

Kiddie Kollege Debacle Illustrates Weakness Overlapping Oversight of Institutional Control Leads

The New Jersey Department of Environmental Protection (NJDEP) ordered the shutdown of Kiddie Kollege Day-Care Center in Franklinville, NJ, following the discovery that more than 30 children ranging in ages from 8 months to 3 years were exposed to mercury vapors that were 25 times the allowable limit. The incident illustrates the weakness of the institutional controls program that depends on close cooperation and communication between state and local government.

Accutherm Corp., a thermometer manufacturer, began operating at the site in 1984. In the late 1980s, groundwater at the site was impacted from wastewater discharged into the septic system and an OSHA inspection revealed elevated levels of mercury in the blood of some workers. In 1994, Accutherm filed a chapter 11 bankruptcy petition and ceased operations. The cessation of operations obligated the company to comply with the state Industrial Site Recovery Act (ISRA) that requires owners and operators to investigate and remediate property to the satisfaction of NJDEP. Accutherm did not comply with ISRA.

Midlantic Bank held a mortgage on the property and after performing its own investigation, the bank postponed a sheriff's sale because of its concerns about the potential for mercury contamination. A lawyer for the bank sent three letters to the owner of Accutherm, Inc. recommending that it post hazard notices signs to protect prospective purchasers touring the building and that it notify the Gloucester County Health Department as well as the real estate agency marketing the building. The bank even went as far as preparing signs at its own expense and provided them to the owner. When the owner of the company failed to respond, the bank attorney contacted the county health department.

In 1995, NJDEP issued a cleanup directive to Accutherm and when the company failed to comply, the agency referred the site to the federal EPA for an emergency removal action. After EPA performed a site inspection, the agency issued a letter in January 1996 indicating that the site did not pose an imminent threat to human health since it was unoccupied but that further investigation and remediation was warranted.

Meanwhile, in 1997, Navillus Group, LLC (Navillus) notified NJDEP that it was planning on acquiring the former Accutherm site through a tax certificate sale and that it was relying on the January 1996 EPA letter that the site did not pose an imminent risk. In August 2002, James Sullivan, Inc., acquired the property from Navillus for \$1. (Navillus spelled backwards is Sullivan.) In 2003, Sullivan requested a change-in-use permit to allow the property to be converted to a day care center. An environmental consultant retained by Sullivan filed a request with the NJDEP under the state Open Public Records Act to review the agency information on the site but the only document provided to the consultant was the 1996 EPA letter. As part of change-in-use permit request, Sullivan provided a copy of the 1996 EPA letter. The site had been placed on the NJDEP database of Known Contaminated Sites in 2001 but apparently had been deleted inadvertently from the list along with 1846 other sites at the time of the zoning change application. Since the zoning for the property permitted day-care centers, no zoning board hearing was required. Moreover, since no construction took place, no planning board hearings that might have required further investigation were held. Since neither board held hearings, the Franklin Environmental Commission was not notified.

The Franklin Township zoning officer issued the day care a change-of-use permit in December 2003 and a certificate of occupancy in 2004.

After the Kiddie Kollege was shutdown, Franklinville township officials discovered that a second day-care center was operating at a site that had been formerly used as a petroleum storage facility operated by the McCandless Petroleum Co. The day-care center operated in a building that formerly housed the company office. According to the property owner, the site is impacted with petroleum contamination but contamination is located in a portion of the property that is fenced-off and is not in the building or the outdoor play area. As a precaution, though, the day-care center was moved to a new facility at a local church. NJDEP has indicated that it will send investigators to the property because it was not clear what contamination was present or where it was in relationship to the day-care center.

NJDEP ordered closed a third day care, Ultimate Scholar Inc., after elevated levels of PCE were discovered inside the day-care center. The day care center is located at Bellcrest Plaza strip mall in Tom's River. A dry cleaner had operated at the space now occupied by the day care center from 1976 until 2004 when it was added to the NJDEP Known Contaminated Sites list. Indoor air concentrations of PCE were initially detected at 33 times the level considered safe for adults. After a ventilation system was installed, a second test indicated that the concentrations had increased to almost 50 times the allowable limit.

Commentary: *The day care centers are the latest shockwave to roil the remediation program of the New Jersey Department of Environmental Protection (NJDEP). As we discussed in our brownfield backlash article of the previous issue, the agency has come under withering criticism for what is perceived to be inadequate oversight of cleanups at a series of high profile sites.*

However, the problems exposed at these sites are not limited to New Jersey. With the shift to risk-based cleanups, institutional and engineering controls play a key role in site remediation programs across the country. Institutional and engineering controls make risk-based cleanups possible by preventing exposure to residual contamination remaining at a site. Yet, as illustrated by the New Jersey day care center cases, the institutional control process can easily breakdown if there is not close communication and coordination among multiple layers of government and private property owners. State regulators often view local governments as their ears and eyes, and expect local regulators to enforce state-mandated controls or advise the state agency when there are problems. However, local officials often lack the resources and expertise to monitoring compliance. This situation is exacerbated by the sheer volume of real estate transactions. State and local regulators simply do not have staffing resources to keep up with the number of real estate transactions. Indeed, NJDEP officials were quoted in local newspapers as saying that they expected banks and prospective purchasers to be the first line of defense in ensuring that the controls are being effectively maintained.

This is frequently not the case, though. Often a state regulatory agency will issue an NFA letter requiring recording of a deed restriction but the property owner may neglect to file the required restriction. Since the case manager has moved onto other open cases, they usually is little follow-up unless the state has a program for

periodically auditing land use controls (institutional and engineering controls). Then, when the property is sold or refinanced, the subsequent purchaser or lender will assume that all conditions of the NFA letter were complied with and fails to confirm that the deed restriction or other land use control was implemented.

In the Kiddie Kollege case, the purchaser of the tax certificate did not do comprehensive due diligence but simply relied on a review of the NJDEP files. Unfortunately, the only document in the NJDEP file was the 1996 EPA letter since the site had been inadvertently deleted from the state list of contaminated sites. Both the purchaser and the local government officials misinterpreted the EPA letter. These parties thought that a finding that the site did not qualify for a federal-funded removal action since it did not pose an imminent risk meant that there were no significant environmental concerns at the site.

Under the federal AAI rule and ASTM E1527-05, purchasers of property and those interested in qualifying for one of the CERCLA landowner liability defenses must determine if there are land use controls imposed on the property. Even if a purchaser or lender is not concerned about qualifying for CERCLA defenses, it is important from a business and reputational risk perspective to review the conditions and assumptions of an NFA letter and verify that those conditions have been satisfied.

The only party involved in the Kiddie Kollege incident that seemed to understand the environmental issues at stake was the bank. Unlike the cases we discussed in our prior issue where lenders did not adequately disclose site conditions to prospective purchasers, the lender in this case performed a comprehensive investigation and urged the borrower to post hazard signs at the property to minimize risks to prospective purchasers. Had the bank not been so pro-active and relinquished its lien without disclosing the environmental conditions of the property, the lender could have found itself as one of the defendants in the class action lawsuit that was recently filed.