# 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.

### USEPA's Final Report on the Impacts of Hydraulic Fracturing Activities on Drinking Water Resources

Recently, the USEPA released its report on the scientific foundation for possible impacts on hydraulic fracturing (aka fracking) activities on drinking water resources. The report, requested by Congress, concludes that hydraulic fracturing activities can impact drinking water resources under some circumstances, and goes on to identify the conditions under which these impacts can be more frequent or severe. The Agency identified instances of impacts on drinking water during each of five stages of the hydraulic fracturing water cycle: (1) acquiring the water used in hydraulic fracturing: (2) mixing the water with chemical additives to formulate the hydraulic fracturing fluids; (3) injecting the hydraulic fracturing fluids to create fractures in the target zone; (4) collecting the returned wastewater; and (5) disposal and/or reuse of the returned wastewater. The conditions under which the impacts associated with hydraulic fracturing activities can be most frequent or severe are identified as: (a) withdrawing water in times or areas of low water availability; (b) spills of the hydraulic fracturing fluids; (c) injecting hydraulic fracturing fluids into wells with inadequate integrity; (d) injecting hydraulic fracturing fluids directly into groundwater resources; (e) discharging returned hydraulic fracturing wastewater that has been treated inadequately; and (f) disposal or storage of returned hydraulic fracturing wastewater in unlined pits. The report also identifies data gaps and uncertainties that "limited EPA's ability to fully assess the potential impacts on drinking water resources both locally and nationally." **View Entire Report.**

### When a Current Owner Might not be the "Current Owner" under CERCLA

A blog posted by Davis Wright Tremaine LLP examines a recent decision by the U.S. District Court for the Eastern District of PA that considered the temporal aspect of the term "current owner or operator" under CERCLA (*Commonwealth of PA, Department of Environmental Protection v. Trainer Custom Chemical LLC, et al*). In this case, the PA DEP filed suit against a company and its current ownership seeking reimbursement for recovery costs incurred by the Commonwealth at the company's facility. However, nearly of all of the costs had been incurred when the facility was owned by another company, i.e., more than 3 years before the present owners had taken title to the facility. Citing the only precedent it could find (a decision in the Ninth

Circuit), the district court held the defendants were not liable to pay the outstanding response costs because these costs had been incurred prior to their purchase of the property. In effect, the author notes, the district court (like the Ninth Circuit) reasoned that the reference to "current owner or operator" in CERCLA means the owner or operator at the time the response costs were incurred and not the owner or operator when the suit is filed. The PA DEP has appealed this decision to the Third Circuit Court of Appeals. **Article Link.**

**Protecting Lenders Against**
**Environmental Liability for Foreclosed Properties**

In this blog from Murtha Cullina LLP, lenders are afforded a refresher on protecting against potential environmental liability at properties "acquired" by the lender through foreclosure. The article notes that there are provisions in federal and some state laws that protect lenders from liability for environmental conditions provided certain requirements are met. These requirements are the: (1) acquiring party must satisfy the statutory definition of a lender; (2) lender must not have participated in management of the operations at the property prior to foreclosure; (3) lender's actions in winding-up business operations at the property or in selling the property must not have specifically caused a hazardous substance release; and (4) lender must sell the property at the "earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." The blog author notes, "[A] lender should pay careful attention to its foreclosure process to ensure it remains exempt from liability [because] if [its] actions take it out of the safe harbor from liability, a lender could find itself liable for all environmental contamination on a property." **Full Text.**

**Vapor Intrusion Added to the Hazard Ranking System for Superfund**

The USEPA has released a final rule adding the consideration of "subsurface intrusion" as a component of the Superfund Hazard Ranking System (HRS) through which contaminated sites are assessed for possible listing on the National Priorities List (NPL). The term "subsurface intrusion" is defined as the migration of hazardous substances, pollutants, and contaminants from the unsaturated zone or shallow groundwater into overlying structures, typically via the vapor phase. Previously, the Agency had only considered subsurface intrusion at a site when it was already listed on the NPL due to another contamination issue or concern (i.e., impacts to air, soil, groundwater, and/or surface water). Now, the Agency's site assessment program can "address two additional types of sites—those that either have only subsurface intrusion issues, and those with subsurface intrusion issues that are coincident with a groundwater or soil contamination problem." Observers note that potentially hundreds of sites could be added to the NPL that would have otherwise not qualified for listing in the past. On the other hand, only NPL-listed sites are eligible to receive federal funding for a long-term cleanup. However, the Agency's news release on the final rule notes that "this regulatory change does not affect the status of sites currently on or proposed to be added to the NPL…it only augments the criteria for applying the HRS to sites being evaluated in the future." **More Information.**

