



PERSPECTIVES

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It's No Longer Just Hot Air: EPA Has Issued Its Long Awaited Vapor Intrusion "Draft" Final Guidance

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In April of this year, the Environmental Protection Agency ("EPA") issued two draft guidance documents addressing vapor intrusion ("Draft VI Guidance").¹ These documents have been long-awaited by the environmental legal community with some trepidation. If finalized in their current form, they would replace the 2002 Vapor Intrusion Guidance issued by EPA and would serve to enhance EPA's current focus on vapor intrusion ("VI") at remediation sites. Although the Draft VI Guidance gives much greater detail as to how one might approach and assess the risk of vapor intrusion at a site, the outlined processes will likely result in increases in expense, time and effort required from responsible parties to achieve compliance at cleanup sites. The Draft VI Guidance will also likely have a great influence on how state regulators assess vapor intrusion, particularly in those states, like Georgia, that do not yet have their own vapor intrusion guidance and rules.

Prior Guidance and Changes Needed

Although remediation of environmental contamination associated with soil, surface water and sediment has occurred since at least the early 1980s in the United States, vapor intrusion ("VI") is a relatively new contaminant pathway of concern that was not widely appreciated until the early to mid-2000s.² EPA's definition of vapor intrusion in the Draft VI Guidance is as follows:

Certain hazardous chemicals that are released into the subsurface as liquids or solids may form hazardous gases (i.e., vapors) that migrate through the vadose zone and eventually enter buildings as a gas by migrating through cracks and gaps in basement floors and walls or foundations, including perforations due to utility conduits and any other openings (e.g., sump pits). Vapor intrusion is the general term given to migration of hazardous vapors from any subsurface contaminant source, such as contaminated soil or groundwater, through the vadose zone and into indoor air. Vapor intrusion can occur in a broad range of land use settings, including residential, commercial, and industrial, and affect buildings with virtually any foundation type (e.g., basement, crawl space(s), or slab on grade). Vapor intrusion is similar to radon intrusion in that mechanisms of subsurface vapor migration and soil gas entry into buildings are similar for radon and volatile, hazardous chemicals of concern to EPA's programs.³

EPA's Office of Solid Waste and Emergency Response ("OSWER") originally issued a draft VI guidance document in November 2002, more than a decade ago.⁴ The 2002 draft guidance, which contained only 48 pages in comparison to the 196 pages of the current draft "final," was considered insufficient by many, specifically by many state environmental

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agencies who in reaction drafted and adopted their own VI guidance.⁵ Accordingly, in December 2009, the Office of the Inspector General (“OIG”) recommended that EPA update its 2002 VI guidance and incorporate several specific measures.⁶ The key recommendations included the following: (1) an update of toxicity values; (2) the use of multiple lines of evidence to evaluate VI; (3) identification of how risks from petroleum hydrocarbon vapors should be evaluated; (4) determination of how the guidance should apply to Superfund five year reviews; (5) an assessment of when and whether preemptive mitigation measures are appropriate; (6) a process for the operation, maintenance, and termination of vapor mitigation systems; and (7) a determination of when institutional controls and deed restrictions are warranted.⁷

The recently released Draft VI Guidance addresses OIG’s recommendations and incorporates helpful provisions from the many state VI guidance documents issued in the last several years.⁸ In addition to this general Draft VI Guidance, EPA issued a separate guidance document to address petroleum hydrocarbon vapor intrusion concerns.⁹ The discussion below will focus on the general guidance.

Migrating in the Right Direction

The Draft VI Guidance is essentially a step-by-step assessment process beginning with assembling and evaluating the data necessary to adopt an initial conceptual model, followed by the gathering of additional data and evaluation of the multiple lines of evidence, which ultimately results in a risk assessment. In addition, the Draft VI Guidance outlines measures for mitigation and remediation. On the upside, this detailed framework will allow for greater consistency across the many EPA regions with regard to the assessment and remediation of vapor intrusion under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and Resource Conservation and Recovery Act (“RCRA”). However, in order to create this very comprehensive assessment process, EPA has relied upon admittedly very conservative assumptions and established strict processes, which if applied without flexibility or judgment, could lead to unnecessary expense and time and the unfair stigmatization of certain properties.

Low Threshold for Requirement of Full-Scale Vapor Intrusion Investigation

According to the decision tree in Section 3 of the Draft VI Guidance, only two conditions are necessary to trigger a full-scale vapor intrusion investigation: (1) available information indicates a potential for vapor forming chemicals to be present in the subsurface and (2) buildings are present or information indicates a potential future presence of buildings. Once these lines are crossed, multiple lines of evidence, including several rounds of site-specific sampling and testing, are required to support a conclusion that vapor intrusion is not a concern at the property. With

so little needed to launch a comprehensive vapor intrusion investigation and no simpler means to screen out properties that in fact pose no actual vapor intrusion risk, many sites will be snagged in this expansive net and will require significant expense and time to extricate.

In contrast, other states allow that even if these two general conditions exist, a site assessor may determine, based on existing data for the property and nearby area that the risk of vapor intrusion is unlikely and no further assessment is required. This data may include information regarding the potential source of vapor (i.e., distance and make-up of the groundwater plume), the specific geology of the area (i.e., high soil moisture or low-permeability soil), or the mechanics of the building. EPA’s attempt to address every possible scenario and the widely acknowledged weaknesses in the science underlying the evaluation of vapor intrusion risks may together result in uncertainty over when to end the investigation and reach a reasonable scientific conclusion.

