

Legal Perspective on Vapor
Intrusion and the Relationship
Between the ASTM E 2600
and E 1527

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Why VI Screening is Important in Property Environmental Due Diligence

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

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)

Common Law

- Negligence
- Trespass
- Nuisance
- Strict Liability
- Breach of Contract (Lease, Sale)

Notable 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* (2007)
- *Nnadili v. Chevron* (DC 2006)

Notable Litigation Cont'd

- U.S. v. Apex (7th Cir 8/25/09)
- Grace Christian Fellowship v. KJG Investments (E.D. WI. 08/07/09)
- West Coast Home Builders v. Aventis Cropscience (N.D. Ca. 8/21/09)
- Rochester Technology Park (NY VCA)
- Moutenot v Dupont (NJ-Passaic Cty)
- Blaine v IBM (NY-Broome cty)

OFF-SITE MIGRATION

- Driving Listing and Re-opening Decisions
- Leading Cause of Litigation

Off-Site Litigation

- Spear v. Chrysler LLC
- First Property Group, Ltd v. Behr Dayton Thermal Products LLC
- Martin v. Behr Dayton Thermal Products LLC
- Sher v. Raytheon

Environmental Quality Review Litigation

- Citizens for Upholding Zoning Regs v. City of Palo Alto
- Bronx Committee for Toxic Free Schools v. NYSCA

Primary Jurisdiction

- Sher v. Raytheon
- Spear v. Chrysler

Lease Liability

- Doherty v. Karten (NY) (reservation of re-entry)

Key Points in Legal Appendix

- Screening tool for encroachment of vapors
- Not Serve as “Good Commercial or Customary” Practice
- Not Limited to CERCLA Hazardous Substances
- Not Part of, Supplement To or Replace E1527
- VEC is not necessarily a REC

Relationship to AAI

- AAI goal:
 - conditions indicative of release or threatened release of
 - hazardous substances
- Vapors may be part of a CERCLA “release”
- CERCLA Facility includes where Hazardous Substances comes to be located

AAI Relationship Cont'd

- AAI Applies to gaseous forms of hazardous substances
- AAI Not Limited to On-Site Releases
- AAI Not Limited to Target Property
- AAI Applies to Migration Pathways

Relationship to E 1527-05

- Presence or likely presence of Hazardous substance or petroleum suggesting existing or past Release or material threat of release into *structures*, ground, groundwater or surface water at target property
- RECs only identified through E1527
- EPA has not determined that E2600 satisfies AAI
- E2600 Not Sufficient for Brownfield Grants
- Indoor air identified as non-scope in section 13

Liability Implications to EPs

- Professional Malpractice
- Negligent Misrepresentation

Summary

- *VEC screening is expected to become a routine part of an E 1527-05 Phase I*
 - REC definition already covers “releases...onto a property”
 - EPA’s VI guidance document is CERCLA-driven - same as E 1527
- Legal Appendix in E 2600-10 supports VEC screening as part of Phase I