ENVIRONMENTAL NEWS & HIGHLIGHTS
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Presented by:
EXCALIBUR GROUP, LLC
Environmental Consultants, Engineers & Liability Management Experts

This latest **EXCALIBUR** bulletin presents several emerging developments and in-progress initiatives potentially significant to regulated industries and environmental projects regionally and nationally.

Tips for Environmental Due Diligence in Business Transactions

In this blog post from Thompson Coburn, LLP, the author tackles "how much and to what extent businesses should conduct environmental due diligence" and concludes the answers for buyers "depend on the nature of the transaction and the anticipated use of the property after purchase". The author goes on to offer five tips for buyers to gauge the appropriate level of environmental due diligence: (1) identify the types of environmental liabilities that could be implicated; (2) understand the limitations of a Phase I environmental site assessment; (3) consider using additional due diligence methods; (4) remember that asset purchasers are not immune from a seller's environmental liabilities; and (5) talk to your environmental attorney early in the transaction. However, sellers are encouraged to follow these tips as well "so that they can better anticipate the types and level of due diligence that a buyer may perform (and understand their reasons for doing so)." **View Discussion.**

Addressing a Consultant's Potential Phase I ESA Liability to a Prospective Purchaser—Recent California Court Case

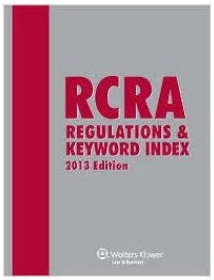
In this blog from Preti, Flaherty, Beliveau & Pachios, LLP, a recent California appeals court case (*Mao v. PIERS Environmental Services, Inc.*) highlights the importance of careful contract and Phase I ESA report language for environmental consultants to minimize exposure to potential liability. In this case, a purchaser of a commercial land parcel had relied upon the findings of a Phase I ESA and a limited Phase II investigation that the environmental consultant had prepared for the exclusive use of the lender. Five years later, the land owner hired the same consultant to update the Phase I ESA. The updated Phase I ESA report repeated the earlier findings as to the former presence of a gasoline station on the property, as well as the prior limited Phase II investigation finding of no evidence of groundwater impact. The land owner subsequently sold the property to a closely held corporation of which the land owner was its president and majority shareholder. Four years later, this corporation hired a different consultant to perform another Phase II investigation, which identified petroleum contamination on the property that required another three years to address before site closure was granted. In filing the lawsuit, the land owner/corporation president claimed the original environmental consultant "failed to meet the appropriate standard of care in its performance of the [original] Phase I and II assessments" prior to her purchase of the property some 16 years earlier. Based on the clear contractual language and testimony, the appeals court disagreed noting, "It is…not enough that a prospective buyer of a property who read and relies on environmental reports prepared for the lender's due diligence purposes may foreseeably be harmed by inaccuracies in the report…The intent to affect or protect [the buyer] or future owner was at best secondary." The authors note several key takeaways for environmental consultants: (1) the firm's contract language and reports must clearly specify who may rely on the assessments, especially assessments conducted for parties other than the prospective purchaser; (2) reports should contain specific language noting that other parties may not rely on any aspect of the assessment absent receipt of a written reliance letter; (3) careful documentation of any scope of work limitations imposed by the client; and (4) long-term preservation of project records. The authors conclude, "[These] precautions alone will not prevent a lawsuit from being filed against a consultant in the event of later-discovered contamination," but "a thorough review of standard ESA contracts and templates for ESA reports to

ensure that these issues are proactively addressed…will be of significant benefit in defending claims in such lawsuits." **Article Link.**

Insured vs. Insurer's Rights to Select Environmental Counsel/Consultant

In this blog posted by Mitchell Williams Selig Gates & Woodyard PLLC, a 12/27/16 decision out of the United States District Court for the Southern District of Indiana is discussed as it pertains to the insured versus the insurer's right to select environmental counsel of consultant. In this case, the plaintiff sought not to be required to use the environmental counsel/consultant retained by its insurance companies through whom the defendant was provided insurance coverage for certain environmental liabilities. Dissatisfied with the environmental work undertaken by a predecessor owner of the company and property, the defendant had hired its own environmental counsel and consultant and sought reimbursement of its costs from its insurers. The insurers allegedly did not react to the defendant's notice that it had retained its own counsel and consultant, nor had the insurer objected to the work and, in fact, had paid the resulting invoices. However, after the predecessor company presented the insured with a $350,000 bill for contamination-related expenses, the insurer sought to take over the defense of the claims. The insured argued irreparable harm, including jeopardizing the working relationship with the state environmental agency with oversight, whereas the insurers argued they had an inherent right to control defense of the claims. The court rejected what it saw as the insured's highly speculative causes of harm and affirmed the insurers' right to select defense counsel absent any conflict of interest. **Full Text.**