Lack of Bright-Line Screening Tests

One way to reasonably screen properties prior to a full-blown vapor intrusion investigation is the incorporation of bright line tests. For example, regulators have generally accepted that if the vapor source is more than 100 feet away from an inhabited building, no further investigation is required.¹⁰ However, in the new Draft VI Guidance, EPA asserts that, because anecdotal information demonstrates that there may be situations where vapor intrusion is still a concern even if greater than 100 feet away, the site assessor should use site-specific testing and evaluation.¹¹ But without such a bright line test to screen out properties with little vapor intrusion risk, real estate transactions and brownfield development will likely be stalled.



Rush to Indoor Air Sampling

As EPA admits, indoor sampling is problematic because chemicals detected in the indoor air are often caused by other background sources, including: (1) the use and storage of consumer products (*i.e.*, dry cleaning, air-fresheners, aerosols, scented candles); (2) combustion processes (*i.e.*, smoking, cooking, home heating); (3) occupant activities (*i.e.*, craft hobbies, home improvements, automotive repairs); or (4) other building materials (*i.e.*, carpets, insulation, paint and wood-finishing products).¹² Nevertheless, the guidance still recommends indoor sampling in all situations even though, depending on the chemical of concern from the subsurface source, accounting for these many other sources is very difficult.¹³

To lessen the inherent inaccuracy, EPA suggests that all such background sources be removed prior to testing, but as may be inferred from the extensive list above, this would likely be impractical.¹⁴ In addition, even if the site assessor determines that cancer-risk vapors are not due to a subsurface source, the building owner is now in possession of data showing the building is unhealthy with no clear means to achieve a clean bill of health. For these reasons, several states in their own VI guidance clarify that indoor air monitoring is an optional tool only appropriate at sites where other evidence already demonstrates that vapor intrusion is likely.

Use of Ultra-Conservative Screening Levels

Not only does the guidance recommend taking multiple samples on multiple occasions, but the site assessor must then compare the results of those several samples to stringent Vapor Intrusion Screening Levels (“VISLs”) for risk assessment.¹⁵ EPA acknowledges that the VISLs are very conservative and likely over-estimate the contribution of indoor air levels from vapor intrusion.¹⁶ In fact, the VISLs represent a lower health hazard threshold for certain chemicals than the levels established by Occupational Safety & Health Administration (“OSHA”). In similar state vapor intrusion guidance documents, the state agency makes clear that if there is a conflict between the vapor intrusion screening levels and the OSHA Permissible Exposure Levels (“PELs”), the OSHA PELs control.¹⁷ EPA, however, fails to offer any guidance on how this conflict should be addressed, which implies that the much lower EPA levels take precedence.¹⁸ The Draft VI Guidance also includes consideration of short-term, noncancer risk-based action levels that are significantly lower and even recommends evacuation of the building as a temporary measure based on such limits.¹⁹

In addition, the Draft VI Guidance requires an aggregate noncancer health risk calculation.²⁰ Thus, even when the exposure level for each contaminant at a particular site is below the relevant screening levels, the Draft VI Guidance recommends the site’s risk manager aggregate the contaminant-specific noncancer health risks to determine

whether, together, they reach a threshold where a response is needed. This aggregate amount is reflected in a “noncancer hazard quotient” which ultimately determines the scope of the responsive action. In at least some instances, the aggregate amount may exaggerate the actual risks posed by the individual contaminants and force a property owner to expend time and funds on responsive actions not necessarily warranted by the present conditions or the potential health risks.

Recommendation of Preemptive Mitigation

The Draft VI Guidance recommends installation of engineered controls to reduce vapor intrusion in buildings even when only limited lines of evidence are available to characterize the overall vapor intrusion pathway.²¹ These measures might serve as an early attempt to block any vapor intrusion, although they would not address the subsurface source. For example, a building owner may take preemptive action if adjacent buildings are confirmed to have vapor intrusion issues despite potential differences in the vapor pathways beneath each building. Or alternatively, a developer may choose a preemptive approach because it is more cost-effective to design, install and operate vapor mitigation systems in conjunction with the construction of a new building rather than mitigating post-construction after a problem is discovered. Yet the Draft VI Guidance provides for such measures only as an initial step for those properties, such as brownfields, where subsurface conditions will require remediation. The Draft VI Guidance does not authorize preemptive mitigation as a means to avoid additional and expansive vapor intrusion evaluation.

Level of Community Outreach

The Draft VI Guidance repeatedly emphasizes the importance of community outreach and public participation in the evaluation process.²² However, the timing and level of involvement suggested in the Draft VI Guidance raises concern for at least two reasons. First, EPA states that the community should have a “say in the decision-making process.”²³ Yet decision-making authority is assigned by statutory and regulatory authority (*i.e.*, property owner or landlord). Thus, the Guidance is unclear as to the degree of the public’s intended influence.

Second, the Draft VI Guidance recommends that community involvement be conducted at the “earliest stage” of the risk assessment process.²⁴ In light of the Draft VI Guidance’s requirement of a full vapor intrusion investigation based on limited evidence, great care should be taken with regard to community outreach during the early stages of the investigation if there is no indication of an imminent health risk. Until there is sufficient data upon which the likely risk can be determined and accurately contextualized, early outreach can unnecessarily alarm the public.

Reopening of Superfund Sites

For Superfund sites that require five-year reviews, EPA will gather data on the relevant vapor intrusion pathways and evaluate the sufficiency of the selected remedy for the resulting five-year report.²⁵ In November 2012, EPA issued a companion guidance regarding assessment of vapor intrusion during five-year reviews (“Five-Year Review Guidance”).²⁶ Thus, the five-year review process will likely result in the reopening of many established Superfund remedies in order to address the potential vapor intrusion issues. If new information raises the potential for a complete vapor intrusion pathway, the Five-Year Review Guidance authorizes a protectiveness determination for vapor intrusion. This process involves not only a review of the data previously collected to derive the remedial action alternatives, but also the evaluation of currently available data and even the collection of additional data.²⁷ Considering the push for collecting multiple samples and multiple lines of evidence, a full vapor intrusion investigation may be required at many sites as a result of the five year review process. This will create significant uncertainty for the “no further action” determination previously given to many sites and create potential problems in the due diligence process for real estate transactions.

