

Vapor Intrusion Legal Issues

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“LEAD-LINED CASKETS POSE HEALTH RISK”

- Scientific Risk
- Legal Risk
- Reputational Risk

VI Sites In the News

- Endicott, NY
- Victor, NY
- Hopewell Junction, NY
- Hillcrest, NY
- Ithaca, NY
- Vestal, NY
- Union, NY
- Norwich, NY
- Cortland, NY
- Plainview-Old Bethpage, NY
- Ford Edward, NY

VI Sites in the News

- Dayton, OH
- Copley, OH
- Napa, CA
- Simi Valley, CA
- Gardena Marketplace , CA
- Lockwood, MT
- Douglas, MI
- San Antonio, TX
- Omaha, NE

VI Litigation

- Antolovich v. Brown Group Retail, Inc. (2000 Co)
- Ball v. Bayard Pump & Tank Co. (PA 2007)
- Defense Logistics Agency v. Pa (EHB 2001)
- New York State v. Exxon
- Nnadili v. Chevron (DC 2006)
- Muniz v. Rexnord (IL)
- Blain v. IBM (NY Broome Cty)
- Martin v. Foster Wheeler (MD PA 12/2007)
- Bonds v. Nicoletti Oil (ED CA 1/08)

Liability for Vapor Intrusion

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

CERCLA

- Exclusion for Releases:
 - Exposures to persons solely in workplace
 - for claims asserted against employer (workers compensation?)
- Facility- where hazardous substances come to rest
- Unilateral Administrative Orders
- Cost Recovery

CERCLA Continued

- Owner of Property
 - Equipment/Vessels
 - stormwater and sewer lines
- Operators-
 - tenants
- Generators-
 - franchisors/equipment manufacturers

CERCLA Continued

- Third Party Defense
 - Due Care Element
 - Precautionary Element
- ILO, BFPP and CPO
 - appropriate care

