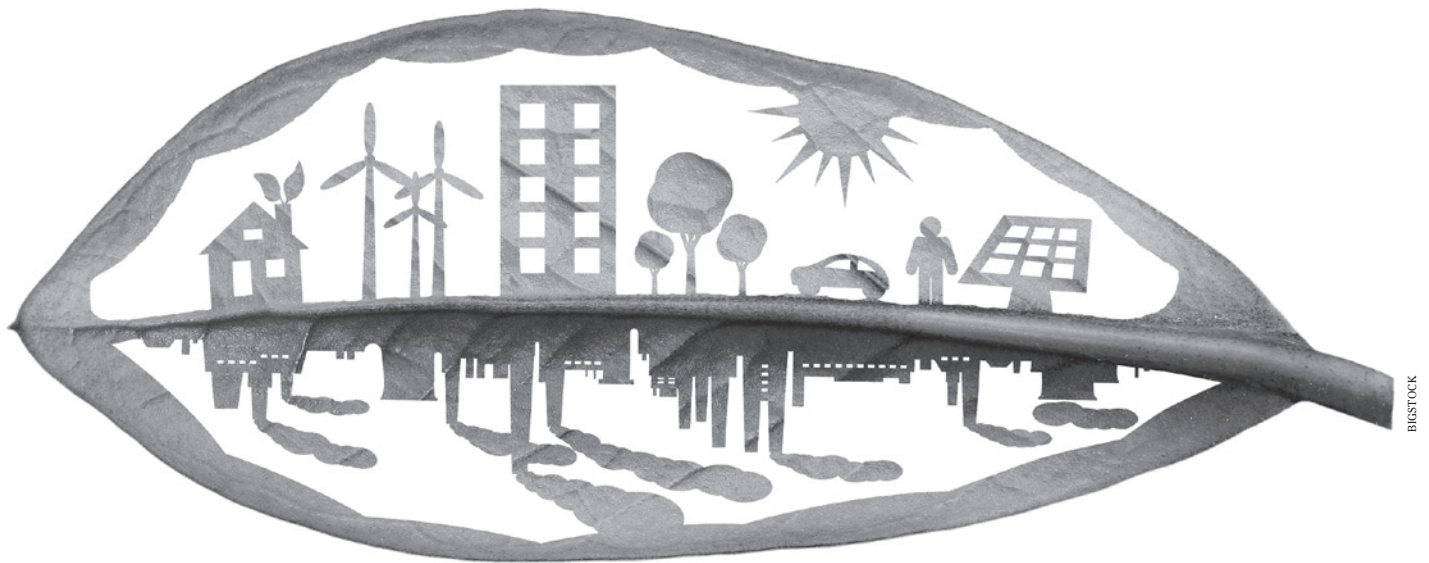


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As Vapor Intrusion Laws Evolve, So Do the Client Risks



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If you litigated and/or settled a federal or state Superfund action in recent years, and thought you were done, you may need to think again. Vapor Intrusion is an increasingly hot topic among federal, state and local environmental regulators and presents a moving target for property owners, developers, lenders, and others trying to gain certainty with their past, present, and future environmental liabilities.

Vapor intrusion, or VI, is the migration of volatile chemicals in a gaseous state from the

subsurface into overlying or adjacent buildings. Improvements in analytical techniques and corresponding knowledge about VI risks have been gaining momentum all over the country for many years, which has resulted in an overlapping, contradictory, and confusing web of guidelines, with no uniform governing regulations. Adding to this uncertainty is the fact that federal and state courts are now just beginning to address what is sure to grow into a major risk management and regulatory issue in the coming years.

In November 2012, the U.S. Environmental Protection Agency (USEPA) released new vapor intrusion guidance, the first of several pending guidance documents and regulations governing VI at contaminated sites. This new USEPA guidance document requires regional EPA offices to evaluate VI risks at previously closed Superfund sites as part of the agency's ongoing five-year

review program.¹ The five-year review guidance now requires regional officials to "identify issues, review data, make recommendations, and develop a protectiveness determination for vapor intrusion."² As such, any Superfund site at which a VI risk was not previously considered, or a VI remedy was not selected or implemented, but at which new information suggests VI is now a possible concern, may be "reopened" for further evaluation and potential additional remediation.

To further complicate matters, in April 2013, USEPA issued another guidance document entitled "Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air," which superseded its 2002 "Draft" guidance of the same name.³ The public comment period, which ended on June 24, 2013, saw a host of critical scrutiny from public and private groups alike. One set of commentators con-

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cluded that “the overly conservative approach throughout the Guidance will exacerbate existing challenges for vapor intrusion investigations and burden property owners, communities, and responsible parties with vapor intrusion studies that may not be warranted and may cause unnecessary alarm.”⁴ But the headache does not stop at the federal level.

