

Environmental Law

Vapor Intrusion Investigations: Community Outreach Is a Necessity

These potentially invasive and expansive surveys require excellent communication with the affected local residents

By David A. Brooks, Sandro G. Ocasio and
Camille V. Otero

Vapor intrusion (VI), the process by which vapors from contaminated groundwater migrate into and accumulate in indoor air spaces, is increasingly becoming a necessary component of every remediation project, and has become a necessary component of environmental due diligence in real estate transactions. The ASTM International 2005 Standard Practice for Environmental Site Assessments now includes VI migration as a component of the Phase I investigation. Recent regulatory changes highlight the importance of a successful community outreach strategy. In March 2013, the New Jersey Department of Environmental Protection (NJDEP) issued its new Vapor Intrusion Technical Guidance, which establishes a complex framework for assessing VI that includes community outreach as a key component of the VI investigation.

Brooks and Otero are directors, and Ocasio is an associate, in the real property and environmental department of Gibbons PC in Newark.

The Mechanics of a VI Investigation

A VI investigation is triggered under several scenarios. Any structure within 100 feet of groundwater contaminated with volatile organic compounds or free product must be evaluated for VI. N.J.A.C. 7:26E-1.15(a). If the groundwater contaminant is a petroleum hydrocarbon, the distance triggering an evaluation is reduced to 30 feet. A VI investigation is also triggered if soil, gas or indoor air contamination is otherwise detected above accepted screening levels, or if other information indicates that human health and safety might be impacted due to VI.

Assessing the VI pathway is an onerous task, complicated by background sources that may also be impacting indoor air quality. VI Guidance, p. 55. For example, background sources in residential structures may include, but are not limited to, household products, recently dry-cleaned clothes, cigarette smoke and even car exhaust. Therefore, a proper investigation, as suggested by the VI Guidance, includes a complex multiple lines of evidence (MLE) approach—a marked departure from the single line of evidence investigative approach that is often sufficient for soil and groundwater investigations. The

MLE approach involves investigating a series of primary and secondary factors, including developing a well-delineated groundwater plume and subsurface soil investigation; sub-slab soil gas, exterior soil gas and ambient air sampling; a review of local, state or regional indoor air background databases and building surveys; and building characteristic and soil property analysis. VI Guidance pp. 58-59.

In addition to technical guidance, applicable regulations set forth aggressive timing requirements for VI investigations. Within 60 days of a triggering event, the person responsible for conducting the remediation (the “investigating party”) must identify buildings and subsurface utilities within the applicable VI trigger distances, and gather specific information concerning those buildings, structures and the surrounding area. N.J.A.C. 7:26E-1.15(b). The VI investigation, including sampling, must be completed within 150 days of the triggering event. N.J.A.C. 7:26E-1.15(c).

If sampling reveals an immediate environmental concern (IEC)—contamination in indoor air at a level greater than NJDEP’s VI rapid action levels—the investigating party must, within 14 days, implement an interim response action, provide a copy of VI analytical results to the property owner and local health department, and make necessary submissions to NJDEP. N.J.A.C. 7:26E-1.8;

N.J.A.C. 7:26E-1.11(a)(2)(ii). Within 60 days following identification of an IEC, the investigating party must implement an engineered response action and identify and sample all buildings within 100 feet of the affected building. N.J.A.C. 7:26E-1.11(a)(6)(ii).

Community Outreach Requirements

Given the 100-foot trigger distance and potential for expanding the area if an IEC is discovered, the potential impact to neighboring properties is a concern. Therefore, the investigating party should begin communication efforts with the public as early as possible and before any work begins in the community, especially if the investigation includes residential properties. This will help manage concerns and expectations upfront, which may minimize unnecessary delays later in the investigation. Local officials should also be contacted early in the process as they will likely be the point source of information to the community, as indicated in the June 2012 NJDEP Community Outreach Guidance. Clear, open communication as to sampling strategies will enhance the investigating party's credibility with the public and develop the public's trust in the investigative process.

