

Product Liability & Toxic Torts

Complex Issues Arising From Vapor Intrusion

Potential claims, causes of actions and liabilities are numerous

By Timothy Corriston

Two recent events have brought considerable attention to vapor intrusion liabilities which impact many practice areas. In September, New York State passed a law, effective December of this year, which requires property owners to disclose the results of environmental testing to current and prospective tenants (*A 10952*). The bill requires that in the event that such results involving indoor air, ambient air and sub-slab air, soil and groundwater exceed New York's State Department of Health (DOH) or U.S. Occupational and Safety and Health Administration (OSHA) guidelines, the landlord must provide tenants with a fact sheet of each contaminant and notice of any public hearings held to discuss the testing results.

In conjunction with federal and state regulators focusing their attention on vapor intrusion contamination, in March, ASTM International issued its "Standard E2600-08, addressing the Assessment of Vapor Intrusion into Structures Involved in Commercial Real Estate Transactions." The purpose of the standard is to define "good commercial and customary practice" for conducting a vapor intrusion

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assessment with respect to chemicals of concern in real estate transactions in the United States.

The standard sets forth a four-tier screening process. The four tiers are as follows:

- Tier One — Initial Screening
- Tier Two — Semisite Specific Numeric Screening
- Tier Three — Vapor Intrusion Condition Assessment
- Tier Four — Mitigation

The first two tiers are geared towards determining whether a potential vapor intrusion condition exists or whether there is an actual vapor intrusion condition. A vapor intrusion condition is defined as "the presence or likely presence of any chemicals of concern in the indoor air environment of existing or planned structures on a property caused by the release of vapor from contaminated soil or groundwater on a property or within close proximity to the property, at a concentration that presents or may present an unacceptable health risk to occupants." Tier

one requires the environmental consultant to use non-numerical information typically collected during a Phase One audit to determine whether any potential vapor intrusion condition is likely or not likely to occur because of site conditions or physical setting. Typical information examined includes the site history, past and present use, physical setting, resistance of natural and manmade conduits, and neighboring property histories. The standard presumes a potential for vapor intrusion is unlikely at certain distances.

If vapor intrusion cannot be ruled out as a result of the tier one screening, a tier two analysis is performed. Tier two applies semisite-specific numeric criteria to existing or newly collected soil gas and/or groundwater sampling results to assess if a potential vapor intrusion condition exists.

If a potential vapor intrusion condition is not eliminated as a result of the tier two evaluations, tier three requires more site-specific screening, which includes indoor and exterior testing. Screening should be performed following regulatory agency guidance documents or statutory requirements. Generally, the investigation incorporates testing of the groundwater, soil gas, sub-slab soil gas, and indoor air.

Finally, if necessary, tier four requires that any established vapor intrusion be mitigated using engineering control, building design or other appropriate methods, such as deed restrictions.

The New Jersey Department of Environmental Protection ("NJDEP") has

issued a vapor intrusion guidance document. The guidance document, which was first adopted in a final version in October 2005, was most recently updated in March of 2007. The document consists of a phased approach to investigate the vapor intrusion pathway that follows the basic provisions of the USEPA vapor intrusion guidance, while incorporating New Jersey-specific factors where appropriate. The vapor intrusion guidance document includes screening levels based upon the USEPA Region III Risk Based Concentration ("RBC") Table. The NJDEP acknowledges that the screening levels are based on conservative, USEPA exposure assumptions that consider daily, long-term exposure corresponding to a residential exposure of 24 hours per day, 350 days per year, over 30 years. The stated objective of the document is to provide guidance in determining whether vapor intrusion of site related contaminants is occurring, and to highlight what actions are appropriate. The guide is intended for the use in the evaluation of vapor intrusion pathway of primarily volatile organic chemical-contaminated sites located within the state of New Jersey to mitigate or eliminate actual potentially human health

impacts.

In some instances, rather than state or USEPA standards being controlling, OSHA permissible exposure limits (PEL) standards may govern. Generally, USEPA authority governs when there is a significant adverse reaction to chemicals posing potential hazard to public health and environment; accidental, un-permitted or deliberate releases beyond the workplace; or violations of the EPA regulations. On the other hand, OSHA PELs govern in instances in which there are occupational exposures to chemicals used in the workplace, or if the exposure is to chemicals which are not used in the workplace, but the chemicals are similar to those used in the workplace.

A vapor intrusion event presents a myriad of complex legal issues. Liable parties include property owners, tenants, operators, dischargers and other responsible parties. Additionally, in the context of real estate transactions, potential liable parties may also include attorneys and environmental consultants for failing to conduct vapor intrusion due diligence.

From a regulatory perspective, liability may arise under RCRA for contributing to the past or present handling of a

solid waste that may present an imminent and substantial endangerment; CERCLA for the release of a hazardous substance, causing the incurrence of response costs or for contribution; OSHA for injury to an employee; and under the New Jersey Spill Act for the discharge of a hazardous substance. There is also potential for common-law liability under the theories of negligence, malpractice, strict liability, trespass, public nuisance and private nuisance.

Among potential claimants are the federal government, state government, local government and private parties, neighbors, lenders and purchasers. Common actions include citizen suits, class actions, contribution actions, and enforcement actions. The scope of remedies and damages available are also diverse, including: injunctive relief, cost recovery, diminution in property value, stigma, lost income or rent, medical monitoring, personal injury, attorney's fees and punitive damages.

Clearly, vapor intrusion is an issue which may impact many practitioners in many areas of law. It is critical that any potential vapor intrusion issues be identified and evaluated in the full context of all the potential liabilities. ■