

NEWS ALERT

RETAIL, RESTAURANT & HOSPITALITY



Environmental Issues that Arise in Retail and Other Commercial Businesses

By Patricia L. Boye Williams | August 9, 2017

Owners, lessors, lessees, and developers of retail and other commercial properties are often unaware of the scope of environmental laws that apply to their businesses and/or properties. Unfortunately, they often become aware that they have failed to register for a required permit or manage waste property after an environmental agency (such as the Connecticut Department of Energy and Environmental Protection (“CT DEEP”), the Massachusetts Department of Environmental Protection (“MA DEP”), or the United States Environmental Protection Agency (“EPA”)) notifies them that their property or business operations violate environmental laws. Further, while tenants can often limit their liability to those violations associated with their own actions, property owners are liable for both their own actions, as well as the actions of their tenants.

Issues can arise in the context of retail and other commercial businesses with respect to environmental laws that govern:

- Proper disposal and management of hazardous materials including expired pharmaceuticals, some cleaning products, products recalled for lead paint, and certain pesticides;
- Renovating or selling a building that contains hazardous building materials such as lead paint, asbestos, and polychlorinated biphenyls (“PCBs”) (these are often found in buildings constructed prior to 1972);
- Stormwater Permits for large parking lots and other impervious surfaces or for construction of new buildings and significant renovations;
- Underground storage tanks used for storing heating oil, diesel or other fuel, or other materials; and
- Management of environmental liabilities when a property or business is transferred to a new owner (including issues arising under the Connecticut Transfer Act).

Each of these issues is addressed in greater detail below.

Before testing for asbestos, lead paint, or PCBs, property owners and tenants should seek advice regarding the ramifications of testing for these substances.

Joseph R. Tarby, III, Chair
781.897.4980
jtarby@murthallaw.com

Hazardous Materials / Wastes and Universal Wastes. Disposal and, in some cases, storage of hazardous wastes must be handled in accordance with environmental laws. Certain substances are regulated as hazardous materials (or wastes when disposed of) and therefore must be handled accordingly.

Materials that may require special handling or disposal include:

- Certain pharmaceuticals (e.g., warfarin; nicotine gum, lozenges, patches; e-cigarettes);
- Pesticides (subject to both hazardous waste rules as well as federal and state pesticide laws regarding storage, use and disposal);
- Dry cleaning solvents;
- Universal wastes (e.g., fluorescent light bulbs and batteries);
- Products that are unsold or returned, for example, products that are defective, damaged, or out-of-date, each to the extent they contain a hazardous material or otherwise fit into another listed category of hazardous materials such as:
 - Items recalled for toxic levels of hazardous materials (e.g., lead paint on children's toys);
 - Ignitable products (e.g., perfumes, solvent-based paints and cleaners, lighter fluid); and
 - Toxic products (e.g., fluorescent light bulbs, some anti-dandruff shampoos, Nickel cadmium and lead-acid batteries, some lithium batteries).

Spills or Releases of Hazardous Materials. Any spills or improper disposal of these hazardous materials must be addressed properly, and where necessary (depending on the quantity spilled and location of the spill), proper authorities notified of the spill. Improper disposal includes pouring chemicals down a sink drain that is not specifically designed for hazardous materials, leaking containers, or other releases that are not contained in appropriate containers.

Hazardous building materials. Most people are aware of the issues associated with asbestos and lead paint. Both asbestos and lead paint can remain in place under certain circumstances and if in good condition, but require certified / trained contractors to remove them. PCBs, by comparison, generally cannot be allowed to remain in place except under limited circumstances. PCBs were often used in caulk and window glazing, as well as old fluorescent light ballasts and some floor coatings. If a property owner discovers PCBs are present, they must develop a plan for removing the PCBs from the building; however, there is no requirement to test for PCBs. The EPA prohibits using any product that contains PCBs greater than 50 parts per million (ppm); CT DEEP prohibits use of PCBs greater than 1 ppm. For these reasons, before testing for asbestos, lead paint, or PCBs, property owners and tenants should seek advice regarding the ramifications of testing for these substances. All of these materials must be addressed prior to renovation efforts and/or demolition. Costs for remediating hazardous building materials can cost millions of dollars.