**Board of Trustees for State Storage Tank Funds Potentially Liable**

The Missouri State Supreme Court in *City of Harrisonville v. McCall Service Stations* issued an interesting ruling with potential import for all insurance-based leaking petroleum storage tank state funds. In this case, the City of Harrisonville had filed suit against the Missouri Fund alleging negligent and fraudulent representation due to unexpected increased cleanup costs that were not paid for by the Fund even though the Fund had apparently promised to reimburse these costs. The original trial resulted in the award of both compensatory and punitive damages to the City of Harrisonville in excess of $8 million. On appeal, the Missouri Supreme Court ruled that the damage awards against the Fund were improper as they are "beyond the coverage articulated in the Fund's enabling statutes," which limits payments for a Fund participant's cleanup costs and for third party claims involving property damage or bodily injury. Moreover, the ruling held that the Fund, which is merely a state treasury account and not a legal person or entity, could not be liable for its conduct. However, the court went on to note that under Missouri law, any claims related to the Fund could only be brought against its Board of Trustees. In fact, the case was sent back to the circuit court for reconsideration of the compensatory damages award "because the allegations in the City's petition may state a cause of action against the Funds' Board of Trustees." The blog article posted by Thompson Coburn LLP observes, "Owners and operators of leaking USTs in Missouri should take note of this decision when considering how to pursue cleanup costs" since it suggests the Board of Trustees, not the Fund itself, is the proper defendant. However, Excalibur observes that this case may have broader applicability to all state leaking petroleum storage tank funds that function similarly to the Fund in Missouri. For example, as a result of this case, might the Board of Trustees/Directors of state leaking petroleum storage tank insurance funds become vulnerable to allegations that insufficient *fund* oversight of any large capital investments funded under a given claim (e.g., installation, operation, and maintenance of a remedial system) contributed to an exceedance of the coverage claim limit thereby exposing the participant to additional unnecessary expenditures? Therefore, although, on its face, this case only has direct applicability in Missouri, it does appear to raise a warning flag for the boards of directors or trustees of leaking petroleum storage tank insurance funds because, as the authors note, "the court has significantly reset the rules regarding how and how much UST owners and operators may collect from [a] fund." **Article Link.**

**Hazardous Waste Generator Improvements Rule Finalized by the USEPA**

On October 28, 2016, the USEPA finalized its rule modifying many important aspects of its requirements for generators of regulated hazardous wastes under the Resource Conservation and Recovery Act (RCRA). The final rule offers clarifications for the existing regulations with the aim of making the generator requirements more user-friendly, addresses identified "gaps" in the existing regulations, and provides for some additional flexibility vis-à-vis certain requirements. In a blog article from Beveridge & Diamond PC, the author offers a lengthy treatment of all the rule changes and even discusses other controversial aspects of the rule as it was proposed by the Agency, but which did not survive to be included in the final rule. Key changes include: (1) renaming Conditionally Exempt Small-Quantity Generators as Very Small-Quantity Generators (VSQGs); (2) VSQGs and Small Quantity Generators will not automatically become subject to the next higher level of generator requirements when an episodic event results in a short-term increase in the quantity of hazardous waste generated; (3) allowing VSQGs to transport hazardous wastes to another facility under the control of the same entity that qualifies as a Large Quantity Generator; (4) Small

Quantity Generators must re-up their status with the USEPA every 4 years; and (5) Small and Large Quantity Generators must hang on to their hazardous waste determination records for 3 years. **Full Article.**

**Addressing Contaminated Property through Voluntary Cleanup Programs**

In this article posted by Greensfelder Hemker & Gale PC, the author offers four tips for companies pursuing the cleanup of contaminated property through voluntary cleanup programs (VCP) at the state level. There are three possible goals for choosing to enter a state-level VCP to remediate a contaminated property. First, the property owner looks to avoid receiving a notice of violation from and/or preclude an enforcement action by the state due to the presence of environmental contamination on the property. Second, most VCPs permit the responsible party to “control” the cleanup action pursuant to a previously defined process. Third, following through VCP process all the way to its conclusion often secures some form of a “no further action” letter or “certificate of completion” that will signal regulatory satisfaction with the end result of the remedial action. The four tips in considering whether entering a VCP may be a good option are: (1) do your homework on the state-specific process; (2) consider the likely overall timing of the VCP process vs. your own business timeline for the property; (3) hire an experienced legal and consulting team; and (4) don’t neglect to consider potential vapor intrusion impacts. **More.**

**First Ten Chemicals Slated for Risk Evaluation under the “New” Toxic Substances Control Act (TSCA )**

On 11/29/16, the USEPA announced the ten chemicals used in consumer products and services that are to be subject to the risk evaluation process under the recently revised TSCA legislation, and which might face restrictions if found to present an “unreasonable risk of injury to health or the environment.” The ten chemicals are: 1,4-dioxane; 1-bromopropane; asbestos; carbon tetrachloride; cyclic aliphatic bromide cluster; methylene chloride; n-methylpyrrolidone; pigment violet 29; tetrachloroethylene; and trichloroethylene. Conduct of the risk evaluation will involve examining hazard and exposure data for each substance to see whether restrictions on their use, or even an outright ban, might be warranted to mitigate risks to human health and/or the environment. **Article Link.**

**A New Twist: Prosecuting OSHA Cases as Violations of Environmental Laws**

In this blog post from K&L Gates, LLP, the authors relate a recent case in Texas where the U.S. Department of Justice (DOJ) pursued what was principally an alleged violation under OSHA laws and standards as an environmental crime. In a December 2015 DOJ memorandum, federal prosecutors were encouraged to work with the Environmental Crimes Section of the DOJ to prosecute worker endangerment violations under various environmental laws. One of the stated reasons was to take advantage of pursuing violations of environmental laws as felonies whereas violations of OSHA requirements are punishable as misdemeanors only. In the Texas case, contract workers welding a pipeline connected to a petroleum products storage tank that had not been drained, isolated, and decontaminated per OSHA regulations sparked an explosion and fire causing one death and multiple injuries. Instead of prosecuting the facility owner/operator for alleged OSHA

violations, a case was brought under the Clean Air Act for "negligently releasing to the ambient air a hazardous air pollutant and at the time negligently placing another person in imminent danger of death or serious bodily injury…" In fact, the authors note that the "information filed with the court does not include any charges directly alleging violations of the OSHA Act or regulations." The blog goes on to observe, "[I]ndustries experiencing serious worker injuries and/or worker deaths may expect the DOJ to utilize environmental statutes to enforce what would otherwise appear to be worker safety violations." **Full Article.**

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