At least 46 states have some form of VI guidance.⁵ In late 2006, the New York State Department of Environmental Conservation (NYSDEC) formally announced a policy of evaluating VI at all past, present, and future contaminated sites across the state. So far, 421 sites out of an estimated 750 or more sites are currently under NYSDEC evaluation for VI risks, which has caused and will likely continue to cause a ripple effect of contribution actions among potentially responsible parties.⁶

Whether on the federal or state level, like a bad hangover that just won’t go away, these developments are potentially devastating news for any “responsible party” that thought their environmental headache was over.

Litigation Developments

Basis for liability. In general, VI liability at the federal level rests in the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In fact, USEPA’s Region 2, which includes New York state, recently stated that VI is “now a standard consideration during investigations related to” RCRA, CERCLA and underground storage tanks.⁷

RCRA imposes strict “cradle to grave” liability against “generators” and “transporters” as well as “owners and operators” that have contributed to the handling, storage, treatment, transportation or disposal of any solid or hazardous wastes that “may present an imminent and substantial endangerment to health or the environment.”⁸ In addition, RCRA also has a “citizens suit” provision that provides the public with the authority to bring an action for injunctive relief directly against a responsible “person”⁹ for RCRA violations, and to potentially obtain legal fees in the process.¹⁰

Similarly, CERCLA imposes strict, joint and several liability on responsible parties for “a release or substantial threat of release...of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare.”¹¹ CERCLA also has a “citizens suit” provision that contains a delayed discovery rule,¹² which provides that the statute of limita-

tions begins at “the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages...were caused or contributed to by the hazardous substances or pollutant or contaminant concerned.”¹³ This is particularly important given the new USEPA mandate to investigate VI risks at formerly closed Superfund sites, and may provide the basis for the plaintiff’s bar to initiate and maintain what would otherwise be time-barred claims.

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In addition, there are also a myriad of state laws and regulations that plaintiff’s may utilize to form the basis for a VI lawsuit, such as New York’s Environmental Conservation Law, as well as common law theories such as negligence, trespass, and nuisance. While only limited precedent has been established across the country to date, a brief survey of existing case law indicates that VI-related lawsuits may be on the rise.¹⁴

Case law is evolving. VI-related litigation generally falls into three broad categories—cost recovery, enforcement, and toxic tort actions. Within this broad spectrum of cases, at least seven federal district courts have recently considered VI in the context of RCRA’s “imminent and substantial endangerment” requirement,¹⁵ employing somewhat differing views on the RCRA triggering requirements. Regardless, VI-related lawsuits are likely to continue to evolve given USEPA’s new emphasis on CERCLA’s five-year review mandate, as well as certain state reopener provisions.

United States v. Apex Oil: When the history of VI is ultimately written, *Apex Oil* may very well end up being our modern-day Love Canal, and perhaps the poster-child for VI litigation.¹⁶ Following a 17-day bench trial, and in an 85-page opinion, the U.S. District Court for the Southern District of Illinois outlined, in painstaking detail, the plight of the little Village of Hartford, Ill. Hartford, with a population of 1,545 people¹⁷ and only about 230 homes,¹⁸ suffered from widespread soil

and groundwater contamination that was well documented over a 40-year period, including:

- Approximately 10 million gallons of free-phase hydrocarbons (or in excess of 24 feet of product) floating on top of the groundwater;¹⁹
- Contamination as deep as 40 to 50 feet below the ground surface;²⁰
- Hundreds of vapor odor complaints from the residents from 161 separate homes, businesses, and houses of worship from 1966 to 2004;²¹
- Numerous hydrocarbon-related fires from 1970 through 1990, including fires that blew out windows and foundation blocks, as well as “fire burning on the wall, six-inches off the floor”;²²
- Indoor vapor levels of benzene, a known human carcinogen, at more than 10 times, and in some cases 30 times, higher than established health-based risk levels in residential homes (and higher levels than were found at the infamous Love Canal site in upstate New York);²³
- Sub-slab vapor levels of benzene at 10,000 times health-based risk levels;²⁴ and
- Groundwater contamination levels of benzene at over 8,000 times health-based risk levels;²⁵

As one commentator pointed out, *Apex Oil* was a “legal no-brainer”²⁶ for the court to conclude the conditions in Hartford constituted an “imminent and substantial endangerment” to the health of the residents as well as to the environment. While the facts in *Apex Oil* are on the far end of the spectrum, and easily triggered RCRA, other courts have taken a more nuanced approach to RCRA’s imminent and substantial endangerment threshold as it relates to VI.

