

Technical Brief for Environmental Professionals and Commercial Real Estate Lenders

Vapor Intrusion and Environmental Liability Webinar: Attorney Q & A

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On February 12, 2013, I moderated an EDR Insight webinar titled [Vapor Intrusion and Environmental Liability](#), featuring three leading attorneys with extensive expertise on managing vapor-related risk. The three panelists were:



Joseph G. Maternowski
Chair of Hessian & McKasy, P.A.'s
Environmental Law Attorney
Practice Group



William C. Wagner
Partner, Taft Stettinius &
Hollister LLP



Stuart J. Lieberman
Esq. and Founding Shareholder
of Lieberman & Blecher, P.C.

During the webinar, this team of legal experts, with decades of experience advising commercial real estate deals, gave attendees a real-world perspective to vapor and how it is impacting transactions and legal cases that they are working on every single day. Their presentations went beyond the guidance, policies and standards to explain why vapor is a risk and what can happen if it is ignored in due diligence.

Interest in the topic was high, judging by the more than 400 professionals from both the environmental consulting and financial institution sectors who tuned in. The questions from the audience were more extensive than could be covered in the available timeframe so I asked panelists to submit their answers, which are provided below with attribution to each attorney speaker.

Does vapor mitigation of a site result in a continuing obligation?

Joseph Maternowski: Vapor mitigation (e.g., the continued operation of a sub slab depressurization system) does create a continuing obligation. Some states may incorporate mitigation measures in institutional controls.

Stuart Lieberman: The obligations continue, in my opinion, so long as the levels are above state action levels.

Is actual indoor air sampling within a building where VI is a concern an appropriate alternative to sub-slab sampling? (i.e., during the Phase I process, our client typically does not own the building, thus a lot of hesitation for sub-slab work)

Maternowski: Generally, I do not believe indoor air sampling would be an appropriate alternative to sub-slab sampling due to potential interference from other substances stored (e.g., cleaning chemicals, dry cleaned clothes, and other quantities of products stored for household or business use). Regulators are concerned with substances collecting under building slabs. Soil gas samples could be collected at the periphery of the building or at other points on the property to document a lack of vapor impacts on the subject property. I believe some consultants may be employing horizontal drilling (not sure if it is cost effective) as a means to find out what levels are present. As a last resort, if other substances could be removed or documented as present during sampling, indoor sampling could be conducted as a last resort.

William Wagner: Like Joe, I am very reluctant to recommend indoor air sampling as a first step because there are numerous sources of indoor air contaminants that can skew results (See my commonground blog titled [Vapor Intrusion Testing: 7 Key Issues To Consider](#)). Additionally, it may be less expensive to pull a groundwater sample to see if readings even exceed screening levels that might indicate a need for a further investigation of indoor air, rather than performing sub-slab testing. Finally, in Indiana, our regulatory agency prefers paired samples. Paired sub-slab and indoor air samples help demonstrate whether any indoor air contaminants result from sub-slab vapors rather than indoor contaminant sources.

Lieberman: It depends on local requirements. In New Jersey, first you look at the sub slab and then you go into living spaces if subslab readings are high enough to warrant it.

? Has anyone given thought to subsurface encapsulation?

Maternowski: I had not heard of that remedy and do not know if it is effective.

? Do the presenters regard doing some sort of vapor encroachment assessment to be a part of All Appropriate Inquiries under CERCLA? If not, why not?

Wagner: My view is that while the standards and practices of all appropriate inquiries do not explicitly require an analysis of whether a vapor migration pathway exists, the language is broad enough that an environmental professional acts at his own peril if he ignores considering whether the pathway exists. There is simply nothing in the standards and practices that would allow an environmental professional to ignore a vapor migration pathway where the pathway would identify “conditions indicative of releases or threatened releases of hazardous substances on, at, in, or to the subject property” (40 CFR § 312.20(e)). In fact, AAI is broadly written as requiring an environmental professional to examine potential migration pathways, which would include the vapor migration pathway. AAI states that: “In performing the all appropriate inquiries ... the environmental professional ... **must seek** to identify ... properties adjoining or located nearby the subject property that have environmental conditions that could have resulted in conditions indicative of releases or threatened releases of hazardous substances to the subject property” (40 CFR § 312.20(e)(1)(vii)) [emphasis added]. There is simply no safe harbor exclusion that would explicitly allow an environmental professional to ignore the vapor migration pathway.