Importance of EPA’s VI Guidance in Georgia

Georgia is in the minority with regard to having no current state-level guidance for evaluating vapor intrusion and has historically relied upon EPA guidance and other

recognized technical guidance (*i.e.*, Interstate Technology and Regulatory Council’s (“ITRC”) 2007 Practical Guideline to Vapor Intrusion Pathway).²⁸ Thus, EPA’s new Draft VI Guidance will have a significant effect on how Georgia’s Environmental Protection Department (“EPD”) treats vapor intrusion. In fact, EPD has already formed a technical working group to address vapor intrusion and EPA’s pending Draft VI Guidance.

Impact on the Future

Although not perfect, the new draft “final” guidance document provides a much more defined and consistent approach to the assessment of vapor intrusion that addresses the concerns cited in previous reviews. Nevertheless, the race to sampling and testing and overly conservative assumptions discussed briefly above will likely cause unnecessary investigations with correspondingly greater costs, time and alarm. This may unfairly stigmatize properties that do not in fact pose an unreasonable risk, delay real estate transactions and create wasteful litigation. Hopefully, EPA’s willingness to issue a draft “final” guidance and invite public comments will allow these concerns to be addressed before it issues the actual final guidance documents.

(Endnotes)

- 1 United States Environmental Protection Agency (“U.S. EPA”) Office of Solid Waste and Emergency Response (“OSWER”), Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway From Subsurface Sources to Indoor Air (External Review Draft), p. 1 (April 2013), available at <http://www.epa.gov/oswer/vaporintrusion/documents/vaporIntrusion-final-guidance-20130411-reviewdraft.pdf>. EPA Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites (Draft EPA External Review Document) (April 2013), available at <http://www.epa.gov/oust/cat/pvi/petroleum-vapor-intrusion-review-draft-04092013.pdf>. The deadline for comments for both draft documents was June 24, 2013. More than 90 comments were submitted. See Public Comments to Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance), available at <http://www.regulations.gov>.
- 2 Arguably, the early stages of vapor intrusion began in the 1980s with a focus on residential air quality and radon. In 1991, the Johnson and Ettinger 1-D Diffusion/Advection Model was developed to determine whether vapor intrusion was a concern. However, it was not until the 2000s that large scale vapor intrusion sites were identified and EPA and the states developed independent guidance to address vapor intrusion.
- 3 Draft VI Guidance, p. 1.
- 4 OSWER, Draft Guidance for Evaluating the Vapor Intrusion to Indoor Pathway from Groundwater and Soils (Subsurface Vapor Intrusion Guidance), available at <http://www.epa.gov/epawaste/hazard/correctiveaction/eis/vapor/compute.pdf>.
- 5 Bart Eklund, Lila Beckley, Vivian Yates, Thomas E. McHugh, *Overview of State Approaches to Vapor Intrusion, REMEDIATION* (Autumn 2012), available at <http://onlinelibrary.wiley.com/doi/10.1002/rem.21327/abstract> (finding that as of March 2012 at least 35 states had implemented their own VI guidance). Of note, the Report showed that several of the southern states, including Georgia, had not implemented their own VI guidance, but relied solely upon EPA’s guidance



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- documents when addressing VI concerns. See, e.g., New Jersey Dep't of Environmental Protection Site Remediation Program, Vapor Intrusion Technical Guidance (March 2013), available at <http://www.nj.gov/dep/srp/guidance/vaporintrusion> (hereinafter *New Jersey VI Guidance*); Dep't of Toxic Substances Control California Environmental Protection Agency, Final Guidance for the Evaluation and Mitigation of Subsurface Vapor Intrusion to Indoor Air, (Oct. 2011), available at http://www.dtsc.ca.gov/AssessingRisk/upload/Final_VIG_Oct_2011.pdf ("hereinafter *California VI Guidance*").
- 6 Lack of Final Guidance on Vapor Intrusion Impedes Efforts to Address Indoor Air Risks, Report No. 10-P-042 (Dec. 14, 2009), available at <http://www.epa.gov/oig/reports/2010/20091214-10-P-0042.pdf>.
- 7 *Id.*
- 8 Draft VI Guidance, p. 1.
- 9 EPA's rationale for the separate guidance is that petroleum hydrocarbons biodegrade aerobically relatively quickly over short distances. The guidance itself is focused on the typical corner gas station. However, in addition to traditional chemicals found in petroleum products (i.e., benzene), the Petroleum Draft VI Guidance requires assessment of vapor risks associated with gasoline additives (i.e., MTBE) and chemicals that develop from biodegradation of petroleum in the soil and groundwater (i.e., methane).
- 10 See, e.g., *California VI Guidance*, p. 14-15 (Oct. 2011) ("buildings within 100 feet of soil gas or groundwater plume should be evaluated for vapor intrusion"); *New Jersey VI Guidance*, p. 13 (March 2013) ("The Department requires a VI investigation where buildings are within 100 feet horizontally or vertically of free product or shallow ground water contamination in excess of the GWSL that is not PHC-related.").
- 11 Draft VI Guidance, p. 50.
- 12 Draft VI Guidance, p. 24.
- 13 Draft VI Guidance, p. 62.
- 14 Draft VI Guidance, p. 58.
- 15 Draft VI Guidance, pp. 72-78.
- 16 Draft VI Guidance, p. 77.
- 17 See, e.g., *New Jersey VI Guidance*, p. 8.
- 18 Occupational Safety and Health Standards, 29 C.F.R. §1910.1000, Table Z-2 (indicating an 8 hour weighted level of 100 ppm or approximately 500 mg/m as compared to a 4 mg/m screening level under the Draft VI Guidance).
- 19 Draft VI Guidance, p. 90.
- 20 Draft VI Guidance, p. 89.
- 21 Draft VI Guidance, pp. 119-125.
- 22 Draft VI Guidance, pp. 31, 131-143.
- 23 Draft VI Guidance, p. 131.
- 24 Draft VI Guidance, p. 131.
- 25 Pursuant to Section 21 of CERCLA, 42 U.S.C. §9621, remedial actions that result in any hazardous substances, pollutants, or contaminants remaining at the site will be re-evaluated every five years to ensure that the remedy is and will continue to be protective of human health and the environment. See The Comprehensive Five-Year Review Guidance, OSWER Directive 9355.7-03B-P (June 2001), available at <http://www.epa.gov/superfund/accomp/5year/index.htm>.
- 26 OSWER, Assessing Protectiveness at Sites for Vapor Intrusion: Supplement to the 'Comprehensive Five-Year Review Guidance, available at http://www.epa.gov/superfund/cleanup/postconstruction/pdfs/VI_FYR_Guidance-Final-11-14-12.pdf.
- 27 See generally, Five-Year Review Guidance.
- 28 See Georgia Environmental Protection Department, Evaluating the Vapor Intrusion Pathway at Regulated Sites, available at <http://www.gaepd.org/Documents/vaporintrusion.html>.

