

Legal Framework Surrounding Vapor Intrusions: Statutory and Common Law Toxic Tort Challenges

*Presentation to the Air & Waste Management Association's Professional Development
Course: Vapor Intrusion – The Next Great Environmental Challenge January 2006*

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ABSTRACT

Recently federal and State regulators have sharpened their focus on the intrusion of vapors emanating from groundwater plumes into commercial and residential structures. Newspapers have reported on concerns of businesses and residents at sites across the country where levels of toxic constituents have been detected in the indoor air, including at the site of a TCE groundwater plume in Endicott, New York and another TCE groundwater plume of concern in Fort Edward, New York. New York State has a Department of Health guideline limit of 5 micrograms per cubic meter for TCE, but a panel of independent scientists recently recommended, based in part on the Endicott experience, that the level be reduced from 5 to 1, and an EPA draft level was lower still. With Federal and State standards varying widely and in flux, an industry representative at the Endicott site recently called publicly for a regulated standard rather than a policy guideline. The toxic tort issue presents another and different challenge to the regulated community.

This paper will address the looming regulatory review of federal and State Superfund sites, even where cleanup work may have been thought to have been closed, to deal with vapor intrusion from a variety of volatile constituents. It will focus on private parties' rights to seek action, under federal statutory schemes, in particular the Resource Conservation and Recovery Act (RCRA), and the state common law schemes such as public and private nuisance, trespass, and negligence. Remedies offered by the courts may include groundwater and vapor cleanups, damages for reduced property values, and damages for harm to people, including physical injury and psychic harm when there is a physical intrusion and medical monitoring.

Introduction – Legal Remedies and Choice of Forum

Attorneys representing businesses or individuals who have properties that are impacted by pollutants need to carefully consider whether the remedies and procedures available in State or federal court are superior given the facts of their case. If the aggrieved party needs to force remedial action, RCRA provides a powerful federal enforcement tool (when dealing with sites that are not Superfund sites or where active removal is ongoing, both of which are excluded from private citizens' suits by the statute). State law remedies may also require remediation, but have the advantage of permitting monetary damages for loss of property value and harm from the invasion of the property by the contaminants.

Choice of Federal versus State Court

The choice of bringing an action in federal court versus state court depends upon:

- Efficacy of State or federal causes of action or claims (discussed below).
- Genuine availability of federal claims, either based upon diversity of citizenship or claims brought under a federal statute. This was recently expanded by the MDL judge in the MTBE groundwater litigation, based on the assertion that the use of the chemical was required by the United States government.
- Perceived value of state court juries.
- Perceived value of pre-trial motion practice and value or detriment to multiple appeals in certain state courts such as New York.
- Daubert-type expert witness admissibility concerns.
- Perceived value of federal court supervision of discovery.

References:

In re MTBE Litigation, 2004 WL 515535 (S.D.N.Y. 2004) (Scheidlin, J.)
Finding federal officer jurisdiction over oil companies in MTBE cases

In re MTBE Litigation, 2004 WL 1969121 (S.D.N.Y. 2004) (Scheidlin, J.)
Finding no federal officer jurisdiction in non-federal mandate states, but asserting federal bankruptcy jurisdiction in MTBE cases

Discussion of Available Legal Rights and Remedies for Vapor Intrusion Cases

Potential Federal Claims for Vapor Intrusion

- RCRA – Resource Conservation & Recovery Act
- CERCLA – Comprehensive Environmental Response, Compensation & Liability Act
- There may be others – most federal environmental statutes have citizens suit provisions but they usually deal with permit violations and provide for civil penalties to the government as the prime remedy, though injunctive relief may be available.

RCRA – The Main Toxic “Tort” Federal Claim for Vapor Intrusion

A) Citizens Suit Provision

RCRA, 42 U.S.C.6972(a)(1)(B), provides that injunctive relief may be issued against:

any person . . . including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

B) Liability is established if defendant:

- (1) has contributed or is contributing to
- (2) the past or present handling, storage, treatment, transportation, or disposal of
- (3) any solid or hazardous waste that
- (4) may present an imminent and substantial endangerment to health or the environment.