Lieberman: When circumstances suggest vapor intrusion, yes.

Maternowski: With all of the focus and attention on vapor intrusion, it is inherently risky to ignore vapor. The ASTM Standard Practice E-1527 revision that must be reviewed by the federal EPA before it is finalized, will very likely address or reference the separate ASTM Standard Practice E-2600 related to vapor.

? On the slide where you list the three tiers for determining a VI problem, Tier 1 included conducting a historical review, receptor survey, and source area sampling. Could you please define "receptor survey" and "source area sampling?" Additionally, are you confirming that you think that sampling for VI should be a part of a Phase I?

Maternowski: A vapor source, migration route and a receptor must be present for the vapor intrusion pathway to be complete and pose a potential health risk. By “receptor survey,” I mean documenting the type and use of buildings and their location relative to nearby vapor sources. Vapor sources may include soil, ground water contamination and subsurface contamination including the presence of light non-aqueous liquids (NAPL). “Source area sampling” may or may not be possible depending on a variety of circumstances. Sampling for vapor intrusion purposes is invasive by nature and therefore would not be a component of a Phase I ESA.

? From a lender perspective, can we bypass typical soil and groundwater investigations for off-site properties with suspected issues and go immediately to a sub-slab vapor/indoor air investigation?

Maternowski: In some circumstances, it may be appropriate to move straight to a sub-slab vapor/indoor air investigation. I am hesitant to recommend it as a blanket policy, though, as it may not be necessary in all cases. Once a sub-slab depressurization is installed, it will need to be operated and maintained for an undetermined length of time.

Lieberman: It is just as protective and may be more efficient.

Wagner: You can, but as explained above, there is always a risk of finding high concentrations of indoor air background contaminants that will now have to be explained to the regulator. It is often less expensive and less intrusive to do a tiered approach starting with groundwater or soil gas, rather than paired sub-slab and indoor air testing.

? Are folks seeing new construction in urban environments incorporating vapor controls into the building design even if the current situation does not suggest any VI issues? For instance, in Oregon the acceptable levels of naphthalene in air recently went down. Cases where VI were previously not an issue now are an issue. As a note - we have also seen some clients opt against a Phase II ESA when the issue is an off-site source and instead just incorporate vapor controls in the new construction.

Maternowski: Yes, with new construction it is often prudent to proactively install barriers and passive or active mitigation systems. These are relatively low cost measures to address vapor intrusion. Installation of controls in existing structures is necessarily more involved.

? Did you say that an attorney could use a standard from an adjacent state as justification for a liability claim?

Maternowski: An adjacent state’s standard may be used for reference if the subject state has no standard.

Lieberman: Agreed, although it may not be strong evidence.

Wagner: Many states have adopted a “same or similar community” standard. (See my blog titled [Will ASTM E1527-05 Save You From A Malpractice Claim?](#)) So the question is fact-specific and turns on whether your community is “similar” enough to that of the adjacent state (e.g., comparing the standard in Hammond, Indiana to Chicago, Illinois).

? There may be cases where it is easier to collect groundwater samples than soil vapor samples. Does Tier 2 always need to include soil vapor testing? How about a situation in which shallow groundwater surrounding the suspected source can be reliably collected and found to be ND? Or a situation where groundwater samples can be collected at up-gradient property boundary if assessing an off-site/up-gradient source and found to be below levels of concern with possible VI?

Maternowski: What you appear to be describing is vapor source sampling of groundwater. If it can be documented that the groundwater has not been impacted, that may support a finding that vapor intrusion is not an issue.

? I realize that the answer would differ by state: (in Florida): If a petroleum contaminated site is eligible for state funded cleanup - does it include soil vapor assessment and remediation/mitigation of vapor intrusion on-site and off-site?