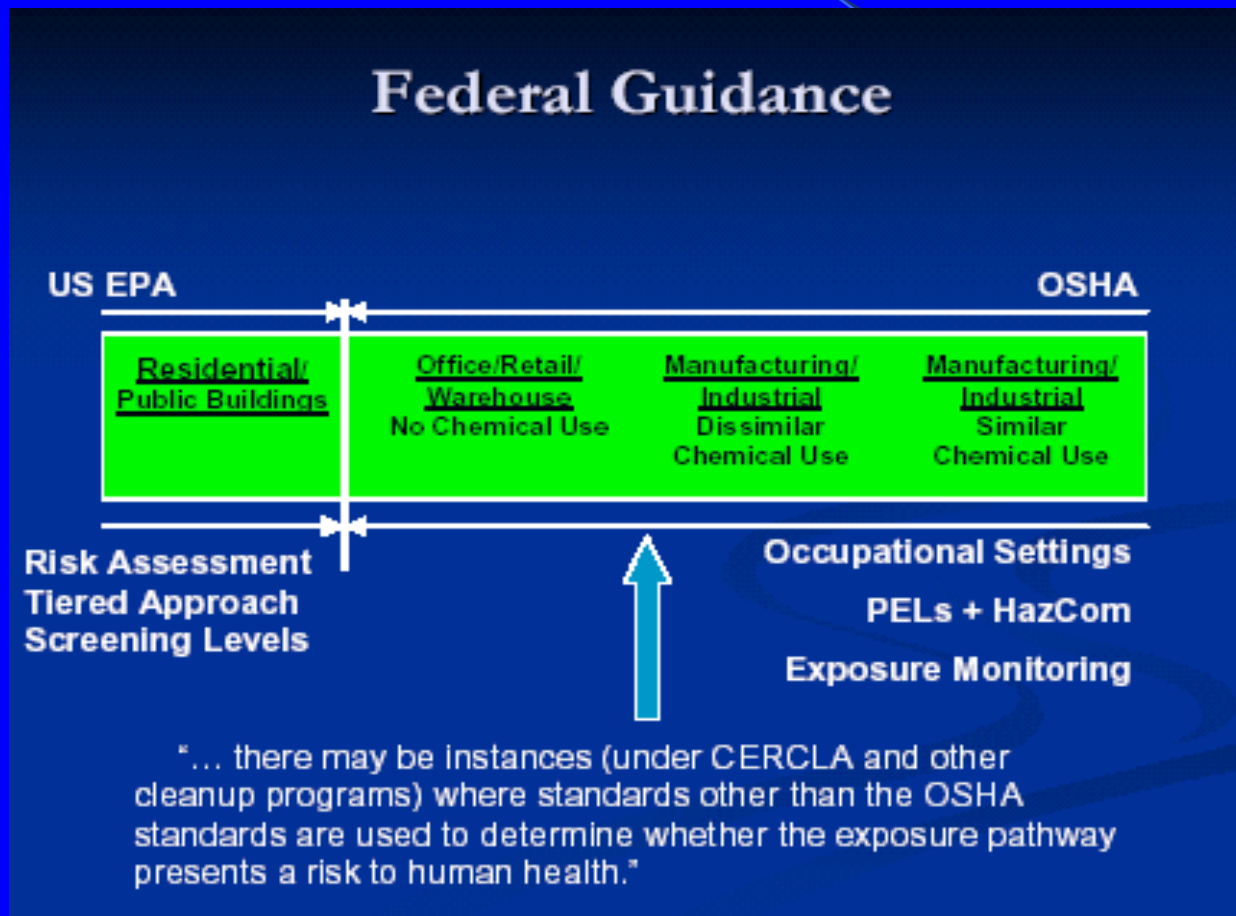
RCRA

- Corrective Action 3004 (u) and (v)
- Closure (TSDF and Generator)
- Section 3013 AO
- Section 7002
- Section 7003
- Section 3008(h)
- Sub-title I (USTs)

State Common Law

- Nuisance
- Trespass
- Strict Liability
- PI/PD
- Professional Malpractice
- Negligent Misrepresentation
- Breach of Contract (Lease, Sale)

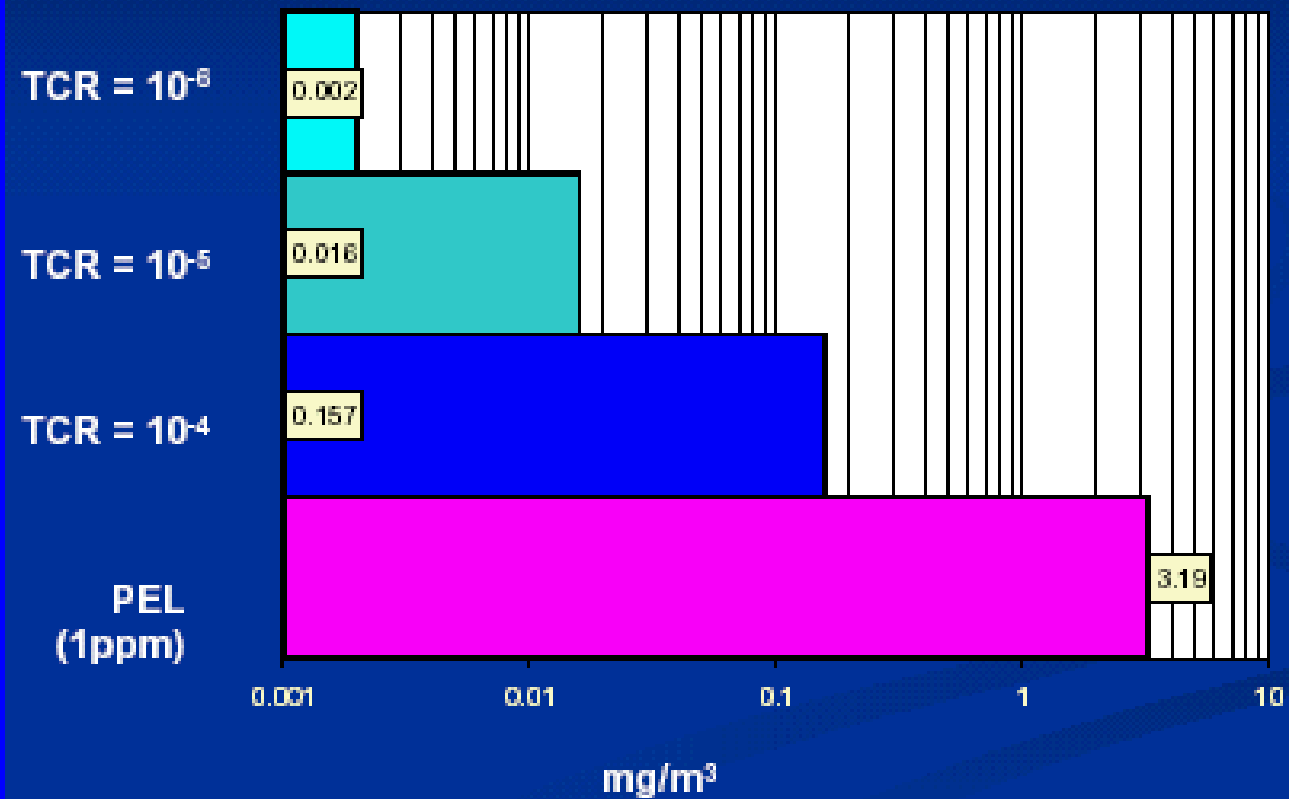
OSHA and EPA/State VI Jurisdictional Issue