Interfaith Community Org. v. Honeywell Int'l, Inc., 188 F.Supp.2d at 502 (D.N.J. 2002) (citing 3 S. Cooke, *The Law of Hazardous Waste*, § § 15.01[3][a] at 15-6 (2001)).

C) RCRA sets forth statutory definitions for the terms “solid waste” and “hazardous waste”:

Section 1004(27) of RCRA, 42 U.S.C. 6903(27), defines the term "solid waste" as:

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or by product material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

Section 1004(5) of RCRA, 42 U.S.C. 6903(5), defines the term "hazardous waste" as:

[A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--
(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

D) How imminent and substantial must the danger be?

"An imminent and substantial endangerment exists if there is 'reasonable cause for concern that someone or something may be exposed to a risk of harm if remedial action is not taken.'" *ICO v. Shinn*, D.N.J. Civ. No. 93-4774(JCL), slip op., November 24, 1998, p. 15. "Plaintiffs need not show actual harm to health or the environment. It is enough to show that such an endangerment *may* exist." *Interfaith Community Org. v. Honeywell Int'l, Inc.*, *supra*, 188 F.Supp.2d at 503 (citing 3 S. Cooke, *The Law of Hazardous Waste*, § § 15.01[3][e] at 15-11 n. 45-47 (2001)). See also *Meghrig v. KFC Western, Inc.*, 516 U.S. at 486, 116 S.Ct. 1251 (imminence "implies that there must be a threat which is present now, although the impact of the threat may not be felt until later"); *Dague v. City of Burlington*, 935 F.2d 1343, 1355-1356 (2d Cir.1991), reversed on other grounds, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir.1994); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 193 (W.D.Mo.1985). "An "endangerment" is present if there is merely threatened or potential harm. *Interfaith Community Org. v. Honeywell Int'l, Inc.*, *supra*, 188 F.Supp.2d at 503; *Dague v. City of Burlington*, *supra*, 935 F.2d at 1356. Only the risk of harm, rather than actual harm, must be imminent. *Id.*

i. It's not just human health

RCRA is not only concerned with threats to human health. Suit may also be brought where there may be "an imminent and substantial endangerment to . . . the environment." 42 U.S.C. 6972(a)(1)(B); *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir.1998) (imminent and substantial danger where toxic wastes were buried

and posed a "constant danger to the groundwater * * *"); *Aiello v. Town of Brookhaven*, 136 F.Supp.2d 81, 115 (E.D.N.Y.2001) (imminent and substantial endangerment under RCRA based on harm to environment, even though plaintiffs conceded no harm to human health); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F.Supp.2d 359, 367 (D.R.I.2000) (liability under RCRA may be based solely on contamination of groundwater and/or soil at the site in levels "exceeding state standards" because "the statute clearly speaks of endangerment to the 'environment' "); *Lincoln Properties, Ltd. v. Higgins*, 1993 WL 217429, *13 (threat to "living organism" need not occur for finding of imminent and substantial endangerment to the environment. "Neither the statute nor the case law interposes an additional requirement that humans or other life forms be threatened." Harm to water, air, or soil alone constitutes "imminent and substantial endangerment."). *Interfaith Community Org. v. Honeywell Int'l, Inc.*, 263 F.Supp.2d 796 (D.N.J. 2003).

ii. Vapor Intrusions are Covered

Once you have a solid waste, the issue is whether that waste poses an imminent and substantial endangerment, through any environmental pathway, including the gas phase.

In *Lincoln Properties, Ltd. v. Higgins*, 1993 WL 217429, * 13, the court stated:

RCRA does not define the term "environment." However, it presumably encompasses the air, soil and water, including groundwater. In this case, the environment has already been degraded significantly by the contaminants' invasion of the water table.

