



Update on TCE Exposure & Toxic Tort Litigation

AARST Indoor Environments 2023
VI Track, Nashville
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Overview

- TCE in the news (2023 and beyond)
- TCE Revolution (second decade)
- Litigation Risks (threats continue)
- Final Thoughts (adapt)

TCE News

- Community Within The Corridor, Milwaukee: TCE testing, evacuation, litigation
- TCE in Glendale luxury apartments, WI: evacuation
- Elevated TCE Levels shuts down Providence classroom
- TCE found at Anaheim Site

TCE News

- On Oct. 23, 2023, Biden's EPA proposes ban on TCE under TSCA:
 - Jan. 2023, EPA evaluated TCE and determined TCE posed an unreasonable risk to HH + Environment
 - Proposes two Chemical Exposure Limits (1.1 ppb or 5.9 ug/m³ (based on controversial Johnson study) or 4ppb or 21.5 ug/m³)
 - OSHA Permissible Exposure Limit (PEL) (100,000 ppb) (from '70s)
 - DoD releases Occupational Exposure Limit (OEL) for TCE (1 ppm or 5,374 ug/m³) (2022)
- Similar issues/challenges for residential exposure scenarios

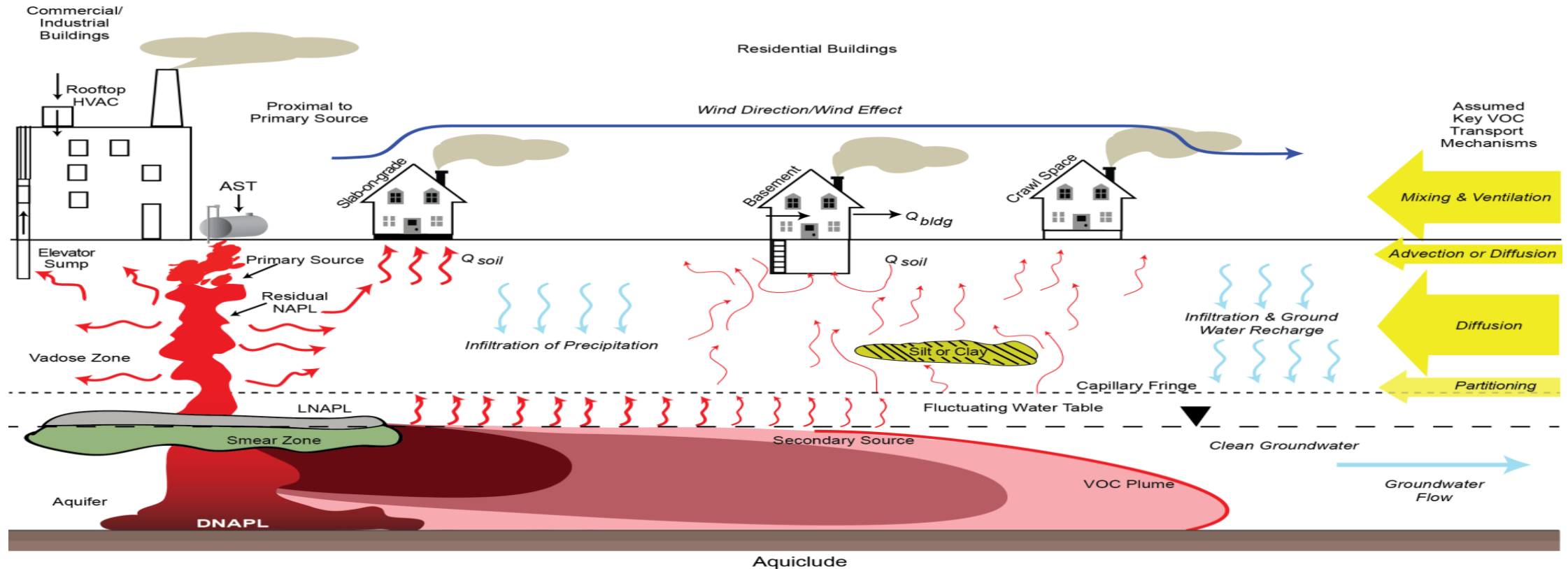
TCE Toxicity Revolution (2011 - ??)

- TCE is a common groundwater contaminant.
- Risk-based cleanups & remedial endpoint revelations
- Paradigm Shift – non-cancer endpoint drives risk (concern that short term exposure to TCE by pregnant woman in first trimester may cause fetal cardiac malformation or FCM)
- Single exposure (non-cancer) v. life time exposure (cancer)
- TCE non-cancer level of 2 ug/m³

TCE Toxicity Revolution – Current National Snapshot

- There are 18 states with some guidance re: TCE short term risk
- Within last three years, only NC has added guidance
- US EPA HQ has not (really) taken a position
- Indiana is unique in specifically rejecting short term risk
- Wisconsin has a different policy

VI – The Invisible Villain + TCE



Litigation Risks

- CERCLA Liability – strict, draconian & retroactive
- RCRA Liability - **imminent & substantial endangerment (ISE) claims**
- Common Law Theories (statutes of limitations)
 - Nuisance, negligence, trespass, bodily injury, wrongful death, emotional distress, anti-dumping

RCRA – Private Citizen Suit

- Citizen Suit provisions under RCRA
 - Sec. 6972(a)(1)(A) (permit violation)
 - Sec. 6972(a)(1)(B) (ISE)
- Targets: any person, including any past or present generator, past or present transporter, or past or present owner or operator of a TSD who has contributed or who is contributing to the disposal of hazardous waste *which may present an imminent and substantial endangerment (ISE) to health or the environment.*

Litigation Risks

- General observations and a case study
 - RCRA ISE + wrongful death
 - Key characteristics of litigation targets
 - Scientific debate and uncertainty can be obstacles to early settlement
 - Battle of scientific experts & exposure
 - Intense focus on use/meaning of “screening” levels
 - Lessons learned and being learned

Case Study (7th Circuit – IN, WI, IL)

Some key holdings from 7th Cir. Ct of Appeals include:

- Exceeding a regulatory screening level does not indicate a risk of an adverse effect.
- Court rejected attempts to apply stricter screening levels adopted by different regions and states. (forum shopping)
- It is a misuse of screening levels to pick the most stringent level and then suggest that any higher level of exposure creates a risk of adverse health effects. They do not represent thresholds for adverse effects, either, as they have multiple layers of conservatism.

Case Study

Some key holdings from 7th Cir. Ct of Appeals include:

- Screening levels do not reflect levels above which serious health effects may occur. Instead, they represent levels at which no effects are expected.
- Caution – this only applies where screening levels are utilized. Compare, New Jersey, New York, IL, MI (which have rules) as opposed to guidance

Final Thoughts

- Evaluate the risk and your client's risk tolerance
- Perhaps we are in a new era of “risk-based” cleanups
 - Develop an integrated approach to reduce source areas and manage residual risk.
 - Use of policies and innovative technologies.
 - Find the appropriate balance to manage both current and future exposures and associated liability.

Final Thoughts

- Develop and tailor activity and land use restrictions for your Site.
- There is also relevant and helpful guidance (e.g., CO or IC Plan) that can be tailored & effectively implemented.
- Mitigation Considerations:
 - There are new technologies and approaches to manage potential long term monitoring obligations.
 - Protect Environmental [Vapor Sentinel Environmental Remote Monitoring System](#)

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