

New York Law Requires Landlord Disclosure of Environmental Test Results to Tenants

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Tenant Notification of Indoor Air Contamination

New York has passed a law, effective December 3, 2008, which requires property owners and landlords to provide current and prospective tenants the results of environmental sampling conducted on the leased property [N.Y. Env'tl. Conserv. Law (ECL) Section 27-2405]. The law requires notification of sampling results conducted on indoor air, as well as sub-slab groundwater and soil, when the test results exceed federal Occupational Safety and Health Administration ("OSHA") or New York State Department of Health ("NYSDH") indoor air guidelines. This law is intended to address the issue of vapor intrusion into tenant-occupied commercial and residential property in situations where contaminated soil or groundwater, located beneath a building slab or foundation, releases evaporated organic vapors that may enter and compromise the indoor air quality of any above grade enclosed structure.

New Law Applicability

1. Applicable to "Test Results"

Notification of test results must be provided by the landlord to the tenant. The new law defines "test results" to include not only actual indoor air sampling results, but also sample results from sub-slab air, sub-slab soil and groundwater. If sub-slab soil or groundwater results indicate concentration levels that would create indoor air quality issues, the landlord should consider these results to fall under the new law's definition of "test results."

2. Applicable Only to Test Results Provided by an "Issuer"

The requirements of the new law apply only to test results that have been provided to the property owner by an "issuer," which is defined to include:

- (a) The New York State Department of Environmental Conservation ("NYSDEC");
- (b) A municipality that has entered a contract with NYSDEC to undertake an environmental restoration project;
- (c) A person subject to an order issued pursuant to New York's hazardous waste and oil spill clean-up laws; or
- (d) A "participant" in New York's Brownfield Cleanup Program ("BCP").

The definition of participant under the BCP is an applicant into the program who is liable for contamination as an owner or operator. A "volunteer" under the BCP is an applicant not liable for the contamination as a "bona fide" purchaser (*i.e.*, an owner whose liability arises solely from ownership after the contaminants were released). In addition, the new law would not cover test results gathered during due diligence on a purchase or lease.

3. Applicable Only to Test Results Provided by an Issuer That Exceed OSHA or NYSDH Indoor Air Guidelines

The new law also applies only to test results that exceed NYSDH indoor air guidelines or OSHA guidelines for indoor air quality. In general, the NYSDH guidelines for certain chemicals of concern are more stringent than the OSHA guidelines. Under any circumstances, the indoor air quality test results must exceed either the NYSDH or OSHA guidelines in determining whether the owner or landlord must provide notice of the test results under the new law.

Requirements for Landlord Disclosure of Indoor Air Contamination Test Results

If there is a determination that the test results require tenant notification, property owners must provide "all tenants and occupants" with a fact sheet and notice of any public meetings to be held to discuss the test results. Test results shall be provided if requested by the tenant. Property owners have 15 days from receipt of the test results to provide the required notice. Fact sheets for specific contaminants of concern are being prepared by the NYSDH to identify reportable detection limits, health risks associated with exposure to the contaminant and a means to obtain more information on the contaminant. NYSDH currently has fact sheets prepared only for TCE, PCE and Radon.

In situations where a site has: (a) an engineering control in place to mitigate indoor air quality contamination (*e.g.*, passive vapor barrier; active vapor capture system); or (b) if the site is subject to monitoring under an ongoing

remediation program, property owners shall provide the following to prospective tenants prior to signing a lease agreement:

- (i) fact sheets regarding the contaminant of concern;
- (ii) test results upon request;
- (iii) any site closure letter received; and
- (iv) notice in the lease agreement.

The notice to prospective tenants to be included in the lease agreement must contain the following language in at least 12-point, boldface type on the first page:

"NOTIFICATION OF TEST RESULTS. The Property Has Been Tested For Contamination Of Indoor Air; Test Results And Additional Information Are Available Upon Request."

Penalties

While the law is silent on the issue of penalties, a property owner who violates the disclosure requirements could face general criminal or civil penalties under New York statutes ECL §§71-4001 and 4003, which provide for imprisonment, injunctive relief and \$500 per violation and \$500 per day for each day the violation continues.

Uncertainty Regarding the New Law

1. Does it apply retroactively? If the law applies retroactively, then there would be a requirement placed upon landlords to research and review whether a site has historic indoor air quality test results and whether those test results (if they exceed applicable NYSDH or OSHA guidelines) must be reported to current tenants and building occupants. Theoretically, there would be no limit on a search back in time for potential test results.
2. The law requires notification of test results to "all tenants and occupants." There is likely to be uncertainty as to who the "occupants" are that the law refers to as requiring notification. Would "occupants" be considered customers who enter an establishment? Would employees working in a retail setting be considered "occupants"? Further clarification of this issue should be sought through pronouncements from NYSDEC.
3. The definition of "test results" not only includes tests performed on indoor air, but also tests performed on sub-slab air, ambient air, sub-slab groundwater and sub-slab soil samples. If an owner has only sub-slab soil or sub-slab groundwater results, how is the determination made that indoor air quality exceedances exist requiring disclosure under the new law?

Conclusion

Owners/landlords are required to provide tenant notification of test results from sites in New York that qualify under the terms of the new law. The first step in this process is likely to be to gather available environmental sampling information from owned sites in New York and evaluate that information to determine if disclosure is required. In addition, for future or pending leases in New York, appropriate notice should be provided to prospective tenants, including written notice on the first page of the lease as required by the new law. Tenants in New York may want to evaluate any notice received from the landlord regarding environmental test results, determine whether indoor air quality has been compromised and take steps to potentially mitigate vapor intrusion effects. Ongoing review of pronouncements or amendments regarding the new law by NYSDEC is necessary for clarification of certain ambiguities that may exist in the new law.

For Further Information

If you have questions regarding the topic discussed in this Alert or would like more information, please contact [Vincent S. Oleszkiewicz](#), any [member](#) of the [Energy, Environment and Resources Practice Group](#) or the attorney in the firm with whom you are regularly in contact.