Newark Group v. Dopaco and *City of Fresno v. United States:* In 2010, the U.S. District Court for the Eastern District of California issued two opinions holding that a plaintiff must show more than just the mere existence of groundwater contamination to “support a reasonable inference that the contamination presents an imminent and substantial endangerment to health or the environment.”²⁷ In both cases, the court ruled that the plaintiffs had not met the “imminent” threat component of the RCRA trigger.²⁸

Sullins v. ExxonMobil. Unlike its neighbor in the Eastern District, the U.S. District Court for the Northern District of California employed a somewhat broader view of RCRA’s trigger in *Sullins*, reasoning, as the Ninth Circuit did, that RCRA’s requirement of “imminent and substantial harm” did “not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present.”²⁹ As such, the planned future development of the site in question, and the corresponding risk of potential harm, includ-

ing VI harm, was enough for the court to hold RCRA was triggered.³⁰

Voggenthaler v. Maryland Square. In *Voggenthaler*, a Nevada district court took an even more expansive view and ruled that as a matter of law RCRA's imminent and substantial endangerment threshold was met when a plume of PCE contamination in the groundwater aquifer was "migrating toward a residential property."³¹ The court found significant that RCRA uses the term "may" preceding the standard of liability "present an imminent and substantial harm."³² As such, "[u]nder an expansive reading of that statutory language, the Court [found] that the contamination poses, or 'may' pose, an imminent and substantial endangerment to health."³³

In all, there appears to be little uniformity in the federal courts' treatment of RCRA's standard of liability, which should continue to fuel VI-related litigation for years to come.³⁴

Aiken v. General Electric. An important decision in the stare decisis of VI-related litigation by New York's Appellate Division, *Aiken* provides a stark wake-up call for anyone who thought they had settled an environmental matter in recent years. In *Aiken*, groundwater contamination in the Village of Fort Edward was a matter of public record for more than 20 years. In fact, GE had settled an earlier lawsuit arising from contaminated well water. Thereafter, residents had been "repeatedly assured" by GE and the NYSDEC that there was "no immediate health problem from contaminated groundwater and...no risk to residents...from exposure to contaminants in the soil or in the air in homes located above the contaminated groundwater plume."³⁵ Although groundwater contamination was well known for 20 years, the VI issues in the village were not discovered until 2005. And in an instant, the VI issue breathed new life into what was thought to be a previously closed matter. The Third Department ruled that the "belated timing of this disclosure" raised "a question of fact as to when plaintiffs should have suspected, let alone discovered, that their properties had been damaged by soil vapor intrusion."³⁶ Accordingly, the court denied GE's motion for summary judgment per New York's three-year "discovery" statute of limitations.³⁷

This precedent could embolden plaintiff's attorneys and set the direction for other courts, reviving decades old closures in neighborhoods still enduring potentially adverse effects of soil and groundwater contaminated sites.

CAEUSA v. Triple Cities Metal Finishing. In a recent example of the ripple effect caused by NYSDEC's reopening of hundreds of previously closed cases, CAEUSA (CEA) commenced an action in

June 2011 against other potentially responsible parties for contribution towards VI investigation and remediation, long after CEA spent \$4 million on soil remediation in 1998. Despite the fact that NYSDEC initially determined that no groundwater remediation was required, it reopened a VI investigation and sought reimbursement of \$2.1 million it incurred during the investigation and mitigation of soil vapor in the area.³⁸ According to a recent court filing, CEA entered into a Consent Decree with the NYSDEC in July 2012, and it appears that the other named defendants are on the verge of a similar settlement.³⁹ As noted, cases like this are most likely going to become more common in the years to come.

In all, there appears to be little uniformity in the federal courts' treatment of Resource Conservation and Recovery Act's standard of liability, which should continue to fuel vapor intrusion-related litigation for years to come.

Conclusions

VI-related liability is evolving, but several recent developments indicate that it is coming of age as a major standalone environmental issue. As most coming of age stories go, VI will likely go through a number of growing pains as we move forward. Heightened regulatory scrutiny, better technology, and greater knowledge about VI risks will hopefully lead to more definitive "guidelines" from state and federal regulators. Similarly, courts will no doubt be faced with an increasing number of cost recovery, enforcement, and toxic tort actions as guidelines and regulations take shape. Although VI risk was not a central issue years ago when many contaminated sites went through a risked-based closure analysis, today, however, clients must be aware of VI and take affirmative steps to protect themselves from this evolving risk.



