

John Ryan¹

Brownfields Capstone

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Prof. Peterson

Soil vapor migration in Minnesota Brownfields

Imagine, for a moment, you own a real estate development firm. Your company specializes in flipping neighborhood-killing contaminated properties nobody else will touch. You've just completed a voluntary cleanup of a property laced with volatile organic compounds in the soils and groundwater. The remediation process took years – from identifying the contaminants, to hashing out cleanup options with the Minnesota Pollution Control Agency (MPCA), to excavation and treatment of the soils. Plus, you'll spend much of the next decade in court seeking cleanup costs from a responsible party that fights all its legal battles by attrition. As consolation, the MPCA granted your firm a Certificate of Completion – the golden ticket of voluntary cleanup programs. This assurance letter seemingly absolves your firm and successors in title from cleanup responsibility in the future. Now, imagine 10 years later, the property you remediated has tested for strong traces of contaminated vapor intrusion, dating back to the compounds your firm cleaned up a decade ago. The MPCA worries these vapors could make people on the property sick, and the agency wants the vapors cleaned up. But, you've got that golden ticket; who wins?

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I. INTRODUCTION

Traditionally, Minnesota and U.S. federal Superfund law concerned itself with cleanup of contaminated earth and water. In the past decade, however, agencies started to look at the air, too. This presents new challenges to developers and potentially responsible parties. To better understand these challenges requires a survey of how agency policy evolved in its treatment of soil vapor migration. This paper provides a brief history of the contaminated properties statutes relevant to Minnesota, reaction to those laws, followed by a more in-depth look at soil vapor intrusion and the unique legal challenges it presents to the state's developers and government.

II. BACKGROUND: CERCLA, BROWNFIELDS, AND ASSURANCE LETTERS

A. CERCLA

President Jimmy Carter signed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or commonly known as Superfund) in 1980.² The statute is well-known to real estate professionals because it tags a broad range of potentially responsible parties with strict liability for cleanup costs of contaminated properties. The Act is commonly referred to as Superfund because EPA adds the most-notorious and high-profile cases of contaminated properties to the National Priorities List where some are remediated with a multi-billion dollar federal "Superfund" set aside for cleanup. Congress intended for CERCLA's strict liability teeth to enable government to nip responsible parties for cleanup costs, recharging the Superfund. CERCLA evolved into much more than a public works project, however.³ In addition to granting the EPA and states power to clean up contaminated sites and recover costs

² Laurence S. Kirsch and Rachel S. Rosenthal, *Federal Environmental Liability*, Environmental Aspects of Real Estate and Commercial Transactions, 4th ed. 2011 at 4.

³ *Id.* at 5.

from responsible parties, CERCLA allows private parties similar authority. Under the law, potentially responsible parties may sue other PRPs to recover costs as well.⁴

Parties become PRPs by falling into one or more of four categories:

1. The current owners or operators of a facility where hazardous substances were released, or are threatened to be released.
2. The owners or operators of a facility at the time hazardous substances were disposed of at the facility (even prior to 1980).
3. Persons or entities that arranged for the treatment or disposal of hazardous substances at the facility, and
4. Persons or entities that transported the hazardous substances to a facility they selected.⁵

CERCLA soon got the attention of real estate professionals and industrial firms due to the broad scope of these categories. Moreover, because of the definition of “hazardous substances,” many chemicals found in routine industrial and commercial property uses qualify as potential contaminants. Because of the low burden of proof, traditionally, plaintiffs seeking to recover cleanup costs need not show much. And, because of the joint and several liability regime, defendants faced picking up the tab for pollution perpetrated by persons or companies long gone – albeit the Supreme Court’s 2009 decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, throws that issue into question.⁶

A decade or so after enacted, critics observed that, in many respects, CERCLA had the opposite effect intended by its drafters. Instead of encouraging and funding the cleanup of contaminated properties, CERCLA’s sweeping liability and costs prompted many companies to shove the mess under the bed. When firms couldn’t use a property – and couldn’t finance upgrades because of investors’ CERCLA concerns – companies would wholesale abandon lots and bury the notes – realizing that no sane buyer would risk the liability associated with

⁴ *Id.*

⁵ *Id.*

⁶ See *United States v. Burlington N. R. Co.*, 200 F.3d 679 (10th Cir. 1999).

purchase. Abandoned industrial properties, their facades rusting into the contaminated soils beneath them, thus earned the nickname “brownfields.”