EPA vs. OSHA PEL

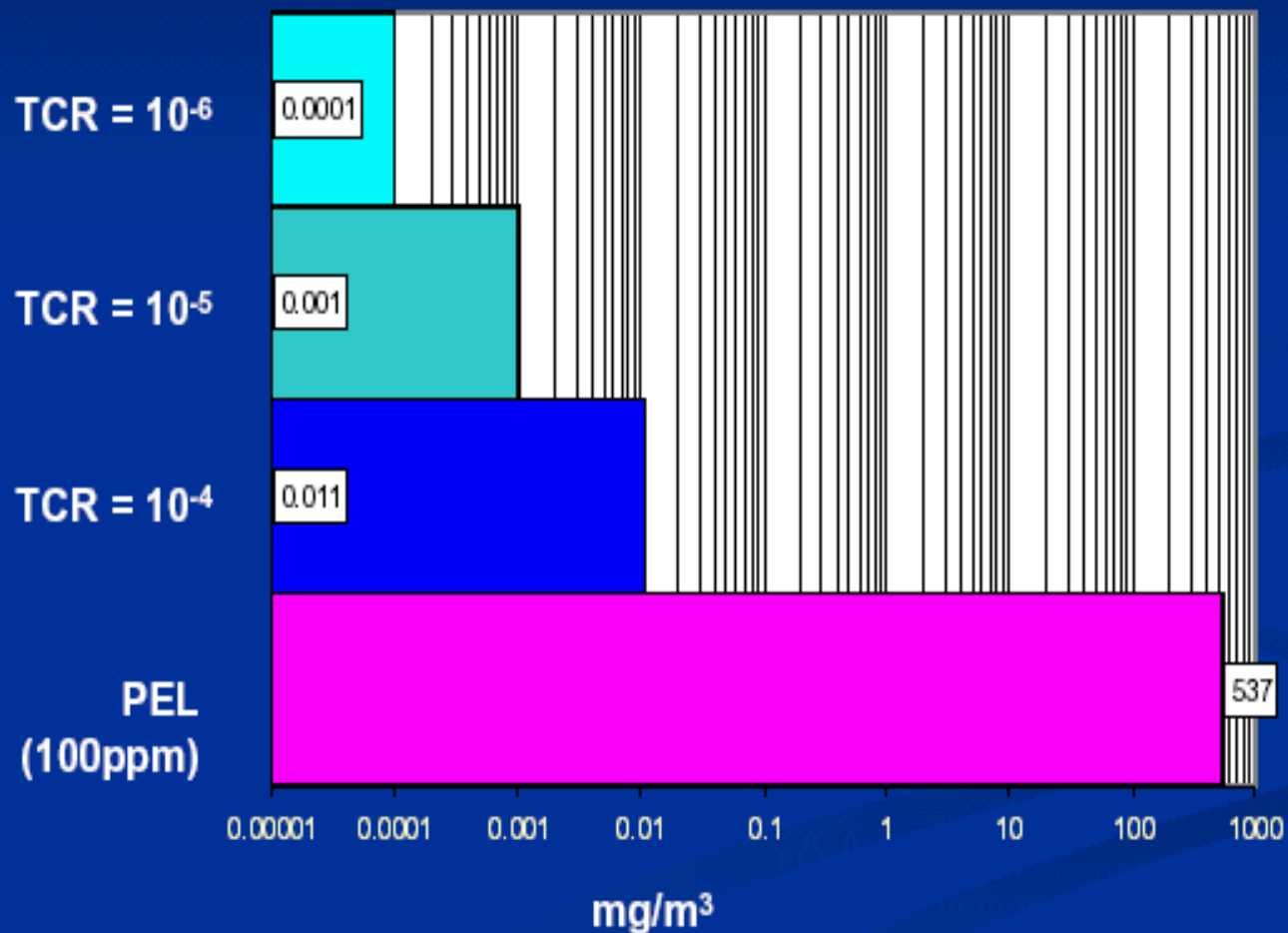
Benzene

