

## STATE ENVIRONMENTAL REGULATION

## Expert Analysis

# Vapor Intrusion a Volatile Issue For Property Owners and Lenders

In late February, the city council of Auburn, in upstate New York, voted to approve an environmental assessment on a proposal to demolish a vacant city-owned building. The assessment found that the project (demolition of a former department store to make way for the construction of a theatre) would not result in any important impact on the environment. Two members of the public (an attorney and an engineer) objected to the assessment on the ground that it was deficient because it failed to consider vapor intrusion. According to a published news report about the council hearing, the objectors claimed that a different study had examined soil vapor intrusion of the property and found numerous contaminants.<sup>1</sup> Whether the city council's decision is successfully challenged on the grounds it did not consider vapor intrusion is not yet known, but this news report highlights the rise of vapor intrusion as a hot-button environmental issue.

Recently, both the New York State Department of Health and the New York State Department of Environmental Conservation (DEC) issued guidance documents on vapor intrusion. The Health Department's "Guidance for Evaluating Soil Vapor Intrusion in the State of New York" (DOH Guidance)<sup>2</sup> and the NYSDEC's "DER-13-Strategy For Evaluating Vapor Intrusion At Remedial Sites in New York" (DEC Guidance)<sup>3</sup> are the agencies' one-two punch of deciding how, where and when to conduct soil vapor intrusion studies. Significantly, by these policies and other actions, these agencies declared that soil vapor intrusion evaluations are among their top priorities.<sup>4</sup>

It is noteworthy that New York regulators recently have reopened more than 400 closed cleanup sites to determine whether they present

vapor intrusion issues.<sup>5</sup> In a Godfather-like moment, just when the owners, operators and other parties deemed responsible for remediating environmental contamination had completed the clean up at these sites, received "no further action" letters or similar statements from the DEC and thought they were done, they are being dragged back into the remedial arena to assess vapor intrusion.

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Attorneys representing parties involved in almost any commercial, industrial or residential real estate transaction now need to take into consideration the growing interest in vapor intrusion by these state agencies.<sup>6</sup> Toward that end, this column first will provide background on vapor intrusion and then will highlight some of the key issues that arise in these situations.

### Vapor Intrusion

"Vapor intrusion" refers to the process by which volatile chemicals move from a subsurface source into the indoor air of overlying or adjacent buildings. Generally speaking, the subsurface source can be either contaminated groundwater or contaminated soil that releases vapors into the pore spaces in the soil.

According to the NYSDEC, vapor intrusion is believed to enter buildings in two different ways.

On occasion, vapor intrusion can occur when contaminated groundwater enters a basement and some of the contaminants are volatilized into the building's indoor air. More commonly, vapor intrusion is caused by contaminated vapors migrating through the soil directly into basements or through foundation slabs.<sup>7</sup>

Historically, New York's regulators were concerned about vapor intrusion where the source of the contaminants was very shallow (close to the foundation) and the concentration of the contamination was very high. More recently, however, the state's regulators have indicated that their understanding about the mechanism of vapor intrusion was incomplete.<sup>8</sup> This gap in knowledge was no doubt one of the factors that led the state to decide to evaluate and re-evaluate "past, current, and future" contaminated sites (including Resource Conservation and Recovery Act Corrective Action sites, inactive hazardous waste disposal sites (a/k/a state Superfund sites), Voluntary Cleanup Program sites, Brownfield Cleanup Program sites and Environmental Restoration Program sites) to determine whether they have the potential for vapor intrusion exposure.<sup>9</sup> This evaluation process is ongoing.

### Tenant Notification

Concerns about vapor intrusion led the New York Legislature to enact a law in 2008 that added a new section to the Environmental Conservation Law<sup>10</sup> to require property owners or owners' agents (such as managing agents) to notify tenants and occupants of test results that exceed certain guidelines relating to indoor air contamination. Only those test results received from an "issuer" are covered by this law. The term "issuer" includes the NYSDEC; a municipality subject to a contract with the NYSDEC under New York's Environmental Restoration Program; a person subject to an order under the State Superfund or Oil Spill programs; and a "participant" (but not a "volunteer") who has entered into a Brownfield Site Cleanup Agreement.

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Effective Dec. 3, 2008, the law, which applies to both residential and non-residential properties, requires that notice be sent to tenants and occupants within 15 days after an issuer provides the owner or owner's agent<sup>11</sup> with test results that show an exceedance of either the DOH Guidance or an Occupational Safety and Health Administration guideline for indoor air quality. The types of environmental test results required to be disclosed are broad, covering not just indoor air test results, but also including disclosure of the results of sub-slab soil vapor, groundwater, soil and ambient air sampling. The notice must include:

- the compound(s) or contaminant(s) of concern;
- reportable detection levels for the compound(s) or contaminant(s);
- health risks associated with exposure to the compound(s) or contaminant(s);
- a means of obtaining additional information on the compound(s) or contaminant(s).

Tenants and occupants have the right to request test results and any regulatory closure letter related to the property from the property owner or the owner's agent. A failure to comply can be costly: Property owners or agents who fail to comply with these requirements are subject to penalties of up to \$500 for each violation and \$500 per day that they remain in violation. The law also contains notice provisions applicable to prospective tenants, where the site has indoor air quality engineering controls or ongoing monitoring of indoor air quality.