B. Brownfields

The EPA defines brownfields as “property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant.”⁷ Brownfields generally sort into four categories:

1. Sites that are still economically viable due to market demand, but still require some remediation.
2. Sites that could be redeveloped but require financing or incentives to make the cost worthwhile to developers.
3. Sites that, even after remediation, have little marketable value, and
4. Sites still in operation, but still hampered by contamination that scares away lenders and new investment.⁸

Brownfields contaminate more than just soils and groundwater, however. The abandoned sites drag down neighboring property values, provide a target for theft and vandalism, and undermine local tax revenue.⁹ Moreover, CERCLA critics claim the Act contributed to urban sprawl. Faced with a choice of redeveloping potentially contaminated urban properties, or building new facilities on undeveloped land at the edge of town (commonly referred to as Greenfields), companies chose the less-risky option and moved to the suburbs and beyond.¹⁰ The urban industrial flight contributed to inner-city unemployment, increased reliance on motorized

⁷ Todd S. Davis, *Brownfields Redevelopment: Creative Solutions to Historical Environmental Liabilities*, Environmental Aspects of Real Estate and Commercial Transactions, 4th ed. 2011, at 254.

⁸ *Id.* at 255.

⁹ Julia A. Solo, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 *Buff. L. Rev.* 285, at 297

¹⁰ *Id.*

transportation, and by extension greater greenhouse gas emissions and impervious surface coverage.¹¹

Worse yet, most brownfields display a self-reinforcing cycle of decline and decay. For example, the typical brownfield starts as a contaminated property, shuttered by its owner because he or she could not – or was afraid to – sell the site. The buildings on the property proceed to break down, and over time vandals dump waste on site and strip the facility of its copper wiring and other reusable materials. As the property sits, contamination can continue to migrate – rain can push plumes of hazardous substances through the soils and potentially into the groundwater, where it may flow to neighboring waters and soils. The spreading contamination exacerbates the mess and increases the cleanup costs, and the property becomes even less attractive to potential investors and developers. Worse yet, spreading contamination can turn up in nearby properties and torpedo their value as well. The cycle continues until the property becomes such a drain on the community that the government must step in to remediate. By then, responsible parties may be insolvent, dead, or both, and the public ultimately bears much of the costs of cleanup.¹²

The brownfields issue impacts much of the United States. A 2004 report by the U.S. General Accounting Office estimated 450,000 to 1 million contaminated sites dot the nation.¹³ A 1996 study figured the cleanup cost at \$650 billion, with billions more in lost wages and tax revenue.¹⁴ Trying to gauge that economic loss, a 2008 survey of 98 cities by the U.S. Conference of Mayors pegged the tax loss at \$3.6 billion on those cities alone.¹⁵

¹¹ *Id.*

¹² Davis, *supra* at 255.

¹³ *Id.*

¹⁴ *Id.* at 256.

¹⁵ *Id.*

To combat the chilling effect CERCLA had on private redevelopment of potentially contaminated sites, Congress passed the 2002 Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Act, commonly).¹⁶

The Brownfields Act amended CERCLA in two general ways. First, Congress sought to create funding for state and local governments to clean up certain contaminated sites. Second, the amendments attempt to lift CERCLA liability for new purchasers of contaminated properties, and property owners who opt into state voluntary cleanup programs.¹⁷ Met with some skepticism at first¹⁸, developers and investors have come back. Minnesota, a pioneer on this issue, saw approximately 4,000 cleanup projects completed since it passed its first land recycling legislation in 1992.¹⁹ The MPCA reports that more than 6,000 brownfields have volunteered for state cleanup programs between 1995 and 2010.²⁰ Nationally, brownfield redevelopment enjoys similar success and popularity with environmental and business interests.²¹ Issues remain, for example, some properties enroll in voluntary cleanup programs as a way to duck liability, only to drag their feet on actual remediation.²² Generally, though, the 2002 amendments have helped quell concerns of good-faith developers and investors – so long as remediation bears a sufficient assurance letter from the state pollution control agency.

