



Vapor Intrusion Regulatory and Legal Issues

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Liability for Vapor Intrusion

- ◆ CERCLA (RI, RD/RA, 5-YR Reviews)
- ◆ RCRA Corrective Action (EI/HE)
- ◆ UST
- ◆ OSHA
- ◆ State Remedial Programs (19)
- ◆ Common Law

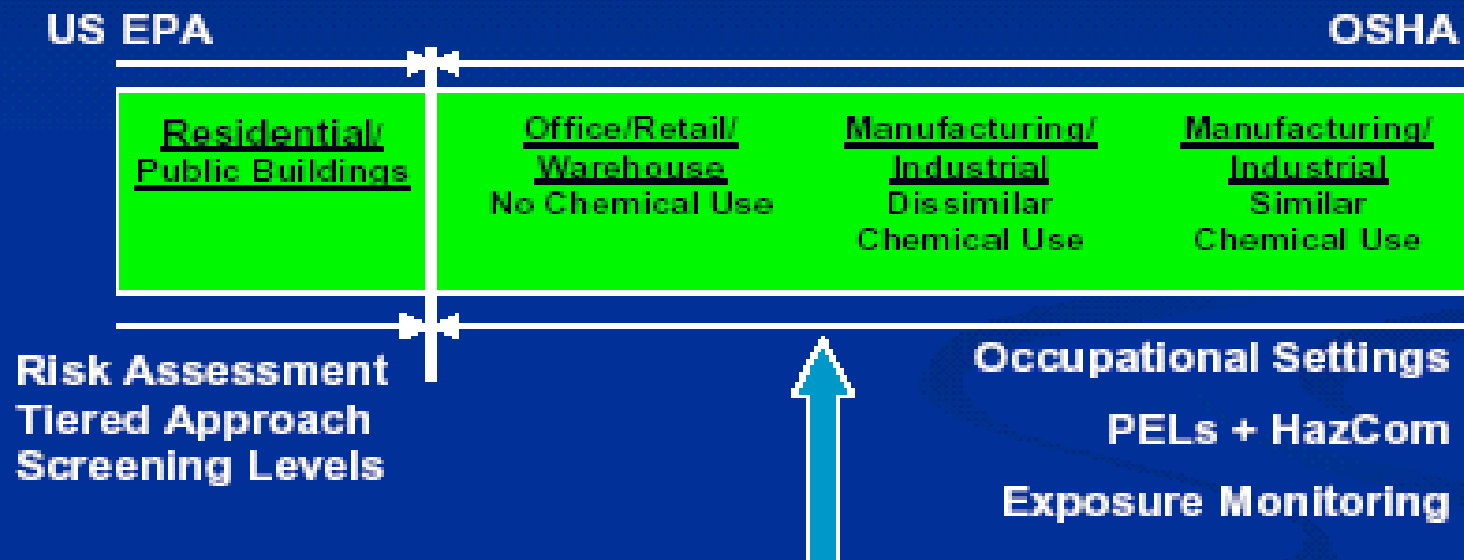


State Common Law

- ◆ Toxic Tort
 - Nuisance
 - Trespass
 - Strict Liability
- ◆ Property Damage

OSHA and EPA/State VI Jurisdictional Issue

Federal Guidance



"... there may be instances (under CERCLA and other cleanup programs) where standards other than the OSHA standards are used to determine whether the exposure pathway presents a risk to human health."



