

VOLATILE TIMES IN VAPOR INTRUSION REGULATION: A LEGAL AND TECHNICAL UPDATE

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MEET YOUR SPEAKERS





Jennifer Boyer

Senior Project Manager Haley & Aldrich, Inc.

Elie H. Haddad, P.E.

Principal Consultant Haley & Aldrich, Inc. *Counsel* Greenberg Glusker LLP

Sherry Jackman

Brian Moskal

Partner Greenberg Glusker LLP





A technical perspective



What is vapor intrusion?

The migration of volatile compounds from the subsurface environment into building structures such as residences or commercial buildings.



Examples of consumer products containing volatiles

Many volatile compounds are human-made chemicals used and produced in the manufacture of paints, pharmaceuticals, and refrigerants.

- Gasoline cans
- Kerosene cans
- Paint/thinner/stripper
- Cleaning products
- Carpet/upholstery
- Mothballs
- Polishes/waxes
- Insecticide

- Hairspray
- Cologne
- Air fresheners
- Furniture
- Carpeting/flooring
- Gun cleaner
- Dry cleaned clothes





Why worry about vapor intrusion?



Potential health risks

Many volatile compounds have low-concentration trigger levels for the inhalation pathway, and some may require quick response actions.

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Real-estate transactions

Part of environmental due diligence – vapor intrusion mitigation measures may be required.



Limitation of liabilities

Exposure of occupants in affected structures may trigger public relations difficulties and lawsuits.



Types of samples used in vapor intrusion investigations





VAPOR PIN[®] devices are installed to allow collection of air samples under a building slab



Air samples are typically collected using a Summa canister



CalEPA draft supplemental VI guidance (Feb. 2020)



Building walkthrough (before indoor air sampling)



Obtain general information on building owner and tenant operations



Understand building characteristics such as general building structural information and preferential pathways such as cracks, conduits, basements



Survey the chemical use in the building to identify possible indoor sources of volatile compounds



Inspect the heating and ventilation system



How do we evaluate the data?



Vapor intrusion mitigation



Fig 1. Sub-slab depressurization system (SSD) under a house. Cost about \$10K. More elaborate systems in an average sized commercial building could cost \$150K - \$250K.



Fig 2. Vapor barriers (Liquid Boot in this case) installed under building slab. Costs are about \$4/square foot.



Fig 3. HVAC retrofit to allow outdoor air can cost \$5-\$10K.



Fig 4. Raised foundations creating a buffer zone to ventilate vapors. Costs are part of the planning as the bottom floor is typically used for parking.





A legal perspective

How do VI issues arise?

- Purchase and sale of property
 - Requested by buyer/lender
- Non-sale loan (e.g., refinance/equity)
- Regulatory-driven
 - Order
 - Voluntary agreement
 - Re-opener
- Litigation





Deal points addressing VI

- Credit/price reduction
- Escrow/holdback for mitigation/remediation costs
- Releases
- Indemnities
- Environmental insurance
- Reps and warranties





Cal EPA's new draft VI guidance document

- Estimated 30-60% increase in cost of VI testing, mitigation, and remediation
- Attenuation factor = 0.03 for soil gas or subslab results
 - Different for crawl spaces (1.0) and 0.001 (groundwater)
- Sewer lines





Litigating VI





Case discussion: Trujillo v. Ametek, Inc.





Click on above image to play video.

Case discussion: Trujillo v. Ametek, Inc.

Motion to dismiss ruling »		
Negligence	✓	
Gross negligence	~	
Public nuisance	✓	
Strict liability	×	



Other issues »

MAGNOLIA ELEMENTARY

- Statute of limitations
- Punitive damages
- Spoliation of evidence



Case discussion: Voggenthaler v. Md. Square



- Federal Rule of Civil Procedure Rule 34 allows for "entry onto . . . Property . . . [to] test, or sample . . . property"
- Federal Rule of Civil Procedure Rule 45 allows for "inspection of the premises"



Litigating VI under RCRA ISE Provision?

 RCRA § 6972(a)(1)(B) permits a private party to bring suit against certain responsible persons "who ha[ve] contributed or who [are] contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which <u>may present</u>

an *imminent and substantial endangerment* to health or the environment; . . ."

- Key words:
 - ... "may present an imminent and substantial endangerment"



Unsuccessful RCRA VI claims

	West Coast v. Aventis / SPPI-Somersville v. TRC	
RCRA claim pled?	Yes.	
Plan to develop?	Sort of. Plans for unspecified future development.	
Agency oversight?	Yes. DTSC orders, etc.	
Defendants argue:	Plaintiff is already receiving the relief it seeks through DTSC.	
Plaintiffs argue:	DTSC not addressing vapor intrusion—need VI injunction.	
Held, on summary judgment:	RCRA claim tossed: (1) DTSC already addressing harm; and (2) risk contingent on development.	



Takeaways from Unsuccessful RCRA VI claims

If there is agency oversight, it may be necessary to allege that VI will <u>not</u> be addressed by the agency.

Need a pathway to establish endangerment.

Exceedance of a regulatory level <u>alone</u> may not be sufficient to establish endangerment.

Vapor intrusion risk contingent on future, unspecified development not enough—risk not "imminent" in that case.



Successful RCRA VI claim



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Occidental Research Corp. v. Tamkin

- ORC alleges groundwater contaminants are migrating from Tamkin site toward ORC site.
- Regulatory oversight at both sites by Regional Board.
- New property owner proposed residential development over plume—potential VI issue.
- Key pleading 1: Regional Board has not adequately addressed endangerment posed by contamination—failure to require off-site cleanup, resulting in recontamination.
- Key pleading 2: Successfully allege pathways of exposure: indoor air, drinking water.



Questions?