

Superfund

Increased Legal Consultation Seen From Vapor Intrusion Superfund Rule

The Environmental Protection Agency's proposal to add vapor intrusion to the Superfund criteria list is already generating increased legal consultations, attorneys and other stakeholders told Bloomberg BNA.

The EPA is targeting January 2017 for finalization of the proposal (RIN:2050-AG67), and stakeholders said the rule will increase Superfund site designations.

The rule may also lead to secondary assessment of sites previously determined to be remediated, causing transactional concerns.

"You're going to have an increase in the number of [National Priorities List or Superfund] sites, and because of the complexity and the conservative screening levels, you're going to, of course, have more attorney time at those sites," Norman Bernstein, a lawyer with Bernstein and Associates LLC in Rye Brook, New York, told Bloomberg BNA in an interview.

The impacts, however, will vary geographically due to a patchwork of approaches in state vapor intrusion guidance.

"Certainly to the extent that states have guidance in place, it's going to have an impact, and in states where no such guidance exists, it's going to have even more of an impact," Bernstein said. Those states without guidance "may well move to develop guidance and, to simplify their burden, adopt or incorporate by reference EPA's complex guidance."

New England and West Coast states, as well as others such as Kansas, already have vapor intrusion guidance in place.

Support for Finalization. Private and public sector commenters largely backed the proposal, which was released in February, to consider pollution seeping into buildings in Superfund designations. The EPA wrapped up the comment period in mid-May, despite calls for an extension from the Utility Solid Waste Activities Group.

That association didn't respond to a Bloomberg BNA request for comment.

Vapor intrusion, referred to in the rule as subsurface intrusion, is the migration of volatile organic compounds from subsurface soil and groundwater into overlying buildings posing a potential health risk.

If the EPA finalizes the proposal as expected, that component would be added to the Hazard Ranking System (HRS), a metric to assess National Priority List designations under the Superfund law.

Vapor intrusion often stems from groundwater and soil contaminated with volatile organic compounds, such as the machine parts degreaser trichloroethylene.

Likely Site Additions. The proposed addition is generating more attorney consultations now due to transactional concerns tied to an expected increase in site designations, Todd Fracassi, a Detroit-based lawyer with Pepper Hamilton LLP, told Bloomberg BNA June 23 at the Air and Waste Management Association annual conference in New Orleans.

Vapor intrusion "truly wasn't evaluated very much at these old Superfund sites, or if it was, it wasn't as thoroughly evaluated as certainly it's being looked at today," Hamilton said. "The greater concern from a transactional standpoint is there is a lot of uncertainty as it relates to reopening closed sites."

Uncertainty, however, clouds the prospect of additions, considering that many sites have already been listed for groundwater contamination, Lenny Siegel, executive director of the Center for Public Environmental Oversight, told Bloomberg BNA in an interview.

"I suspect there will be under 50 [new] sites listed nationally because of the new rule," Siegel said. "There may be some other, blank-slate sites that no one has heard of. Once EPA lists them, they will be subject to aggressive investigation and response."

2015 Nationwide Guidance. The Superfund program proposal comes on the heels of the 2015 release of national vapor intrusion guidance.

The guidance recommends methods to best assess and mitigate vapors from contaminated soil or groundwater seeping into overlying buildings and contaminating indoor air. The recommendations, which are non-binding, surfaced roughly 14 years after the EPA released draft guidance.

The proposal and the guidance aren't congruous, and there is a possibility of conflict, Chris Lutes, principal technologist at CH2M Hill, an engineering and construction company, told Bloomberg BNA at the New Orleans conference.

"The hazard ranking incorporation of vapor intrusion is a totally different mentality, a totally different system from the 2015 vapor intrusion guidance," he said.

The ranking system is “pretty prescriptive and algebraic, and that’s quite different in my mind than the spirit of the 2015 Vapor Intrusion Guide, so I do think there’s some potential for conflict between the two approaches,” Lutes added.

That conflict, alongside the regulatory and guidance patchwork across the country, may fuel consultation needs.

Tepid Commitment to Remediate. Companies that could be affected by the vapor intrusion listing may not be tackling new remediation demands head-on at this stage in the process, said Jeff Carnahan, a vapor intrusion expert with EnviroForensics, an environmental engineering company.

Those potentially responsible parties are likely sticking to attorney consultation until they’re forced to act, Carnahan told Bloomberg BNA in an interview.

“Once they’re flagged, once they come on the hot seat, they’ll reach out,” said Carnahan, who analyzes remediation needs linked to the pathway. “They don’t want to blow the whistle on themselves.”

Carnahan agreed the vapor intrusion listing is likely to induce more Superfund site designations. The prospect of revisitation of sites declared to be remediated is also likely causing jitters in the real estate market, he added.

Environmental consultants use the 2015 EPA guidance for Superfund and Resource Conservation and Recovery Act sites as well as state-specific guidance to diagnose remediation needs.

Carnahan also pointed to a vapor intrusion standards guide released recently by the the American Society for Testing and Materials as a resource for companies. That document includes “pretty conservative” levels for intrusion safeguards, he said.

‘Something Bigger on Their Minds.’ Companies are more concerned with the possibility of trichloroethylene’s connection to cardiac birth defects than the vapor intrusion listing, and that linkage is consuming significant attention, Siegel also told Bloomberg BNA.

The EPA and the Agency for Toxic Substances and Disease Registry have established that connection, but industry has countered with criticism. Some states, such as Massachusetts, are revisiting Superfund sites to flesh out the link.

“If that finding is carried through to a sampling requirement, that will be a major burden for companies and a burden they deserve,” Siegel said. “That’s what they’re more concerned about. There’s not a lot of push-back against the vapor intrusion listing because there is something bigger on their minds.”

The agency findings, however, lack airtight reliability, Lutes said.

“As to getting to any certainty in TCE through field operational studies, I guess I’m not optimistic,” he said. “I think that there’s enough mud in the record.”

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