United States v. Elias, 269 F.3d 1003 (9th Cir. 2001), is not precisely on point, and it is a criminal case, but it is highly persuasive. After a three-and-a-half-week trial, a jury convicted Elias of four RCRA criminal offenses, the most serious of which was disposing of hazardous waste without a permit, knowing that his actions placed others in imminent danger of death or serious bodily injury in violation of 42 U.S.C. § 6928(e). Elias ordered four of his employees to enter a tank and wash cyanide-laced sludge out a valve opening in the end, without safety equipment. One issue was whether the waste was "hazardous" (as opposed to merely a "solid waste"), under the hazardous waste definition of "reactivity."

The court took note of one regulation under RCRA, 40 C.F.R. § 261.23, which provides as follows:

A solid waste exhibits the characteristic of reactivity [and is thus hazardous waste] if a representative sample of the waste ... (5) is a cyanide ... bearing waste which, when exposed to pH conditions between 2 and 12.5, can generate toxic gases, vapors or fumes in a quantity sufficient to present a danger to human health or the environment.

The court concluded that “it would be preferable to have some numerically-quantified, test-based standard for determining whether a substance releasing cyanide gas should be deemed hazardous but that this is not possible given the variety of situations and circumstances in which cyanide may exist and pose a hazard.” While the case is not directly on point, Elias is a strong demonstration that gas discharges associated with solid or hazardous waste are covered by RCRA.

E) RCRA, as Opposed to CERCLA,
Requires Active Waste Disposal

In Interfaith Community Org. v. Honeywell Int'l, Inc., 263 F.Supp.2d 796 (D.N.J. 2003), the Court held that liability under RCRA requires active disposal:

The Court finds that a straightforward reading of RCRA compels a finding that only *active* human involvement with the waste is subject to liability under RCRA § 7002(a)(1)(B). In this regard, RCRA § 7002(a)(1)(B) provides that liability may attach only if a person “*has contributed or is contributing* to the handling, storage, treatment, transportation or disposal of a solid or hazardous waste that may pose an imminent or substantial endangerment to human health or the environment.” 42 U.S.C. § 6972(a)(1)(B) (emphasis added). The ordinary meaning of “contribute” is “to act as a determining factor.” Webster's II New Riverside University Dictionary (1998). Thus, Congress intended to impose liability only where a person is shown to have affirmatively acted as a determining factor over the waste management activities listed in RCRA 7002(a)(1)(B). No other reading is possible as the phrase “has contributed or is contributing to” in § 7002(a)(1)(B) modifies the specified waste management activities of “handling,” “treatment,” “transportation,” “storage” and “disposal” in that provision. See also ABB Industrial Systems, Inc. v. Prime Technology, Inc. et al., 120 F.3d 351, 359 (2d Cir.1997).

F) Will Relief be Available Even if The Aggrieved Party Cannot Demonstrate Exceedances of a State Vapor Intrusion Regulatory Standard?

The *Honeywell* case went up on appeal to the Third Circuit Court of Appeals in Philadelphia. That court noted that the lower court adverted to state regulatory standards for the presence of contaminants, in that case chromium, and held that the lower court had created too strict a standard. Exceedances of a standard are not the measure under the statute:

Here, the District Court added four additional requirements to the endangerment showing. These held plaintiffs to a higher than needed showing for success on the merits under § 6972(a)(1)(B). The additional requirements were as follows: [A] site “may present an imminent and substantial endangerment” within the meaning of RCRA where: (1) there is a potential population at risk; (2) the contaminant at issue is a RCRA “solid” or “hazardous waste”; (3) the contaminant is present at levels above that considered acceptable by the state; and (4) there is a

pathway for current and/or future exposure. 263 F.Supp.2d at 838.

* * *

The third requirement, apparently intended by the District Court to give quantitative meaning to the word "substantial" in § 6972(a)(1)(B), is similarly without support. The word "substantial" is not defined by the statute or its legislative history. Turning to a dictionary, we find that "substantial" means "having substance" and "not imaginary"; only as the last of several definitions does the dictionary offer "of considerable size or amount." *Webster's New Universal Unabridged Dictionary* 1817 (2d ed.1983). These definitions do not support one particular type of quantification measurement, such as the District Court's requirement that there be an exceedence of state standards.

