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NEW YORK COURT BACKS NEW DAMAGE CLAIMS FOR VAPOR INTRUSION

A little-noticed New York State court ruling has found that plaintiffs' damages claims for vapor contamination are not subject to the same statute of limitations as those for previously disclosed groundwater contamination, clearing the way for suits against polluters who had already settled their liabilities years ago.
The ruling is a double blow for many polluters who are also facing renewed action by state regulators to address vapor contamination having previously resolved their regulatory cleanup liabilities.

The ruling late last year in *Richard Aiken et al. v. General Electric Company* is one of the first by a court to decide on the viability of vapor intrusion claims against polluters who have already negotiated a settlement or cleaned up their pollution.

The Appellate Division of the New York State Supreme Court ruled Dec. 4 that a damages claim by a group of homeowners stemming from vapor intrusion in their homes was not time-barred by the standard three-year statute of limitations because the vapor intrusion pathway was not considered at the time of the original settlement, which only covered contaminated groundwater.

In their ruling, the court said the homeowners had no reason to know they were at risk of exposure though vapor intrusion until 2004, when they were informed by the New York Department of Environmental Conservation that there was a risk of exposure. "Given the belated timing of this disclosure, there is, at the very minimum, a question of fact as to when plaintiffs should have suspected, let alone discovered, that their properties had been damaged by soil vapor intrusion," the court said.

A GE spokesman did not return calls seeking comment by press time and it is not clear whether the company is appealing the ruling.

The ruling allowing the homeowners to pursue damages claims comes as state regulators have long implemented a policy requiring review of contaminated or potentially contaminated sites to assess for exposure to harmful vapors -- even in cases where liable parties have been assured of no further action.

The claim stems from a plume of trichloroethelyne (TCE) contamination that had spread from an industrial site in Fort Edwards, NY, into a surrounding residential area, contaminating the soil and groundwater beneath several homes. GE settled the case brought against them by the homeowners for their liability associated with the groundwater contamination in 1983.

In 2007 the homeowners brought another case against GE for contamination caused by soil gas vapor that had entered their homes, which GE claimed they could not do because they had already settled their liability with the homeowners more than 20 years beforehand.

The case has broad implications in New York state, which is home to many contaminated sites, many of which had already been settled out of court or cleaned up before vapor intrusion became understood as a legally viable exposure pathway in the last 10 years or so. Lawrence Schnapf, an environmental attorney specializing in brownfields cleanups and vapor intrusion, said during a vapor intrusion conference held by RTM Communications April 8 that the *Aikens* case is important both because it is one of the first cases to bring a claim for vapor intrusion exposure alone, and because it is a claim based on a contamination source that had been known for more than 20 years.

"We're starting to see actions that are predicated only on vapor intrusion," Schnapf said. "*Aiken v. GE* is probably one of the most important decisions, because it's a statute of limitations case. The court ruled that [the plaintiffs] had clearly not been aware of the vapor intrusion pathway until [2004], that the statute of limitations had not run, and they were able to bring an action. So that's a pretty scary decision."

The case is also troubling for potentially liable parties because there is no standard nationwide guidance on how to detect or protect against liabilities stemming from vapor intrusion. Currently those guidelines are handled by the states, whose guidelines vary considerably. EPA had been working on issuing a revised draft guidance since 2002, when it first issued a draft guidance (*see related story*).