

# 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.

## Systematic Review of UST Cleanup Projects Accelerate Cleanups



A careered regulator, Jeff Kuhn, notes that the USEPA's National Cleanup Backlog Study found that the LUST cleanup backlog represents a large number of groundwater-contaminated sites in the US. The USEPA found that groundwater is still the primary contaminant receptor and the reason that LUST sites remain open and "backlogged". Since groundwater-impacted sites are the most difficult and the most-costly sites to remediate with limitations of most in-situ remediation technologies, remediation programs for these sites require continual site optimization efforts. One of the USEPA recommendations that the author feels should be highlighted is the need to use a systematic process to explore opportunities to accelerate cleanups and reach closure. The article appears in June 2017 Bulletin 82 L.U.S.T. Line <http://neiwppcc.org/lustline>. The full list of USEPA's opportunities for UST cleanups excerpted from National Cleanup Backlog Study can be found at: [Web Link](#)

## Environmental Liability Insurance Market Trends

In this Business Insurance article, several key insurance industry trends noted are: (1) increasing number of mold claims, especially in the hospitality sector; (2) environmental insurance coverage for development and redevelopment projects; (3) the handling of vapor intrusion claims; (4) increased risk associated with aging petroleum pipeline infrastructure; and (5) the continuing inability of some environmental insurance policyholders previously insured with American International Group (AIG) to find a new insurer. Excalibur notes that the article suggests particular challenges are posed by older sites where the contamination had been cleaned up pursuant to less stringent requirements (including the absence of any assessment of potential vapor intrusion), or which had not considered contaminants now on the regulator's radar screen (e.g., 1,4-dioxane, perfluorooctanesulfonic acid, and perfluorooctanoic acid.) [Article Link](#).



## States Increasingly Revisiting Sites to Assess the Vapor Intrusion (VI) Pathway



In this blog, Pepper Hamilton LLP notes that states are increasingly revisiting sites where the VI pathway was either not evaluated or evaluated insufficiently, including sites that were formerly remediated and closed. The article focuses on a recent Michigan Dept. of Environmental Quality (MDEQ) announcement that some 4,000 sites in that state would be re-evaluated for VI risks, but notes similar activity occurring in many other states, including New York, Massachusetts, and New Jersey. The article goes on to note that this initiative is underway at the same time the MDEQ is developing new cleanup criteria, including VI criteria, under Part 201 of the Natural Resources and Environmental Protection Act. The author notes, “While the outcome of the process to establish new Part 201 criteria is not yet complete...[t]he VI screening process will become more stringent, criteria will be lowered for some chemicals, and there will be heightened regulatory scrutiny of the VI pathway...” The article goes on to discuss six potential implications for the regulated community in Michigan, but most of these implications probably apply more broadly in all the states revisiting the screening levels for assessments of the VI pathway. **Full Text.**

## Insurance & Remedial Planning for Emerging Contaminants

In this posting from McCarter & English LLP, the author advises examining remediation obligations in the face of “regulators beginning to target emerging contaminants and revising relevant action levels.” As defined by the U.S. Geological Survey, an emerging contaminant is “any synthetic or naturally-occurring chemical or any microorganism that is not commonly monitored in the environment, but has the potential to enter the environment and cause known or suspected adverse ecological and/or human health effects.” As the article points out, 1,4-dioxane and a class of compounds known as per- and polyfluoroalkyl substances (PFAS) are two such emerging contaminants. The U.S. EPA issued a PFAS Drinking Water Health Advisory in May 2016 lowering the combined health advisory level from 200 parts per trillion (ppt) to 70 ppt for perfluorooctanesulfonic acid (PFOS) and perfluorooctanoic acid (PFOA). Since then, however, states have varied from “no action,” adopting the U.S. EPA’s drinking water criterion without change, to adding PFAS compounds in applying the combined total aggregate criterion. Action levels for 1,4-dioxane also vary. The author notes that “PFAS and 1,4-dioxane present two unique issues:” (1) achieving the necessary analytical sensitivity levels, and (2) requiring the application of both traditional and nontraditional remedial technologies. The author warns that since completed site characterization and remediation focused only on the recognized contaminants at the time, “state agencies have begun requesting that previously characterized and remediated sites be reopened to assess whether evidence suggests that these emerging contaminants may be present in the environment.” Consequently, “potentially impacted parties should start thinking about whether, when, and how to go about addressing the potential risk” that “these emerging contaminants can represent a significant financial burden...” **Link.**