Changing Phase I ESA Standards: Are You Ready?

By Addy Brooks and Chris Gilmer/Principal Consultants/GaiaTech

Introduction

The ASTM International (ASTM) E 1527-05 Phase I Environmental Site Assessment (ESA) standard (“Standard”) that we have been using for the past approximately eight years is expected to be revised and could be published by the end of this year. What do pending revisions to the Standard mean to you? Are your environmental due diligence teams prepared for upcoming changes? If you retain firms to conduct environmental reviews, title searches or related services, the new requirements in the Standard may affect your time tables, cost and results. The following discussion presents a brief background of the existing standard and pending revisions, a discussion of the notable changes, and the implications for your transaction activities.

How it all Started

The organization that became ASTM originated in the late 1800s out of an effort to regulate the material quality of railways. Those efforts required cooperation amongst competitors and members of a material supply chain whose interests were not always aligned. Conflicts arose due to the collaborative nature of ASTM’s approach and the sensitive nature of self-regulation. This mix of collaboration and debate is still present in ASTM’s efforts to generate and revise new standards today.

ASTM Takes on Environmental Diligence

The Environmental Assessment, Risk Management, and Corrective Action (E50) Committee (“Committee”) was established in 1990 and published the first Phase I ESA standard in 1993. The pending revisions will be the sixth modification of this standard. Motivation for the development and modification of the standard over the years has been in part an effort to preempt potential federal regulation and to comply with new federal standards. In addition, ASTM considers all standards to have an eight-year shelf life. When approaching sunset, options include 1) no action (allow an obsolete standard to sunset); 2) revise (if updates are necessary, which it submits for ballot to the committee); or 3) re-ballot with no changes (if considered perfect). In the specific case of the Standard, the Committee seeks EPA’s approval of the standard, which makes the standard more authoritative than simply an industry-accepted best practice.

The Standard is scheduled to sunset in December 2013. Initial efforts to evaluate the standard began in 2009

and included identification of a Task Group comprising consultants, lawyers, lenders, EPA and others with an interest in the standard. A subset of attorneys began a legal review to determine whether any gaps in the standard might be contributing to litigation for consultants, Phase I ESA Users, or others who rely on Phase I ESAs. The attorneys did not identify any obvious legal issues; however, many reported that Users, their consultants and their counsel were interpreting certain aspects of the standard inconsistently.

After years of meetings, hours of research, roundtable discussions, and two subcommittee ballots in August 2011 and February 2012, ASTM submitted the revised standard to the Task Group for ballot in October 2012. The results of this ballot were 96 percent affirmative (or abstained). Subsequent meetings in late 2012 resolved the majority of the negative responses, and the proposed draft ASTM E 1527-13 was completed.

The pending revisions most notably include:

- modifications to the definitions of a recognized environmental condition (REC) and a historical REC (HREC),
- introduction of a new term: controlled REC (CREC);
- modification of expectations regarding the review of environmental documentation for properties that adjoin the site; and
- inclusion of vapor migration as a potential pathway for impact to the site.

Revisions also include language changes to align the standard more closely with CERCLA’s definition of a release and clarify User requirements regarding the search for liens and activity and use limitation (AULs) such that they more closely follow All Appropriate Inquiry (AAI) requirements.

More on the Changes

Since the introduction of the term REC, and the subsequent introduction of the term HREC, consultants have struggled and often disagreed on the categorization of known, potential, and historical environmental impacts. Many consultants and Users developed their own additional categories (*e.g.*, business environmental risks [BER], noteworthy issues, and other considerations) that could be used to better define potential liabilities in the context of a particular transaction or take into consideration a customer’s specific sensitivities. Given the varied approaches observed

across the industry, as well as the prevalence of risk-based closure for releases at commercial and industrial properties, the Committee decided to clarify and expand the categories for known and potential releases.