3 Orders Different



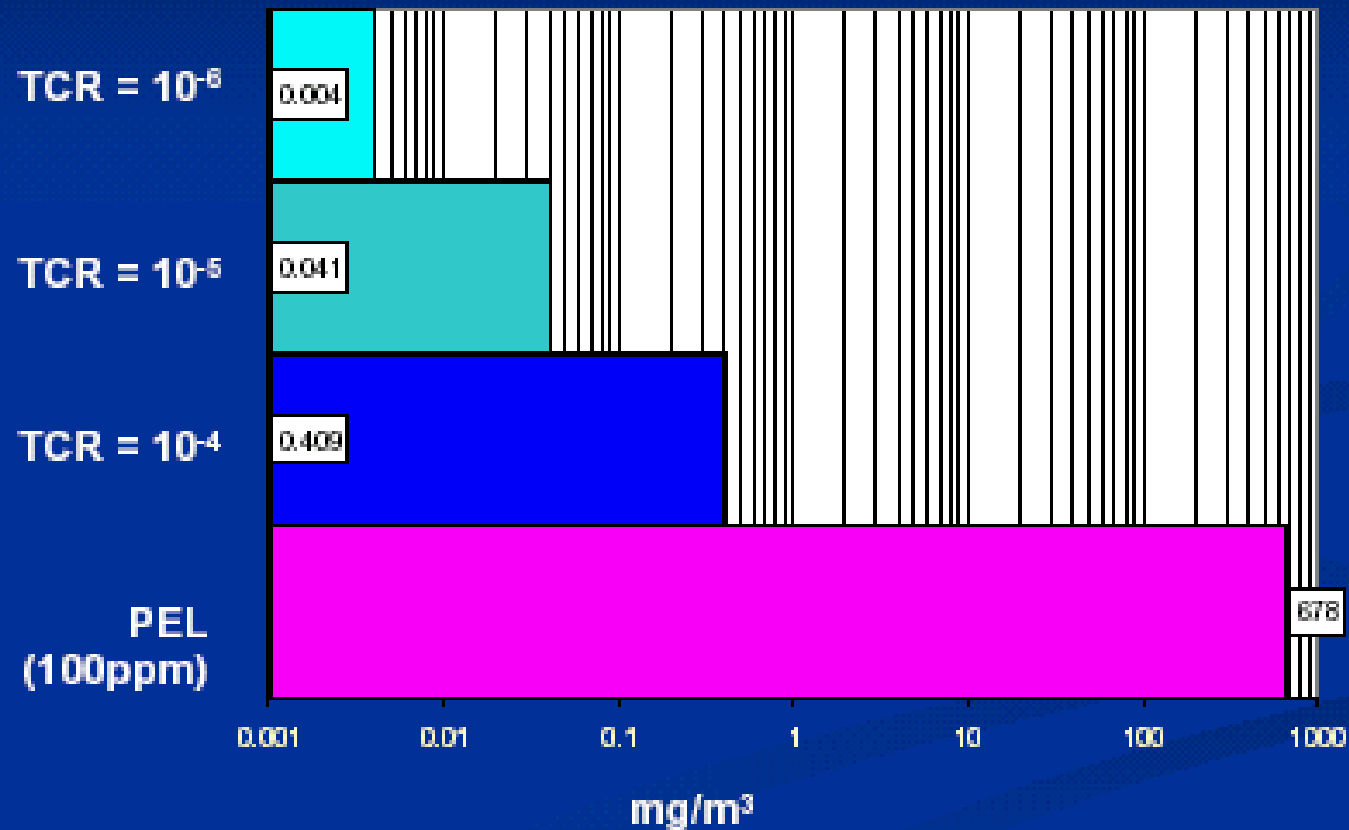
Trichloroethene (TCE)