Hazardous Waste Management Unit Post-Closure Care:
New USEPA Guidance on Modifying Length of Post-Closure Care Period



This blog post by Katten Muchin Rosenman, LLP references new guidance issued by the USEPA on 1/4/17 for evaluating possible adjustments to the length of the post-closure care period for hazardous waste disposal facilities under the Resource Conservation and Recovery Act (RCRA). The new guidance ("Guidelines for Evaluating the Post-Closure Care for Hazardous Waste Disposal Facilities under Subtitle C of RCRA") identifies ten criteria for considering the length of the post-closure care period. These criteria are: (1) waste treatment (how the waste may have been treated prior to disposal and whether it was subject to the land disposal restriction); (2) the nature of the hazardous was remaining in the unit; (3) unit type/design; (4) leachate; 5) groundwater; (6) siting and geology/hydrogeology; (7) facility history; (8) gas collection system integrity; (9) integrity of cover system; and (10) long-term care. The guidance also recommends starting the evaluation process for hazardous waste management unit approaching the end of the post-closure care period at least 18 months before the expiration of the post-closure period or permit. **Link.**

Changing Chapter 245 Regulations for Storage Tanks in PA

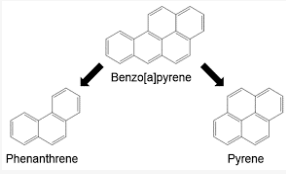
On 12/6/16, the Pennsylvania Department of Environmental Protection (PADEP) unveiled its proposed changes to the Chapter 245 regulations and shared drafts of its revised technical guidance for the closure of aboveground and underground storage tanks at a meeting of the Storage Tank Advisory Committee. In this blog posted by Manko Gold Katcher & Fox, links are provided to the proposed rulemaking and technical guidance drafts. The author notes that many of the changes being proposed were triggered by the July 2015 changes to the corresponding federal regulations, which were prompted by the Energy Policy Act of 2005 legislation. For most of the new changes, the PADEP is proposing only a one-year "phase-in" period to afford tank owners/operators time to come into compliance by the 2018 deadline set by the federal regulations. Among others, the proposed changes address new requirements for: periodic operation and maintenance and walk-through inspections; providing secondary containment; training of storage tank operators; ensuring the compatibility of the storage tank components to higher ethanol-containing gasoline blends and biodiesel fuel blends; and acceptable types of overfill prevention equipment. Regulations pertaining to underground tanks associated with emergency generators are also

proposed. **Article Link.**

New Administration Freezes Implementation of Several Environmental Regulations

Shortly after taking office, President Trump issued an executive memorandum to all executive departments and agency heads directing them to: (1) send no federal regulations (subject to certain exceptions) for publishing in the Federal Register until the appointed department/agency head reviews and approves the regulation; (2) immediately withdraw any federal regulations already sent for publishing, but have not yet been published so that those regulations may be reviewed; and (3) delay the effective date by 60 days for any federal regulation that has been published, but has yet to take effect. In response to this memorandum, the U.S. Environmental Protection Agency (USEPA) delayed the effective dates for some 30 regulations it had issued until 3/21/17. Among these regulations were the rule adding vapor intrusion as a contaminant pathway considered in placing a site on the Superfund National Priorities List; a rule governing the administrative assessment of civil penalties; and a rule revising elements of the National Emission Standards for Hazardous Air Pollutants for radon emissions from operating mill tailings. The executive memorandum does exempt regulations subject to statutory or judicial deadlines or regulations that affect critical health, safety, financial, or national security matters, but, even in these instances, the Director of the Office of Management and Budget needs to be notified and will determine whether the exclusion is appropriate. This action does not affect any state-level environmental regulations. **Full Article.**

Possible Lowered Soil Cleanup Standards for Benzo[a]pyrene



In January 2017, the USEPA updated/revised its toxicological parameters for benzo[a]pyrene—a polynuclear aromatic hydrocarbon derived from the combustion of organic matter (wood, coal, oil, gasoline, diesel fuel, etc.), which renders it a frequently encountered contaminant in urban and industrial areas undergoing redevelopment. These toxicological parameters are often used by regulatory agencies in develop risk-based cleanup standards for the remediation of contaminated sites. In its *Final Assessment of Benzo[a]pyrene*, the Agency notes that benzo[a]pyrene, while still a carcinogen, is not as toxicologically potent as previously thought. Consequently, as state regulatory agencies incorporate this new toxicity criteria into the calculation of their cleanup standards, less stringent cleanup standards for benzo[a]pyrene may result. More urban fill materials removed from brownfield redevelopment sites may also qualify as “clean” fill. **More.**

