

## Pay Attention to Environmental Liability Protection Fine Print

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While the Pennsylvania Department of Environmental Protection's Act 2 voluntary cleanup program protects a property owner from certain liabilities, acquiring such a property could leave the new owner with certain unexpected liabilities and limit how the property can be developed.

That makes it imperative for a potential buyer of any property with Act 2 liability protection, along with the buyer's counsel, to carefully examine all aspects of the Act 2 Final Report issued to prevent unexpected construction work and costs after the purchase and to ensure that the property can be used as planned.

The Act 2 voluntary cleanup program provides liability protection to owners of properties that have met specified environmental cleanup standards. Under that program, in return for meeting either background, statewide health standards, or site-specific standards (or a combination of these standards) for soil and/or groundwater, property owners are protected in most instances from any liability for future cleanup costs. Banks and financial institutions frequently require attainment of Act 2 standards as a condition for financing the purchase of potentially contaminated properties.

To meet an Act 2, a party must completely characterize the soil and/or groundwater at the property and determine whether any contamination could potentially impact neighboring properties. These findings are included in a final report, which is submitted to DEP for its review and approval. Because of what usually are lower costs of attainment, parties most frequently seek to attain site-specific standards. Properties that meet such site-specific standards typically are subject to specified use restrictions that must be recorded as environmental covenants to the property's deed. The restrictions usually involve banning the use of groundwater or limiting a property to nonresidential uses.

Potential purchasers should conduct due diligence to determine if a property is possibly contaminated. It should be determined whether a property has been approved through the Act 2 program and, if it has not, whether it should.

Potential buyers should not curtail their due diligence simply because a property is approved by DEP under Act 2. First, a potential purchaser should determine whether use restrictions would limit their anticipated use of a property. Next, a potential purchaser should review DEP's approval letter to identify the contaminants and media for which an Act 2 approval was given. There is no requirement that a property owner address every contaminant or impacted medium as part of the Act 2 process. Therefore, there may be potential liability for contaminants that were not characterized and reported to DEP in the Act 2 Final Report.

Finally, a potential purchaser should review the site characterization information submitted to the department as part of the Act 2 process to understand the assumptions the DEP relied on to approve a final report. For example, DEP's approval might be based on assumptions on how stormwater flows onto neighboring properties. If the anticipated development of the property changes how stormwater is handled or flows from the property, the property owner may

lose the Act 2 liability protections. This analysis should be conducted prior to closing on a property.

Property buyers should work closely with environmental counsel and consultants early in the process as they consider property acquisitions. This can prevent considerable expenses and headaches down the road.

If you have any questions on examining an Act 2 approval report to ensure it complies with DEP standards, please [contact me](#) or any member of the [Barley Snyder Environment & Energy Industry Group](#).

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**Martin R. Siegel**

Counsel

Tel: (717) 718-7581

Email: [msiegel@barley.com](mailto:msiegel@barley.com)