

Vapor Intrusion: Liability and Due Diligence Implications

Lawrence Schnapf

Schnapf Law PLLC

New York, NY 10128

Larry@SchnapfLaw.com

www.SchnapfLaw.com

212-756-2205

VI IS DILIGENCE GAME CHANGER

- Historic Uses
- Urban “Rogue” Plumes
- Old/ RBCA Cleanups (Dry Cleaner Funds)
- Off-site Sources-leading cause of litigation
- School and Day Care Facilities
- Varying State Standards
- Complex Pathway
- Often the Only Completed Pathway

VAPOR INTRUSION LIABILITY

- CERCLA (Removal Actions, UAOs, RI, RD/RA, 5-YR Reviews, HRS?)
- RCRA Corrective Action (EI/HE)
- RCRA 7002
- UST
- State Remedial Programs
- Common Law
- Disclosure Laws

CERCLA and VI

- EPA considering incorporating VI into HRS
 - HRS weighted to drinking water
 - New pathway or incorporate into groundwater or air pathways
- Retroactive Application to Prior Listing Decisions?
- Systematic Review of CERCLIS?

CERCLA and VI

Exclusion for Releases:

- Exposures to persons solely in workplace
- for claims asserted against employer (workers compensation?)
- E1527 confusion
- Facility- where hazardous substances come to rest
- Response Costs
 - What about sites in states w/o VI programs?

CERCLA Continued

■ Third Party Defense

- Due Care Element
- Precautionary Element

■ ILO, BFPP and CPO

- appropriate care

RCRA 7002

- Perhaps More Important Than CERCLA
- Low Pleading Threshold
 - May be “contributing to”
 - May be creating “Imminent and Substantial Endangerment
- Injunctive Relief
- Attorney Fees

State Remedial Programs

- Dry Cleaner and USt Funds
- Groundwater Ordinances
- Indoor sampling vs modeling
- Applicable standards
- HRECs and old UST sites

Common Law

- Negligence
- Trespass
- Nuisance
- Strict Liability
- Negligent Misrepresentation
- Malpractice
- State Disclosure

Notable Litigation

- Voggenthaler v Maryland Square LLC
- Stoll v Kraft
- U.S. v. Apex
- Rochester Technology Park (NY VCA)
- Moutenot v DuPont (NJ-Passaic Cty)
- Spear v. Chrysler LLC
- Blaine, et al. v. IBM

Notable Litigation

- First Property Group, Ltd v. Behr Dayton Thermal Products LLC
- Martin v. Behr Dayton Thermal Products LLC
- Sher v. Raytheon
- , (Broome Cty. 0012-2008)

Statute of Limitations

- *Aiken, et al. v. General Electric Co* (2008 N.Y. App. Div. LEXIS 9212)
 - 20-year old groundwater plume
 - SOL not preclude claim because VI pathway not known
- Role of newspapers, public meetings for determining when person should have reasonably known of potential exposure

Value of ASTM E2600?

- REC Only Through E1527
- E2600 Does Not Satisfy AAI
- E2600 Not Sufficient for Brownfield Grants
- Beware of critical radius distance
- HREC?