THE HRP

Advisor

April 2007

HRP Associates, Inc.– Creating the Right Solutions Together

Vapor Intrusion Related Toxic Tort Litigation Continues to Evolve

Pennsylvania Court Allows Controversial Testimony

Starting on March 15, 2007, the Pennsylvania Court of Common Pleas began hearing arguments in Ball v. Bayard Pump & Tank Company, a case alleging that negligent management of petroleum products at a Blue Bell, PA gasoline station allowed high levels of benzene and other carcinogenic vapors to enter area homes, causing local residents to develop blood cancers and various neurological disorders. One of the ground breaking issues in this case is that the court has ruled that the plaintiffs may present (through their experts) a **retrospective estimate** of the concentrations of indoor air contaminants that **may have been** present in these homes, even though there was no sampling conducted within the structures at the time of the release (1998).

Vapor Intrusion Dynamics

Vapor intrusion (VI) occurs when volatile organic compounds present in spilled industrial degreasers, gasoline, dry cleaning solvents, and other petroleum products vaporize and migrate through the subsurface in a gaseous state. These vapors, if present beneath a structure as a result of an underlying or even upgradient source of contamination, can move through cracks, seams, utility trenches, and other penetrations of a building's foundation, and then accumulate in the building's indoor air breathing space. In many cases, health risks presented by VI are far greater than those associated with traditional soil and groundwater contamination due to the continued exposure over a period of years. People occupying buildings impacted by VI have no choice other than breathing the available air, and if the air space is unaddressed, the exposure pathway to contamination via inhalation can occur for prolonged periods of time.

Significance of Ball v. Bayard Pump & Tank Company

Parties responsible for contaminated sites with vapor intrusion issues should be particularly aware of several aspects of the Pennsylvania court's decision to allow the testimony.

The purpose of the "retrospective modeling" is to project indoor air concentrations that may have been present eight to nine years before the trial, leaving defendants no ability to collect test results to confirm or refute the modeling **estimations**. This is particularly significant given that many of the variables that control vapor intrusion can change appreciably over time such as soil and groundwater chemistry, the number, size, width, and condition of cracks in the building foundation, the function and related air exchange volume of the structure's HVAC systems, etc. Even on actively investigated sites with comprehensive data from all media (groundwater, soil, soil vapor, and indoor air), the measured concentrations of vapor contaminants are often lower than those projected by available vapor intrusion models utilized by the U.S. EPA. Furthermore, the hybrid model which has been accepted by the court for the retrospective analysis has never been published or peer reviewed.

If you believe you may have a potential liability associated with vapor intrusion, you can turn to HRP Associates, Inc. for help. For more information on vapor intrusion issues, please contact Andy White, LEP at 860-674-9570 or Jim LaRegina, PG at 717-920-1350.

HRP Opens Philadelphia Area Office

HRP Associates Inc. is pleased to announce the opening of a regional office in King of Prussia, PA. The office is conveniently located at 1060 First Avenue, Suite 400 in King of Prussia PA. The telephone number is 610-768-8061. This office allows HRP to better support its clients in the region and gives it access to opportunities in the greater Philadelphia and South New Jersey areas.

Please contact Jim LaRegina, PG at 866-232-9824 to discuss any needs that you may have in the Pennsylvania area.

Got Money?

By John L. Malanchuk, Ph.D.

Corporations with remediation issues originating 25 years or more ago may have an excellent opportunity to fund present – or future – remediation obligations by tapping into historical liability insurance policies dating from the days of the original site operations. For the uninitiated this may seem a bit bizarre, but for those companies that have conducted such projects, old general liability policies have proven to be a source of unanticipated funds that, if untapped, would have eventually been wasted. If you have such a circumstance, you should evaluate it as soon as possible.

An estimated recovery can be made fairly easily and used to decide whether you have a project worth doing. The information required to make this estimate, though typically not extensive, originates from three diverse sources of historical knowledge: company history, environmental liabilities, and insurance coverage.

COMPANY HISTORY

Many companies grew via acquisitions or divestitures to arrive at their current corporate structure. And whether the purchase (or divestiture) was an asset or stock purchase generally established how the liabilities flowed through the corporation. After identifying the universe of corporate entities involved in these transactions, we pay particular attention to those that have past or future environmental liabilities that may warrant further scrutiny with respect to insurance recovery opportunities.

ENVIRONMENTAL LIABILITIES

On a site-by-site basis consideration is given to whether remediation has occurred or whether there is some probability that remediation or other related issues (e.g., natural resource damage) might be required in the future. If so, a rough dollar estimate of the past or future liability should be made. Then we analyze when the polluting events took place and whether the events occurred during a time period when relevant insurance coverage exists without pollution exclusions.