## USEPA Approves Alternative Low Liquid Level Method for UST Containment Sump Testing

A 5/11/17 news release from the Petroleum Marketers Association of America (PMAA) indicates that the USEPA's Office of Underground Storage Tanks (OUST) has approved the PMAA's low liquid level integrity test method for the testing of containment sumps. The testing of UST containment sumps was added by the USEPA in its 2015 revisions of the federal UST regulation. This added requirement (already in place in several states) specified a liquid-



level based testing of all containment sumps used for the interstitial monitoring of piping every 3 years. The Agency's testing method specified filling a sump with enough water to submerge all the penetration points in the sump wall. Believing this testing method would prove "prohibitively expensive for tank owners," the PMAA formed a task force to develop an alternative testing method for the integrity testing of containment sumps. This alternative method, which OUST has approved, would require "filling sumps only to the level of a liquid sensing device equipped with a positive shutdown that is mounted below penetration points in the sump wall." According to the press release, OUST also clarified that: (1) third-party vendors may reuse the water employed for spill bucket and sump testing at other sites; and (2) "if double-walled pipe systems using sumps for interstitial monitoring were installed before the date secondary containment for piping was first required by regulation, the tank owner may instead use leak detectors and annual line testing to meet leak detection requirements." OUST also approved the PMAA's request to permit use of a liquid level audible alarm for overflow prevention if removing an otherwise functional in-tank probe to meet the new visual inspection requirement, would render the probe inoperable. However, it is important to note that while the UST testing requirements in states with authorized UST programs cannot be less stringent than the federal requirements, these states may choose to be more stringent than the federal requirements. Therefore, it remains to be seen how many states will also adopt this alternative low liquid level testing method for containment sumps. A 5/5/17 press release from the PMAA notes that the Omnibus Bill intended to fund federal government spending through 9/30/17 includes \$91.9 million for the federal Leaking UST Trust Fund. [\\_Article Link.](#)

### **USEPA Administrator Seeks Input on Streamlining the Superfund Program**



This blog posting from K&L Gates notes that USEPA Administrator Scott Pruitt has opened a 30-day window of opportunity for stakeholders to provide input on streamlining the federal Superfund program to an Agency task force. According to the article, the task force is to develop recommendations for improving program efficiencies; incentivizing private investment at Superfund sites; improving risk management and consistency in remedy selection; improving stakeholder relations; reducing administrative costs; and using alternative and non-traditional approaches for financing site cleanups. Per the 5/22/17 memorandum, the task force is to offer its recommendations within 30 days. [Full Article.](#)

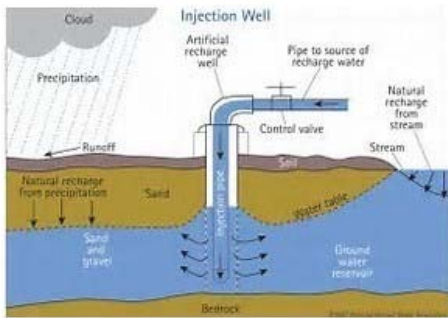
### **Emerging Developments in Liability-Related Insurance**

Allianz Global Corporate & Speciality (AGCS) has issued its *Global Claims Review* report examining liability-related issues and trends that emerged worldwide between 2011 and 2016. In the report, AGCS identifies 10 key emerging developments in liability insurance: (1) large liability claims are



becoming more expensive; (2) environmental claims are increasing; (3) large industrial claims are potentially materializing in Latin America; (4) product liability and recall claims are becoming more challenging; (5) liability is on the rise outside the U.S.; (6) global class actions to become more significant; (7) overseas liability exposures are growing for new global giants; (8) despite fewer accidents, general liability increases globally; (9) technology will likely be a major driver of liability claims; and (10) investing in talent and innovative tools is critical to match the increasingly technical nature of liability claims. In this report, the definition of “environmental claims” considers more than pollution incidents to include climate change-driven and other liability claims related to a much broader conception of environmental damage (e.g., “property damage due to chemical spill; jet fuel leaks into ground; noise pollution claim by resident living under airport flight path; farm crops damaged during heavy industrial dust spill; faulty water treatment facilities cause legionellosis outbreak; etc.”). Interestingly, although the “environmental damage” category comes in as the #7 cause in the top 10 list of liability claim causes according to AGCS, this category presents the second highest average value of a claim (approximately \$2.396M) behind claims caused by vandalism and terrorism. Overall, the report maintains that even though the frequency of such claims is not increasing, as liability claims become more expensive and complex, the potential for larger liability insurance claim payouts is increasing. **More.**