¹⁶ See Small Business Liability Relief and Brownfields Revitalization Act of 2002, H.R. 2869, 107th Cong. (2002)

¹⁷ Davis, *supra* at 260.

¹⁸ Brad Cahoon, *Contaminated Property Transactions After 2002 Superfund Brownfield Amendments*, 13 Utah B.J., 13, 13-15 (2002).

¹⁹ *The Benefits of Brownfields*, Minnesota Brownfields, March 18, 2011 at 4.

²⁰ *Id.* at 5.

²¹ Eisen, *supra* at 755.

²² *Id.*

C. Assurances

Liability assurance for brownfield redevelopers varies by state. The Minnesota Environmental Response and Liability Act (MERLA) created several tiers and categories of statutorily created liability assurances. Mirroring the federal brownfields amendments, MERLA waives liability for voluntary parties and their contractors – who are not otherwise responsible parties – for investigation²³ and response actions²⁴ conducted in accordance with the Voluntary Investigation and Cleanup Program (VIC). MERLA grants VIC participants six types of assurances for cleanup of hazardous substances, pollutants and contaminants, including:

1. Lender letters explaining liability coverage to investors.²⁵
2. No Association Determinations (NAD), protecting the volunteer cleanup party from becoming a liable responsible party while conducting approved remediation.²⁶
3. Lender-specific NADs.²⁷
4. Retroactive NADs to parties not associated with the identified contamination.²⁸
5. Off-Site Source Determinations for groundwater contamination migrated from another property.²⁹
6. Certificates of Completion, requiring the highest level of remediation in exchange for the highest level of liability protection.³⁰

Additionally, the MPCA Commissioner grants No Further Action Letters to VIC participants.³¹

No Further Action Letters typically contain significant qualifiers, reserving authority with the Commissioner to take appropriate future action to correct conditions on the site.³²

²³ Minn. Stat. § 115B.17, subd. 14

²⁴ Minn. Stat. § 115.175, subd. 1

²⁵ Minn. Stat. § 115B.03, subds. 6 and 7

²⁶ Minn. Stat. §115B.03, subd. 3(4).

²⁷ Minn. Stat. §115B.178

²⁸ Minn. Stat. §115B.03, subd. 3(4)

²⁹ Minn. Stat. §115B.177

³⁰ Guidance Document #4: Types of Written Assurances, Minnesota Pollution Control Agency Voluntary Investigation and Cleanup, Revised Sep. 2001.

³¹ *Id.*

³² *Id.*

Time and cost tends to persuade developers away from seeking a Certificate of Completion. The assurance requires an agency-approved response action plan containing a complete soil and groundwater investigation. Further, the qualifying response action plan must document the extent and magnitude of all releases, including contamination that has migrated off site in concentrations beyond the acceptable risk standard set by the Minnesota Department of Health. To qualify for a full Certificate of Completion, all known releases must be remediated. Parties may instead opt for a partial certificate, which focuses on remediation of one media, like soils or groundwater.

A partial Certificate of Completion, however, doesn't fully close a site. The MPCA grants partial certificates on the condition that property owners cooperate with the agency on any future response actions the Commissioner deems necessary. Moreover, this condition stems from MERLA itself. The statute states that “[c]ertification of completion of response actions taken under a voluntary response action plan *that does not require removal or remedy of all releases and threatened releases* is subject to compliance,” with language in 115B.175, subd. 2(3) (emphasis added). The referenced language in 115B.175 requires property owners to cooperate with MPCA response actions that are necessary to address remaining or threatened releases. Additionally, “releases,” as defined by MERLA, includes “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment which occurred at a point in time or which continues to occur.”³³ Upon review of what vapor intrusion, is, arguably it fits the statutory definition of a release.

³³ Minn. Stat. §115B.02, Subd. 15.