Honeywell's arguments actually provide an additional reason why we will not read state standards into the language of this federal law. **Honeywell** contends that its conceded discharges into the Hackensack River could not possibly be "substantial" because New Jersey has not yet established a remedial standard for river sediment chromium. We do not believe that Congress intended § 6972(a)(1)(B) to be dependent upon the states in such a manner, and the statutory language provides no support for such dependency.

When Congress enacted RCRA in 1976, it sought to close "the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. As we have noted, there is no definition or explanation of the meaning of "substantial," but a discussion of RCRA's amendments observes that § 6972(a)(1)(B) is " 'intended to confer upon the courts the authority to eliminate any risks posed by toxic wastes,' " S.Rep. No. 98-284, 98th Cong., 1st Sess. at 59 (1983) (quoting *Price*, 688 F.3d at 213-14), and further that courts should "recogniz[e] that risk may be assessed from suspected, but not completely substantiated, relationships between imperfect data, or from probative preliminary data not yet certifiable as fact." *Id.* (internal quotations and citations omitted). This supports neither the District Court's particular quantitative requirement nor the even higher and more narrow quantitative standards that **Honeywell** would have us impose.

Interfaith Community Org. v. Honeywell Int'l, Inc., 399 F.3d 248 (3d Cir. 2005) (affirming).

F) What remedies are appropriate?

i. Sampling Program to Delineate the Problem

In *Interfaith Community Org. v. Honeywell Int'l, Inc.*, 263 F.Supp.2d 796 (D.N.J. 2003), the court held:

[The] deep groundwater at the Site . . . may also present an imminent and substantial endangerment to health or the environment. This problem requires further study. Accordingly, Honeywell will be required to test and fully delineate the extent of chromium contamination in the deep groundwater at the Site in order to ensure that this contaminated water does not discharge to the Hackensack River, or flow to any fresh water aquifer that is used as a water supply, or to the bedrock. If it is found that the contaminated deep groundwater beneath the Site is discharging or threatening to discharge, into the Hackensack River or any other surface water body, or is migrating, or threatening to migrate into the bedrock or an area of a freshwater aquifer that is used as a drinking water supply, Honeywell must take appropriate remedial actions necessary to prevent such discharge or migration.

ii. Excavation and Removal or Further Groundwater Remedies.

In Interfaith Community Org. v. Honeywell Int'l, Inc., 263 F.Supp.2d 796

(D.N.J. 2003), the court held:

[A] mandatory injunction will issue directing excavation and removal of COPR as the only effective remedy that will address the health and environmental risks as well as the heaving problem at the ECARG property. Upon removal of the COPR, Honeywell must completely backfill the entire ECARG property with clean fill.

iii. Vapor Removal Systems

These are a common regulatory remedy which might be ordered by a court under RCRA. However, given RCRA's broad scope, a court might require the remediating party to demonstrate that the discharges to ambient air do not themselves harm either the residents of the property or other environmental receptors. The question will be whether the air discharges are significant enough to create an endangerment to the environment.

CERCLA – the Federal Superfund Law

To prevail on a claim under CERCLA § 107(a), a party must show that:

- (1) the property at issue is a CERCLA "facility";
- (2) there has been a "release" of a "hazardous substance";
- (3) the defendant falls within at least one of the categories of "covered persons" defined in CERCLA § 107(a);
- (4) the costs sought by the plaintiff constitute recoverable "costs of response"; and
- (5) the plaintiff is not itself a liable party under CERCLA.

42 U.S.C. § 9607(a).

In Interfaith Community Org. v. Honeywell Int'l, Inc., 263 F.Supp.2d 796 (D.N.J.

2003), the court explained:

CERCLA § 107(a)(2) provides that "any person who *at the time of disposal* of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" is strictly liable for response costs incurred by any other person at such facility. 42 U.S.C. § 9607(a)(2)(emphasis added). As the statutory language makes clear, section 107(a)(2) renders liable any party who owned a facility at the time hazardous substances were being "disposed" on the property. *See, e.g., United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-08 (6th Cir.1989).