6 Orders Different



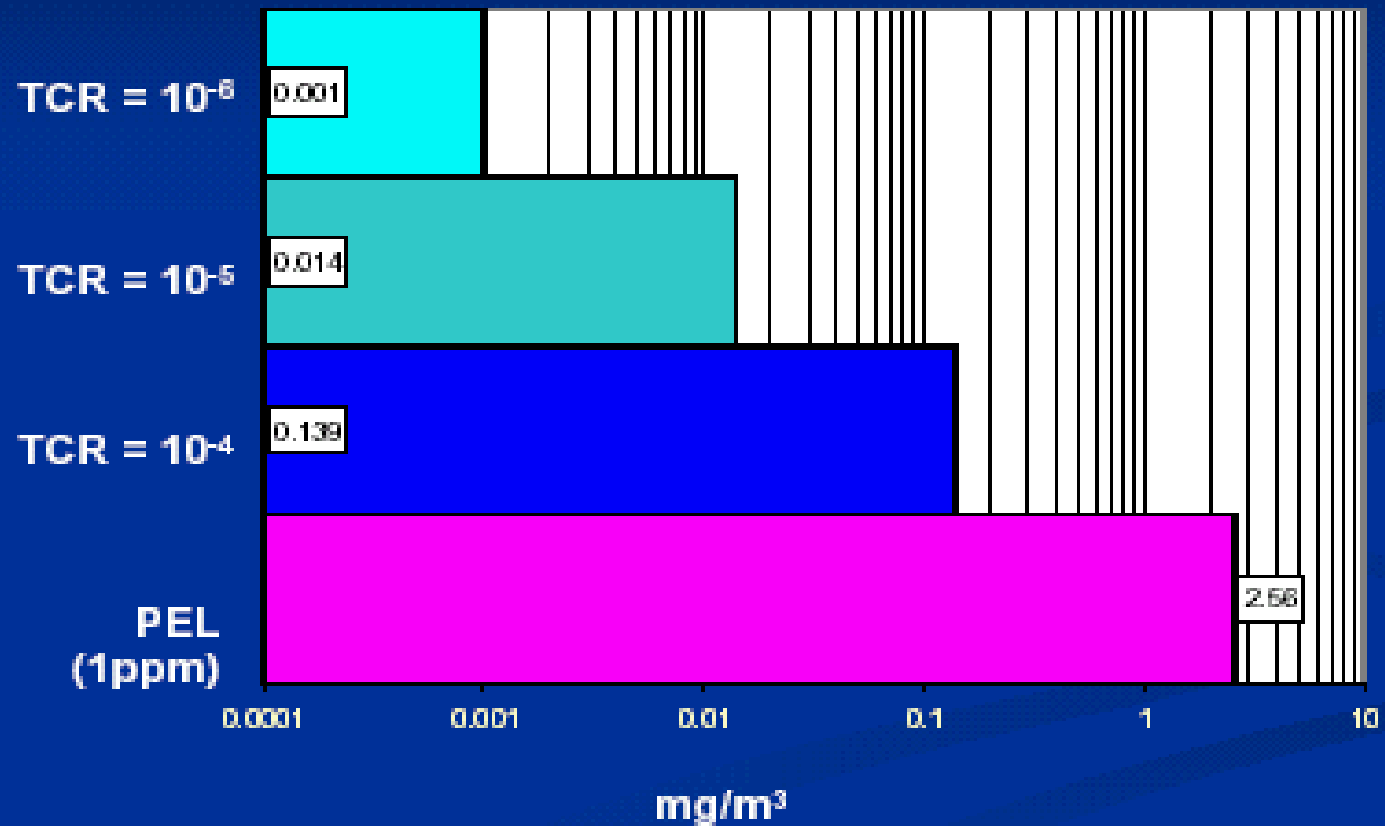
Tetrachloroethene (PCE)

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

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

Disclosure

- Statutory Reporting Obligations Disclosure
 - CERCLA
 - EPCRA
 - State Cleanup Laws
- Common Law
 - on-site
 - off-site

Diligence Considerations

- VI May Drive Cleanup
- Ie Indoor Air Issues Excluded from SOW?
- ASTM 2600

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!!

Diligence Issues Cont'd

- 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)

MISSION ACCOMPLISHED?

- IT IS NOT JUST ABOUT THE SCIENCE
- UNDERSTAND CLIENT RISK TOLERANCE
 - screening
 - sampling
 - remedy