Maternowski: Petroleum cleanup funds are generally directed toward the investigation and remediation from leaking tanks. Other cleanup programs including grants for brownfield redevelopment may be available to fund soil vapor assessment and remediation of vapor conditions.

Lieberman: This is a very site- and fund-specific question.

? Is there still a need to confirm a complete pathway from contaminant plume to indoor air? There was a lot of early concern with background sources (nail polish, etc.).

Maternowski: Not necessarily. Vapor mitigation may be installed as a proactive measure. Moving to mitigation based on indoor air sampling alone does not seem appropriate. Vapor intrusion is a concern at many sites, but not every site. Distance from a source area, soil type and other factors may mean there is no concern.

Lieberman: It depends who you ask. I say yes, but oil companies, etc. say no!!

? Why is Tier 3 (Indoor air sampling) not addressed in ASTM Standard E2600-10?

Anthony Buonicore, chair of E2600 Task Group: Because the lawyers who "legalized" E2600 designed the standard to comply with CERCLA and AAI which is only concerned with releases on, at or to the property. Indoor air testing is assessing vapor intrusion. The E2600-10 standard, however, only assesses vapor migration.

? To what extent can low levels of vapor intrusion into a building be mitigated in a building simply by managing the air flow within a building (using outdoor air exchange)?

Maternowski: Managing air flow alone may not be effective as a sole source of mitigation. Many state regulators prefer a more robust system of addressing vapor intrusion concerns.

? How can you control contamination if there is the migration of volatile chemicals product?

Maternowski: If a property is subject to off-site contamination, hopefully state or federal regulators would be willing to require a responsible party to take corrective measures.

Lieberman: To follow up, you may have to file a lawsuit against the responsible party, requiring it to control this migration.

? What types of projects are most at risk for vapor intrusion issues? When should I be advising my clients to have a vapor assessment done?

Maternowski: Generally, any property located in the immediate vicinity of past or current dry cleaning operations, gas stations with leaking tanks or manufacturing operations with documented solvent releases may be at high risk for vapor intrusion.

? I'm an EP and we don't currently address vapor. What's my risk if I'm not including vapor migration in my Phase Is? Now vs. after the 1527 standard is effective?

Wagner: You may do hundreds of Phase I reports where vapor migration will not be an issue. But, if vapor migration is a problem and you fail to identify it, you could be sued for the many claims described in the presentation. And, once the plaintiffs have a judgment against you, they may pursue that against your business or you personally depending on the facts and your state law.

"You will have a much more difficult time trying to convince a judge or jury that you exercised reasonable and ordinary care when performing your Phase I ESA if you ignore the vapor intrusion pathway once the revised E 1527 standard becomes adopted because the latest draft E 1527-13 specifically identifies the vapor migration pathway as a potential contaminant pathway that deserves consideration, no different than a groundwater pathway, for example."

~ Bill Wagner

Lieberman: I think this depends on where you are situated, local laws, and property use. In New Jersey, we have a strong industrial past, with lots of vapor intrusion potential.

"Before 1527 or after, I think it is a liability risk for an environmental professional to not address this. In fact, it is hard to imagine anyone who does work here not doing so."

~ Stuart Lieberman

Q We've been having a heated debate at my firm about whether vapor is required to satisfy AAI. Can you comment on whether vapor is part of the CERCLA liability scheme?

Lieberman: First, get into sports betting...it's more fun. Second, this is a gray and emerging area. I believe the safe answer is yes.

Wagner: To qualify for landowner liability protections under CERCLA, a person must show that he or she "did not know and had no reason to know that any hazardous substances which is the subject of the release or threatened release was disposed of on, in, or at the facility" (42 U.S.C. §9601(35)(A)(i)). Your client must prove that he carried out all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standard practices (42 U.S.C. § 9601(35)(B)(i)). This specifically includes a review of "federal, state, and local government records ... concerning contamination at or near the facility" (42 U.S.C. § 9601(35)(B)(iii)(V)). Again, this is very broad language that requires an examination of contamination at or near the facility. There is nothing in this language that excludes or carves out a safe harbor to ignore the vapor migration pathway.

