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## When Guidance Is Not Really a Rule: EPA's Effort to Expand Vapor Intrusion Investigation

**Wednesday, October 12, 2011**

Awareness of the potential risks from indoor air contamination has existed for decades. In 2002, the Environmental Protection Agency issued a "Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater to Soils" out of "concern that volatile chemicals in buried wastes or groundwater can emit vapors that may migrate into the indoor air spaces of buildings." In other words, breathing vapors can make people sick. The draft guidance expressly states, however:

[T]his draft guidance is not designated to be used during the process for determining whether and to what extent, cleanup action is warranted at the [RCRA or NPL] cites.[i]

The fact sheet accompanying the draft guidance underscores this:

Implementers should remember, of course, that this document serves as guidance only and should not be construed in any fashion as mandatory.[ii]

Although the final guidance document is not expected to be issued until 2012, and the formal rulemaking process has not been completed, EPA has increasingly used the draft guidance as the basis for requests that potentially responsible parties (PRPs) at Superfund sites investigate vapor intrusion in buildings as part of the Five-Year Review process, even where a remedy unrelated to indoor air has already been implemented. This has put PRPs into a quandary about whether and how far to push back on these requests.

Draft guidance is not a rule, and it is well established under administrative law that draft guidance is not an enforceable standard.[iii] So why would a PRP agree to do the investigation at all?

There are two central factors that would lead a PRP to conduct the investigation - cost and potential third-party liability. Although the costs of investigation and mitigation vary greatly depending on the type contamination and the kind of building potentially affected, if a PRP is the source of the contamination, it may not be worth a protracted legal fight to oppose conducting the investigation, especially if one assumes that the standards set forth in the draft guidance will *eventually* become enforceable rules. It may simply be more cost effective to conduct the investigation and even mitigate the problem than to engage in a fight that might only delay the obligation.

This is especially true if third-party liability is considered. Owners and tenants of buildings may bring claims against a PRP for personal injury or diminution in value of property arising out of the indoor air problems. If a PRP does not have strong evidence showing it was not the source of the contamination, it may make sense to proactively address the problem rather than engage in a series costly fights that the PRP may ultimately lose. The third-party claims may be inevitable, but the PRP is likely in a stronger position if it undertook the steps to mitigate the issues.

If, on the other hand, a PRP has solid evidence that it was *not* the source of contamination (*i.e.*, it can show it is not jointly and severally liable for all contamination at the site, but rather is the source of a divisible harm), it may want to consider pushing back on a request to perform a vapor intrusion investigation or mitigation. The screening criteria for many contaminants set forth in the 2002 draft guidance are low,[iv] and therefore it does not require detection of large amounts of contamination to call for further action.

The risk of third-party claims to the PRP that was not the source of the contamination affecting indoor air often deters that PRP from conducting the investigation. To be sure, vapor intrusion investigation can involve some rather obvious activity, including soil gas and interior sub-slab probes which can obviously lead to questions and concerns from people occupying the buildings. The PRP conducting the investigation can be readily identified by potential claimants as a target for a lawsuit.

Requests to conduct vapor intrusion investigations should be evaluated carefully, especially in light of any consent order entered into with regard to a site. It may be that the best course of action is to conduct the investigation after all. However, there are grounds to push back on the request in appropriate circumstances, especially where a PRP has solid evidence that it was not the source of the problem. PRPs should not simply assume that they have an enforceable obligation to conduct the investigation – and a PRP faced with such a request should consult with legal counsel before taking action.



[i] VI Draft Guidance Excerpt, pp. 9-10.
[ii] EPA Fact Sheet, November, 2002 for Draft Vapor Intrusion Guidance Document.
[iii] *Appalachian Power Co. v. EPA*, 208 F.3, 1015, 1028 (D.C. Circuit 2000).
[iv] *See* Tables 1-3.