A Case of ‘The Vapors’: A PCE Vapor-Intrusion Case Analysis

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Literature about cases involving vapor intrusion arising from groundwater contamination is few and far between. For decades, cleaning up hazardous waste meant focusing on soil and groundwater. But increasingly, offsite property owners are suing owners and operators of contaminated sites over the migration of vapors into their homes from evaporating contaminants in the shallow groundwater, a process known as vapor intrusion. This commentary examines one such case involving a plume of perchloroethylene, which migrated over a 30-year period from a dry cleaner beneath a neighborhood of about 300 homes in Las Vegas.

RCRA SUIT

In Voggenthaler et al. v. Maryland Square LLC et al., No. 2:08-CV-1618, complaint filed (D. Nev. Nov. 19, 2008), homeowners brought a private-citizen action under the Resource Conservation and Recovery Act, 42 U.S.C. § 321, seeking injunctive relief against the owners and operators of a shopping center in Las Vegas. The plaintiffs alleged that a PCE plume migrated from the defendants’ shopping center beneath their neighborhood some 4,000 feet to the east. From 1969 until 2000, a dry cleaner leased space and operated in the shopping center while using PCE as a dry cleaning chemical. The lawsuit arose from an investigation by the Nevada Division of Environmental Protection. The suit sought an order requiring the defendants to clean up the onsite soil and offsite groundwater and to abate the vapor intrusion into the homes.

BACKGROUND

According to NDEP, the PCE discharge was first reported in 2000 during a routine property transaction. NDEP received an initial environmental report in 2001, but it was not discovered that PCE had migrated offsite until 2002. In 2003 and 2004, monitoring wells showed that the PCE plume had traveled due east beneath a regional shopping mall. A 2005 report revealed the plume had migrated further east under the plaintiffs’ residential neighborhood. In 2006 additional monitoring wells were installed and sampled, revealing PCE concentrations in the groundwater beneath the neighborhood up to 1,800 micrograms per liter. In 2007 soil gas samples...
were collected throughout the neighborhood and submitted to NDEP for computer simulation, which indicated the potential for vapor intrusion into homes overlying the plume.

In August 2007, more than seven years after NDEP was first notified of the discovery of PCE in the groundwater, the agency mailed letters to the homeowners, notifying them for the first time that the shallow groundwater beneath their homes was contaminated and that vapors may be infiltrating into their homes. In late 2007 NDEP sampled indoor air in over a hundred homes and found concentrations ranging from zero to more than 100 micrograms per cubic meter. NDEP set an “immediate action level” of 32 ug/m$^3$ to trigger the installation of sub-slab depressurization systems in the affected homes to reduce the concentration level below this interim level. Over a dozen homes had an SSDS system installed at NDEP’s expense.

**STATE SUIT**

In addition to the RCRA lawsuit in federal court, the plaintiffs also filed a separate suit in state court, seeking damages for the diminution in value of their homes under common-law theories of negligence, trespass and nuisance. The state court granted certification of the class action, finding that a class action was a superior method to handle the case because “a class will be required to complete the neighborhood-wide cleanup.”

**SUMMARY JUDGMENT IN RCRA ACTION**

Following certification of the state class action for monetary damages, the plaintiffs moved for summary judgment in the RCRA case on their sole cause of action for injunctive relief. Under RCRA Section 6972(a)(1)(B), a suit may be brought against any party “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.” The Environmental Protection Agency has determined that PCE is a “hazardous waste” under RCRA. *Lincoln Props. v. Higgins*, 1993 WL 217429 (E.D. Cal. 1993); 40 C.F.R. § 261.31.

U.S. District Judge Robert Jones granted the plaintiffs’ motion for summary judgment July 22, 2010. Although the judge noted that “the 9th U.S. Circuit Court of Appeals has never addressed whether an owner of a contaminated site is liable under RCRA for contributing to the contamination through passive behavior,” he found that the defendants’ ownership of the shopping center was not merely “passive.” The judge found that the process piping beneath the dry cleaner, where the highest concentrations of PCE were found in the soil, were owned and maintained by the owners of the shopping center. Additionally, he found that the owners participated in the financial operation of their dry cleaner tenant by collecting as additional rent a percentage of the dry cleaner’s over-the-counter sales. Thus, Judge Jones held that the owners had profited directly from the dry cleaner’s use of PCE at the site.

The judge concluded that the PCE plume constituted an “imminent and substantial endangerment” to health or the environment. He relied upon declarations submitted by the plaintiffs’ environmental expert, who cited the results of groundwater monitoring
wells in the neighborhood and indoor air sample results showing elevated levels of PCE concentrations inside dozens of homes overlying the plume.

Because the plaintiffs acted as private attorneys general in bringing the RCRA action, the judge also awarded the plaintiffs’ attorney fees and costs totaling $603,000.

Judge Jones issued a final permanent injunction Dec. 27, ordering the former and current owners of the shopping center, as well as the dry cleaner, to clean up the contaminated soil and groundwater and to abate the vapor intrusion to the satisfaction of the state regulatory agency.

CONCLUSION

Although there are nine separate appeals arising from the federal court’s order granting summary judgment and issuing the permanent injunction, the defendants have continued to perform under the terms of the injunction while pursuing settlement negotiations with the plaintiffs and the NDEP. This case illustrates the remedies available to aggrieved property owners when contaminants migrate offsite and vapors from polluted groundwater invade their homes.

Alexander Robertson IV of Robertson & Associates in Westlake Village, Calif., has more than 25 years of experience handling complex construction and environmental litigation. Robertson represented the plaintiffs in the Voggenthaler cases with co-counsel Jan A. Greben of Santa Barbara, Calif. He can be reached at www.arobertsonlaw.com.