

VAPOR INTRUSION: DON'T LET THIS RISK SLIP THROUGH THE CRACKS

Vapor intrusion refers to the migration of volatile chemicals (also known as VOCs - Volatile Organic Compounds) from the subsurface into overlying buildings or structures. A vapor intrusion condition occurs when rapidly evaporating chemicals from polluted soil or groundwater migrate and impact the indoor air quality of area buildings. It is quickly emerging as one of the top environmental concerns as it brings with it several liability and health issues for many regulators, attorneys and building/property owners to contemplate.

EXPOSURES, POTENTIAL LIABILITIES AND OTHER CONCERNS

- **REGULATORY "REOPENERS"** The government has been and continues to reopen sites that had previously received regulatory closure in order to examine potential vapor intrusion issues (literally hundreds of those scenarios in Massachusetts, California and New York). The EPA and state agencies are also starting to reopen sites where no vapor intrusion analysis was considered in earlier remedial decisions (e.g., *United States v. Intel Corp. and Raytheon Co.*, 91-CV-20275).
- **THIRD PARTY LAWSUITS** Asserting bodily injury, diminution in property value or other types of damages (e.g., third-party claims based on alleged exposure to vapors under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA) or traditional common law theories, including nuisance and trespass)
- **CLEANUP COSTS/REMEDATION EXPENSES** Potential for hefty cleanup costs or remediation expenses to mitigate a vapor intrusion condition.
- **NEW DUE DILIGENCE STANDARDS AND REGULATIONS** Revised ASTM E 2600 vapor encroachment screening standards in place; a majority of the states have published vapor intrusion guidelines dictating that vapor intrusion issues be incorporated and addressed. New guidance for vapor intrusion at Superfund and RCRA sites is expected and many legal professionals now

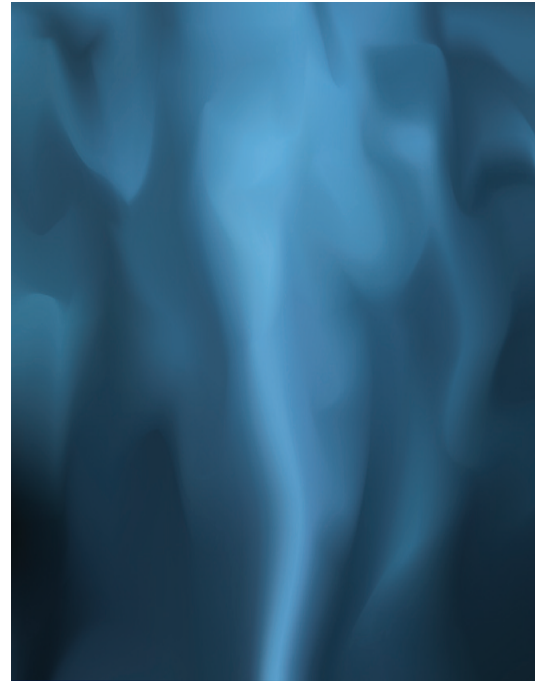


TABLE OF CONTENTS

VAPOR INTRUSION: DON'T LET THIS RISK SLIP THROUGH THE CRACKS	1
BROWNFIELDS: GOOD OPPORTUNITY OR A ROLL OF THE DICE?	2
CONTACTS	4

recognize vapor encroachment as a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) risk, rather than an issue that is beyond the basic scope of an Environmental Site Assessment.

- **INCREASED NOTIFICATION REQUIREMENTS** Landlords and property owners will need to properly notify tenants and building occupants of any vapor intrusion related issues (e.g., NY Landlord Notification Requirements).

- **SOURCE IDENTIFICATION ISSUES** Identification of the source and causation of the Indoor Air Quality condition can be daunting (an indoor air quality issue stemming from a subsurface vapor intrusion issue, off-gassing from new building materials that were introduced after building construction or some other unrelated Sick Building Syndrome issue). Vapor intrusion can also come from off-site sources (a release on a different property from the one affected) as vapors migrate not only from contaminated groundwater but independently through soil and other conduits as well.

INSURANCE SOLUTIONS

Insurance coverage for these exposures and liabilities can easily slip through the cracks if not properly addressed with an environmental insurance policy since traditional General Liability and Property policies are not intended or designed to respond. Among other coverage grants being provided, these environmental policies can cover third-party bodily injury and property damage claims, cleanup cost/remediation expenses (including regulatory reopeners) and legal defense associated with vapor intrusion.

Most carriers have vapor intrusion coverage built directly into their form via their definition of pollutants (e.g., “...any solid, liquid, **gaseous** or thermal pollutant, irritant or contaminant including but not limited to...smoke, **vapors**, toxic chemicals, hazardous substances...”). Fortunately, environmental insurance can effectively seal the coverage “cracks” to help manage and transfer the risk.

BROWNFIELDS

GOOD OPPORTUNITY OR A ROLL OF THE DICE?

Most property owners, buyers, sellers and developers have become familiar with the term “Brownfields” over the years but it can have a different meaning and bring with it a whole host of concerns depending on your individual experience in this space. The two greatest concerns from an environmental liability and risk perspective are associated with toxic tort scenarios and unknown or unanticipated remediation expenses which stem from historic pollution conditions. The magnitude and uncertainty surrounding the consequences of environmental risks can become a major barrier to development. The success of any real estate transaction or redevelopment project depends in large part on the appropriate allocation and effective management of risk.

