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## New York Becomes First State to Require Landlords to Notify Tenants, Prospective Tenants and Building Occupants of Indoor Air Test Results

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Federal and state regulators are focusing on indoor air contamination issues. This heightened level of governmental interest began about 10 years ago and continues to be one of the “front burner” environmental issues. For example, in 2002, the federal Environmental Protection Agency (EPA) published a “Draft Guidance for Evaluating The Vapor Intrusion to Indoor Air Pathway From Groundwater And Soils” (the Draft Guidance).<sup>1</sup> The Draft Guidance notes that vapor intrusion is a rapidly developing field of science and policy. The Draft Guidance is intended to aid in evaluating the potential for human exposure from this pathway and to provide technical and policy recommendations on determining if the vapor intrusion exposure pathway poses an unacceptable risk to human health at cleanup sites.

Since it issued the Draft Guidance, the EPA continues to explore this area by collecting observations from vapor intrusion sites across the country. The purpose of this research is to improve the government’s knowledge and understanding of vapor intrusion. In particular, the EPA focuses on the attenuation of vapors between the subsurface and indoor air. Moreover, the EPA designed, developed and operates a database that stores and analyzes data collected at several vapor intrusion sites. This past March, the EPA issued a draft report

about its vapor intrusion database, explaining that the database is aimed at providing environmental professionals, regulators, responsible parties, and others assessing and managing vapor intrusion investigation programs with a better understanding of vapor intrusion pathways.

### IN THE STATES

States are also actively evaluating the issues associated with indoor air quality. For instance, in October 2006, the New York State Department of Health (NYSDOH) issued the final version of its “Guidance for Evaluating Soil Vapor Intrusion in the State of New York” (the NYSDOH Guidance).<sup>2</sup> The NYSDOH Guidance explains that the phrase “soil vapor intrusion” refers to the process by which volatile chemicals migrate from a subsurface source into the indoor air of buildings. The NYSDOH Guidance further explains that soil vapor, also referred to as soil gas, is the air found in the pore spaces between soil particles. When there is a difference between interior and exterior pressures, soil vapor can enter a building through cracks or perforations in slabs or basement floors and walls, and through openings around sump pumps or where pipes and electrical wires penetrate through the foundation. For example, the use of heating, ventilation or air-conditioning (HVAC) systems or the operation of large

## New York Becomes First State to Require Landlords

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mechanical appliances (e.g., exhaust fans, dryers, etc.) may create a negative pressure that can draw soil vapor from beneath the slab into a building. As the NYSDOH Guidance notes, radon gas can enter buildings from the subsurface in the same manner.

The NYSDOH Guidance also points out that soil vapor can become contaminated when chemicals located in subsurface areas evaporate into the subsurface air. Chemicals that can undergo this evaporation process are called “volatile chemicals” and include volatile organic compounds (VOCs), certain semi-volatile organic compounds (SVOCs), and some inorganic substances, such as elemental mercury. Subsurface sources of volatile chemicals can include the following, according to the NYSDOH Guidance:

- Groundwater or soil that contains volatile chemicals;
- Non-aqueous phase liquid (NAPL);
- Buried wastes; and
- Underground storage tanks or drums.

According to the NYSDOH Guidance, if subsurface soil vapor contains volatile chemicals, and the conditions are right, it can migrate into a building and can adversely impact indoor air quality. The NYSDOH Guidance notes that soil vapor can enter a building, regardless of whether the building is old or new, or whether it is constructed on a slab or has a crawl space or basement.<sup>3</sup>

Concerns about subsurface contaminants and their potential entry into buildings via the soil vapor intrusion pathway led ASTM International, formerly known as the American Society for Testing and Materials, to issue a report last February entitled, “New Practice for Active Soil Gas Sampling in the Vadose Zone for Vapor Intrusion Evaluations.”<sup>4</sup> The ASTM report highlights the need for specific written protocols and standard sampling practices to ensure that the process of collecting soil gas samples “is practical and reasonable,” and to “provide an industry standard for soil gas sampling performed in support of vapor intrusion evaluations.”

### THE NEW YORK LAW

The New York State legislature, focusing on these issues, took action and passed an indoor air quality notification law that had been introduced by two legislators from upstate New York—becoming the first state in the nation to have an indoor air quality notification law.<sup>5</sup> The new law, which took effect on December 3,<sup>6</sup> requires landlords of residential and commercial property and their agents to notify tenants and building occupants of certain environmental testing results. The law also

requires notice to prospective tenants and even specifies the language that must be included in a lease or rental agreement for property covered by the law.

The kinds of environmental test results that the New York law now requires to be disclosed are quite broad. Importantly, the New York law covers not just indoor air test results, but also test results of subslab soil vapor, subslab groundwater, subslab soil and ambient air sampling.<sup>7</sup>

If a landlord or its agent is in possession of test results that exceed standards or guidelines set by either the federal Occupational Safety and Health Administration (OSHA) or the NYSDOH, and that testing data was provided by an “issuer,” the landlord or agent must provide “fact sheets” about the contaminants and timely notice of any public meetings required to be held to discuss such test results. In addition, upon request, the landlord or agent must provide copies of the test results and any closure letter. The law requires the NYSDOH to create generic “fact sheets” containing information about the chemical, including reportable detection limits established by the NYSDOH or OSHA and health risks associated with exposure to the chemical.<sup>8</sup> Currently, the NYSDOH has “fact sheets” for three chemicals: tetrachloroethylene (also known as PERC), trichloroethylene and radon.