NC DEQ Unable to Develop a Uniform Risk Management Approach for Residual Contamination Impacts to Public Right-of-Ways in Voluntary Cleanups

Recently, EXCALIBUR interviewed a representative of the Inactive Waste Sites Program in the Division of Waste Management at the North Carolina Dept. of Environmental Quality (NC DEQ) about efforts to establish an environmental covenant waiver approach for dealing with impacted public right-of-ways (ROWs) in the context of a voluntary site cleanup. Such an instance can arise when impacted soil and/or groundwater is found to extend off a source property undergoing a voluntary cleanup into the abutting or adjoining roads and ROWs. In North Carolina, there has reportedly been little progress so far towards developing consensus for Voluntary Cleanup Program guidance and means (e.g., covenant waivers) for dealing with environmental contamination affecting roadways and ROWs. Therefore, the NC DEQ has decided to tackle these situations on a case-by-case basis for now. However, before the NC DEQ may get involved, it expects the Registered Environmental Consultant (REC) to exhaust all efforts to secure access to the affected properties, including the public roads and ROWs. Clearly, the preference is for the REC to gain the information necessary for a complete health risk assessment of all potential exposure pathways, including the on- and off-property construction/utility worker exposure pathways. Otherwise, the NC DEQ will only get involved should the owner(s) of an affected property decline access outright, or if the parties cannot agree upon those restrictions necessary to eliminate potential exposure pathways.

Risk Evaluation under the New Toxic Substances Control Act (TSCA)

The USEPA issued a proposed rule on 1/12/17 establishing its process for the conduct of the risk evaluations that are to determine whether a manufactured and currently in-use chemical substance poses an unreasonable risk to human health or the environment. In the rule, the Agency identifies the scope, hazard and exposure assessments, risk characterization, and risk determination components of the risk evaluation process, which it will apply to its prioritized list of chemical substances, or at the behest of a manufacturer or importer. Per TSCA section 6(b)(4), this risk evaluation process must "determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation…under the conditions of use." Each risk evaluation must: (1) "integrate and assess available information on hazards and exposure for the conditions of use of the chemical substance, including information on specific risks of injury to health or the environment and information on potentially exposed or susceptible subpopulations;" (2) "describe whether aggregate or sentinel exposures were considered and the basis for that consideration;" (3) "take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use;" and (4) "describe the weight of scientific evidence for the identified hazards and exposure." The Agency intends to first apply this new risk evaluation process to the ten chemicals that were identified as "high-priority substances" in the 2014 update of the TSCA Work Plan for Chemical Assessments. **Full Article.**

What Qualifies You as an Additional Insured?

In this blog from Seyfarth Shaw LLP, the author reports on an Appellate Division, First Department court case in New York State that emphasizes making sure the language of the contractual arrangements between the parties and the language of any applicable insurance policies work together to provide any additional insured with coverage. In this case (G*ilbane Building Co. v. St. Paul Fire and Marine Insurance*), the prime contractor had named a retained construction manager as an "additional insured" to be covered by its contractor liability insurance policy in conformance with the requirements of the prime contractor's contract with its client. However, the construction manager and the prime contractor did not enter into a specific contractual arrangement. Later, when a construction quality dispute arose, the construction manager, understanding that he had been designated as an additional insured, sought coverage under the prime contractor's insurance policy. A lower court ruled in favor of the construction manager, but, on appeal, the ruling was reversed based on the language of the insurance policy. The policy expressly stated an additional insured was "any person or organization with whom you have agreed to add as an additional insured by written contract. Since there had not been any contract executed between the prime contractor and the construction manager, the appeals court ruled the construction manager was not covered under the prime contractor's insurance policy. The author concludes, "*Gilbane* makes clear that a party seeking coverage as an additional insured by virtue of a contractual provision must carefully review both the contract and the insurance policy to make sure that they work together to provide the coverage sought." **More.**