EVENING THE ODDS

In addition to the more traditional approaches in dealing with environmental risk, such as price discounting, indemnifications, escrows and hold-back provisions, an increasingly attractive

KEY ENVIRONMENTAL EXPOSURES

Brownfield sites can pose a range of exposures for owners, buyers, sellers, developers and even lenders and investors. Some include, but are not limited to, the following:

- **Third-Party Claims** Pollution-related property and/or bodily injury damages (including Natural Resource Damages).
- **New Issues** Discovery of new or additional contamination/pollution conditions.
- **Government “Reopeners”** Regulatory determination of more stringent cleanup requirements (virtually no environmental cleanup is ever unequivocally “closed” as states/regulatory authorities rarely ever issue an unconditional release of liability). Several reopener contract qualifiers allow the government to reassess sites previously deemed closed/clean.
- **Cost Overruns** Exceedance on cleanup projects.
- **Contractor-caused Pollution** Creation of new pollution from activities of contractors.
- **Financial Defaults** Bank/Financial Institution exposed if borrower defaults due to environmental liabilities.
- **Consequential losses** such as business interruption or loss of tenant revenue resulting from pollution incidents.

alternative is to transfer these risks into the environmental insurance market to further augment or replace the previous approaches. For a single fixed premium, environmental insurance can be used to protect against the risk of unexpected future losses – providing more certainty and comfort to all parties. Environmental insurance is a proven and effective risk management tool which can serve as a catalyst for Brownfield development.

TRADITIONAL APPROACHES	KEY DISADVANTAGES
Price Discounting	<ul style="list-style-type: none"> ■ Can lead to severe under/over – estimation of underlying risk ■ Risk estimates can vary widely; third-party verification often unavailable
Buyer/Seller Indemnification	<ul style="list-style-type: none"> ■ Difficult to negotiate ■ Dependent on the future financial viability of indemnifier
Escrow and Hold-Back Provisions	<ul style="list-style-type: none"> ■ Difficult to structure/estimate and can require complex ongoing administration ■ Can reduce transaction value to one or both parties

RISK MANAGEMENT STRATEGIES & SOLUTIONS

The most critical factor for all parties of a Brownfield is to understand the environmental risks, both actual and perceived, which can generally be broken into two main categories, the “known” and the “unknowns.” Solutions to these challenges do not typically lend themselves to traditional approaches. They require innovative thinking and creative strategies that invariably incorporate complex contractual arrangements and customized insurance programs. Effective negotiation of both known and unknown conditions is crucial to obtaining meaningful coverage in any type of environmental insurance policy. It necessitates both insurance and technical expertise and demands a thorough knowledge of the property(ies) and environmental site conditions. Clearly this presupposes a full and comprehensive knowledge of the different environmental policy forms available, their applicability, exclusions, endorsements and available coverages.

The approach by carriers for known (existing) conditions is pretty straightforward but the coverage negotiations can be very complex and protracted. The insurers will attempt to obtain the broadest exclusion possible but the broker’s approach in representing their client is to tighten the exclusion as much as possible. For example, limiting a broad exclusion to a specific pollutants such as chlorinated solvents (as opposed to accepting an offer by the carrier to exclude the entire parent grouping - i.e., Volatile Organic Compounds) or negotiating an exclusion associated with specific contamination identified in a particular report instead of accepting a more broad exclusion across the board for contaminants from a past spill. Effective risk management of environmental exposures during Brownfield redevelopment may also entail an integration of contracting strategies coupled with insurance solutions. The right contracting strategy will allow a site owner to achieve the most efficient balance between retaining risks and transferring them to third party contractors. Site owners have many options for negotiating terms with contractors for cleanup of contaminated sites. These options allow for varying levels of remediation expense risk to be transferred from the site owner to the remediation contractor in addition to the other insurable risks.

While Brownfield properties can clearly bring with them some risk, you can dramatically improve the situation, address the liabilities and transfer the risk via thorough due diligence, creative risk management approaches and a properly structured environmental insurance policy. Working with a qualified and experienced environmental insurance broker will ensure that you properly manage the risk, protect your balance sheet/investment and put these properties back into productive use.

CONTACTS

For additional information, contact a local Willis Associate or the following Environmental Practice team members:

NORTH AMERICA

Rich Sheldon

Environmental Practice Leader
+1 610 254 5625
richard.sheldon@willis.com

Anthony Wagar

National Sales Leader
+1 212 915 7768
anthony.wagar@willis.com

Brian McBride

National Placement Leader &
South Region Team Leader
+1 404 224 5126
brian.mcbride@willis.com

Kate Dodge

Midwest Region Team Leader
Environmental Team Leader – Willis Canada
+1 312 288 7336
kate.dodge@willis.com

Rick Ringenwald

Northeast & Atlantic Region Team Leader
+1 610 254 5985
richard.ringenwald@willis.com

David Orleans

West Region Team Leader
+1 415 955 0142
david.orleans@willis.com

LONDON

Brian Hendry

Environmental/M&A Practice Leader
+44 20 3124 6851
brian.hendry@willis.com

Amber Lepparde

Environmental Resource
+44 20 3124 6407
amber.lepparde@willis.com

Clive Walker

Environmental Resource
+44 20 3124 6315
clive.walker@willis.com

We also invite you to visit our [website](#) for past publications or other information about environmental issues.

The observations, comments and suggestions we have made in this publication are advisory and are not intended nor should they be taken as legal advice. Please contact your own legal adviser for an analysis of your specific facts and circumstances.