III. VAPOR INTRUSION

A. What is it?

Vapor intrusion involves chemical vapors that move through soils from contaminated soils and groundwater.³⁴ The gases can collect in the foundations and basements of structures on contaminated properties.³⁵ These contaminated vapors, when concentrated enough, can prove dangerous to human health in a variety of ways.³⁶ Contaminated vapors typically come from volatile organic compounds (VOCs).³⁷ VOCs are most frequently associated with the use of solvents and degreasers.³⁸ These substances are typically associated with industrial sites which utilize heavy machinery, and commercial dry cleaners.³⁹

The U.S. EPA warns that, in extreme cases, vapors may accumulate in buildings at levels that create risk of explosion, as well as acute health impacts.⁴⁰ Typically, however, EPA finds low concentrations in buildings, where “the main concern is whether the chemicals may pose an unacceptable risk of chronic health effects due to long-term exposure.”⁴¹ Detecting these low level concentrations, however, proves difficult in the presence of household solvents, cleaners, and gasoline, which obfuscate traces of contaminated vapors.⁴²

Like most releases of hazardous substances and pollutants, VOCs often find their way into the soil and groundwater through inappropriate disposal – typically illicit dumping of the

³⁴ Vapor Intrusion, Minnesota Pollution Control Agency, available at: <http://www.pca.state.mn.us/index.php/waste/waste-and-cleanup/cleanup/superfund/vapor-intrusion.html>, accessed May 2013.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Vapor Intrusion, United States Environmental Protection Agency, available at: <http://www.epa.gov/oswer/vaporintrusion/>

⁴¹ *Id.*

⁴² *Id.*

substance, or mismanagement of contaminated wastewater. But, says MPCA hydrogeologist Amy Hadiaris, sometimes the chemicals are just hard to use without contamination.⁴³ The chlorinated solvents most famously used in metal cleaning, for example, tend to “go right through the concrete,” Hadiaris said.⁴⁴

Soil vapors are just as tricky to keep out of structures after a release of contaminants. Changes in barometric pressure, wind, temperature and even pressure changes from a building’s exhaust fans can contribute to seepage.⁴⁵ Also, some VOC vapors pose less risk than others. Typically, petroleum-based hydrocarbons degrade easily and rapidly into carbon dioxide in the presence of oxygenated microbes in the soil.⁴⁶ Chlorinated solvents, however, are a different matter. Like their petroleum cousins, chlorinated solvents will degrade, but the process comes slower and less readily under naturally occurring soil conditions. Moreover, the byproducts of chlorinated solvent degradation, as opposed to petroleum-based hydrocarbons, may in fact pose risk of increased carcinogenicity.⁴⁷

B. How have state governments treated vapor intrusion?

Hadiaris, who has worked for the MPCA since 2000, said attitudes toward soil vapors changed in the past decade. When she first came on board, soil vapors didn’t register as an issue. Then, “eight to 10 years ago,” the MPCA began to collect soil vapor data, but would not include it as a specifically identified release in response action plans. Hadiaris said some MPCA staff pushed at the time to include vapor intrusion as a specific identified release. But, the rationale against intrusion reasoned that, because vapors stemmed from a release to groundwater and a

⁴³ Interview with Amy Hadiaris, Hydrogeologist, MPCA, in St. Paul, Minn. (March 12, 2013).

⁴⁴ *Id.*

⁴⁵ Re-Visiting “Closed” Site for Vapor Intrusion Concerns, survey fact sheet, Interstate Technology & Regulatory Council, (Oct. 2007).

⁴⁶ *Id.*

⁴⁷ *Id.*

release to soils, it was by extension covered by controlling just those two traditional media.

About two years ago, Hadiaris said, the MPCA changed course and has included vapors as a third media identified as specific releases.

