Vapor Intrusion and Legal Liability Issues
Vapor Intrusion and Legal Liability Analysis

- Defining the Problem
- Regulatory Issues
- Mitigation Measures
- Transactional Issues
Defining the Problem

- Buyer and Seller want to complete Commercial Real Estate Transaction
- Phase I Environmental Assessment - Identifies Potential for Vapor Releases near Property
- Need to identify “Release” to receive Liability Assurances
- Testing or Mitigation?
- Minn. Stat. 115.061 says “it is the duty of every person to notify the agency immediately of the discharge, accidental or otherwise, of any substance or material under its control which, if not recovered, may cause pollution of waters of the state . .
- MPCA “policy” is to report if >33X ISVs?
  - Seller does not want to unduly “label” property if Buyer does not close
  - On site matters vs. Off-Site Results
Typical Vapor Intrusion Problem

Subject Property

Vapors?

Actual Contaminants?

Source Property

Former Dry Cleaner
December 4, 2018

Joel Buttenhoff
120 Jonathan Blvd. N, Ste 200
Chaska, MN 55318

RE: Notice of Potential Contamination
Tonka Business Center, #4164 and #4164 Shoreline Dr, Spring Lake Park
FPLNs: 1811722430155 and 1811722430000

Dear Joel Buttenhoff:

The Minnesota Pollution Control Agency (MPCA) Superfund Program staff has prepared this letter to provide you notice of potential contamination from Volatile Organic Compounds (VOCs) on the Tonka Business Center property (the Property) in Spring Park. The suspected contamination may be in part due largely due to historic machining operations at the former Clarke facility which was located at the Property from the early 1950's into the 1970's.

Background

The Property is located south of the West Arm Townhomes along West Arm Drive, which were constructed in the mid- to late-1990's. Prior to the construction of these townhomes, the Advance Machine Company operated a large manufacturing facility from the 1950's to 1987. The Advance Machine Company was acquired by Niflisk, Inc. (Niflisk) in 1997, which was also the year Niflisk began conducting environmental investigations to assess groundwater releases associated with the former Advance Machine facility. Releases from the former Advance Machine facility is now referred to as the Minnetonka Lakeshore – Advance Machine Superfund Site (the Site). Regulatory oversight for the Site is through the Minnesota State Superfund Program.

Groundwater at the Site is impacted by trichloroethylene (TCE) and tetrachloroethylene (PCE), as well as by minor petroleum releases from former leaking fuel storage tanks at the Site. Groundwater sampling conducted near the north, west and east portions of the Property by Niflisk indicates groundwater contamination is likely located beneath a portion of the Tonka Business Center.

Groundwater remediation at the Site has involved an active pump-and-treat system since 2004 and Niflisk has plans for expansion of this system. Vapor mitigation systems have also been installed in the majority of the West Arm Townhomes in response to concerns of vapor...
intrusion from TCE and PCE.

Nilfak conducted a passive soil vapor screening level assessment along the Dakota Regional Trail property and in Right-of-Way (ROW) in August 2015 to investigate other potential sources of the groundwater contamination.

The results of the screening level assessment identified the presence of TCE and PCE near the northeast corner of the Tonka Business Center building. Figures showing the estimated extent of TCE and PCE screening levels identified near the Property are provided in Attachment A. The source(s) for this contamination have not been determined. This contamination could be associated with releases from the adjacent Superfund Site, however, other potential sources are from former machining activities that occurred in the eastern and northeastern portion of the former J.B. Clarke facility as evidenced from the 1950, 1952, 1963 and 1966 Sanborn Fire Insurance maps (Attachment B).

**MPCA Recommendation**
The MPCA has requested Nilfak to conduct additional investigation of the suspected TCE and PCE releases indicated by the passive soil vapor survey; however, they will not conduct additional investigation on your Property as they believe they are not responsible. The MPCA staff are concerned that these releases could pose a risk to human health for the occupants of the Tonka Business Center from the intrusion of TCE and PCE vapors upward through the building’s foundation from the soil underneath it. As a result, we recommend that you consider conducting an environmental investigation of these suspected releases to evaluate whether there are potential risks to your building’s occupants from this contamination.

If you have any questions about the contents of this letter, please contact Rick Jolley, Hydrogeologist at 551.757.2475 or by email at rick.jolley@state.mn.us or Michelle Mahny, Project Manager at 651.757.2155 or michele.mahny@state.mn.us.