The proposed **Standard will refine the definition of a REC** as “The presence or likely presence of any hazardous substances or petroleum products in, on, or at a property 1) due to any release to the environment; 2) under conditions indicative of a release to the environment; or 3) under conditions that pose a material threat of a future release to the environment. *De minimis* conditions are not recognized environmental conditions.” While E 1527-05 included the definition of *de minimis* conditions along with that of a REC, the revised standard separates the two. Though the new REC definition is more concise, the potential for inconsistent interpretation of these categories still exists.

The definition of an HREC will be revised as “A past release of any hazardous substances or petroleum products that has occurred in connection with the property and has been addressed to the satisfaction of the applicable regulatory authority or meeting unrestricted residential use criteria established by a regulatory authority, without subjecting the property to any required controls (for example, property use restrictions, activity and use limitations, institutional controls, or engineering controls).” While the existing standard describes an HREC as a past release that has been granted regulatory closure, the proposed standard will specify closure to the most stringent residential criteria. Those releases that have been granted conditional closure or risk-based closure will now be described in a **new category: controlled RECs (CRECs)**.



The pending standard defines release, which had not been defined in earlier standards, and makes clear that **releases include** those associated with **vapors and vapor migration**. This concept is also applied to the definition of migrate/migration, which, as pending, will include vapor in the subsurface and refer to the ASTM E2600 standard that pertains to vapor migration. Though many consultants have been considering vapor and vapor migration as a pathway for contaminants when conducting Phase I ESAs, its inclusion was not explicitly incorporated in earlier versions of the Standard. As a result, some consultants avoided this matter entirely, citing vapor as an indoor air quality issue that is outside the scope of a Phase I ESA. Under the pending revision, the Environmental Professional (EP) must evaluate potential vapor impacts using an established ASTM standard practice or other method that it describes clearly in the Phase I ESA report.

Also modified in the pending standard is the recommendation to **review agency files for adjoining properties that are identified on governmental databases**. Though not identified as a requirement, the pending standard recommends that these files be reviewed unless information to address a particular concern can be obtained from another source (*e.g.*, on-site files, owner records, or direct contact with the neighboring property owners/operators). The pending standard also mandates that when an EP determines file reviews are unnecessary, the EP must include its rationale in the narrative report.

The pending revisions also include modifications to existing User requirements that will align the pending standard more closely to requirements for parties seeking Landowner Liability Protections (LLP) under CERCLA. In instances where the User has not completed a questionnaire consistent with Appendix X3 of the existing standard, the **EP must now consider whether the absence of this information represents a data gap**. Revisions reiterate that Users, not EPs, are responsible for the identification of environmental liens and AULs, which are recorded differently than institutional or engineering controls registries that EPs search. Further, **traditional title products** (*e.g.* Chain of Title, Preliminary Title Reports, Title Commitments) **do not typically identify environmental liens or AULs**. Under the new standard, **the User must be sure to retain a firm capable of searching the appropriate records**.

Other revisions are intended to increase clarity and conform existing standard language to AAI and CERCLA. These revisions appear to be largely clerical and should not significantly alter the procedure, findings, or conclusions of a Phase I ESA.

The Implications

GaiaTech’s observations of informal polls and discussions during committee and workshop meetings, as well as our

frequent review of Phase I ESAs prepared by our peers, suggest that many consultants currently use customized, non-ASTM categories in Phase I ESAs. Consultants are both creating unique definitions for standard categories and establishing new categories altogether, such as BERs. In some cases, customers have required these categories and definitions, and in other instances, consultants define their own additional categories to strive for internal consistency. Though certain customized conditions will continue to appear in the findings and conclusions of Phase I ESAs, the modification of REC and HREC, along with the introduction of CREC, may provide more uniformity across the industry. Based on GaiaTech's observations, these modifications appear to be largely supported by the consulting community.

Revision of the Standard to require consideration of the potential for vapor migration has been slightly more contentious. According to a survey by Environmental Data Resources (EDR) of EPs using the current Standard to conduct Phase I ESAs, between 14 percent and 22 percent of those surveyed consider vapor migration as a potential environmental impact. Of those, less than 40 percent conducted this evaluation using the ASTM standard for vapor intrusion. Under the pending revision, EPs can no longer omit a discussion of vapor migration or present it as a non-ASTM scope item. Using EDR's data as an indication, this modification of standard practice could affect the effort, cost and timing for a number of consultants that are not currently considering vapor migration. Additionally, we could see the number of RECs in reports increase as more consultants consider risks associated with vapor migration.

The instructions for agency file review for adjoining properties have also been the subject of debate and concern with regard to timing and cost. Environmental consultants are typically given a relatively short turnaround time, firm deadlines, and a fairly fixed fee to conduct Phase I ESAs. The common concern among attendees of the meetings and workshops GaiaTech attended was the inflexibility and difficulty in working with the many regulatory agencies that hold environmental files. For example, GaiaTech often submits a request to review files only to receive an automated response that the agency will respond to our request within a designated timeframe (days, weeks or months). Only after that response will the agency schedule an appointment, which could then be another month or more in the future. This delay could stretch the typical diligence window and challenge the delivery of a complete ASTM-compliant Phase I ESA by closing.

Consultants were also concerned with the associated increase in agency fees and costs that will likely result from collecting and reviewing additional documentation. Though additional fees and time will likely be required for some, many consultants are already negotiating and conducting these activities for some investigations and for certain clients. As an example, many of GaiaTech's current customers (largely

in the lending industry) have already established this baseline level of documentation review for properties of environmental significance in close proximity to the site.

Based on GaiaTech's experience, Users often fail to formally respond to questions related to their knowledge of the environmental condition of properties being evaluated. Given that the pending revisions instruct an EP to determine whether this non-response could be a data gap, we may see an increased focus on this issue.