The PADEP Clean Streams Law Continuing-Violations Policy is Limited

Manko Gold Katcher & Fox highlights a recent PA Court decision (*EQT Production Co. v. Department of Environmental Protection*) limiting the Department's continuing-violations penalty policy under the Clean Streams Law. After a release from a natural gas well pad leak was found to have impacted groundwater downgradient from the leak, the PA Department of Environmental Protection proposed a $1,270,871 civil penalty based on 878 days of "new, continuing, and ongoing impacts to the multiple waters of the Commonwealth." In response, the plaintiff argued that a violation of the applicable sections of the Clean Streams Law can occur only on the individual days that an industrial waste is initially discharged to or enters into the waters of the Commonwealth from an outside source. Therefore, once the discharge ceases, there is no additional violation of the law. The Department argued that the additional violations accrue each day the discharged

substance remains in the water of the Commonwealth. The Commonwealth Court decided in favor of the plaintiff ruling that the Department's continuing violations interpretation ignored the "discharger's underlying culpable actions or omissions on which the Clean Streams Law penalty provision is based." The decision also noted that the Department's interpretation presented a never-ending accrual of violations tied to the mere presence of waste in waters of the Commonwealth thereby expanding the law from one penalizing the discharge of industrial wastes to one penalizing a failure to accomplish an immediate and complete remediation of the discharged waste. The author notes that given the implications of this decision for the continuing-violations policy, the Department is likely to file an appeal with the PA Supreme Court. **Read More.**

Court Case Ruling Specifies Compliance with all Incorporated Quality Standards in a National Pollution Discharge Elimination System (NPDES) Permit

A blog posting from Beveridge & Diamond PC draws attention to a recent Fourth Circuit decision, *Ohio Valley Environmental Coalition v. Fola Coal Co.* In this case, the NPDES permit issued to the defendant incorporated language requiring compliance with all state water quality standards, which included narrative standards not reflected in the effluent limits of the permit. In their suit, the plaintiffs alleged non-compliance with two of Waste Virginia's narrative water quality standards, which had been incorporated into the 2009 permit issued to the defendant through language that prohibited discharges that "cause violation of applicable water quality standards adopted by the state." Lower court rulings found the defendant liable because its discharges contain sufficient ions and sulfates to increase the conductivity of the receiving waters, even though it was acknowledged that there had been no exceedances of the permit's effluent limits. Upon appeal, the Fourth Circuit affirmed the defendant's liability rejecting the argument that compliance with the effluent limits afforded a permit shield because: (a) the language of the permit was intended to apply to the discharger, not the state, (b) the defendant had disclosed the sulfate and ion content of its discharges; and (c) per the decision reached in *Piney Run Preservation Association v. County Commissioners*, the shield from liability required compliance with all permitting terms, not just the effluent limits. The author concludes, "The decision raises important questions for dischargers as they take stock of their compliance obligations and seek permit language that would reduce their potential exposure…they may find they need to be aware of how their discharges might impact compliance with a narrative standard." **Link.**

Partners Corner

This quarter EXCALIBUR is featuring one of our trusted partners, ALL4 Inc., with whom we have enjoyed an excellent and mutually beneficial working relationship in addressing the air compliance and permitting needs of our clients. ALL4 is a nationally recognized consulting services firm providing the full gamut of air quality compliance, permitting, and modeling services from evaluating rule applicability, managing complex emissions testing programs, and serving as expert witnesses in litigation proceedings. ALL4 provides support in a variety of areas, including Title V, New Source Review, and State permit requirements; Maximum Achievable Control Technology Standards; New Source Performance Standards; process monitoring; emissions testing; emissions trading; and various other air quality compliance and permitting topics.

Recently, EXCALIBUR and ALL4 collaborated on facilitating a chemical plant acquisition on behalf of one of EXCALIBUR's multi-national clients. EXCALIBUR was hired to provide environmental due diligence, manufacturing equipment valuations, environmental liability quantification, engineering, and permitting assistance to separate out the purchase a PVC-additive manufacturing operation from within a larger chemical manufacturing facility located in PA. EXCALIBUR teamed with ALL4 to address the air emissions evaluation and secure an operating permit for the acquired plant's air emission sources. ALL4 expertly navigated an intricate permitting process that seamlessly secured a state only operating permit for the acquired plant operations in record time and without any production down-time.

In this series of blog articles, ALL4 looks ahead to what it believes could be the substantive regulatory

changes, air quality monitoring and modeling technology, and other technical developments on the near-term horizon for industrial, oil & gas industry, and other operators of regulated air emission sources. **All4 Web Link.**

EXCALIBUR manages and mitigates environmental risks and liabilities with clients' business objectives in mind. **EXCALIBUR** develops better solutions more compatible with its customer's operations and budgets. Clients hire **EXCALIBUR** again and again because it is loyal, innovative, resourceful, and results-oriented. In our business, best ideas lead to client advocacy wins. Read what our customers say at **Customer Commendations**. For more information on **EXCALIBUR** visit **www.excaliburgrpllc.com** or email us at info@excaliburgrpllc.com.