### **Courts Recently Differing on Whether the Clean Water Act Requires a Permit for Discharges of Pollutants to Groundwater**



In this Crowell & Moring LLP posting, the authors note both a rise in litigation and differing outcomes as to whether the Clean Water Act (CWA) requires a permit for pollutant discharges to groundwater when those discharges are believed to ultimately reach waters of the U.S. The article discusses several recent court cases where the plaintiffs have either alleged a CWA permit for discharges for groundwater is or is not required. In the South Carolina case (*Upstate Forever v. Kinder Morgan Energy Partners, L.P.*), the federal district court

dismissed the claim noting that the plaintiffs failed to demonstrate that the discharge to groundwater from a petroleum pipeline leak actually added pollutants to navigable waters. The authors note, “Ultimately, the court held that the migration of pollutants through soil and groundwater constitutes a nonpoint source pollution that is not within the purview of the CWA.” However, the authors also note that various district courts have split on the question of whether it is a CWA violation to discharge pollutants to groundwater that is hydrologically connected to surface waters, including a lower court decision in *Hawaii Wildlife Fund v. County of Maui* where a “conduit theory” of liability was decided, but has been appealed to the Ninth Circuit. The article observes that a possible Ninth Circuit affirmation of the “conduit theory” of liability for pollutant discharges to groundwater that is hydrologically connected to surface waters would differ from decisions in the Fifth and Seventh Circuits arguing that the CWA does not apply even if the groundwater is hydrologically connected to surface waters. The authors conclude, “These recent developments illustrate that CW litigation over alleged groundwater pollution remain active, and conflicting decisions on this issue likely will continue to pile up...,” and project that the question will ultimately be before the U.S. Supreme Court. **Add'l Info.**

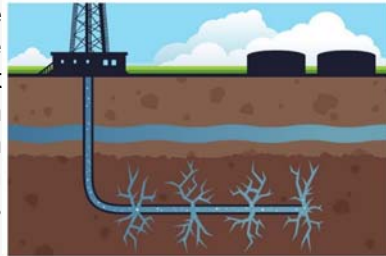
### **Consideration for National Priorities Listing Will Now Include Looking at Subsurface (Vapor) Intrusion**



The USEPA and states use the Hazard Ranking System (HRS) to quantify the relative environmental risks associated with a given contaminated site to decide whether the cumulative risk exceeds the threshold for listing that site on the federal National Priorities List (NPL) qualifying the site for CERCLA funding. On 5/22/17, the USEPA finalized its rule adding subsurface (i.e., vapor) intrusion as a new component of the HRS scoring. Previously, only four exposure pathways were considered—surface water, groundwater, air, and soil—and VI would be considered only if the site posed a risk via one or more of the other exposure pathways. However, under the new rule, consideration of VI and evaluation of the VI risk is added as a component of the soil exposure pathway. The final rule does not change the threshold score for listing on the NPL or how the overall HRS score is calculated. Nevertheless, it is now theoretically possible for a contaminated site to be listed on the NPL only because the risk associated with the VI exposure pathway exceeds the threshold limit. As this blog posting from Spencer Fane LLP notes, adding VI to the HRS “will not affect the status of sites already on or proposed to be added to the NPL.” Furthermore, “USEPA...does not plan to systematically re-evaluate sites that had not previously met the HRS cutoff for inclusion on the NPL,” but will “continue to follow its policy...of typically re-scoring only those sites for which new information becomes available or additional sampling has been performed...”. [Full Article.](#)

### **Study Finds Defective Wells, Not Hydraulic Fracturing, is Principal Cause of Contaminated Water Supply Wells**

A study by researchers from Duke University, Ohio State University, Stanford University, Dartmouth College, and the University of Rochester looked at the methane gas content of more than 130 drinking water supply wells in Pennsylvania and Texas. Eight clusters of wells (seven in PA and one in TX) were found impacted with contamination, including increased levels of methane gas from the Marcellus Shale in PA, the Barnett Shale in TX, and from shallower geologic strata in both states. Using



noble gas and hydrocarbon tracers, the researchers determined the contamination was related to construction problems with the gas extraction wells, including poor well casings and insufficient sealing of the annulus space surrounding the casing, but not as a result of methane migrating into the drinking water aquifers as a result of the horizontal drilling and fracking to extract the natural gas resident in the shale rock. This study made comprehensive use of “stray gas forensics” whereby the chemical signature of the methane was examined to determine its source. The forensic analysis indicated the methane in the impacted water supply wells was neither naturally occurring nor the result of hydraulic fracturing. [More.](#)