As to the mechanics of the community outreach, NJDEP suggests a two-step approach. First, the investigating party should send letters to residents, written in layman's terms, to provide an explanation of the timing and type of sampling that will be conducted, the contaminants of concern, and contact information of the Licensed Site Remediation Professional. It may also be appropriate to attach NJDEP's "Instructions for Occupants—Indoor Air Sampling Events" to the letter where indoor air sampling is anticipated. VI Guidance p. 44-45, Appendix F. The Instructions for Occupants lists activities that should be avoided before and during sampling, i.e., smoking or the use of chemicals on site. The second suggested step involves calling residents to schedule informational meetings and sampling appointments.

Although the VI Guidance contains suggestions, not requirements, for public outreach, an investigating party would be wise to consider these steps as a starting

point when reaching out to the community. However, the approach can be markedly different depending on whether the study area is largely residential, commercial or industrial. Individual circumstances may dictate a more aggressive approach to public outreach if a large residential area is within the study area, or if additional sensitive areas such as schools or child-care centers will be affected by the investigation.

Beyond public outreach within the area of the VI investigation, there are additional public notice requirements associated with an eventual remediation action. The investigating party must provide written notification to local property owners and tenants who reside within 200 feet of contamination, within 14 days of commencing field activities associated with any VI remedial action. Notice should summarize site conditions and describe the remedial activities expected to occur at the site. N.J.A.C. 7:26C-1.7(h).

Gaining Access to Off-Site Properties

Given the necessity for eventual sampling at neighboring properties, access can present special challenges, particularly if an investigating party has not reached out to the community. If an off-site VI investigation is required, an investigating party will need to enter into an access agreement with each owner of property where sampling will be necessary. The access agreement is often a heavily negotiated document drafted by an attorney containing the terms of access, including, among other things, the scope of work, indemnification for property damage, insurance requirements and restoration of the property. Every effort should be made to enter into a voluntary access agreement with the property owner to avoid the need for judicial intervention to gain access. However, if a voluntary agreement is not reached, the investigating party is required to seek injunctive relief from the court to gain access. N.J.S.A. § 58:10B-16. Court intervention is often costly, time-consuming and can be a public-relations nightmare for an investigating party.

In a court action for access, the investigating party can establish a prima facie case if it has a department oversight docu-

ment, or if it can demonstrate a legal obligation to remediate the property. N.J.S.A. § 58:10B-16(b). In addition, the investigating party must demonstrate good-faith efforts to obtain access prior to initiating any such action. N.J.S.A. § 58:10B-16. The regulations require that the investigating party send the property owner, via certified mail, a written request for access that includes a description of the obligation the investigating party is under to remediate the site; a site map indicating the areas for which access is needed; a description of the reason access is needed; the extent to which access is needed; a description of the remediation to be conducted, including time frames; and a request that the property owner respond to the investigating party in writing within 30 days. N.J.A.C. 7:26C-8.2. If a response is not received, a second request must be sent. If the investigating party does not receive a response to its second request for access, it must seek injunctive relief from the court, as the investigating party remains obligated to comply with the VI investigation deadlines. However, if the investigating party fails to meet the remediation deadlines because access is not granted, the investigating party will not be subject to civil penalties if it can demonstrate that all appropriate actions to gain access to the property have been taken. N.J.S.A. § 58:10B-16(c). Thus, effective communication and documentation of the investigating party's outreach efforts is essential, and will likely support the investigating party's application for access through court intervention.

Conclusion

Due to the invasive nature of a VI investigation and the potential expansiveness of the study area, the investigating party must develop a community outreach program and begin corresponding with the public as early as possible. The investigating party should provide information that will be helpful to educate the individuals and manage their expectations concerning the investigation. Early, open communication will go a long way toward developing good relationships with the community—a critical asset that will yield a more efficient and cooperative VI investigation. ■