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Environmental Corner: PADEP Update on Report Releases

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Section 91.33(a) of the Pennsylvania Clean Streams Law provides that a person has a duty to notify the Pennsylvania Department of Environmental Protection (DEP) if there is an "accident or other activity or incident" that "endangers downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would otherwise damage property." The statute requires the owner to immediately notify the DEP. Throughout the years, DEP has interpreted its statutory mandate to require property owners to report incidences in which there is historic contamination. In other words, if an owner or operator at a site had a hazardous waste lagoon, DEP's position was that, if it is discovered by a later property owner, that property owner should notify DEP.

In the years since the passage of the Clean Streams Law, DEP has not litigated whether the language deals with historic contamination, or whether the duty to report extends to areas beyond groundwater or streams.

All this is in the process of changing. In a pending case before the Pennsylvania Environmental Hearing Board, DEP has taken the position that if a property owner, during due diligence at a site, discovers any elevations above DEP's statewide health standards, those elevations must be reported to DEP. DEP's Steve Sinding, Southeastern Region Act 2 head, stated that the DEP would follow up these reports by asking what individuals intended to do to address a cleanup or to study site conditions. In other words, reporting to DEP would likely lead to more inquiries from DEP regarding what contamination might be present and what the property owner would do to address those issues.

The economic consequences of DEP's insistence on reporting are obvious. First, numerous consulting companies retained by developers recommend testing of soils or ground water, without concern about whether reporting would be required. Often a developer does not know whether the consultant's recommendation is a legitimate concern for future use of the property, or an effort to make additional money off the developer. Now, there may be a reporting obligation if those tests are done.

Second, if DEP's position prevails, the number of reports required for new developments would expand dramatically. With the expansion of reporting, there would be an equal delay in responses from DEP, which could complicate and draw out new land transactions.

Third, the mere cost of doing the studies required by DEP will discourage many people from investing in brownfields properties. This runs contrary to DEP's policy to develop brownfields.

The Environmental Hearing Board will shortly make its decision interpreting the statute. It is likely that any party involved in this matter will appeal to Commonwealth Court. However, when making

decisions regarding testing, make sure you have full confidence that the tests are necessary and will be a productive use of funds.

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