### **Does Attorney-Client Privilege Extend to Communications with Environmental Consultants? Maybe Not**

Confidential Document  
Attorney-Client Privilege

This blog post from Jenner & Block, LLP highlights a recent court case in the Northern District of Indiana that highlights an attorney's e-mails exchanged with environmental contractors may not be considered privileged communication "despite best efforts to make them so." In *Valley Forge Insurance v. Hartford Iron & Metal, Inc.*, the court's opinion drew a distinction between attorney-environmental consultant communications that address the conduct of remediation vs. communications prepared for the purposes of litigation. After reviewing 185 e-mails, the court found that "Hartford retained [its] environmental contractors for the primary purpose of providing environmental consulting advice and service...in designing and constructing a new storm water management system, not because Hartford Iron's counsel needed them to 'translate' information into a useable form so that counsel could render legal advice." Certain e-mails were considered subject to the work-product doctrine, but, as the author observes, "The legal privileges are narrowly construed and generally do not protect communications with environmental consultants."

[Read More.](#)

### U.S. Geological Survey Study Shows No Current Link Between Unconventional Oil & Gas Production and Drinking Water Quality

In its article "*Methane and Benzene in Drinking Water Wells Overlying the Eagle Ford, Fayetteville, and Haynesville Shale Hydrocarbon Production Areas*," the U.S. Geological Survey (USGS) suggests that unconventional oil and gas production in areas of Arkansas, Louisiana, and Texas is "currently not a significant source of methane or benzene to drinking water wells." This study is touted as the "first study...to systematically determine the presence of benzene and methane in drinking water wells near unconventional oil and gas production areas in relation to the age of groundwater." Looking at groundwater age provides for assessing "whether the hydrocarbons [present in the aquifer] were from surface or subsurface sources." The USGS collected samples from 116 domestic and public supply wells



that were located as close as 360 feet to unconventional oil and gas wells in these areas of Arkansas, Louisiana, and Texas. Methane was detected in 91% of the sampled wells, but 90% of the detected methane concentrations were below the 10 milligrams per liter threshold set by the Dept. of Interior's Office of Surface Mining, Reclamation, and Enforcement. Most of the detected methane was judged as originating from naturally occurring microbial sources at shallow depths. The study found that "nearly all the benzene detected [in 8% of the wells sampled in Louisiana and Texas]...occurred in old groundwater, indicating it was from subsurface sources such as natural hydrocarbon migration or leaking oil and gas well." In Arkansas, where the groundwater was younger (i.e., less than 40 years old), only one sample contained detectable benzene, which "could be associated with a surface release associated with unconventional oil and gas production activities." The highest benzene concentration detected was nearly 40 times lower than the 5 parts per billion federal standard for benzene in drinking water; however, benzene was detected in groundwater in these study areas about 1.5 to 8 times more frequently than is typical of groundwater elsewhere. Therefore, the study's lead author observed, "Decades or longer may be needed to fully assess the effects of unconventional oil and gas production activities in the quality of groundwater used for drinking water." [Link.](#)

## Coverage & Claim-Handling Issues with Environmental Impairment Liability (EIL) Policies



In this blog post from Zelle LLP, the author reviews the typical coverage and claims-handling issues associated with EIL policies. Noting that most EIL policies are claims-made policies, the author explains that an insured may not have coverage if the pollution condition was not discovered during the policy period and/or if the claim was not submitted during the policy period. Whether the claim was submitted in the required form may also be at issue. The author observes, "EIL policies typically define a 'claim' to mean a written demand seeking a remedy and alleging liability on the part of the insured." However, the author references two cases where the courts split on the question whether a letter received from the state oversight agency constituted a claim under the EIL policy even though in both cases no demand for monetary damages was made. The article goes on to discuss the question of whether the policyholder complied with the requirement to promptly report a claim that arose during the policy period noting that "the lateness of the notice may not be apparent from [the] documentation initially submitted by the policyholder..." Differences in court rulings as to what constitutes a late notice are also discussed. Other topics addressed by the author include: whether defense costs incurred by the insured prior to providing notice of the claim are covered; coverage exclusions when there has been a change in the use of the insured's site to materially increase a covered risk; the availability of other insurance coverage; excluded coverage for intentional acts; availability of fortuity and known loss defenses; and policy exclusions based on prior knowledge of/failure to disclose a prior pollution condition on the policy application. **Web Link.**

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