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New vapor intrusion policies change scope of environmental due diligence

When dealing with the remediation of contaminated properties, one question always arises: How clean is clean?

For any environmentally impacted property where a cleanup is desired or imposed (by a governmental or third-party lawsuit), how does one know how stringent a remediation must be conducted before the property legally will be deemed "clean enough"?

One slightly tongue-in-cheek answer to the question has been "When the government says it is."

That refers to the fact that in most states, an agency such as the Illinois Environmental Protection Agency promulgates remediation standards, in "look-up" tables, of various contaminants that may occur in soil and groundwater.

While more lenient site-specific cleanup standards sometimes can be negotiated with the state agency, the default look-up remediation tables are usually the first step in answering this question.

However, what is one to do when the government essentially changes its mind as to "how clean is clean" — sometimes right in the middle of a remediation project?

This exact situation occurred last year when the Illinois Pollution Control Board adopted new regulations that added the "indoor inhalation pathway" — commonly known as "vapor intrusion" — to the cleanup criteria for issuing "no further remediation" letters under the IEPA's voluntary Site Remediation Program. The amendments were added to the IEPA's Tiered Approach to Corrective Action Objectives, or TACO, at 35 IAC Part 742.

Vapor intrusion refers to the volatilization of contaminants from soil or groundwater that, like radon, can infiltrate basements or slab foundations and compromise the air inside buildings. Depending on the type of contaminant, such intrusions can have a seriously deleterious effect on human health.

The IEPA issues NFR letters after it reviews the environmental data for a site, often after a remediation plan has been implemented and confirmatory sampling shows that any residual contaminants are at acceptable levels. The NFR letter must be recorded in the chain of title for the property and signifies IEPA approval, confirming that it believes the site doesn't pose a threat to human health or the environment.

But before the 2013 vapor intrusion amendments, NFR letters generally did not take vapor intrusion issues into account.

While not by any means exclusive, typical sources of vapor intrusion include volatile chlorinated solvents such as trichloroethylene, which was commonly used as a degreaser in manufacturing, and tetrachloroethylene (also known as perchloroethylene, or PERC), which was used extensively by dry cleaners. Both have been deemed likely to cause cancer in humans by the International Agency for Research on Cancer.

Before the new regulations were promulgated in 2013, potential issues related to vapor intrusion were often overlooked in Illinois, as no specific action standards for the indoor inhalation pathway existed under the SRP.

Thus, the IEPA did not require an applicant to address the risk of vapor intrusion to obtain an NFR letter. Now, addressing this pathway is mandatory for those seeking site closure through the SRP.

BY LAWRENCE W. FALBE

Lawrence W. Falbe is a partner in the Chicago office of Quarles & Brady LLP where he focuses his practice on environmental transactions, litigation and compliance.

Just as importantly, the lack of standards for vapor intrusion also meant that vapor intrusion was typically not emphasized in the course of conducting environmental due diligence in preparation for a property or corporate acquisition. Indeed, it was only this year that an updated ASTM standard for conducting a Phase I, E1527-13, assessment mandated the investigation of vapor intrusion.

Now that evaluation of indoor air concerns has been firmly established as a requirement pursuant to both the Illinois vapor intrusion regulations under TACO and the newest Phase I ASTM standard, environmental practitioners are starting to see their effects (monetary and otherwise) on property transactions and environmental risk management in Illinois.

First, as one might expect, the cost of performing environmental due diligence has somewhat increased overall. While performing a Phase I assessment may not be significantly more expensive, compared to a few years ago (given that simply identifying vapor intrusion as a possible concern doesn't require much, if any, additional work), the greater likelihood of performing Phase II invasive testing with a focus on ruling out — or quantifying — vapor intrusion concerns means that average overall investigative costs are rising.

Second, given that evaluation of the indoor inhalation pathway is now mandatory under TACO for obtaining an NFR letter, the time and costs for preparing such documentation to be submitted to the IEPA are on the rise. Reviewers at the IEPA are likely to have more questions, which require fulsome responses and therefore also tend to increase time and costs to obtain the NFR letter.

Finally, and perhaps most significantly, the recent acknowledgement of vapor intrusion as an issue now poses something of a trap for property buyers who may rely on older NFR letters that do not include an evaluation of vapor intrusion.

The IEPA has not, thus far, indicated an intent to reopen and re-evaluate pre-vapor intrusion NFR letters en masse. However, any prospective property buyer who identifies an NFR letter in the chain of title for the property, and intends to rely on the letter as evidence that the condition of the property is protective of human health and the environment, may be lulled into a false sense of security if the buyer assumes that the NFR letter addresses all known issues on the property.

That's always a somewhat risky assumption unless the letter itself is thoroughly reviewed, but it is now even more problematic.

While NFR letters predating the vapor intrusion amendment are not per se invalid under the new regulations, any buyer intending to rely on an older letter (which, to be safe, probably should be defined as anything issued prior to 2014) should consider independently evaluating the underlying investigational data to ensure that any residual contaminants onsite do not pose a vapor intrusion threat.