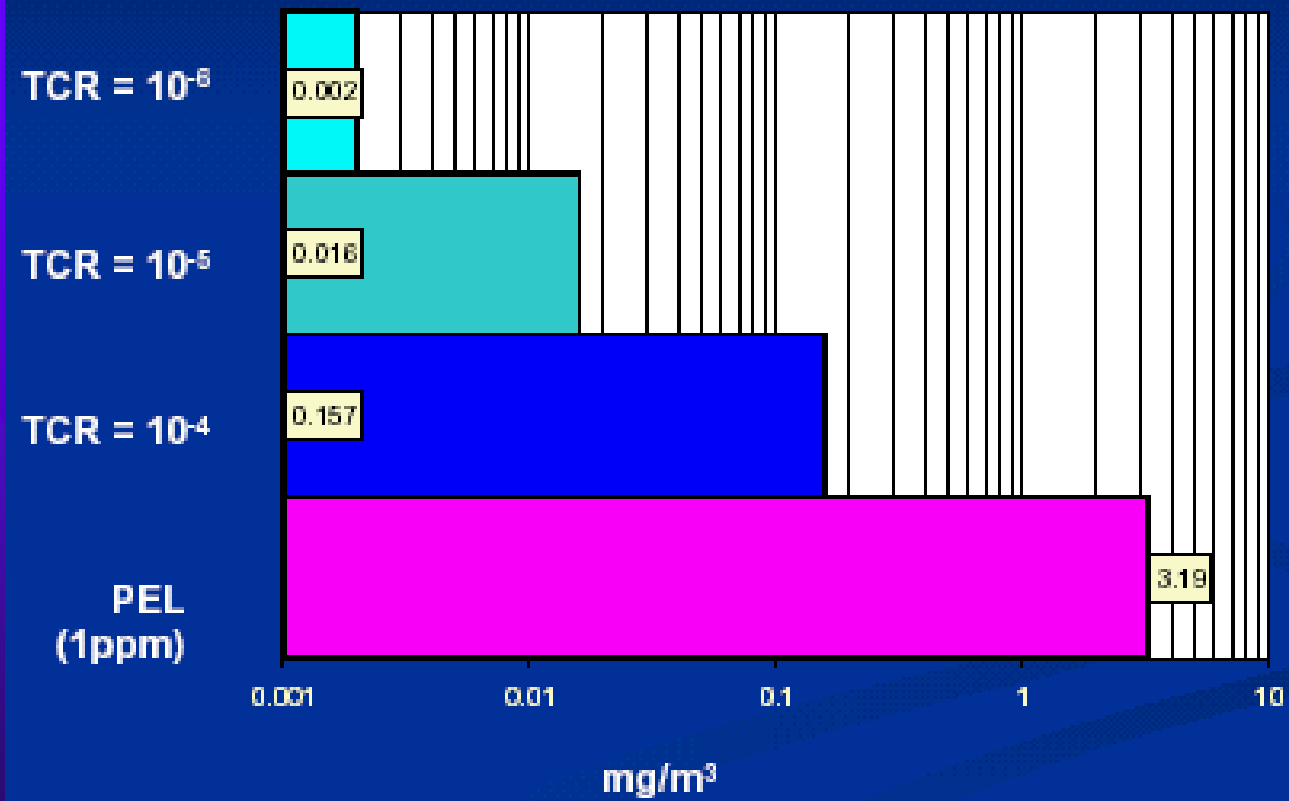
Worker Scenarios

- ◆ Workers Exposed to Chemicals Not Used In Workplace
- ◆ Exposed to Chemicals Not Used In Workplace But:
 - Similar to Chemicals Used
 - Haz Com/Medical Monitoring
- ◆ VI Exposure for Same Chemicals Used in Workplace
- ◆ Medical office, mixed use or office workers of Manufacturing Facility