Under pending changes, the User must be sure to secure the appropriate type of search to identify potential environmental liens and AULs. This revision could require additional effort on the part of Users and their representatives to identify qualified firms and products. This revision may lead Users to reevaluate existing vendors and request that those vendors demonstrate their ability to satisfy requirements.

As with the initial introduction of the Standard, there will likely be a period of adjustment while consultants and Users familiarize themselves and their customers with the requirements and modify their expectations. Ultimately, the revisions will provide clarity and consistency and will further align the industry and federal standards.

Timing

ASTM submitted the pending revisions to EPA with the request that EPA reference the standard as compliant with the AAI rule. On August 15, 2013, EPA published a direct final action to amend the AAI rule to reference E1527-13, the proposed revision. As of the date of this article's publication, at least three adverse comments have been received and Committee members have begun discussing alternatives to address comments.

If you would like to know more:

EPA's announcement can be found at <http://www.regulations.gov>

The Federal Register reference is 2013-19764.

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Court of Appeals of Georgia to Hear Wetland Buffer Cases¹

By Karlie Clemons Webb, Troutman Sanders LLP

Turner v. Georgia River Network, Docket No. 2013-CV-227212.

On July 10, 2013, the Court of Appeals of Georgia granted petitions for discretionary appeal of two superior court orders – specifically, a May 16, 2013 Fulton County Superior Court order and a May 30, 2013 Grady County Superior Court order. The superior courts in each of these cases reversed an Office of State Administrative Hearings (“OSAH”) decision on the scope of Georgia’s state buffers program under the Erosion and Sedimentation Act of 1975, O.C.G.A. § 12-7-1 et seq. (“E&S Act”).

The substantive environmental legal issue in these cases is whether the E&S Act establishes a buffer to all state waters, including wetlands, or whether instead the Act’s buffer requirements are more limited and only apply to state waters that have “banks.” The superior courts held that OSAH lacked jurisdiction to address the issue because there was no underlying “order or action” of the Environmental Protection Division (“EPD”) Director. The Fulton County Superior Court also found that the petitioners lacked standing. Both courts went on to address the underlying E&S Act issue, and both found that the E&S Act unambiguously establishes buffers on only those state waters that have “banks” and that the buffer is measured from the point where vegetation has been wrested due to stream flow or wave action. These superior court decisions confirm EPD’s long-held and – with one notable exception – consistently applied position that the state buffer program only applies to state waters that have a point of wrested vegetation.

The E&S Act “establish[es] a 25-foot buffer along the banks of all state waters, as measured horizontally from the point where vegetation has been wrested by normal stream flow or wave action” O.C.G.A. § 12-7-6(b) (15)(A). And it prohibits certain land disturbing activity within this state buffer without a variance from the EPD Director. In this case, Grady County received authorization from the U.S. Army Corps of Engineers to construct a 960-acre fishing lake near Cairo, Georgia. The Corps permit authorized the construction of a dam on Tired Creek and the inundation of at least 129 acres of wetlands and nine miles of streams. Grady County also applied for and obtained a state buffer variance from the EPD Director authorizing the inundation of state buffers to the onsite streams. Consistent with EPD guidance and a likely universal understanding within Georgia’s regulated

community, the County’s variance request did not address the onsite wetlands because such features have no bank or discernible point of wrested vegetation.

The Georgia River Network and American Rivers (“GRN”) appealed the project’s buffer variance to OSAH, arguing that it was unlawful because the Director failed to consider buffer impacts to wetland buffers. EPD and intervener Grady County argued, *inter alia*, that the Act does not establish buffer protections for wetlands. On Jan. 14, 2013, OSAH agreed with GRN and vacated the buffer variance, holding that the E&S Act establishes a state protected buffer to *all state waters* – including wetlands.

On appeal, the two superior courts reversed the OSAH decision, restoring EPD’s and the regulated community’s interpretation on the scope of the E&S Act buffer program. Specifically, the superior courts found that the Act plainly and unambiguously demonstrates the General Assembly’s intent: (1) “to establish 25 foot buffers *only* along state waters that have ‘banks,’ and (2) that the demarcation between those ‘banks’ and the water body be visibly discernible due to the presence and movement of water (i.e., stream flow or wave action)”

While these cases focused on issues miles from coastal Georgia, they may trigger close scrutiny of a July 8, 2004 memorandum by then EPD Director Carol Couch concerning implementation of the E&S Act’s buffer program to coastal marsh. In that memorandum, the Director asserts that the E&S Act establishes a 25-foot buffer to coastal marsh as measured from the marsh jurisdiction line established by the Coastal Resource Division. That position appears to be in conflict with the superior courts’ interpretation of the E&S Act buffer provisions – chiefly because of the absence of any consideration of a visibly discernible point of wrested vegetation.

As noted above, in addition to the E&S Act interpretive issue, these cases raise OSAH jurisdiction and standing issues, which are likely to be addressed by the Court of Appeals.

(Endnotes)

- ¹ Editor’s note: in lieu of an OSAH decision reporter in this edition of *Perspectives*, this article provides an update on the status of a particularly significant OSAH decision discussed in last Winter’s edition, *Georgia River Network v. Turner*, Docket No. OSAH-BNR-EPD-ES-1308374-60-Miller.

