

When May a Previously Approved Site Closure Not Provide Closure - Reopening Vapor Intrusion Sites



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WE CAN EXPECT THE TREND SEEN IN MASSACHUSETTS AND SOME OTHER STATES OF REEVALUATING AND REOPENING PREVIOUSLY CLOSED SITES TO ADDRESS THE VAPOR INTRUSION PATHWAY TO GROW.

Massachusetts is the latest state to reevaluate the vapor intrusion (VI) pathway at previously closed waste sites. We have seen this trend in recent years as some states (e.g., New York) reassess previously closed waste sites where the VI pathway was never evaluated, where the VI pathway may not have been properly/fully evaluated initially, or where screening or remedial criteria have been lowered.

The Massachusetts Department of Environmental Protection (MassDEP) recently indicated that it will revisit the remedies at approximately 700 already-cleaned-up

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trichloroethylene (TCE)-contaminated groundwater sites that have been closed out under previous versions of Massachusetts' cleanup rules. The MassDEP now has a much lower level that triggers remedial action for indoor air containing TCE concentrations (2 micrograms per cubic meter [$\mu\text{g}/\text{m}^3$] for residential indoor air and $8 \mu\text{g}/\text{m}^3$ for workplaces).

These levels were established based on the U.S. Environmental Protection Agency's (EPA's) noncancer reference concentration (RfC) for TCE that was developed in 2011. The RfC was based on noncancer risk or adverse impacts on fetal developmental and immune system effects. The new limits are well below the OSHA worker permissible exposure level of $535,000 \mu\text{g}/\text{m}^3$ and are very close to background levels for TCE. The scientific uncertainty with the EPA's determinations is unusually great and is demonstrated by the fact that many regulators (including those at the EPA and in various states) and independent experts decided not to rely on the underlying animal studies and novel approaches. For more information on this topic, see our previous article, "Changing the EPA's Opaque Scientific Methods" (available at <http://www.pepperlaw.com/publications/changing-the-epas-opaque-scientific-methods-2016-01-20/>).

Although MassDEP has indicated that it will not necessarily take enforcement action against the party responsible for the property, it anticipates contacting approximately 200 site owners of previously remediated sites to ask them to test the groundwater and air in and around their buildings for TCE. If the new lower levels are exceeded, the owners will be asked to take steps, including potential evacuation, to protect building occupants, particularly women of childbearing age, until the TCE can be remediated or the exposure mitigated. While MassDEP indicates that the previously closed sites may not be "reopened" *per se*, a new release letter will be issued to the party responsible for the property.

We can expect the trend seen in Massachusetts and some other states of reevaluating and reopening previously closed sites to address the VI pathway to grow, not only at TCE sites, but also at sites where any volatile organic compounds (VOCs) are present. This is based on factors such as the following:

- EPA regions use action levels based on noncancer effects from very short-term exposure (24-hour exposure instead of the more typical 30-year duration)
- EPA guidance explicitly requires consideration of VI during CERCLA Five-Year Reviews

- EPA guidance on TCE VI urges early/interim action for VI, including presumptive remedies
- EPA has proposed a rule to add a VI component to the Superfund Hazard Ranking System, which will likely result in more sites qualifying for the National Priorities List
- Many states have lowered, or will soon lower, the VI screening levels and remedial criteria for VOCs, particularly at TCE sites.

This new emphasis on VI in site remediation programs raises concerns about remedial obligations and potential litigation challenges, particularly given the flaws in the EPA's noncancer RfC analysis, inconsistent state and federal guidance, the use of "screening" levels instead of promulgated remedial action criteria, and the general trend of regulators using a "better safe than sorry" approach. Pepper's environmental attorneys are well-versed in the scientific and legal challenges these new initiatives may pose for our clients, and we invite you to contact us with any questions.