

EPA Vapor Intrusion Guidance Would Shape Decisions by Project Managers, Attorneys Say

By [*Pat Ware*](#)

June 3 --Final Environmental Protection Agency vapor intrusion guidance would be expected to have considerable influence, even though a majority of states have published their own guidance or regulations, several environmental attorneys told Bloomberg BNA.

“We think it will be significant when it comes out and that it will be used by EPA project managers in determining when a vapor intrusion evaluation is needed and when it will be considered adequate or complete,” Chris Roe, a lawyer with Fox Rothschild LLP, told Bloomberg BNA. Roe also said the document would be looked to by states, including those with their own guidance, to some degree.

“EPA's final guidance will be relevant and will be considered an enforcement document in the sense that EPA regions will use it to make enforcement decisions,” he said.

A New Jersey official, however, downplayed the importance of the final EPA guidance precisely because of so much state activity.

John Boyer, an environmental scientist with the state's Department of Environmental Protection, said some states that don't have their own guidance, such as Utah, may defer to the EPA's. In general, though, he said he doesn't think the EPA's broad vapor intrusion guidance for chlorinated solvents would be that significant.

Petroleum Guidance More Relevant.

The EPA's narrower guidance for petroleum vapor intrusion would probably be more relevant than the general guidance, Boyer, who also leads vapor intrusion efforts for the Interstate Technology & Regulatory Council (ITRC), said.

Others told Bloomberg BNA that only some parts of the federal guidance were likely to be significant or that the guidance would mainly be relevant at federal sites.

Vapor intrusion refers to the upward migration of volatile organic chemicals from soil or groundwater into overlying or nearby buildings. At low levels in

indoor air, VOCs can cause health effects such as watery or burning eyes, skin irritation or rashes, nausea, dizziness or fatigue. Under extreme conditions, more severe symptoms can include kidney and liver damage or damage to the nervous system.

In 2002, the EPA issued for comments draft vapor intrusion guidance for chlorinated solvents only but never finalized it.

Two Documents Issued.

More than a decade later, in 2013, the EPA issued significantly revised draft guidance--a general document to address chlorinated solvents and a narrower one for petroleum vapor intrusion. The agency plans to release both final guidance documents at the same time .

As of June 3, the draft documents hadn't been received by the White House Office of Management and Budget for interagency review.

In the absence of federal guidance, by now most states have issued their own guidance or regulations, Boyer said.

As recently as nine years or 10 years ago, only a few states had addressed the issue, he said. Today, 41 states and Puerto Rico have some type of guidance or regulation, and two more states are in the process of developing it, according to a [draft summary](#) provided by Boyer. When finalized, the summary will be part of a petroleum vapor intrusion document ITRC expects to issue in October, he said.

Consistent Screening Values.

The state guidance documents lack consistency, creating a patchwork of regulations that makes it difficult for national developers working in other states, some say .

This inconsistency among state guidance makes national guidance even more important, one attorney said.

“It is no secret that states have not taken one uniform approach to vapor intrusion issues, particularly to screening values and risk numbers, as well as to long-term assurance measures,” Greg Bibler, with Goodwin Procter LLP, said.

“The EPA, by contrast, should at least make an attempt to proceed in a consistent manner at all sites across the country, subject to the requirement that it give some credence to 'applicable or relevant and appropriate requirements'” under the Comprehensive Environmental Response, Compensation and Liability Act, he said.

Relevant to Superfund Sites.

Bibler said he believes the EPA staff, such as in the regional offices, will look to federal and not state guidance to determine what sampling and remediation to require at federal superfund sites.

“I do think it will matter what EPA's final vapor intrusion guidance says, if and when it finally comes out,” Bibler said.

David Gillay, a lawyer with Barnes and Thornburg LLP, also said he believes the vapor intrusion guidance, “if and when it comes out,” will have teeth.

“Notwithstanding the fact that EPA's [vapor intrusion] guidance is just that--guidance--and is not legally binding, in my experience state and federal regulators will 'require' that the regulated community strictly adhere to the final guidance,” he said.

For private party transactions, parties are likely to look to the EPA's vapor intrusion guidance in their property transactions, which frequently don't fall within the scope of agency oversight, Adam Cutler, an attorney with Fox Rothschild, said.

Not 'Controlling' for State Cleanups.

David Freeman, an attorney with Gibbons PC, said he believes new federal guidance would be “instructive but not necessarily controlling” for cleanups being accomplished under state law, which he said make up the vast majority of cleanups.

The federal guidance will have its most direct application to sites being remediated under CERCLA or the Resource Conservation and Recovery Act, he said.

“However, there will be some pressure to at least pay careful attention to the guidance,” Freeman said. The big risk regarding soil vapor isn't the cost of

remediation--which is often quite nominal--but rather the possibility of future personal injury lawsuits, he said.

“In that context, it would not be unrealistic to assume that a future plaintiffs' counsel will claim the guidance to represent at least a minimum 'standard of care,'” he said. “A given court may or may not agree with that characterization.”

However, site owners or operators may decide to minimize their risks by following the federal guidance in conducting their investigatory and remedial activities, he said.

Robustness of State Program.

Larry Schnapf, an environmental lawyer with Schnapf LLP, said he believes the significance of the final EPA document will depend on the robustness of the state program.

“EPA [indoor air] screening levels may be the only relevant aspect of the federal guidance--primarily for transactions,” he said. If a state has a vapor intrusion program, that program will be used, he said.

However, state screening levels vary widely, and some states don't have screening levels, he said.

Similar sites may have quite different risk management measures depending on the state the property is located in, he said. In such cases, federal screening could act as a guide to determine whether a site is suitable for acquisition or transaction, he said.

Schnapf said he is seeing many problems with the new definition of “controlled recognized environmental condition” (CREC) (that appears in the revised industry standard ASTM E1527-13) and vapor intrusion, especially in states such as Texas or Florida that don't have their own indoor air screening levels.

The EPA adopted E1527-13 in a direct final rule published Dec. 30, 2013. The agency's action allows parties to use the revised standard to satisfy "all appropriate inquiries" requirements to qualify for the innocent landowner, contiguous property owner and bona fide prospective purchaser defenses under CERCLA

CREC Gives False Assurance.

The 2013 standard, revising a 2005 one, adds the new term CREC, which describes situations in which a release, such as a spill or leak, has occurred and was addressed to the satisfaction of the regulator.

“CREC isn't created equally depending on the state program,” Schnapf said. The definition refers to regulatory controls and doesn't incorporate risk to human exposure, he said. For example, a state may say a site is a CREC because its groundwater isn't being used, but vapor intrusion may not actually be addressed, he said.

In another, the same site may be a “recognized environmental condition” where further investigation and cleanup is needed, he said.

The U.S. states and territories that don't have any type of vapor intrusion guidance are: Arizona, Arkansas, Connecticut, Kentucky, Mississippi, Nevada, New Mexico, Puerto Rico, Rhode Island, South Carolina, Texas and Utah, according to the summary provided by Boyer. Florida is in the process of developing guidance.