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Will New Illinois Right-to-Know Law Protect Communities or Stifle Voluntary Cleanups and Breed Litigation?

New amendments to the Illinois Environmental Protection Act (P.A. 94-0314) have potential far-reaching consequences for owners of contaminated property and those who live nearby. One significant feature of the new law is that it requires the Illinois Environmental Protection Agency (IEPA) to notify landowners of contamination that migrates onto their property from a nearby release. Thus, if a property owner or developer voluntarily enters the Illinois Site Remediation Program (SRP) to obtain a "no further remediation" letter from the IEPA, it may unwittingly generate data showing off-site impacts that will require IEPA to inform the local community; once given, the notice may stir up local concern and breed toxic tort lawsuits. Consequently, the law may discourage entry into the voluntary cleanup program because of the notification requirement.

A second provision in the law requires notification of certain enforcement actions to affected neighbors.

Equally significant is a provision of the new amendment that empowers IEPA to issue administrative orders to compel remediation of sites where soil or groundwater contamination has migrated off-site to adjacent parcels. The new law sets forth an administrative process by which IEPA may issue these orders, many features of which are troubling.

This Management Alert is intended to furnish an overview of the new amendments. Because of the significance of this new law, members of Seyfarth Shaw LLP's Environmental, Safety and Toxic Torts Group will host a **Teleconference Web Meeting in early September**. Please check your email for the invitation in the coming weeks or visit our website at www.seyfarth.com. In the meantime, please feel free to direct any questions on the

new legislation or the briefing to Andy Perellis (aperellis@seyfarth.com), Jeryl Olson (jolson@seyfarth.com), or Philip Comella (pcomella@seyfarth.com).

Notification of Contamination

When Must IEPA Provide Notice of Soil Contamination? IEPA must provide notice of contamination conditions on affected property whenever: (1) soil contamination which has moved off-site from where a release occurred poses a threat of exposure above the Tier I clean-up objectives (based on the current use of the affected off-site property) at the affected off-site property, or (2) where groundwater contamination poses a threat of exposure to the public above the Class I groundwater quality standards at the affected off-site property.

To Whom Must IEPA Provide Notice? For soil contamination, IEPA must notify the affected property owner. For groundwater contamination IEPA must provide notice to the owners of private and semi-private well systems and non-community water systems, and to the owners and operators of public water supply systems.

Who Provides the Notice? Although IEPA must provide the notices of soil and groundwater contamination to affected property owners, in situations where a responsible party has a "community relations plan," that party can provide Agency-approved notices in lieu of notices by the Agency. Whether notice is by IEPA or the responsible party, the costs of the notice are to be born by the responsible party.

How Does IEPA Decide Whether to Notify? The notice must be made for soils exceeding Tier I standards for the current use of the affected property and for groundwater exceeding Class I limits at the affected property. In order

to determine whether the standards have been exceeded IEPA may rely on available scientific information; the Agency is not required to perform any investigations or do confirmation analysis of contamination.

What is the Form of the Notice? The form of the notice can vary, at the discretion of the IEPA, but may include notification in person, by mail, public meetings, signs, electronic media or print media; after July 1, 2006 notices must be posted on the Internet on IEPA's website.

How Will IEPA Obtain Information for the Notice? To facilitate notice by IEPA, the Agency can issue an "information demand letter" to the responsible party to provide information on the contamination. The Agency can require the County in which the affected property is located to provide the names and addresses of all affected property owners.

What Information Will be Included in the Notice? (1) Name and address of the site where the release occurred; (2) contaminant(s) of concern; (3) whether the release was to air, water or soil; (4) brief description of potential health effects; (5) recommendation for testing impacted wells; (6) IEPA contact person.