EPA vs. OSHA PEL

Benzene

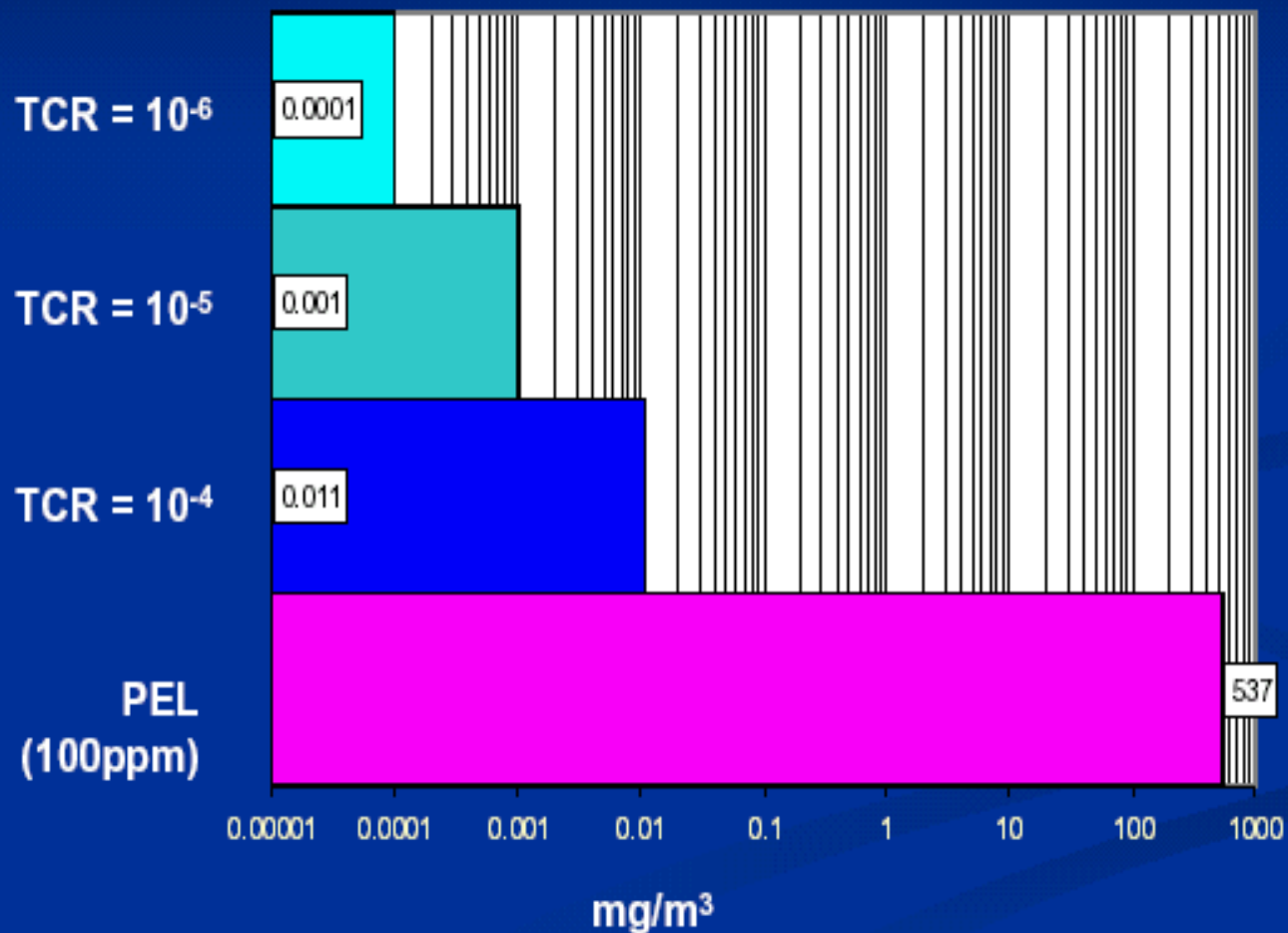
3 Orders Different





Trichloroethene (TCE)