1. USEPA, Assessing Protectiveness at Sites for Vapor Intrusion, Supplement to the "Comprehensive Five-Year Review Guidance," OSWER Directive 9200.2-84, http://www.epa.gov/superfund/cleanup/postconstruction/pdfs/VI_FYR_Guidance-Final-11-14-12.pdf.

2. *Id.* at 2.

3. USEPA, Office of Solid Waste and Emergency Response, Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air, <http://www.epa.gov/oswer/vaporintrusion/documents/vaporIntrusion-final-guidance-20130411-reviewdraft.pdf>.

4. Comments on Draft OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air (April 11, 2013), Christopher M. Roe, Karen H. Davis, Adam H. Cutler, June 24, 2013, <http://www.regulations.gov/#!docketBrowser;ppp=25;po=0;dt=PS;D=EPA-HQ-RCRA-2002-0033>.

5. Laurent, C. Levy, A Review of Vapor Intrusion Guidance by State, Aug. 14, 2012, Northeast Waste Management Officials' Association Webinar, http://www.newmoa.org/events/docs/39_41/VI_GuidanceWebinarAugust2012.pdf.

6. New York State Department of Environmental Conservation, Status of Vapor Intrusion Evaluations at Legacy Sites, <http://www.dec.ny.gov/regulations/51715.html>.

7. USEPA Region 2 Superfund, Vapor Intrusion, <http://www.epa.gov/region02/superfund/npl/vaporintrusion/>.

8. 42 U.S.C. §6973 (2006) (emphasis added).

9. 42 U.S.C. §6972(a)(1)(B) (2006).

10. 42 U.S.C. §6972(e) (2006).

11. 42 U.S.C. §9604(a)(1)(B) (2006).

12. New York also has a delayed discovery rule. See CPLR 214-c(2), and *infra*, Section B.v.

13. 42 U.S.C. §9658(b)(4)(A) (2006).

14. Christine G. Rolf, Valarie E. Torres, and John W. Everett, "The 'Volatile' World of Vapor Intrusion: Understanding Vapor Intrusion Regulation and the Potential for Litigation," 30 Pace Env't. L. Rev. 107 (2012).

15. Douglas A. Henderson and Jeffrey J. Heyward, "Vapor Intrusion Litigation Under RCRA: Where Environmental Law Meets Toxic Torts," *Toxics Law Reporter*, 26 TXLR 140, 2/3/11.

16. *United States v. Apex Oil*, No. 05-CV-242-DHR, 2008 WL 2945402 (S.D. Ill. July 28, 2008).

17. *Id.* at 1.

18. *Id.* at 43.

19. *Id.* at 15.

20. *Id.* at 19.

21. *Id.* at 31, 45.

22. *Id.* at 32.

23. *Id.* at 37, 48.

24. *Id.* at 49.

25. *Id.* at 67.

26. See Henderson, *supra* note 15, at 4.

27. *City of Fresno v. United States*, 709 F. Supp. 2d 934, 942 (2010), citing *Newark Group v. Dopaco*, 2010 WL 1342268.

28. See also *Grace Christian Fellowship v. KJG Inv.*, No. 07-C-0348, 2009 U.S. Dist. LEXIS 76954 (E.D. Wis. Aug. 7, 2009) (no showing that gas leak from adjacent property created an imminent endangerment absent an "exposure pathway" for the vapor to actually reach the plaintiffs or other potential victims).

29. *Sullins v. ExxonMobil*, 729 F. Supp. 2d 1129, 1135-36, citing *Price v. U.S. Navy*, 39 F3d 1011, 1019 (9th Cir. 1994).

30. *Id.*

31. *Voggenthaler v. Maryland Square*, No. 2:08-CV-1618-RJ-GWF, 2010 U.S. Dist. LEXIS 74217 (D. Nev. July 22, 2010).

32. *Id.*

33. *Id.*

34. While not a VI-related action, the Second Circuit in *Cordiano v. Metacon Gun Club*, 575 F.3d 199 (2009) appears to fall into the expansive camp, calling RCRA's liability standard "a broad one" noting that four sister circuits construed RCRA expansively emphasizing the "preeminence of the word 'may' in defining the degree of risk needed to support [RCRA's] liability standard." *Id.* at 210 (citing *Me. People's Alliance v. Mallinckrodt*, 471 3d 277, 288 (1st Cir. 2006)).

35. *Aiken v. General Electric*, 57 A.D. 3d 1070, 1073 (3d Dept. 2008).

36. *Id.* at 1073.

37. See CPLR 214-c(2).

38. Complaint, *CAEUSA v. Triple Cities Metal Finishing*, Civil Action No.: 3:11-CV-0711-LEK-DEP (N.D.N.Y. filed June 24, 2011).

39. *Id.*, Docket 68, filed Feb. 28, 2013.