### Vapor Intrusion in the Courts

The new focus on vapor intrusion has reached the courts. Consider, for example, the decision by the Appellate Division, Third Department, in *Aiken v. General Elec. Co.*<sup>12</sup>

As the Third Department explained, the case arose in 1983, when groundwater beneath a General Electric Company facility in the Village of Fort Edward, Washington County, was found to be contaminated with the chemical trichloroethane<sup>13</sup> and other chemical compounds, and its groundwater had migrated onto property in nearby residential areas. Claiming that their drinking water wells had been contaminated by this groundwater, homeowners commenced an action against General Electric for damages to their property. That action was settled, and the terms of that settlement were sealed by stipulation.

More than two decades later, in 2005, tests performed by General Electric at the request of the NYSDEC established that soil vapor from the contaminated groundwater had permeated the air and soil of some of the residences located near the site. In July 2006, General Electric was

sued by individuals who claimed that their properties had been damaged as a result of the vapor contamination. General Electric moved for summary judgment dismissing the complaint, alleging that the action was time-barred because it should have been commenced within three years of the detection of the groundwater contamination.<sup>14</sup> After the trial court denied General Electric's motion, it appealed.

The Third Department explained that the key issue in the case was when the plaintiffs should have reasonably been aware of the presence of soil vapor contamination and the threat it presented to their properties. The appellate court noted that, in the two decades that had passed since groundwater contamination was first detected in this area, residents of the community, including the plaintiffs, had been assured by General Electric, as well as by the NYSDEC, that there was no immediate health problem from contaminated groundwater and that there was no risk to residents of the village from exposure to contaminants in the soil or in the air in homes located above the contaminated groundwater plume.

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Only in 2004, after tests of the air in nearby homes had been conducted by General Electric at DEC's request, was it publicly announced that soil vapor contamination emanating from the groundwater beneath the site was a potential problem for residents, especially those located in the vicinity of the contaminated water plume. Given what the appellate court said was "the belated timing of this disclosure," it found that there was, at a minimum, a question of fact as to when plaintiffs should have suspected, let alone discovered, that their properties had been damaged by soil vapor intrusion. Accordingly, the Third Department affirmed the trial court's decision denying General Electric's summary judgment motion.

### Steps to Take

With New York's recent focus on vapor intrusion, and its continuing re-evaluation of various closed sites, property owners and their lenders are recognizing the need to include vapor intrusion as part of their due diligence activities. Thus, attorneys

should become familiar with the contents of both the DEC Guidance and the DOH Guidance because, taken together, the two documents provide a basis for deciding how, where and when to conduct soil vapor intrusion evaluations. Given that the evaluation of soil vapor intrusion is an evolving process, the DEC and the Health Department have indicated that knowledge gained from the investigation and mitigation of soil vapor intrusion sites in New York—and other states—"will be used to refine and improve" their approach to addressing soil vapor intrusion.

Moreover, the agencies view these documents as "dynamic tools" that may be refined and revised over time, so it is important to regularly ensure that the most up-to-date guidance is being used.<sup>15</sup> It is likely that we will see a lot more regulations and court action involving vapor intrusion, especially because evaluating levels of vapor intrusion seems to be more an art than a science, and that the concept itself typically frightens tenants because of the indoor air quality implications.



1. See Christopher Caskey, "Council OKs Kalet bids, assessment," available at [http://auburnpub.com/news/local/article\\_8849a710-409a-11e0-bca2-001cc4c03286.html](http://auburnpub.com/news/local/article_8849a710-409a-11e0-bca2-001cc4c03286.html).

2. [http://www.health.state.ny.us/environmental/investigations/soil\\_gas/svi\\_guidance/](http://www.health.state.ny.us/environmental/investigations/soil_gas/svi_guidance/).

3. [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/der13.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/der13.pdf).

4. See NYSDEC Guidance, available at [http://www.dec.ny.gov/docs/remediation\\_hudson\\_pdf/der13.pdf](http://www.dec.ny.gov/docs/remediation_hudson_pdf/der13.pdf).

5. See NYSDEC "Status of Vapor Intrusion Evaluations at Legacy Sites," available at <http://www.dec.ny.gov/regulations/51715.html>.

6. It should also be noted that the U.S. Environmental Protection Agency recently announced it is considering adding a vapor intrusion component to its hazardous ranking assessments. See "HRS Addition for Vapor Intrusion," available at <http://www.epa.gov/superfund/sites/npl/hrsadddition.htm>.

7. Indoor air may become affected through the infiltration of outdoor air containing volatile chemicals, which are found in many household products (such as paints, glues, aerosol sprays, new carpeting or furniture, refrigerants and recently dry-cleaned clothing) and which also are emitted by common commercial and industrial activities. See NYSDEC Guidance, *supra*.

8. *Id.*

9. See NYSDEC Strategy, *supra*.

10. ECL 27-2405.

11. The owner or owner's agent can itself be an issuer if it fits into one of the categories of "issuer" and conducted tests which results exceed the guidelines.

12. 57 A.D.3d 1070 (3d Dept. 2008).

13. The decision refers to the chemical as "trichloroethane" and "TCE." The usual acronym for trichloroethane is TCA. TCE is the usual acronym for trichloroethylene. Both are commonly used solvents and degreasers and both are volatile organic compounds.

14. See CPLR 214-c(2).

15. See NYSDEC Strategy, *supra*.