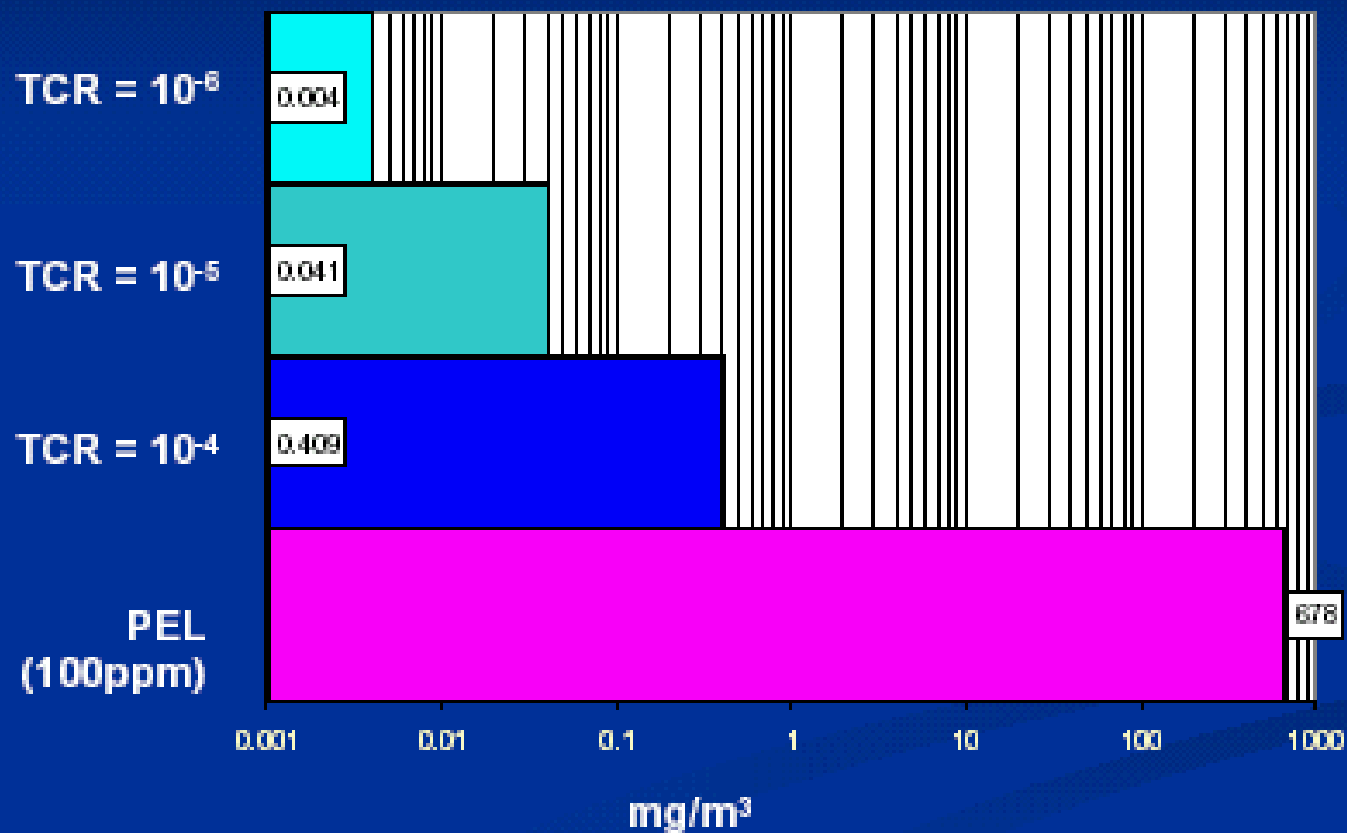
6 Orders Different





Tetrachloroethene (PCE)

