

MID ATLANTIC REAL ESTATE JOURNAL

NEW JERSEY-PENNSYLVANIA-DELAWARE-MARYLAND-VIRGINIA

Friday, September 11, 2009

Volume 21, Issue 9

QUESTIONS AND ANSWERS

Environmental Law

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Various environmental laws impose requirements on industrial, commercial and even office buildings. For example, the use or storage of chemicals in certain quantities at a facility may trigger requirements under the Environmental Planning and Community Right-to-Know Act ("EPCRA") to notify local emergency planning agencies and file reports with details about the chemicals on hand. In addition, backup generators at a facility may trigger air permitting requirements, and depending on how the facility is operated, a storm water permit may also be required. The violation of these environmental requirements can expose the facility to significant potential penalties, and the United States Environmental Protection Agency ("EPA") can often

look back several years and assess penalties for past violations.

In addition to whatever contractual remedies you may have against the former owner, EPA offers certain incentives to encourage facilities to voluntarily disclose and correct the violation of numerous environmental laws. Under EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" policy (the "Audit Policy"), disclosures meeting the criteria established in the Audit Policy are eligible for substantial reductions in the civil penalties that EPA could otherwise assess. The stated purpose of the Audit Policy is to enhance the protection of

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human health and the environment by encouraging the correction of violations of environmental laws and to prevent future violations. Many states have corresponding audit policies for violations of state environmental laws.

Recognizing that the new owner of a facility may be uniquely situated and motivated to evaluate the operations of the facility and bring those operations into compliance with environmental requirements, a little over a year ago EPA expanded the incentives available under the Audit Policy for new owners. Under its August, 2008 "Interim Approach to Applying the Audit Policy to New Owners" (the "New Owner Policy"), EPA relaxed some of the requirements of the Audit Policy while also expanding the potential relief from penalties that is available to a new owner. Following

the New Owner Policy allows a new owner to avoid all penalties for the historic violations at the facility and further mitigates the penalty for violations after the acquisition. While the Audit Policy typically requires that the disclosed violations be discovered through a systematic self-audit or other periodic review of operations, the New Owner Policy expands coverage to include violations discovered through pre-acquisition due diligence activities. The New Owner Policy also extends coverage to certain more serious violations that are otherwise ineligible for consideration under the Audit Policy.

The New Owner Policy does, however, require a new owner to act quickly in order to be eligible for the benefits of the policy. In general, the Audit Policy requires that a violation

be disclosed to EPA within 21 days of discovery, and the New Owner Policy only lengthens this disclosure period to 45 days from closing for a violation discovered as part of the due diligence activities. In addition, EPA only considers an entity to be a "new" owner for nine months from acquisition, so along with promptly disclosing violations discovered during due diligence, a new owner that wants to take advantage of the significant additional incentives under the New Owner Policy should consider whether to perform a self-audit soon after closing.

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