of causing irreversible or irreparable damage to the public health and the environment. Immediate action is required. The only Class 1 site that was assigned this designation was the infamous Love Canal site); Class 2 (poses significant threat to public health or the environment. Action is required. This is equivalent to the federal NPL); Class 3 (does not present a significant threat to public health or the environment. Action may be deferred); Class 4 (site properly closed but continued management is required); and Class 5 (site is properly closed and there is no evidence of present or adverse impact so no further action is required).

3. ECL § 27-1305(4)(d).

4. ECL § 27-1313(3)(a).

5. ECL § 27-1313(4).

6. Navigation Law §§ 170–197.

7. Navigation Law § 173.

8. Navigation Law § 181.

9. The same third party defense contained in CERCLA and the SSF was added to the Oil Spill Law in 2003. However, state courts have not had an opportunity to address this defense.

10. Navigation Law § 176.

11. Indeed, some apartment buildings have paid fines in excess of $1 million for failing to promptly report and clean up spills from heating oil tanks.

12. *State v. Tartan Oil Corp*., 219 A.D.2d 111 (3d Dep't 1996); *White v. Regan*, 171 A.D.2d 197 (3d Dep't 1991); *State v. King Serv. Inc*., 167 A.D.2d 777 (3d Dep't 1991).

13. 96 N.Y.2d 403 (2001).

14. 3 N.Y.3d 720 (2004).

15. *Id*. at 724 (emphasis added).

16. Subsequent cases finding lessors liable as dischargers based on sufficient control. *See In re Huntington & Kildare*, 89 A.D.3d 1195 (3d Dep't 2011); *State of N.Y. v. C.J. Burth Servs*, 79 A.D.3d 1298 (3d Dep't 2010); *State of N.Y. v. LVF Realty Co.*, 59 A.D.3d 519 (2d Dep't 2009); *State v. B & P Auto Serv. Ctr., Inc.*, 29 A.D.3d 1045 (3d Dep't 2006); *State of N.Y. v. Dennin*, 17 A.D.3d 744 (3d Dep't 2005); *Roosa v. Campbell*, 291 A.D.2d 901 (4th Dep't 2002).

17. *Veltri v. N.Y. State Office of the State Comptroller*, 81 A.D.3d 1050 (3d Dep't 2011); *Golovach v. Bellmont*, 4 A.D.3d 730 (3d Dep't 2004); *310 S. Broadway Corp. v. McCall*, 275 A.D.2d 549 (3d Dep't 2000).

18. *Sunrise Harbor Realty, LLC v. 35th Sunrise Corp*., 86 A.D.3d 562 (2d Dep't 2011).

19. 1-800-457-7362. The reporting requirement does not apply to spills that meet all of the following criteria: (i) The quantity is known to be less than 5 gallons; (ii) the spill is contained and under the control of the spiller; (iii) the spill has not and will not reach the state's water or any land; and (iv) the spill is cleaned up within two hours of discovery. Navigation Law § 175.

20. N.Y. Comp. Codes R. & Regs. tit. 17, pt. 32.3 (N.Y.C.R.R.).

21. Navigation Law § 181(5).

22. Navigation Law § 182.

23. Navigation Law § 181-a. The notice of lien is indexed in the same manner as a lien under Lien Law § 10. An action to vacate an environmental lien is governed by Lien Law § 59, and should not be brought as an Article 78 proceeding. *Art-Tex Petroleum, Inc. v. N.Y. State Dep't of Audit & Control*, 93 N.Y.2d 830 (1999).

24. ECL § 17-0101, "Control of the Bulk Storage of Petroleum."

25. 6 N.Y.C.R.R. pts. 613, 614.

26. 6 N.Y.C.R.R. pt. 613.8.

27. *In re Middletown Kontokosta Assocs., Ltd.*, NYSDEC Case No. R1-6039.

28. ECL § 17-1007(2).

29. ECL §§ 27-1401 *et seq.*

30. 2015 N.Y. Laws ch. 56.

31. Eligible costs include those related to engineering and environmental consulting costs, legal costs, transportation and disposal of contaminated soil, remediation measures taken to address contaminated soil vapor; cover systems consistent with applicable regulations; physical support of excavation; dewatering and other work to facilitate or enable remediation activities; sheeting, shoring, and other engineering controls required to prevent off-site migration of contamination from the qualified site or migrating onto the qualified site; and the costs of fencing, temporary electric wiring, scaffolding, and security facilities until such time as the certificate of completion has been issued.

32. An En-Zone is a census tract with a poverty rate of at least 20% and an unemployment rate of at least one and one-quarter times the statewide unemployment rate based on the most recent five-year American Community Survey (ACS) or areas with a poverty rate of at least two times the poverty rate for the county in which the areas are located based on the most recent five-year ACS.

33. ECL § 72-402.

34. ECL § 72-0402(1)(d). These will be discussed in the next part of this series.

35. ECL § 27-2405.