Minnesota experienced its first large scale vapor intrusion health scare in 2007 when it obtained a report showing heightened levels of VOCs in the soils of St. Louis Park. Because of the size and scope of the study, MPCA brought on board the EPA to help conduct soil sampling. The EPA promptly notified approximately 270 properties in the St. Louis Park area, warning that homes and businesses suffered risk for VOC vapor intrusion. After months of sampling, EPA then equipped 41 homes with vapor mitigation systems – similar to radon kits – to help keep vapors out of the buildings, although the MPCA reported no evidence suggesting residents suffered imminent health risks.⁴⁸

In 2009, as a result of heightened awareness of soil vapor intrusion, MPCA conducted a study into previously closed brownfield cases to assess and prioritize the remaining risk of vapor intrusion.⁴⁹ From that study, MPCA contracted engineering and consulting firm AMEC Geomatrix to review, rank, and create a short list of sites most likely to have vapor intrusion concerns based on a variety of weighting factors. Those factors included VOC concentration, soil characteristic, depth to contamination, land use above the contamination, sensitive receptors (such as day cares, senior centers, hospitals, etc.), and preferential vapor flow paths.⁵⁰ The listed sites included a mix of residential-, commercial- and industrial-use properties. Only a few of the

⁴⁸ St. Louis Park Solvent Plume, Minnesota Pollution Control Agency, available at: <http://www.pca.state.mn.us/index.php/waste/waste-and-cleanup/cleanup/remediation-sites/st.-louis-park-solvent-plume.html>

⁴⁹ Memoranda from Minnesota Pollution Control Agency, Vapor Intrusion Site Analysis, (Feb. 2009).

⁵⁰ *Id.*

54 sites named in the report received No Further Action letters, and none boasted Certificates of Completion.⁵¹

Other states vary in their treatment of reopening closed cleanups. In a 2007 survey that saw 34 states participate (Minnesota did not), only Maine and New York confirmed they had actively re-opened formally closed sites to investigate whether vapor intrusion had been adequately addressed.⁵² New York, which notably helped the MPCA formulate its weighting formula for the 2009 AMEC study⁵³, boasts the most-active review and remediation program according to the survey.⁵⁴ The state identified 421 sites where VOC contamination was “suspected or confirmed, and a remedial decision was made prior to 2003.” New York plans to revisit each of those sites, in order of a priority weighting formula similar to the MPCA’s. As of 2007, New York reported it was already working on approximately 110 previously closed cases, using “mitigating structures at a number of sites.” Responsibility for additional investigation falls on a range of parties in the New York survey. The Empire State tasked responsible parties with approximately 225 sites, while the EPA took over approximately 50, and the New York Department of Environmental Conservation manages the remainder.⁵⁵

Maine admitted it “has no plans to systematically evaluate vapor intrusion potential at its closed uncontrolled sites,” citing resource constraints. Still, Maine reserves the option to “revisit vapor intrusion from any closed site upon evidence that residual contaminants posed health or safety issues.” Moreover, Maine reported it has done this at several previously closed petroleum remediation sites where neighbors reported air quality issues. The state’s survey response did

⁵¹ *Id.*

⁵² ITRC, *supra*.

⁵³ Memoranda, *supra*.

⁵⁴ ITRC, *supra*.

⁵⁵ ITRC, *supra* (comments by Jim Harrington of the NYDEC).

note reservations about reopening sites “without cause,” adding that it’s done this once, at a CERCLA site as part of that specific site’s five-year review.⁵⁶

Most of the remaining states indicated disposition similar to Maine on reopening closed sites. In fact, 18 of the 34 surveyed indicated willingness and a regulatory or contractual mechanism that allowed the relevant state agency to revisit closed sites to investigate and potentially mitigate vapor intrusion.⁵⁷ Most of those 18 states indicated the responsible parties would foot the bill for investigation and cleanup efforts, although in some states, it depends on what government program handled the site.⁵⁸ For example, in Kansas, if the property was closed through the state dry cleaning program, the state dry cleaning fund picks up the tab. If Kansas closed a site through the voluntary cleanup program, however, the responsible party would pay to investigate and clean up vapors.⁵⁹

C. How has EPA treated vapor intrusion?

EPA didn’t offer guidance on vapor intrusion until 2002, when it published draft guidance on the issue.⁶⁰ The agency intended for that guidance to serve as a tool for evaluating “vapor intrusion pathway[s].” This evaluation examines first, if the vapor intrusion pathway is complete (i.e. exposed to humans), and second, if the pathway presents “an unacceptable risk to human health.”⁶¹ EPA states the guidance does not purport to tell users on how best to mitigate risk, only how to best assess “potential for an unacceptable risk.”⁶²

More than a decade after first advising on how to screen for vapor intrusion risks, EPA appears ready to help states do more. On April 11, 2013, the agency released an external review

⁵⁶ ITRC, *supra* (comments by Fred Lavallee of Maine Dep. Of Env. Prot.).