CERCLA § 107(a)(3) imposes strict liability upon "any person who by contract, agreement or otherwise arranged for disposal ... of hazardous substances owned or possessed by such person, by any other party or entity, at any facility." 42 U.S.C. § 9607(a)(3). As the Third Circuit has recognized, section 107(a)(3) covers any party who has taken action to dispose of its hazardous substances at a facility. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir.1992).

Section 107(a)(4) of CERCLA imposes strict liability on "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities ..." U.S.C. § 9607(a)(4). This provision encompasses any person who has caused a hazardous substance to be transported to a disposal site. *See, e.g., Tippins Inc., v. USX Corp.*, 37 F.3d 87, 90 (3d Cir.1994).

i. A Broad Range of Costs are Covered

In Interfaith Community Org. v. Honeywell Int'l, Inc., 263 F.Supp.2d 796 (D.N.J.

2003), the court further explained:

Although CERCLA does not define the phrase "costs of response," it broadly defines the term "response" as "remove, removal, remedy and remedial action," which are in turn defined to include "such actions as may be necessary to monitor, assess and evaluate the release or threat of release of hazardous substances," "[t]he cleanup of released hazardous substances from the environment," and "the disposal of removed material." *See* 42 U.S.C. § § 9601(23) and (25). Courts construing these definitions have held that CERCLA "costs of response" include all site investigation costs, costs of providing site security, and any costs that may be required to remove hazardous substances from a contaminated property. *See, e.g., Bowen Eng'g*, 799 F.Supp. at 476 (costs of testing soil for the presence of hazardous substances deemed recoverable "response costs"); Gen. Elec. Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1419-20 (8th Cir.1990) (costs of excavating and removing soil contaminated with hazardous substances found to be recoverable "costs of response" under CERCLA); Hatco Corp. v. W.R. Grace

& Co., 849 F.Supp. 931, 971 (D.N.J.1994) (costs of investigating nature and extent of hazardous substances at site were recoverable "costs of response"); Amoco Oil Co. v. Borden, 889 F.2d 664, 672 (5th Cir.1989).

* * *

Further requirements to bring a CERCLA claim are beyond the scope of this paper. Take note of the recent Supreme Court decision in Cooper v. Aviall, 125 S. Ct. 577 (2004), which limits the right to bring a Section 106 action unless there has been a claim filed by the government or a settlement with the government, and subsequent cases expanding the availability of Section 107 claims. See, e.g., Consolidated Edison Co. of New York v. UGI Utilities, Inc., 423 F.3d 90 (2d Cir. 2005).

Potential State Common Law Claims for Vapor Intrusion

Negligence

A landowner who engages in activities that may cause injury to persons on adjoining premises owes those persons a duty to take reasonable precautions to avoid injuring them.” See, e.g., Weitzmann v Barber Asphalt Co., 190 NY 452, 457 (19--). There must be some physical injury to person or property that was foreseeable. 535 Madison Ave. v. Finlandia, 96 NY2d 280, 290 (2001).

Private Nuisance

“... [O]ne is subject to liability for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable; (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities” Copart v. Consolidated Edison, 41 NY2d 564, 569 (1977).

Trespass

A person, who without justification or permission, intentionally causes a thing or substance to go on or contaminate the property of another person commits what is known in the law as a trespass. There must be proof that the defendant caused the toxin to invade the plaintiff’s property, and there must be proof that the defendant’s conduct was intentional or reckless:

Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness.

Phillips v. Sun Oil Co., 307 NY 328 (1954).