Stormwater permits. Owners of large shopping centers often have large parking lots which are impervious to water and accordingly, a commercial stormwater permit must be maintained. Similarly, when more than one acre of land will be disturbed as part of any construction project, a construction stormwater permit is likely required. These stormwater permits include a variety of requirements such as monitoring of rainwater discharge, implementing low impact design construction methods, and maintaining surfaces at the property.

Underground Storage Tanks ("USTs"). Many retail and commercial property owners or tenants maintain USTs and aboveground storage tanks ("ASTs") for the purpose of storing heating oil, motor fuel, fuel for emergency generators, or other liquids. If USTs and ASTs are used to store heating oil for use on the premises, there are fewer applicable requirements, but there are still regulations to be followed. For USTs and ASTs that are storing other substances, an even larger number of regulations apply, and failure to comply with these regulations can result in an environmental agency requiring the owner to empty and stop using the tank. All owners of USTs and ASTs need to be aware of the life expectancy of their tanks, the required maintenance, and the method of release detection that is being used on the tanks. All releases from tanks must be properly addressed—and it is critical that USTs, in particular, have functioning monitoring equipment as an undetected release from a UST could eventually impact groundwater or adjacent properties, resulting in a significant clean-up cost.

Sale of Real Estate and/or Business Operations. When properties or businesses are sold, especially if the property has ever included a dry cleaner, a service station, a photo-developer, a medical center, a pharmacy, or other operations that may generate hazardous wastes, the parties to the transaction should evaluate the risk of environmental liabilities and whether remediation or other work may be required. Environmental risks can then be allocated as part of the transaction. Purchasers of properties that may be contaminated should also be aware of protections available to “innocent landowners,” i.e., those parties who did not cause the contamination. But these protections are only available if the purchaser first undertakes certain investigations and actions.

Transfer Act. In Connecticut, another concern arises whenever real property or a business is transferred. Specifically, if the business, or any businesses at the property, ever generated over 100kg of hazardous waste in a single month, then the property is an “establishment,” and certain forms must be filed with CT DEEP at the time of transfer. Additionally, either concurrently with or subsequent to the transfer, a thorough environmental investigation and remediation must be completed at the property.

For this reason, leases should be drafted to ensure tenants are not permitted to cause the property to become an “establishment” under the Transfer Act, and companies should be aware of waste generation practices, especially if it is possible to avoid generating more than 100kg of waste in any one month. In particular, a company that does not generate large amounts of waste, but does not immediately transport it off-site, should maintain records to demonstrate when the waste was generated in order to show that it did not generate over 100kg of hazardous waste in one month, even if the waste was transported off-site all at once.

In order to avoid potentially significant civil penalties and also avoid disrupting ongoing operations, retail and commercial businesses need to remember that taking care of business should include being aware of and following environmental regulations, such as the ones identified here.

If you have questions or need additional assistance with environmental matters, please contact Patti Boye-Williams, pboyewilliams@murthalaw.com, (860)240-6168.

Joseph R. Tarby, III, Chair
781.897.4980
jtarby@murthalaw.com

Paul D. Bekker
617.457.4032
pbekker@murthalaw.com

Patricia L. Boye-Williams
860.240.6168
pboyewilliams@murthalaw.com

Michael P. Connolly
617.457.4078
mconnolly@murthalaw.com

Bridget M. D'Angelo
860.240.6015
bdangelo@murthalaw.com

Thomas M. Daniells
860.240.6078
tdaniells@murthalaw.com

Michael J. Donnelly
860.240.6058
mdonnelly@murthalaw.com

Robert E. Kaelin
860.240.6036
rkaelin@murthalaw.com

Janemarie W. Murphy*
860.240.6143
jmurphy@murthalaw.com

James F. Radke
617.457.4130
jradke@murthalaw.com

Jane Torcia
860.240.6132
jtorcia@murthalaw.com

Thomas S. Vangel
617.457.4072
tvangel@murthalaw.com

Keith S. Varian
203.653.5415
kvarian@murthalaw.com

**Not an attorney*