As to prospective tenants, a landlord or agent that has test results from an “issuer” for property that is subject to an engineering control to mitigate indoor air contamination or is subject to ongoing monitoring must provide “fact sheets” and, upon request, the testing data and any closure letter prior to signing a binding lease or rental agreement. In addition, the leases/rental agreements for such properties must contain specific language on the first page of the agreement in at least 12-point boldface font.<sup>9</sup> The required language is as follows:

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

*Exceptions* Interestingly, New York’s tenant notification law only applies to testing data that is provided by an “issuer” and not to every piece of data in a landlord’s possession. The New York law defines “issuer” as:

- The New York State Department of Environmental Conservation (NYSDEC);
- A municipality that has entered into a contract with the NYSDEC to conduct an environmental restoration project; and

## New York Becomes First State to Require Landlords

- A person or entity that is subject to an order pursuant to New York's hazardous waste or oil spill cleanup laws.

"Issuer" also includes a "participant" that enters into an agreement with the NYSDEC under its Brownfield Cleanup Program (BCP), but does not apply to a "volunteer" in the BCP. (Under the BCP, a "participant" is an applicant that is liable as an owner or operator for the contamination and a "volunteer" is an applicant who is not liable for known or suspected contamination or whose liability arises solely from ownership after the contaminants were released.) Thus, it appears that testing done by or on behalf of a landlord that is not subject to an NYSDEC order or that is not a "participant" in the BCP, or data obtained from a "non-issuer" source, such as from the federal EPA, is not subject to disclosure under this new law.

*Penalties* The law includes fines for failure to comply with the notification requirements. Fines of up to \$500 per day per violation can be assessed against landlords and their agents for failing to comply with the law.

### CONCLUSION

A variety of laws and regulations require property owners to notify government regulators when they discover certain types of environmental contamination on their property. New York's new law, however, is the first to require that tenants be notified. Whether the New York law achieves its goal of educating tenants and building occupants about possible exposures, or results

in fewer environmental assessments being done because of the notification requirement, will be determined in the future.

### NOTES

1. See <http://www.epa.gov/fedrgstr/EPA-AIR/2002/November/Day-29/a30261.htm>.
2. See [http://www.health.state.ny.us/environmental/investigations/soil\\_gas/svi\\_guidance/docs/svi\\_main.pdf](http://www.health.state.ny.us/environmental/investigations/soil_gas/svi_guidance/docs/svi_main.pdf).
3. Another state that is addressing indoor air contamination issues is the State of Washington. See Vapor Intrusion Fact Sheet, available at <http://www.ecy.wa.gov/programs/tcp/sites/cadet/Dept%20of%20Health%20Vapor%20Intrusion%20fact%20sheet.pdf>.
4. See <http://www.astm.org/DATABASE.CART/WORKITEMS/WK18835.htm>.
5. See NY Environmental Conservation Law § 27-2405.
6. Similar legislation had been vetoed in 2006 and 2007 by prior New York governors.
7. ECL § 27-2405(1)(a) provides that "test results" shall include the results of any tests conducted on indoor air, subslab air, ambient air, subslab groundwater samples, and subslab soil samples.
8. ECL § 27-2405(2) provides that "Any owner of real property or any owner's agent to whom indoor air contamination test results have been provided by an issuer shall, in cases where test results exceed department of health indoor air guidelines or the occupational safety and health administration guidelines for indoor air quality, provide a fact sheet and timely notice of any public meetings required to be held to discuss such results to all tenants and occupants and upon request such test results and any closure letter, within fifteen days of receipt of such results. Generic fact sheets shall be prepared by the department of health and shall identify at a minimum the compound or contaminant of concern, reportable detection levels established by the department of health indoor air guidelines or the occupational safety and health administration guidelines for indoor air quality and health risks associated with exposure to such compound or contaminant and a means to obtain more information on the compound or contaminant."
9. ECL § 27-2405(3) provides that "For real property for which an engineering control is in place to mitigate indoor air contamination, or if the real property is subject to ongoing monitoring pursuant to an ongoing remedial program, the owner or owner's agent of real property to whom indoor air contamination test results have been provided by an issuer shall provide, or cause to be provided, fact sheets, and upon request any test results, or closure letter received by such owner or owner's agent to any prospective tenant prior to the signing of a binding lease or rental agreement. Generic fact sheets shall be prepared by the department of health and shall identify at a minimum the compound or contaminant of concern, reportable detection levels established by the department of health indoor air guidelines or the occupational safety and health administration guidelines for indoor air quality and health risks associated with exposure to such compound or contaminant and a means to obtain more information on the compound or contaminant. Such notice shall be included in the rental or lease agreement and shall contain the following in at least twelve point type in bold face 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.""

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