Notification of Enforcement or Removal Actions

Under What Circumstances Must IEPA Provide Notice of an Enforcement Action? In addition to providing notice of contamination to affected property owners, under the new law IEPA is also required to give notice to nearby property owners of certain enforcement actions. Notices of enforcement actions are required under three circumstances: (1) where IEPA identifies a circumstance of substantial danger to human health or the environment which is referred for injunctive relief to the Attorney General or State's Attorney; (2) where IEPA issues a "seal order" to seal equipment or a facility operated in violation of regulations; or (3) where an immediate removal action is performed pursuant to CERCLA by USEPA, IEPA or a private party.

When Must IEPA Give Notice of an Enforcement/Removal Action? When any of the three conditions above exists, the Agency must, within 60 days, give notice to all property owners within 2,500 feet of the contamination subject to the enforcement action, order or response action.

Are Notices Available On The Internet? After July 1, 2006 IEPA is required to make the notices of contamination, as well as the notices of enforcement/removal actions, available on their website, and searchable by

date, zip code, site or facility name and geographic location. IEPA must also post on the internet searchable State and USEPA information about releases and suspected releases in the State.

Administrative Order Authority - New Section 22.2d of the Illinois Environmental Protection Act

When Can an Order Issue? IEPA may issue an Order to a responsible party whenever: (1) soil contamination beyond the boundary of a site where a release occurred poses a threat of exposure above the Tier I clean-up objectives (based on the current use of the off-site property) at an affected off-site property, or (2) where groundwater contamination poses a threat of exposure to the public above the Class I groundwater quality standards at an affected off-site property.

To Whom Can IEPA Issue an Order? To a party "potentially liable" under the Illinois Environmental Protection Act for the release or substantial threat of release. A potentially liable party includes any site owner or operator, a former owner or operator who operated the site at the time hazardous material (including petroleum) was disposed of, and any person who arranged for disposal of the material.

What can be Required Under an Order? IEPA has broad authority to issue "any order that may be necessary to protect the public health and welfare and the environment" to require response actions consistent with CERCLA regulations; however the remediation objectives used will be risk-based remediation objectives established under TACO (Tiered Approach to Corrective Action).

How Can I Challenge an Order? Once an order is received, the recipient can challenge the validity of the order before the Illinois Pollution Control Board ("the Board") by filing a petition within 35 days of being served with the order. Note that this 35-day window is the only opportunity a party has to challenge the order (the recipient cannot wait until an attempt is made by the State to enforce the order or to seek penalties for violation of the Act). The final action taken by the Board can be directly appealed to the appellate court.

Can I Get Reimbursement of Incurred Response Costs if I am Not Liable? If a party seeks to challenge its liability or the validity of the order before the Board (and if needed before the appellate court), and it is successful in that challenge, then the Board or appellate court "may" authorize payment to the petitioner of the reasonable costs of the challenge, as well as any response costs incurred to comply with the order. It appears that reimbursement is discretionary.

If I am Liable for Remediation, Can I Recover My Costs From Others? What about Orphan Shares? There is a right of contribution against another person who is liable for the costs of response action. Additionally, if a party performs the remediation it may petition the Director of IEPA for reimbursement of the costs incurred that represent the “orphan share” of liability attributable to a bankrupt or insolvent party otherwise liable under the Environmental Protection Act. The petition for reimbursement must be made within 60 days of completion of the required action. If IEPA refuses all or part of the petition, the party may seek review of the Agency’s determination with the Board.

Is the State Authority Comparable to That Held by U.S. EPA under CERCLA § 106? Although the new law appears to be modeled after CERCLA, the state administrative authority is significantly different. Under CERCLA, US EPA may issue a CERCLA 106 UAO only where it concludes that the release or threatened release of a hazardous substance may present an “imminent and substantial endangerment to the public health or welfare or the environment.” The State law does not appear to be limited to these emergency-type situations.

If you have questions or need further information on the implications of this new legislation, please contact the Seyfarth Shaw Environmental, Safety and Toxic Torts attorney with whom you normally work or visit our website at www.seyfarth.com.

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This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents please contact the Firm’s Environmental, Safety and Toxic Torts Group.

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