Curtailing “Extortionate” Practices in (Land-Use) Permitting: Examining the Supreme Court’s Decision in *Koontz v. St. Johns River Water Mgmt. Dist.*

By William Tomlin, Project Attorney, King & Spalding, LLP

“**E**xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation,” the Supreme Court declared in its ruling in *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, slip op. at 10 (2013). Taking an often critical tone towards local government exactions, the Court held in June that the heightened scrutiny of *Nollan v. California Coastal Comm’n*¹ and *Dolan v. City of Tigard*² (which together require that exactions have a nexus and rough proportionality to impacts) protects land-use permit applicants “even when the government denies the permit and even when its demand is for money.”³

The Offer You Can’t Refuse

In 1994, Coy Koontz, Sr. sought a permit from the St. John’s River Water Management District (the “District”) to develop 3.7 acres of a 14.9 acre tract near Orlando, Florida that he bought in 1972.⁴ That tract is considered mostly wetlands by the state and is subject to two statutes meant to protect the state’s water resources and the public interest.⁵ The State of Florida passed the Water Resources Act in 1972, the same year Koontz purchased his property.⁶ That statute regulates “construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.”⁷ It does so by dividing the state into five water management districts and requiring developers to obtain a Management and Storage of Surface Water (MSSW) permit from their local district.⁸ The statute authorizes districts to place “reasonable conditions” on a permit that are needed to ensure that any construction will “not be harmful to the water resources of the district.”⁹

By 1984, the state passed the Warren S. Henderson Wetlands Protection Act, requiring another permit, a Wetlands Resource Management (WRM) permit, for anyone who wishes to “dredge or fill in, on, or over surface waters” to be obtained before beginning work.¹⁰ Permit applicants must “provide reasonable assurance that state water quality standards ... will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands ... is not contrary to the public interest.”¹¹

When Koontz decided to develop his property in 1994, he offered in his application for the MSSW and WRM permits to build on only 3.7 acres of his land and to protect the remaining 11.2 acres with a conservation easement deeded to the St. Johns River Water Management District.¹² Koontz also pledged to raise and grade parts of his property and to install a dry-bed pond to manage storm water runoff from the proposed building and parking lot.¹³

The District considered Koontz’s proposal to be lacking and allowed him the chance to select one of two options to achieve greater mitigation before it would approve the permits.¹⁴ First, the District proposed that Koontz limit his development to only one acre, deeding a conservation easement to the District on the remaining 13.9 acres, and it suggested that, rather than installing the dry-bed pond, Koontz construct a more expensive subsurface storm water management system.¹⁵ This option also would have had Koontz build retaining walls instead of grading his land from the site of the development down a gradual slope to the elevation of the rest of his property.¹⁶

The second option the District offered would have allowed Koontz to build on the 3.7 acres as he originally proposed while still deeding to the District a conservation easement protecting the remainder of his property.¹⁷ This option, however, also would have required Koontz to hire contractors to improve approximately 50 acres of public land, not connected to Koontz’s property, by either replacing culverts on one parcel or by filling in ditches on another parcel.¹⁸ The



District has a policy to never require permit applicants to fund any particular offsite mitigation project, though, and it would have considered proposals from Koontz for other offsite projects if those projects were equivalent to those proposed by the District.¹⁹

Florida Courts Get it Wrong

Koontz considered the District's proposals to be excessive, and so he sought relief in state court.²⁰ Among other claims, he sought monetary damages under a Florida statute allowing such damages where "a state agency's action is 'an unreasonable exercise of the state's police power constituting a taking without just compensation.'"²¹

Claiming that Koontz had not exhausted his administrative remedies, the District made a motion to dismiss, which was granted by the trial court, but the Florida District Court of Appeal for the Fifth Circuit reversed that decision and remanded the matter for trial.²² After a two-day bench trial that included testimony from several experts who examined Koontz's property, the trial court found that Koontz's property was already "seriously degraded" by construction on surrounding parcels, and it held that the District violated the rule articulated in *Nollan* and *Dolan*.²³ Specifically, the court decided that, in light of the degraded nature of Koontz's property and Koontz's offer to protect the remainder of his land, funding offsite mitigation projects on public property "lacked both a nexus and rough proportionality to the environmental impact of the proposed construction."²⁴ The Florida appellate court affirmed this decision, but the Florida Supreme Court later reversed.²⁵

The Florida Supreme Court's decision rested on two grounds that it thought separated Koontz's complaint from the issues in *Nollan* and *Dolan*.²⁶ First, the court distinguished the present case on the fact that Koontz complained about a condition precedent rather than a condition subsequent.²⁷ That is, Koontz complained that his application was denied because he refused to accept the District's demands rather than that his application was approved only because he accepted the District's demands.²⁸

Second, the court held that monetary exactions do not give rise to a claim under *Nollan* and *Dolan*.²⁹ Acknowledging a split of authority as to whether demands for money can give rise to a claim under *Nollan* and *Dolan* the same as demands for and interest in real property, the court ruled against Koontz, saying that they do not.³⁰ Recognizing this split of authority and the fact that these two issues are questions of federal constitutional law, the Supreme Court granted certiorari and reversed.³¹

The Supreme Court Weighs In

The Supreme Court's reversal begins with a first principle: the Unconstitutional Conditions Doctrine. This doctrine "vindicates the Constitution's enumerated rights by

preventing the government from coercing people into giving them up."³² *Nollan* and *Dolan* are a "special application" of this doctrine that protects landowners from unconstitutional takings during the land-use permitting process.³³

The Court expounds on two realities it says are reflected in its cases on the permitting process.³⁴ First, the broad discretion governments have to deny permits leaves applicants especially vulnerable to coercion.³⁵ A government can pressure an applicant into voluntarily giving up some property so long as the permit sought is more valuable than any just compensation the applicant might receive for the property.³⁶ Second, applicants often seek permits for land uses that would impose costs on the public. Forcing applicants to internalize such costs is "a hallmark of responsible land-use policy," and the Court has upheld such policies against constitutional challenges.³⁷

With these realities in mind, the Court worries about governments engaging in extortionate behavior and says that the test articulated in *Nollan* and *Dolan* addresses such threats.³⁸ "*Nollan* and *Dolan* accommodate both realities," according to the Court, "by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between that the government demands and the social costs of the applicant's proposal."³⁹ This test allows governments to force applicants to carry the full costs of their developments while at the same time preventing those governments from resorting to extortion that would frustrate the Fifth Amendment right to just compensation.⁴⁰

The Court then turns to the two major issues presented in the case, namely whether the doctrine distinguishes between conditions precedent and conditions subsequent and whether monetary exactions implicate the Takings Clause of the Fifth Amendment.

