

ENVIRONMENTAL ENFORCEMENT: WHAT THE OWNER REALLY NEEDS TO KNOW

By John E. Osborn

Our law firm's practice concentrates in representing commercial and residential property owners on construction and environmental law matters. A significant portion of our environmental law practice involves negotiating with government agencies and defending environmental enforcement actions.

On May 23, 2000, our law firm, together with ATC Associates, Inc., a national environmental consulting firm, presented a forum before the Greater New York Construction User Council to examine the environmental enforcement priorities at the Federal, state and local levels. The forum was hosted by Deutsche Bank at their New York Headquarters.

The forum featured presentations by Patrick Harvey, Chief, Compliance Assistance Bureau, United States Environmental Protection Agency, Russell Pecunies, Assistant Counsel, New York City Department of Environmental Protection and Louis Oliva, Acting Regional Counsel, Region 2, New York State Department of Environmental Conservation.

The Greater New York Construction User Council's membership is predominately large corporate property owners and tenants in New York City. The members include Pfizer, G E Capital, IBM Corporation, the American Museum of Natural History, J P Morgan, Citigroup, Port Authority of New York and New Jersey, the Dormitory Authority of the State of New York, Columbia University, New York University and Deutsche Bank. The panel discussion focused on issues affecting these types of entities.

United States Environmental Protection Agency

The United States Environmental Protection Agency ("US EPA") emphasized that many Federal programs had been delegated to the state and, therefore, it was less likely that there would be direct contact with the US EPA. Whether delegation was in place or not, the US EPA role was to assist companies in evaluating alternatives in their business practices, to educate and inform, rather than to enforce and impose penalties. Some of the areas of emphasis have been Title 5 permits, the phase out of CFC's, the monitoring of asbestos activities under the Federal Clean Air Act NESHAP regulations. Although the asbestos regulations do not require removal of asbestos, once asbestos is disturbed or is to be removed or abated in the renovation process, Federal notification and other requirements are triggered. US EPA called attention to New York State requirements, including those that each asbestos project have an independent air monitor and that asbestos waste be properly disposed.

The US EPA also called attention to the focus on three different types of lead based paint laws and regulations: (1) the Real Estate Disclosure Rule, which requires that a seller or lessee of housing built pre 1978 inform the purchaser or lessor of the property of the potential of a lead based paint hazard through a disclosure statement and the distributing of a pamphlet entitled "Protect Your Family From Lead In Your Home"; (2) the Pre-Renovation Education Rule, which requires a contractor to advise home owners and others of potential lead hazards before work

begins and to distribute a pamphlet calling attention to the lead based paint hazards; this requirement went into effect in June 1999; and (3) the Renovation Rule, which requires that all activity involving lead based paint abatement be carried out by contractors certified to undertake lead based paint abatement.

The US EPA University Initiative

The US EPA targets specific industries which have trouble complying and, as to these industries, sets a priority to assist in promoting compliance. During 2000, colleges and universities are the subject of a Region 2 initiative. Patrick Harvey notes that colleges and universities show poor environmental management. In order to address these issues, US EPA has encouraged a voluntary environmental audit program focused on attaining compliance. The program has been commenced by sending questionnaires to colleges and universities in Region 2. In response, the college or university may disclose environmental problems which may lead to violations, and, if corrected within 21 days of discovery, no violation or penalty will be issued or assessed. If the college or university is proceeding in good faith, extensions of time to comply are granted as a matter of course.

Excluded from the amnesty program are serious environmental hazards, hazards which threaten public health and safety and failures to follow prior judicial or administrative orders. Environmental issues which are part of a pattern of non-compliance are also excluded from amnesty and are subject to significant fines, and if economic benefit has been derived by past non-compliance, that economic benefit must be forfeited by payment of a fine.

In substance, the US EPA University Initiative promotes self-disclosure and compliance by foregoing gravity based penalties if they college or university is willing to discover, disclose and correct promptly.

New York City Department of Environmental Protection

Russell Pecunies, Assistant Counsel, New York City Department of Environmental Protection, lists the following as DEP's top priorities: asbestos, hazardous materials, right-to-know, water and sewer, and air and noise. Mr. Pecunies specifically noted that DEP has relinquished its role relating to lead based paint violations and that the New York City Department of Health has taken on that role.

