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WHAT PHASE 1 ESAS ARE MISSING

METHANE MITIGATION REQUIREMENTS FROM LANDFILLS MAY BE A POTENTIAL ENVIRONMENTAL ISSUE THAT IS FLYING UNDER THE RADAR—AND IT COULD COST MILLIONS TO CORRECT.

NOVEMBER 2, 2017 | BY KELSI MAREE BORLAND

Phase 1 Environmental Site Assessments may miss the presence of methane from nearby landfills, and the result could lead cost millions of dollars to meet methane mitigation requirements. To find out more about methane mitigation, the legal background and what developers need to know, we sat down with **Cox, Castle & Nicholson LLP** partner **Keith Walker**for an exclusive interview.

GlobeSt.com: Why is methane mitigation becoming an issue for developers?

Keith Walker: For developers throughout California, there is a potential environmental issue that appears to have been consistently flying under the radar. It is quite often missed by the standard Phase I Environmental Site Assessment and the failure to identify it on a pre-acquisition basis can lead to requirements to install mitigation measures that could cost millions of dollars. To be blunt, the issue is garbage – and, therefore, methane. Under the California Building Code, "[p]ermits shall not be issued for buildings or structures . . . within 1,000 feet (304.8 meters) of fills containing rubbish or other decomposable material," subject to certain exceptions. The problem is that, according to the State of California's Department of Resources Recycling and Recovery ("CalRecycle"), there are over 1,500 current and former landfills in the state; and many Phase I Environmental Site Assessments, even from reputable consultants, fail to identify the presence of nearby landfills based on inadequate database research or other investigation. When that occurs, landowners may only learn of the requirement to install methane mitigation measures after acquiring the property at issue, thereby missing the chance to avoid incurring significant mitigation costs.

GlobeSt.com: What is the legal context for this issue?

Walker: The legal background behind the Los Angeles County Code warrants some explanation. First, the International Code Council (ICC) issues the International Building Code (IBC). Previously, the International Conference of Building Officials (ICBO) was the organization that had issued the Uniform Building Code (UBC), which was then typically adopted by reference into many state building codes. In 2000, however, the ICBO's UBC merged with the National Building Code issued by the Building Officials and Code Administrators and the Standard Building Code issued by the Southern Building Code Congress International – to become the IBC. For California, the California Building Standards Commission reviews the IBC issued by the ICC and decides which provisions to incorporate by reference into the California Code of Regulations (CCR) – as the California Building Code (CBC). Once incorporated into the CCR, each county then adopts the CBC in its own way.

GlobeSt.com: What do developers need to do to comply?

Walker: With respect to Section 110.3 of the California Building Code for 2016, the County of Los Angeles adopted it by reference as Title 26 of the Los Angeles County Code. Under that section, when a site is located within 1,000 feet of a current or former landfill, the fill needs to be isolated by "approved natural or artificial protective systems." These systems may be the responsibility of the owner or former owner of the landfill at issue based on requirements

imposed by LACDPW. The protective systems are typically extraction systems or air injection systems. An extraction system provides a constant vacuum to areas where methane migration is likely, in order to pull the methane from subsurface areas and vent it to the atmosphere. As a result, annual permits must be obtained for from the Air Quality Management District for the area in which the extraction system is located. In contrast, air injection systems pull air from the atmosphere and force it into the subsurface in order to create an "air curtain" that prevents methane from migrating away from the methane source. Because this system does not force methane into the atmosphere, no permits from the Air Quality Management District are required.

When an approved protective system is in place, the developer (or other party) seeking its building permits should provide LACDPW with documentation regarding the protective system and request that LACDPW approve the sufficiency of the protective system and confirm that no mitigation requirements will be imposed on the developer. Even in that scenario, however, LACDPW may add as a condition to its approval that in the event the protective system ever goes offline (for example, if the responsible party goes bankrupt such that there are no further funds to use for operation of the protective system), further requirements may be imposed by LACDPW at the non-source property for methane monitoring and/or mitigation. Consequently, LACDPW typically requires contact information for the non-source property owner for prospective future communication on that issue. To date, according to LACDPW, it has apparently not required that a deed restriction be recorded on title to any property, memorializing that requirement. Nevertheless, the agency's viewpoint is that it has the right to do so.

GlobeSt.com: Is compliance different for municipalities without a mitigation system in place?

Walker: In a scenario where a responsible party has not yet been established and a County-approved mitigation system has not yet been put into operation, the municipality in which the site is located may in consultation with LACDPW impose methane mitigation requirements on off-site property developers in order to address the potential for methane migration. Consequently, property owners could be required to pay the cost of addressing a condition that they never caused in the first instance. The mitigation requirements imposed on property owners near to the methane source typically consist of sub-slab methane barriers with passive venting systems which provide methane with a path of least resistance out from under the foundation and otherwise block methane from passing through the foundation. These

systems may add anywhere from $3 to $5 per square foot in ground floor construction costs. Therefore, for a large development, the incremental costs could easily amount to millions of dollars. If the development at issue is or could be above levels of parking, that construction design sometimes provides the necessary ventilation to the satisfaction of LACDPW with respect to preventing methane intrusion. The sufficiency of that measure would need to be confirmed, however, and is not without cost. In addition, active venting requirements—as opposed to passive ones—may be required, thereby increasing costs further.

GlobeSt.com: If ESAs don't detect methane, how does the city determine or detect sites that require methane mitigation?

Walker: LACDPW's requirements for methane mitigation may be imposed despite evidence showing no presence of methane at the property at issue. Even when methane survey results are "non-detect," LACDPW has in the past taken the position that the results of the methane survey are but a snapshot in time and that conditions could change, such that areas with no methane migration at the current time may become affected by methane migration in the future. For older landfills, where sufficient time has passed that methane concentrations should be naturally attenuating, surrounding property owners may be able to avoid methane mitigation requirements by showing results of successive rounds of methane sampling that show no or very low levels of methane. In that instance, the methane mitigation requirement may transform into a methane monitoring requirement, which would leave open the possibility of mitigation requirements in the future if methane spikes ever occur.

GlobeSt.com: What can developers do prior to acquiring a land site?

Walker: A crucial element of environmental due diligence is the concept of pre-acquisition risk management; not only identifying potential risks, but quantifying them and otherwise developing risk mitigation mechanisms to protect purchasers and developers. As stated above, the methane mitigation requirement is one often missed by certain environmental consultants based on an over-reliance on standard database information. Discerning the presence of former landfills at or in the vicinity of a subject property will take a deeper dive into the available information, and quite often in-depth discussions with environmental counsel to identify, evaluate and address the issue. The earlier it can be identified as an issue, the better.