



Vapor Intrusion Seeps Into Indoor Air Nationwide—and Into the Minds of Regulators, Attorneys, and the Public

Are You Prepared?

by **Dianne Crocker**

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A preparatory school in Minnesota. A Nevada shopping center. A popular New York supermarket. An environmentally-themed school in Los Angeles. What do these sites have in common? They have all made recent headlines due to vapor intrusion risk, and the attention is showing no signs of abating.

Vapor intrusion cases are on the rise across the United States—some estimates put the number of potentially affected properties in the thousands—and real estate stakeholders, not to mention the general public, are understandably concerned. If you are not yet familiar with the issues surrounding vapor intrusion, or are unaware that the newly revised ASTM E 2600 vapor encroachment screening standard is changing environmental due diligence best practices, read on.

Vapor Intrusion: A Primer

As an environmental professional, you probably know that a vapor intrusion condition occurs when rapidly evaporating chemicals from polluted soil or groundwater make their way into indoor air. What you may not know is that recent scientific developments suggest that vapor intrusion is more widespread than previously reported, and that it can affect human health even in low concentrations.

As a result, federal and state regulators are taking action. The U.S. Environmental Protection Agency (EPA) is in the process of determining the extent to which it will assess vapor intrusion risk as part of its process of adding sites to the National Priorities List (NPL). Currently, the agency's Hazard Ranking System—the mechanism used to identify sites that qualify for listing on the NPL—does not assess the risk of vapor intrusion caused by subsurface hazardous substances. As of this writing, 30 states have published vapor intrusion guidelines, and regulators in Massachusetts, California, and New York are reopening hundreds of formerly closed sites to examine for the condition. What this means is that

formerly “clean” sites may not necessarily be problem-free.

What's at Stake?

Property owners who hold the deed to a property identified as the cause of a vapor intrusion issue may not only face property value losses and potentially hefty cleanup costs; they may also be the target of class action lawsuits from nearby residents, seeking claims for property devaluation, personal injury, or other types of damages.

The risks are just as serious for lenders. Aside from health concerns and the negative impact on property values, a vapor intrusion condition can lead to borrowers defaulting on their loans as the result of costly litigation. In the event of foreclosure, lenders become unwilling property owners, and therefore subject to the same federal and state cleanup liability laws—and potential for lawsuits—that taking title to a property entails.

And in today's market, where refinancing is on the rise, vapor intrusion is becoming an important concern because contamination from the vapor pathway may exist today, but may not have at the time of loan origination. Or, what was believed to be a low level of contamination at the time may now exceed the screening level for vapor intrusion. “During a recent refinance, we identified vapor intrusion for a loan that previously closed in 2002,” says Richard Belyea, PG, REA, vice president with Comerica Bank. “An off-site property currently undergoing remediation had significantly impacted the subject property groundwater with chlorinated solvents.”





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Impact on Due Diligence Best Practices

In response to all this recent attention, a growing number of due diligence consultants are incorporating vapor intrusion into their practice and actively talking to clients about the risk. "If a bank is concerned enough to require a Phase I assessment, it should require a vapor encroachment assessment," says Edward Devine, CEI, EP, senior consultant at Due Diligence Inspection & Assessment Services.

Consultants who have not yet approached clients about adding a vapor encroachment screen to their environmental site assessments should consider doing so, not only because of the potential for regulatory noncompliance, losses, and lawsuits, but because they could be held to a new standard of care. As reflected in the legal appendix of ASTM's revised vapor encroachment screening standard, many attorneys now recognize vapor encroachment as a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as "Superfund") risk, rather than as an issue that is beyond the basic scope of a Phase I environmental site assessment.

"Vapor intrusion issues should already be part of environmental due diligence," says Susan Phillips, an environmental attorney and partner with Mintz Levin, who adds that ASTM's vapor encroachment screening standard helps environmental professionals identify whether they can dismiss a vapor intrusion concern at an early stage in the process. "If your Phase I identifies the likelihood of a release of a contaminant that is volatile, then if initial screening can't dismiss it, it warrants further evaluation. Regulatory agencies are looking at this issue all over the country, and the liability risk dictates a closer look as well," Phillips says.