NYC DEP's Role In Asbestos Enforcement

In the asbestos area, NYC DEP operates under a detailed and lengthy set of regulations. Most relevant for the property owner is that much of the regulations provide for strict liability on the part of the building owner. When the contractor is issued a notice of violation, for many of the asbestos violations, the building owner will be issued a separate notice of violation and fine, separate from that notice of violation and fine issued to the contractor. The key, as NYC DEP sees it, in avoiding receiving violations and being fined, is to hire only those asbestos abatement contractors who will not commit violations.

NYC DEP's View: Underwriting and Hiring the Right Contractor is the Key

NYC DEP's Contractor Quality Checklist lists the following factors for the property owner to look at before choosing the asbestos abatement contractor: (1) years in business; (2) principals, owners and salaried personnel; (3) business name; (4) project experience; (5) insurance for asbestos liability; (6) bonding; (7) financial statements; (8) bank relationships; (9) equipment list; (10) vehicle list for project use; (11) description of warehouse and office facilities owned/rented; (12) list of state licenses and other certifications; (13) company history; (14) professional membership; (15) regulatory compliance; (16) safety and training; and (17) company organization.

Based on experience, the NYC DEP urges the building owner to look carefully at how many times the contractor has changed its name and to make sure that the contractor is licensed by the New York State Department of Labor and that the license has not lapsed. In addition, it is important to look at the contractor's list of violations which is available by writing to the NYC DEP.

Independent Air Monitor Is Required On Asbestos Abatement Projects

Mr. Pecunies pointed out that the independent air monitor who checks the abatement contractor's results must truly be independent and not be chosen through or at the recommendation of the abatement contractor.

Access to the Asbestos Abatement Site Is the Building Owner's Responsibility

Although the asbestos abatement contractor will most often fill out the notification form filed with the NYC DEP indicating the dates and times at which the asbestos abatement activity will take place, the building owner must be careful. A violation will result if the notification form indicates that the work will be taking place 24 hours a day, 7 days a week and access is not available when a NYC DEP inspector shows up to inspect. Other practical details such as locking up the decon when the contractor is not on site, but leaving keys with building personnel if a NYC DEP inspector requires access and making sure that the address provided by the contractor on the notification forms is correct can head off violations being served on the owner.

Community Right to Know Requirements

A facility inventory form must be filed on March 1 of each year identifying the presence and quantity of hazardous substances in each building. While these requirements are often thought to apply to industrial or manufacturing, they also apply to office buildings which have large quantities of chemicals for cleaning on premises. The NYC DEP inspection is arranged by appointment and is conducted to check that the hazardous substances are where there are reported to be, in the reported quantities and that they are appropriately labeled.

Release of Hazardous Materials: NYC DEP Requirements

Releases of hazardous materials must be reported to the NYC DEP when the amount exceeds reportable quantities on the NYC DEP list of hazardous materials. A "spill" requires an immediate phone notification, followed by a written report within a week of the incident. The notification is followed by a Commissioner's Order showing the scope of work to be undertaken and the compliance date.

NYC DEP Noise and Odor Violations

Industrial and restaurant uses adjacent to residential uses create a climate in which noise and odor can result in violations being issued. Visible emissions and odor are prosecuted on a complaint driven basis. Air circulation devices used to combat food odors often result in excessive noise; noise above 45 db, measured 3' inside the open window of a residential unit will result in a violation if measured by NYC DEP.

New York State Department of Environmental Conservation

Lou Oliva, NYS DEC's Acting Regional Counsel, focused on the NYS DEC spills program. He urged that corporate attitudes need to be to get the clean up over with and get back to core business. He indicated that stipulation agreements entered among polluters and the NYS DEC was upon basic obligations, not upon allocation of liability and not upon allocating fault. He indicated that most often agreements could be reached between the environmental consultant and the NYS DEC technical staff. The likelihood of prompt resolution was significantly increased when the polluter moved forward in

setting the remediation study and setting realistic goals to be reached. In these cases, the record of decision could then be drafted based upon the remediation study without the need for any further significant expense.

Overall, Mr. Oliva stated that it was NYS DEC's view that being pro-active puts the building owner in a good light in all points of contact with the NYS DEC: (1) enforcement; (2) permitting; and (3) remediation. He urged building owners to work cooperatively with the NYS DEC, get issues resolved and get back to their core business.

Conclusion

Methods of addressing environmental enforcement have evolved over the past 30 years. Virtually all of the mystery has been taken out of compliance. Agencies at the Federal, state and local levels urge education, sharing information and pro-active action on the part of the regulated. Clearly, to avoid meeting environmental enforcement action under emergency conditions, undertaking a well-managed and thorough environmental self assessment is the key.

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