The Court described a rule, like that articulated by the Florida Supreme Court, that would distinguish between government orders creating a condition precedent and orders creating a condition subsequent as "especially untenable."⁴¹ The principles underlying *Nollan* and *Dolan* remain constant whether the government issues an order that would approve a permit if the applicant turned over property or the government issues an order that would deny a permit until the applicant turned over property.⁴² The Court plainly states that the "unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent."⁴³ The District here applied a condition precedent, denying Koontz's application unless he met the District's demands, thus implicating the Takings Clause.⁴⁴ The "[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."⁴⁵



Turning to whether a monetary exaction can constitute a taking, the Court began by observing that the monetary exaction here did “operate upon” Koontz’s “identified property interest.”⁴⁶ The Court then held that these fees “are functionally equivalent to other types of land use exactions” and that monetary exactions must satisfy *Nollan* and *Dolan*.⁴⁷ A contrary result would have allowed governments to avoid the nexus and rough proportionality rules of *Nollan* and *Dolan* by simply giving a permit applicant the choice of surrendering an easement or paying an “in lieu of” fee, a result the Court could not accept.⁴⁸

Conclusion: the Revolution that Isn’t

In the end, the Court’s ruling may not lead to many changes in how monetary exactions are applied. Despite claims that the Court’s rule announced here is an “unwise ... adventure,”⁴⁹ some have pointed out that some states already apply this heightened scrutiny to monetary exactions.⁵⁰ Indeed, Georgia seeks to limit duplicate and ad hoc exactions,⁵¹ pushing some exactions into a system of impact development fees.⁵² The Georgia Development Impact Fee Act restrains these fees with a *Nollan/Dolan*-like rule that says these fees may not “exceed a proportionate share of the cost of system improvements.”⁵³ The statute defines “proportionate share” as “that portion of the cost of system improvements which is reasonably related to the service demands and needs of the project within the defined service area.”⁵⁴

Rather than working a “revolution in land use law,”⁵⁵ the lasting legacy of the Court’s decision may be its status as another round in the ongoing debate over the role of government in public life.⁵⁶ The competing extremes of whether government is an antagonistic force have found a firm footing in the Supreme Court.

(Endnotes)

- 1 483 U.S. 825 (1987).
- 2 512 U.S. 374 (1994).
- 3 *Koontz*, slip op. at 22.
- 4 *Id.* at 1, 3.
- 5 *Id.* at 2-3.
- 6 *Id.* at 2.
- 7 Fla. Stat. §373.403(5) (2010), *quoted in Koontz*, slip op. at 2.

- 8 *Koontz*, slip op. at 2-3 (citing Fla. Stat. §§ 373.403(5), 373.413(1) (2010)).
- 9 *Koontz*, slip op. at 3 (quoting Fla. Stat. § 373.413(1) (2010)).
- 10 *Koontz*, slip op. at 3.
- 11 Fla. Stat. § 373.414(1), *cited in Koontz*, slip op. at 3.
- 12 *Koontz*, slip op. at 3-4.
- 13 *Id.* at 3.
- 14 *Id.* at 4.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 *Id.* at 4-5.
- 21 *Id.* at 5 (quoting Fla. Stat. § 373.617(2)).
- 22 *Id.*
- 23 *Id.*
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 *Id.* at 5, 9.
- 28 *Id.* at 5.
- 29 *Id.* at 6.
- 30 *Id.* at 5-6.
- 31 *Id.* at 6.
- 32 *Id.* at 7.
- 33 *Id.*
- 34 *Id.* at 7-8.
- 35 *Id.* at 7.
- 36 *Id.*
- 37 *Id.* at 7-8 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).
- 38 *Koontz*, slip op. at 7-8.
- 39 *Id.* at 8 (quoting *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837).
- 40 *Id.* at 8.
- 41 *Id.* at 9.
- 42 *Id.* at 8-9.
- 43 *Id.* at 9.
- 44 *Id.* at 10.
- 45 *Id.*
- 46 *Id.* at 16 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998)(opinion of Kennedy, J.))(internal quotation marks omitted).
- 47 *Koontz*, slip op. at 15.
- 48 *Id.*
- 49 *Koontz*, slip op. at 2 (Kagan, J. Dissenting).
- 50 Posting of Jonathan Zasloff to Legal Planet, <http://legalplanet.wordpress.com/2013/06/27/koontz-and-exactions-dont-worry-be-happy/> (June 27, 2013)(Noting that California has applied *Nollan* and *Dolan* to monetary exactions for 20 years and that when municipalities impose this level of scrutiny, they often learn that their previous fees were too low).
- 51 O.C.G.A. § 36-71-1(4) (2012).
- 52 O.C.G.A. § 36-71-3(a), -12 (2012).
- 53 O.C.G.A. § 36-71-4(a) (2012).
- 54 O.C.G.A. § 36-71-2(16) (2012).
- 55 *Koontz*, slip op. at 21.
- 56 See *id.* at 7, 8, 11, 22 (Majority describes local government actions as “extortionate”); See *Koontz*, slip op. at 11 (Kagan, J. Dissenting)(Justice Kagan says that no evidence was presented showing that local governments where *Nollan* and *Dolan* do not apply to monetary exactions engage in extortionate behavior).