Potential State Common Law Damages or Remedies for Vapor Intrusions

- A) Physical damage, or personal injury, if present.
- B) Property Damage. The general rule in New York is that the measure of damages for injury to real property is the lesser of the repair costs or the diminution of market value. *Jenkins v. Etlinger*, 55 NY2d 35 (1982). Stigma damages, involving a decline in property value due to toxic contamination, are an available remedy. *Matter of Commerce Holding Corp., v. Town of Babylon*, 88 NY2d 724, 732 (1996) (in a tax assessment case, the court recognized “the stigma remaining after cleanup [of the toxic contaminants]” as an appropriate consideration in assessing “the effects of environmental contamination” on property value); *Criscuola v. Port Authority*, 81 NY2d 649, 651-652 (1993) (an eminent domain case where stigma damage was allowed); *Nalley v. GE, et al*, 165 Misc2d 803 (Sup. Ct. Rensselaer Co. 1995) (cause of action for devaluation of property even without tangible invasion of the property by the contaminants).
- C) Medical Monitoring. “There is a basis in law to sustain a claim for medical monitoring as an element of consequential damage” from a toxic exposure. *Askey v. Occidental Chemical Corp.*, 102 AD2d 130 (4th Dept. 1984). See also *Ayers v. Jackson Township* 106 N.J. 557 (1987). One must demonstrate: 1) that plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; 2) that as a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; 3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and 4) that monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. *Id.*
- D) Emotional Distress or Cancerphobia. The court in *In re MTBE Litigation*, -- F. Supp.2d – (S.D.N.Y. 2005) (Scheindlin, J.), explained that under New York law, “one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.” *Dana v. Oak Park Marina, Inc.*, 230 A.D.2d 204, 208, 660 N.Y.S.2d 906 (4th Dep’t 1997) (alterations omitted). *Accord Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783, 785, 610 N.Y.S.2d 664 (3d Dep’t 1994) (intentional infliction of emotional distress requires “extreme and outrageous conduct [so transcending] the bounds of decency as to be regarded as atrocious and intolerable in a civilized society”) (alteration in original) (quoting *Freihof v. Hearst Corp.*, 65 N.Y.2d 135, 143, 490 N.Y.S.2d 735, 480 N.E.2d 349 (1985)). Because damages are not recoverable for anxiety caused by property damage, these plaintiffs may only recover for emotional distress caused by injury or fear of injury to the person. To maintain a cause of action for emotional distress following exposure to a toxic substance, a plaintiff must establish (1) that he or she was in fact exposed to the disease-causing agent, and (2) there is a rational basis for his or her fear of contracting a disease. See *Prato v. Vigliotta*, 253 A.D.2d 746, 748, 677 N.Y.S.2d 386 (2d Dep’t 1998) (“rational basis” construed to mean the presence of polychlorinated biphenyls

(PCBs) in the body, or a physical manifestation of PCB-contamination); *Abusio v. Consolidated Edison of N.Y., Inc.*, 238 A.D.2d 454, 454, 656 N.Y.S.2d 371 (2d Dep't 1997); *Wolff v. A-One Oil, Inc.*, 216 A.D.2d 291, 291-92, 627 N.Y.S.2d 788 (2d Dep't 1995) ("rational basis" interpreted as the presence of asbestos fibers in the plaintiff's body, or some indication of asbestos-induced disease). "A 'rational basis' has been construed to mean the clinically-demonstrable presence of a toxin in the plaintiff's body, or some other indication of a toxin-induced disease." *Id.*

E) Quality of Life Nuisance Damages. A claim for quality of life damages is derived from the law of nuisance. It has long been recognized that damages for inconvenience, annoyance, and discomfort are recoverable in a nuisance action. See *Prosser and Keeton on the Law of Torts* § 89, at 639 (5th ed. 1984); *Ayers v. Jackson Township*, 106 NJ 557, 571 (1987).

F) Punitive Damages. Where appropriate as punishment for outrageous conduct. Note that the U.S. Supreme Court 2003 decision in *State Farm v. Campbell* limits the amount of punitive damages that will pass constitutional muster.

CONCLUSION

As outlined above, aggrieved parties may have a broad range of legal doctrines and remediation or damages remedies to choose from in the event of significant harm from vapor intrusions. Counsel for plaintiffs would be well advised not to create unreasonable expectations where the damage is relatively minor and abatement measures are applied quickly. On the other hand, counsel for the parties responsible for the contamination will end up paying far more in the long run if they seek to simply install ventilation on people's homes while failing to address the very serious issues of diminished property values and harm to quality of life when people are forced to live and work in a home or business knowing that the air they breathe contains or contained toxins.

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