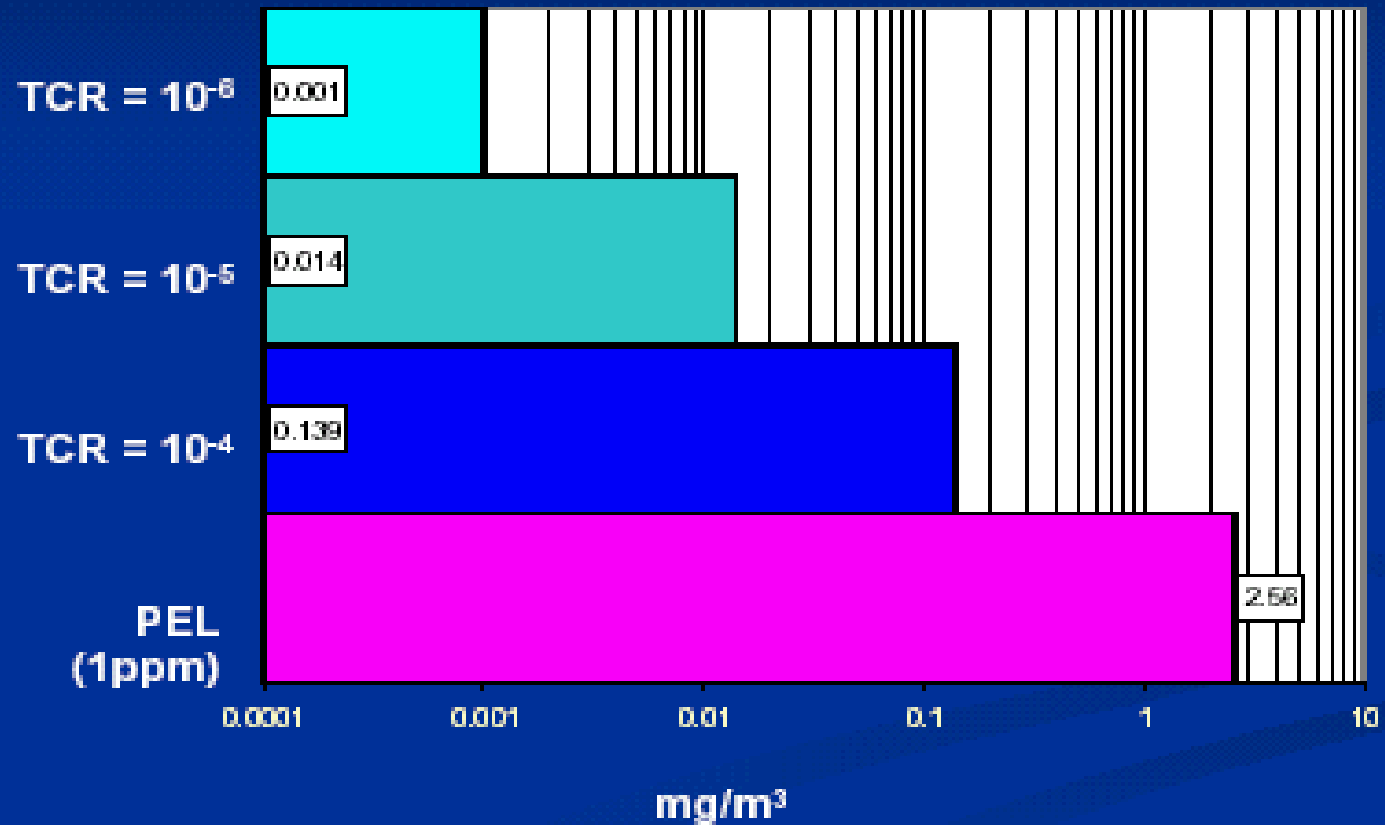
5 Orders Different





Vinyl Chloride (VC)

3 Orders Different





EPA-OSHA Jurisdiction

- ◆ EPA/OSHA MOU 11/23/90
- ◆ EPA authority includes
 - Significant adverse reactions to chemicals posing potential hazard to public health or environment
 - Accidental, unpermitted or deliberate releases beyond workplace
 - Violations of EPA regulations



EPA-OSHA Jurisdiction

◆ VI Guidance

- Not apply to occupational exposures where contamination similar to chemicals being handled
- May apply in occupational settings where VI constituents no longer or never used in workplace, or where chemicals modified by degradation
- Change in use may trigger pathway reevaluation

◆ PELs not ARARs



OSHA-State Jurisdiction?

- ◆ Supremacy Clause
- ◆ Express Preemption
- ◆ Implied Preemption-federal law occupies field or state law conflicts with federal law



OSHA-State Jurisdiction?