Sincerely,

Richard M. Jolley
Hydrogeologist
Site Remediation & Redevelopment Section
Remediation Division

Michelle Mahny
Environmental Specialist
Site Remediation & Redevelopment Section
Remediation Division

cc: Dan Tolma, City of Spring Park (electronic), John Evans, Hennepin County (electronic)
Vapor Intrusion & Legal Liability Issues
Regulatory Prospective

► Soil vapor is a unique environmental media
  ► Influenced by site contamination/hydrogeology AND building/man-made features.

► MPCA has developed guidance (BMPs) on soil vapor investigation and mitigation
  ► Site conceptual model is fundamental. Begins with Phase I ESA - historical uses of the property/nearby area, potential source areas, distances to known releases, etc.

► Goal of BMPs are to provide clear path towards definition of vapor release and building-specific mitigation decisions.

► Mitigation is necessary when a risk of vapor intrusion is identified (exceedance of applicable ISVs).
Vapor Intrusion & Legal Liability Issues

Regulatory Prospective

- Vapor investigation is necessary whenever there is a known or potential release of vapor forming chemicals. If not already done, it would be a condition of any liability assurance letter.

- Investigation BMP outlines process to arrive at building mitigation decisions and extent of the vapor release - VI AOC. Both are required for a No Action or No Further Action letter.

- As an alternative to a NA/NFA letter, which requires off-site investigation if needed, a non-RP is eligible for a closure letter that is limited to their property:
  - Completion of Soil Vapor Assessment Letter
  - Completion of Vapor Mitigation for On-site Building(s) Letter
Vapor Intrusion & Legal Liability Issues

Regulatory Prospective

Reporting a Vapor Release to State Duty Officer...?

- Current reporting law enacted in 1969
- No clear, direct authority for mandatory reporting of soil gas
- MPCA recommends reporting when above action levels so response actions can be taken
- Failure to act can jeopardize future liability assurance
  - MPCA has discretion to not issue Retroactive NAD
Receptors/Exposures

- On-site
  1. Residential
  2. Commercial/Industrial

- Off-site Area of Concern
- Source distance, definition
- Petroleum, Non-Petroleum Constituents
Figure 1
Sample Location Map
Vapor Mitigation System Costs

- Depends on Mitigation System Requirements
  1. Suction Pit(s)
  2. Trenching
  3. Use of Existing Building Systems
  4. Building Footprint
  5. Partial Mitigation Systems
  6. New Building Construction
Vapor Mitigation Support Items

- Phase I ESA*
- Brownfields application and Support documents*
- Area of Concern definition on and off-site*
- Pilot Testing/Design
- Contractor bids
- Construction QA/QC
- System Performance Testing*
- Implementation Report*
- O&M Manual*
- Environmental Covenant*
- Decommissioning

* MPCA Brownfields program requirement
Vapor Transactional Issues - Understand, Educate and Communicate

- Challenges to Awareness / Acceptance of the Process Road Ahead
  - Unfamiliar with Regulation Changes Surrounding Vapors
  - Prior Environmental On Site - Remediated Already, Did As Asked
  - Off Site Influence - Not My Property Not My Problem

- With Perspective Comes Solutions to BMP Complications
  - Two-Season Testing Timing Challenges - Trusted Vendor Partners
  - Uncertain Mitigation System Requirements - Vendor and MPCA Collaboration

- Transaction Closing Resolutions
  - Seller system Implementation and Mitigation
  - Escrow Mitigation Costs at closing - Negotiate who pays (most often seller)
Navigating Transactional Issues and Financing

- Buyer and Bank Generally in Alignment - Who Pays and Value Impact
  - Testing - Mitigation Costs - Ongoing O&M - Negative Property Valuation
- Seller - Unfamiliar / Impact to Proceeds / Uncertainty - $ and Timing
- Financial Institution Navigating to Closing
  - Early recognition of potential concerns and open discussions with borrowers
  - Identify Process Synergies When Possible
  - Engaging Knowledgeable Third-Party Providers (Environmental / Title)
  - Active Management by Bank During the Testing / Solution Discussion Process
  - MPCA Engagement, Responsiveness and Collaboration
- Recipe for Success - Align Parties to Similar End Objective
- Different Financial Institutions - Different Policies and Thresholds
Questions?