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The Environmental Law Firm℠

Environmental News

August 30, 2013

New Buyer Protections Under the Audit Privilege Act

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Beginning September 1, 2013, buyers conducting pre-acquisition due diligence can take advantage of certain privileges and immunities currently available only to owners and operators conducting internal compliance audits of regulated facilities under the Texas Environmental, Health, and Safety Audit Privilege Act. Since 1997, owners and operators have had the ability to conduct internal environmental and health and safety audits of regulated facilities without the risk that the audit reports could be discovered and used against them by regulatory agencies or plaintiffs' attorneys during third-party litigation. The Texas Legislature has now expanded the same protections to buyers performing pre-acquisition compliance investigations and subsequently correcting problems found.

Buyers will soon be entitled to protect environmental or health and safety due diligence reports from discovery during civil litigation or administrative enforcement proceedings. Provided the buyer meets all applicable requirements of the Audit Privilege Act, including the timely, post-closing correction of discovered violations, there will be no state-imposed penalties for such violation. Violations entitled to the limited immunity under the Act include those governing waste water discharges, waste management, air emissions, and building maintenance or renovations that may disturb asbestos. The limited immunity can also come into play in real estate transactions where storm water or other water discharges are involved.

Unlike the owner or operator of a regulated facility, a buyer need not notify the applicable state agency of pre-acquisition due diligence prior to its commencement. The buyer must, however, notify the appropriate regulatory authority of any discovered violations and of any intent to continue the audit, no later than 45 days after it acquires the facility in order to qualify for immunity from penalties. Ongoing audits must be completed within six months post-closing. In addition, the buyer must certify it is not a majority owner of, majority owned by, or under common ownership with the seller, and that it was not responsible for the facility's compliance with environmental, health, or safety laws prior to the acquisition.

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