⁵⁷ ITRC, *supra*.

⁵⁸ ITRC, *supra*.

⁵⁹ ITRC, *supra* (comments by Bill Morris of KS Bureau of Env. Remediation).

⁶⁰ Review of the 2002 Subsurface Vapor Intrusion Guidance, U.S. Environmental Protection Agency, (Nov. 2002).

⁶¹ *Id.*

⁶² *Id.*

draft guidance for “assessing and mitigating the vapor intrusion pathway from subsurface sources to indoor air.” EPA hopes to solicit “pre-dissemination public review” on the subject with the external review draft. The document sets out a definition, overview, and conceptual model of vapor intrusion, as well as detailed investigation, and risk management frameworks, and building mitigation and subsurface remediation guidelines.⁶³ However, until the EPA finalizes the 2013 draft guidance, it encourages states and PRPs to operate under the original 2002 document, albeit the older version does not cover mitigation best practices.

In addition to guiding states and responsible parties, EPA has also litigated vapor intrusion issues. In 2008, the U.S. District Court for the Southern District of Illinois granted an injunction forcing Apex Oil Company to conduct a massive cleanup in Hartford, Illinois.⁶⁴ After a 17-day bench trial, the court found Apex responsible for “millions of gallons of oil, composing a ‘hydrocarbon plume’ trapped not far underground, ... contaminating groundwater and emitting fumes that rise to the surface and enter houses.”⁶⁵ The Apex case, affirmed by the Seventh Circuit and denied cert, represents the extreme example of vapor intrusion problems. In the finding of facts, Hartford residents reported random fires breaking out in the basements of their homes, scorch marks on their walls, and constant nauseating fumes.

IV. LEGAL ISSUES RAISED BY VAPOR INTRUSION

Vapor intrusion and its relatively new addition to brownfields redevelopment regulation raises potential legal questions with assurances granted to satisfactorily closed sites, as well as questions concerning common law claims for nuisance.

⁶³ Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air (external review draft), U.S. Environmental Protection Agency, (April 11, 2013).

⁶⁴ *United States v. Apex Oil Co., Inc.*, 2008 WL 7836308 (S.D. Ill. July 28, 2008) aff'd, 579 F.3d 734 (7th Cir. 2009).

⁶⁵ *United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 735 (7th Cir. 2009)

A. Assurance letters

At first glance, assurances similar to MERLA's Certificate of Completion seem to protect land owners from submitting to more investigation and cleanup. After all, the rare few Minnesota developers who opt for the Certificate of Completion over the heavily qualified No Further Action letter, do so in order to breathe easy and move on. The No Further Action letter itself typically spells out that recipients should best read their liability assurance as a No Further Action, For Now letter. A closer reading of a Certificate of Completion seems to suggest similar treatment is in order for the Cadillac of liability assurance.

"Our assurance letters tend to be very specifically limited to a defined, identified release," Hadiaris said. "They typically spell out, 'chemical X, in medium y.'"⁶⁶

She notes that MPCA currently identifies vapor intrusion in its assurance letters, but that "older letters didn't cover soil vapor. It was thought that being covered for all media meant being covered for soil vapors."⁶⁷

This begs the potentially thorny question. If the MPCA and the developer understood an assurance that covered "all media," as including vapors – during the timespan between when the MPCA began vapor sampling, and two years ago, when the MPCA began to break out vapor intrusion as a specific identified release – can the agency force property owners to comply with, and pay for further vapor investigation and remediation?

MERLA doesn't provide an answer for this specific question, but the statute arguably suggests that property owners would be covered in this situation. Obviously, in a partial Certificate of Completion, the MPCA could argue that investigation and remediation focused on only one media, and therefore the other two were still in play. As discussed above, response

⁶⁶ Hadiaris, *supra*.