Other attorneys agree. "I have seen a dramatic increase in the number of environmental professionals who are addressing vapor intrusion as a component of advising clients regarding due diligence," says Peter Serrurier, an environmental attorney and partner with the Environmental, Land Use, and Natural Resources practice group at Stoel Rivers. "I suspect that, based on the current trend, vapor encroachment screening could become a standard part of performing environmental due diligence in the future."

An important component of the industry transition is client education. Environmental professionals should explain to their clients who are property owners and investors that a number of key factors distinguish vapor intrusion from other types of environmental risks. Phillips explains: "First, vapor intrusion can arise as a result of a release on a different property from the one affected, as vapors migrate not only from contaminated groundwater, but also independently through soil and along conduits. Second, vapor intrusion is a particular concern for even commercial tenants, who are unlikely to want to remain in a space where the air is potentially 'unhealthy,' especially if that tenant has employees it is responsible for protecting. Finally, the concept of acceptable risk is a difficult one when it comes to the air we breathe, particularly in a residential context. Even if contaminant levels in indoor air are determined to be below risk-based standards, the concerns of owners and occupants of a building with any levels of contamination can be disproportionate to the risk involved and increase the risk of litigation."

If you're worried about approaching clients with yet another service they need to buy (especially in today's tough market), focus on an approach that educates them on the basics and points them to the ASTM standard as a consensus-based approach for screening out vapor intrusion as a concern upfront. "ASTM's E 2600 guide is certainly an important step toward standardizing the discussion between environmental professionals and their clients," says Serrurier.

You should also talk to your clients about the possible need for additional investigation. "We have seen states reopening old sites that had achieved regulatory closure in order to examine potential vapor intrusion issues, which is a frightening prospect for those owners and their lenders and investors who are holding No Further Action [NFA] letters," says Phillips, who adds that NFA letters generally contain a "reopener" clause that allows an agency to reopen closed sites where there is a new concern. "I recommend that potential buyers and lenders have their environmental professionals evaluate the potential for vapor intrusion risk even on sites that achieved regulatory closure, particularly if closure was granted before the vapor intrusion pathway was considered."

You can also point out to clients that savvy buyers are using vapor intrusion to their advantage. "Some investors who take the time to understand the science behind vapor intrusion may be willing to take the risk to purchase contaminated property at very low prices, with the benefit of grants and loans under Brownfield programs," says Bill Wagner, an attorney and partner with the Environmental Law and Litigation Practice Groups at Taft Stettinius & Hollister. "These investors are cleaning the properties to residential or commercial closure levels while the market is down, anticipating that the properties will be cleaned up and re-sold when the real estate market turns."

EP Liability

Property owners and lenders are not the only ones that need to worry about vapor intrusion liability, as an environmental professional, you should be aware of your own exposure. "We have defended environmental professionals who have been sued by their clients for malpractice, negligence, and breach of contract for having failed to identify risks related to vapor intrusion," confirms Wagner. "Malpractice is nothing more than a professional failing to exercise reasonable and ordinary care of that of his or her profession where that failure results in injury or damages to the client. Because of the substantial body of knowledge developed regarding vapor intrusion by EPA and state governments, ASTM, and other professional organizations, an environmental professional could easily be subject to a malpractice or negligence claim if they fail to identify a vapor encroachment condition."

What this all points to is that the field is changing quickly with every new case involving vapor intrusion that surfaces. And it is important for environmental professionals to come up to speed as well in order to protect their clients—and themselves. To learn more about vapor intrusion and the newly revised ASTM E 2600 standard, visit www.edrnet.com/vi. (*Editor's Note:* You can read more about vapor intrusion, the focus of this month's feature articles, starting on page 3.) **em**

Errata

In the October 2010 edition of *Inside the Industry* (see "BEPAs: A Growing Opportunity for Environmental Consultants," p. 28), the last name of Carl de Stefanis, P.E., CEM, CRM, president of Energy Reduction Solutions, was misspelled. We regret the error.