INSURANCE COVERAGE

Various means can be employed to reconstruct the relevant corporate insurance program. It always helps if the company has good historical records of its insurance but most companies either have document destruction polices or for other reasons have not maintained these valuable records. Fortunately, there are also various external means that can help reconstruct a company's insurance coverage year-by-year.

Finally, all the pieces are combined to ascertain that 1) there is sufficient liability, 2) coverage exists that coincides with the time period over which the liabilities were created, and 3) the corporate entity has legal rights to the historical insurance asset.

CONCLUSION

Given all this, the decision should be made to move forward with the detailed preparation of a claim while such an opportunity still exists. Saving your old insurance policies for a "rainy day" is not a good idea because unfavorable future changes in insurance law or insurance company insolvency can eliminate the possibility of recovery.

From a management perspective, not to do insurance recovery means the loss of a valuable asset.

John L. Malanchuk, Ph.D. is a Founding Partner of Eisenstein Malanchuk LLP, Washington, DC. Dr. Malanchuk has published extensively and has been handling environmental matters for over 30 years, and has been working on environmental insurance claims for four years. He can be reached at 202-965-4700 or at jmalanchuk@em-law.com.

NYSDEC Industrial Stormwater Permit Finalized

As you may be aware, the existing Industrial Stormwater Permit expired November 1, 2003; therefore, the NYSDEC administratively extended the permit until it was renewed. Well, the time has come. On December 27, 2006, the NYSDEC published a new five-year SPDES Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity with an effective date of March 28, 2007.

The new permit closely reflects the USEPA's Multi-Sector General Permit Associated with Industrial Activity; therefore, it includes general requirements applicable to all facilities with permit coverage and industry-specific requirements that have been tailored to address 31 different industrial categories. Affected facilities are required to:

- Submit Notice of Intent (by June 25, 2007)
- Complete Stormwater Pollution Prevention Plan (by August 25, 2007).

The stormwater permitting requirements have increased significantly and include:

- Coverage no longer based solely on primary SIC classification (each separate industrial activity is potentially covered).
- More detailed NOIT form.
- Sector/industry-specific requirements are imposed, including monitoring parameters for specific industrial facilities.
- Quarterly visual stormwater discharge examinations must be documented and annual dry weather testing completed;
- "Benchmark sampling" added for certain sectors. If concentration above benchmark, *not* be a permit violation, however must address potential sources of the contamination and "remedy" as appropriate.
- Revised requirements for facilities subject to SARA Title 313 reporting facilities that have secondary containment for storage and transfer areas.
- Submit Annual Certification which includes results of dry weather and applicable Benchmark and Numerical sampling.

Please contact Tom Seguljic, P.E. or Kelsi Backus of HRP Associates, Inc. at 888-823-6427 if you have any questions about the regulation or if you need further assistance.

Brownfields Redevelopment in New York

What is a 0.8 square mile community to do with a vacant 25-acre parcel that was occupied by a railroad? Like many communities, this upstate New York community decided to develop the parcel as an industrial park to attract light industry to the community. However, during the installation of the site's infrastructure an underground tank and petroleum contaminated soil were encountered. Further investigation determined that petroleum contamination impacted four acres of the site and adversely impacted groundwater and remediation costs were estimated to be $1M.

Once it was determined that the site was contaminated, several potential tenants backed out of deals to purchase lots. At this point, the city realized they needed to remediate the site and decided to apply for a New York State Brownfield grant (provides 90% of funding to investigate and remediate a site) to fund the project. However, the NYSDEC denied the application since the site's deed indicated that the City indemnified the railroad when the site was purchased and the railroad's historical activities were allegedly the source of on-site petroleum contamination. In particular, the NYSDEC stated that a municipality is not eligible where it "undertakes any indemnification obligation respecting a party responsible under law for the remediation of the property."

Therefore, the city retained HRP to review the site, evaluate remedial options and identify available sources of funding. Given the state's denial of the Brownfield application, HRP enlisted an environmental attorney to review the indemnification. The attorney determined that the property deed was actually a "release from environmental liability" and not an "indemnification." With this finding, HRP submitted a second application containing the required information, and a discussion of the deed's interpretation.

Upon review, the NYSDEC agreed with the attorney's opinion and the City was granted $410,000 to complete an investigation and Interim Remedial Measures (IRMs) for contaminated soil removal. HRP is currently negotiating an Investigation Work Plan with the NYSDEC which will include investigations to define the degree and extent of contamination and IRMs to remove grossly contained soils. Once the investigation and IRMs are completed, additional funding will be requested, if necessary, to complete the remediation of residual contaminated soils.

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The HRP Advisor

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