- ◆ OSH Act § 18(a)- States not prevented from asserting jurisdiction under state law over occupational and health issues for which OSHA has not adopted a standard
- ◆ OSH Act §18(b)- States may assume responsibility for occupational safety and health issues thru approved-state



OSHA-State Jurisdiction

- ◆ State Laws Not Preempted if:
 - OSHA approved state program
 - Does Not directly, substantially and specifically regulate occupational health and safety
 - Law of general applicability not preempted if they regulate workers as part of general public



Recent Transaction Complicated By Vapor Intrusion

- ◆ Bakery (CT)- former solvent recycling facility.
- ◆ Medical Office (CT)- former manufacturing facility
- ◆ California Mall-former carwash/gas station
- ◆ Donut Shop (Chicago)-former gas station closed in 1980s
- ◆ Retail (TX-former gas station)(subslab sampling)



VI-Impacted Transactions Cont'd

- ◆ Shopping Center (New Jersey)-former dry cleaner. Adjacent residence impacted (\$345K)
- ◆ Shopping Center (SC)-no PCE outside but additional subslab sampling. SSDS (\$48)
- ◆ Shopping center (TX)- dry cleaner program does not address. Sampling.
- ◆ Shopping Center (KS)-dry cleaner program (\$73k)



VI-Impacted Transactions Cont'd

- ◆ Shopping Center (FL)(HVAC)(\$32K)
- ◆ Shopping Center (AL)(risk assessment)
- ◆ Office Building (NYC)-mercury vapors from former millinery
- ◆ Leased Warehouse/Office Building (NYC)-former ice cream facility



VI Impacted Transactions

- ◆ Mobile Home Park (NV)-former landfill. Vapors in crawlspace. Poor disclosure.
- ◆ Apartment Building (SD)(benzene screening level)
- ◆ Apartment Bldg (LV)(1500 ft PCE)
- ◆ Low Income Housing (Atlanta)-Adjacent donut shop (former dry cleaner)



Litigation

- ◆ (Antolovich v. Brown Group Retail, Inc. Co. District Ct., No. 00-CV-1021)-\$1MM to residents
- ◆ Ball v. Bayard Pump & Tank Co.
- ◆ Asbury Sq. v. Amoco (Iowa 2004)
- ◆ McDonald's v. Philadelphia (2004)
- ◆ Bourbon Mini-Mart, Inc. v. Gast Fuel and Services, Inc. (Ind. 2003)
- ◆ Defense Logistics Agency v. Pa (EHB 2001)
- ◆ Greenpoint-Brooklyn, NY



Diligence Considerations

- ◆ Is VI a potential Issue at Site?
 - Dry cleaners
 - Gas stations
- ◆ Is Vapor Intrusion a REC?
 - Off-site releases
 - Prior cleanup
 - Definition of “de minimis” (appropriate gov. agency)
 - Are Indoor Air Issues Excluded from SOW?



Diligence Cont'd

- ◆ Is there a potential VI pathway?
 - Failing Screening Criteria Does Not Mean Vapor Intrusion Pathway is Complete but...
 - DON'T NEED COMPLETED PATHWAY TO SCARE BANKS!!
- ◆ Appropriate Standard
 - OSHA (but beware of Haz Com and MM Requirements)
 - DOH



Diligence Cont'd

- ◆ Know State Program (COCs, vertical/horizontal, sampling vs. modeling)
- ◆ Building Design-Remedy Challenges
- ◆ State Dry Cleaner Funds
- ◆ Disclosure
- ◆ Insurance (E&O, Reopeners, PLL for TP liability)
- ◆ Fixed Price Remediation (NFA address VI?)



Post-Closing Purchaser Concerns

- ◆ Plume Migration
- ◆ New Chemicals (degradation)
- ◆ New Buildings-(Change in Use)
- ◆ Reopeners
 - Changing VI Assessment Techniques
 - Changing Science/Toxicology
 - State Dry Cleaner/UST Funds
- ◆ Changing Social Expectations/Awareness (e.g., Mold, Asbestos, LBP)