

According to Ohio EPA staff, the agency soon will be sending letters to hundreds of sites throughout the state requesting that property owners take action to evaluate known trichloroethylene (TCE) contamination.

For more than a year, the Ohio Environmental Protection Agency (EPA) has been reviewing records and investigating sites that may be contaminated with TCE. Now, Ohio EPA intends to request that property owners take further action. In a recent meeting with environmental consultants, Ohio EPA announced its intention to send letters informing property owners that "TCE may be a health concern at their property." In these letters, Ohio EPA plans to ask property owners to "evaluate health risks both on and off their property" and notify Ohio EPA of the property owners' "plan of action and results" regarding TCE. Ohio EPA has not yet shared the letters with the public, but noted that the letters will be sent "in the coming weeks." Sites targeted by Ohio EPA include some that have satisfied all of Ohio EPA's Voluntary Action Program (VAP) no further action criteria. This is significant for site owners and interested parties who believed all environmental issues on their properties have been addressed.

Ohio EPA has been evaluating TCE and potential subsurface vapor intrusion in buildings for quite some time. In August 2016, it issued a new guidance document titled "Recommendations Regarding Response Action Levels and Timeframes for Common Contaminants of Concern at Vapor Intrusion Sites in Ohio." The guidance establishes response actions based on concentrations of certain chemicals and seeks prompt response actions within recommended time frames when certain levels of contaminants are exceeded. In some cases, for TCE and vapor intrusion, Ohio EPA's guidance recommends action within a matter of days. The guidance is reportedly based upon US EPA's Integrated Risk Information System's updated toxicity assessment for TCE released in September 2011. Based on this toxicity assessment update, the guidance now includes "accelerated," "urgent" and "imminent hazard" response action levels for TCE in indoor air, ground water and sub-slab soil gas. Although the guidance expressly states that it "does not have the force of law," Ohio EPA recommends use of the guidance's action levels and time frames for response at sites that are being investigated for vapor intrusion and TCE.

US EPA's model with accelerated response action levels for TCE indoor air exposures has not been implemented or agreed with by all states or US EPA regions. Nevertheless, Ohio EPA appears to be using the new conservative standards in its 2016 guidance as a basis for notifying property owners that "acceptable health based levels for TCE have been lowered" and property owners should evaluate health risks at their sites. Again, Ohio EPA is taking this action without first changing its own regulations and seeking public input.

Ohio EPA recognized that the TCE letters may come as a surprise to many people who believed their sites were cleaned up years ago. As noted, some letters will be sent to sites that completed all work under the VAP and already received a Covenant Not to Sue (CNS) from Ohio EPA. For these sites, Ohio EPA noted that the property owner "may still receive a letter" because a "[h]ealth concern may still exist" even if the VAP applicable standards were not exceeded. This should alarm many property owners, certified professionals and others who properly completed a VAP cleanup, received a CNS and believed that their work at a site was finished long ago – only now to find out that Ohio EPA is seeking more work be done at the site (and possibly off-site, too). This also appears contrary to the principles in the VAP statute, which states that the CNS will remain in effect as long as the property complied with the applicable standards that were in effect at the time the volunteer entered the VAP.

Ohio EPA's letters requesting property owners take action at their own property and at neighboring properties trigger many legal issues that should be carefully evaluated. Further, Ohio EPA's notice of "potential" health risks will require property owners, adjacent landowners and environmental professionals to carefully weigh liability and risk issues. If you have a site receiving such a letter from Ohio EPA, or if you need more information, please contact your Squire Patton Boggs attorney.

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