Q My lender clients want their Phase IIs cheaply and quickly so what am I supposed to tell them to make a case about why I think they should have me assess vapor as part of the Phase I scope of work? When should they require it?

Maternowski: You should advise them of the risks associated with not assessing vapor impacts. A bank may be able to use a transaction screen to identify circumstances when a vapor assessment is recommended. Revisions to the Phase I standard in 2013 may require additional review of agency records when adjacent properties may be sources of releases.

Wagner: Consider sending your lender clients my blog post titled "[A Banker's Perspective On Environmental Due Diligence](#)", where banking expert Steve Butler provided some good insight. Also see the blog titled "[Vapor Intrusion: When Do You Recommend A Vapor Intrusion Assessment?](#)". Both address your questions in detail.

Remember, if a vapor intrusion pathway exists and poses a problem, your lender clients' board of directors and general counsel will be the ones deciding whether to sue you for malpractice, rather than your lender contact who keeps on you to cut your prices.

"At the end of the day, you have to decide whether keeping your client happy is worth the cost and disruption of a malpractice lawsuit."

~ Bill Wagner

Lieberman: And, if you are not providing a vapor assessment service, your caveats should be in the form a letter to the lender, not a file memo.

Q I was wondering how banks are digesting VEC. Are they requiring it across the board, ignoring it, etc.?

Maternowski: Many of the lenders I am working with (Midwestern based) or whose reports I have seen are not addressing vapor intrusion with regularity. Lenders' understanding of the issue appears to be evolving. For this reason, it is incumbent upon Environmental Professionals and legal advisers to discuss the changes with their clients and suggest appropriate revisions to Scopes of Work, Phase I formats, Transaction Screens and due diligence protocols.

Wagner: The EPs I talk to say that banks looked at E-2600 when it was published and determined that since a VEC analysis wasn't required, they weren't going to spend the money on it. Banks typically do not include a VEC analysis in their SOPs. With the focus on the vapor migration pathway in the new 1527, it will be interesting to see if banks change their tune and start including a VEC analysis or vapor pathway consideration of some type in their SOPs. Certainly, if an EP notices a possible VEC situation they should address it with the lender and let the lender decide whether to take the next step. The EP's communication of the possible VEC situation and recommendation for additional investigation should be documented in a letter to the lender in case events go south and the lender tries to sue the EP for malpractice down the road for failing to advise of the possible VEC.

Q Is there a difference if a bank orders ASTM 1527-00 vs ASTM 1527-05 regarding the vapor requirement being implemented?

Maternowski: If banks are still ordering under ASTM 1527-00, with all due respect, they are behind the curve. Arguably, a report prepared to the earlier version may not satisfy AAI. All lenders and purchasers should be using the current standard, ASTM 1527-05, and be prepared to switch the 2013 revision as soon as practicable after it is finalized. As noted above, although vapor is not explicitly addressed in ASTM E 1527-05, it is risky to ignore with the rapidly changing regulatory environment.

Wagner: I don't know of any difference if a bank orders a 1527-00 versus a 1527-05 regarding whether vapor is considered. Neither addresses vapor explicitly, as opposed to the new proposed 1527-13. (I don't know why a bank would even consider ordering a 1527-00 since the standard has been superseded and they aren't really saving any money in the process. The bank will definitely have a hard time trying to convince a jury that it exercised reasonable care demanding the use of an outdated standard when the only reason is to save a few bucks in cost.)

DISCLAIMER: The answers to the questions posed here are provided for general informational purposes only and do not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. No one should act upon this information without seeking professional counsel.

NOTE TO READERS: The attorneys' presentations contain valuable references to policy documents, case law and other information. A copy of the slides is posted on [slideshare](#) and access to the complete replay is posted on [EDR's events page](#).

EDR Insight wishes to extend special thanks to Joe, Bill and Stuart for their valuable contribution to this webinar.

Questions or comments?

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