⁶⁷ Hadiaris, *supra*.

action plans that don't require removal or remedy of all releases or threatened releases are subject to compliance with ongoing efforts by the agency.⁶⁸ Moreover, the reserve clause in 115B.175 Subd. 8 commands that the commissioner and private parties retain the authority to exercise powers under MERLA, but only against parties “not subject to the liability protection under this section.” Read together, the reserve clause seems to imply that a liability assurance must count for something.

The hypothetical may just be moot, however, as noted above, none of the closed Minnesota sites prioritized in 2009 for vapor intrusion follow-up received even a partial Certificate of Completion, and at best only a select handful picked up No Further Action letters.⁶⁹ Finally, even if property owners could shield themselves from investigation and remediation or mitigation costs, the specter of common law tort liability may nonetheless prompt them into action.

B. Vapor intrusion and common law claims for nuisance and negligence

In limited situations, responsible parties and property owners may be liable to on-site employees, tenants and the state for the harm caused them by vapor intrusion under Minnesota tort doctrine for private nuisance, and negligence.

Minnesota defines a private nuisance as:

Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.⁷⁰

⁶⁸ Minn. Stat. §115B.175 Subd. 5(b)

⁶⁹ Memoranda, *supra*.

⁷⁰ See Minn Stat. § 561.01

While private nuisance claims are typically lodged against neighboring properties, *Union Pacific v. Reilly Industries* held in part that Minnesota’s private nuisance statute doesn’t preclude the successor in title of a site from bringing a nuisance claim against a previous owner of the same site.⁷¹ In *Union Pacific*, the railroad company cleaned up a portion of an old rail yard which had been leased and used as a wood-treatment facility. When the railroad went after the lessee’s successor company to recover cleanup costs under CERCLA, the U.S. District Court dismissed the federal claim with prejudice because Union Pacific failed to provide for public comment, as required by the National Contingency Plan.⁷² As a result, Union Pacific had to get creative with its state claims, or face holding the bill for cleanup.

Thus, applying *Union Pacific*, a subsequent property owner suffering from vapor intrusion could, in some limited situations, bring a nuisance claim against a responsible party. The catch is, Minnesota set s six-year statute of limitations applies to nuisance claims. Typically, the statute of limitations on a nuisance begins with the offending act. Like Union Pacific tried, a plaintiff facing an expired statute of limitations on a nuisance claim could argue the doctrine of “continuing wrong” applies, and by extension argue that a vapor intrusion nuisance is ongoing. In Minnesota, “[t]he determination of whether a trespass or nuisance is continuing, or a single permanent trespass depends on the character of the invasion and the structures erected.”⁷³ For the *Union Pacific* court, “[t]he continuous presence of the contaminants is insufficient to constitute a recurring damage. . . . To the extent that leakage from storage tanks or basins could constitute a

⁷¹ *Union Pac. R. Co. v. Reilly Indus., Inc.*, 4 F. Supp. 2d 860, 867 (D. Minn. 1998) aff'd, 215 F.3d 830 (8th Cir. 2000)

⁷² *Id.*

⁷³ *Id.* citing *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963)

continuing wrong, such wrong ceased when the storage tanks and settling basins no longer existed.”⁷⁴

Therefore, plaintiffs bringing a vapor intrusion nuisance claim against a site’s previous owner would need to be aware of the statute of limitations. If the vapors stemmed from contamination related to a previously removed structure – like a settling basin or a storage tank – removal of those structures likely cues the statute of limitations, even in a continuing tort.

V. CONCLUSION

Vapor intrusion regulation represents a new and rapidly developing area of environmental law. Moreover, the threat to human health and safety, as seen in *Apex* can prove significant. While state and federal regulators have begun to pin down detection and mitigation tools, vapor intrusion still poses a liability to previously closed sites in many states. As EPA and more states come to better understand the risk to human health that vapors pose, it is plausible that more closed sites will be revisited. As more sites are re-opened, or more vapor cleanups are ordered, courts will likely see an uptick in litigation of this medium. In return, environmental consultants, investors, developers, real estate professionals, and their attorneys, will need to become more familiar with this issue, in order to protect their clients and investments.

⁷⁴ *Id.*