ENVIRONMENTAL NEWS & HIGHLIGHTS

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Presented by:
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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.

RCRA Hazardous Waste Generator Improvements Rule Now Final

On 5/30/17, the U.S. EPA's rule making over 60 changes to the federal regulatory requirements applicable to generators of regulated hazardous wastes was finalized. As noted in this blog posting from Bergeson & Campbell, the changes include: (i) replacing the former conditionally exempt small quantity generator designation with "very small quantity generator" (VSQG) designation, although the threshold quantity limits remain unchanged: (ii) adding regulatory provisions applicable to VSQGs, including allowing hazardous wastes to be sent to a large quantity generator under the control of the same person/entity prior to transport to a RCRA-designated facility; (iii) allowing VSQGs and small quantity generators (SQGs) to retain those designations if, under certain circumstances, an episodic waste generation event would otherwise prompt coverage under more stringent generator requirements; and (iv) requiring periodic re-notification for SQGs every four years. Other changes include revising the regulations pertaining to closure requirements, waste determinations, contingency plans, and emergency response and preparedness. The new rule also reorganizes how the generator rules are presented. **Read full article.**

The Future of Superfund—What Might be in Store? The Superfund Task Force charged by U.S. EPA Administrator Scott Pruitt to "streamline and improve the Superfund program" has issued its summary report and recommendations (see report link here). According to this article posted by Faegre Baker Daniels, the Task Force's report makes 42 recommendations the USEPA could implement itself to address the five overarching goals set by the Administrator: (1) expediting cleanup and remediation; (2) re-invigorating responsible party cleanup and reuse; (3) encouraging private investment; (4) promoting redevelopment and community revitalization; and (5) engaging partners and stakeholders. The article

notes, “Some of the recommendations…will take some time to be implemented, as they will require guidance…while others will be implemented immediately.” Administrator Pruitt has already identified 11 of the 42 recommendations for immediate action, including asking the USEPA regional offices for a list of sites that meet the cleanup criteria for delisting from the Superfund program. Among the 11 “immediate action” items are: (1) weekly reviews by the Administrator’s office of a priority of list of ten sites that have been on the National Priorities List for at least five years without meaningful movement; (2) optimization reviews are to closely track progress at old sites; (3) use of early action at sites to accelerate partial cleanup during an often extended investigative process; (4) use of indirect cost reductions as an incentive for potentially responsible parties (PRPs) to conduct timely and high quality cleanups; (5) use of Unilateral Administrative Orders to discourage negotiation delays; (6) have regions focus on the re-use potential of sites; and (7) establish strong stakeholder relationships, with communities, PRPs, and potential developers of the sites. The article advises that all interested parties “pay close attention to the reforms and how the overall recommendations will be implemented." **Read full article.**

Further Erosion of the Pollution Exclusion in Insurance Policies

Pillsbury Winthrop Shaw Pittman LLP reference a recent federal court ruling in Pennsylvania related to an insurance case alleging drinking water contamination from corroding pipes. The author notes, “The decision is “a reminder that the pollution exclusion is not nearly as all-encompassing as insurers like to think it is.” In this case (*The Netherlands Insurance Company v. Butler Area School District*), a school district and its administrators had been sued alleging that elementary school students had consumed high levels of lead and copper because excessive chlorine concentrations delivered by a chlorinator in the water system had accelerated corrosion of the water pipes and the leaching of lead and copper into the drinking water. The school district sought defense and indemnity coverage under its liability policies, which included standard exclusions for pollution and lead. The insurers denied coverage citing these exclusions and sought a declaratory judgement to that effect. However, the court ruled the standard pollution exclusion “did not apply to a substance such as lead that is a component of a product that degrades over time rendering the substance incrementally bioavailable.” The court also held that the pollution exclusion was ambiguous since, at this stage, it could not determine whether there had been a “discharge, dispersal, seepage, migration, release or escape of pollutants.” The court also interpreted the lead exclusion in favor of coverage because the language only excluded injury proximately caused by lead. Moreover, since separate injuries were claimed as a result of the exposure to copper, the insurers had a duty to defend that could not be sidestepped through the lead exclusion. The authors note, “The court reiterated that the duty to defend is broad, the duty is triggered by any potential for coverage, and an insurer is required to defend the entire suit as long as one claim is potentially covered.” **Read full article.**

Superfund Liability Trumps "As Is" Contract Terms

Arnall Golden Gregory LLP references a recent federal court case that "reaffirms the proposition that an 'as is' disclaimer will not by itself divest CERCLA liability from a seller." In this case (*Gavora, Inc. v. City of Fairbanks*), the court assigned 55% of the remediation costs to the city because it knew of contamination on the property it used to own, but did not disclose this fact to the purchaser, and because it would be inequitable to hold the current owner entirely responsible for contamination occurring prior to its occupancy. The author notes, "Numerous courts have held that Superfund liability cannot be defeated by contract unless specifically addressed in the contract language." This case also demonstrates that "a court may resort to equity [considerations] to allocate greater responsibility to a seller who does not disclose contamination even when it has not made a representation with regards thereto." **Read full article.**

U.S. Court of Appeals for the D.C. Circuit Partially Reverts to 2008 Rules Governing the Recycling of Hazardous Wastes

Manko Gold Katcher & Fox summarizes a D.C. Circuit Court of Appeals decision in *American Petroleum Institute v. EPA* "with potentially significant implications for entities involved in the recycling of hazardous wastes." This decision vacated one of the four factors that the USEPA had set forth in its 2015 rule amending the definition of soil wastes for distinguishing between "legitimate" and "sham" recycling of hazardous secondary materials, with the former subject to lesser or no RCRA regulation. The court also withdrew certain conditions, also promulgated in the 2015 rule, which the USEPA had tacked on to a pre-existing exclusion that allowed generators of hazardous secondary materials to send these materials to third-party recyclers for reclamation. Based on guidance set forth in 1989 and a definition of solid waste rulemaking in 2008, the 2015 rule had established four factors that would be applied to distinguish between "legitimate" and "sham" recycling of hazardous secondary materials. The 2015 rule also extended these four factors for all RCRA solid waste recycling exclusions independent of what those exclusions had established. Those four factors had been: (1) the hazardous secondary material must provide a useful contribution to the recycling process; (2) the recycling process must produce a valuable product or intermediate; (3) the persons controlling the secondary material must manage the hazardous secondary material as a valuable commodity; and (4) the product of the recycling process must be comparable to a legitimate product or intermediate. The Court agreed with the petitioners that the 4th factor involved a two-track evaluation procedure that was too imprecise and/or imposed an unjustified administrative burden. The petitioners had also sought to challenge factor #3, but the Court found the imposed conditions to be reasonable. **Read full article.**

Environmental Issues that Arise in Retail and Other Commercial Businesses

A post by Murtha Cullina LP summarizes issues that can arise in the context of retail and other commercial businesses with respect to environmental laws that govern; proper disposal and management of hazardous materials including expired pharmaceuticals, some cleaning products, products recalled for lead paint, and certain pesticides; renovating or selling a building that contains hazardous building materials such as lead paint, asbestos, and polychlorinated biphenyls ("PCBs", often found in structures built prior to 1972); stormwater permits for large parking lots and other impervious surfaces or for construction of new buildings and significant renovations; USTs used for storing heating oil, diesel or other fuel, or other materials; and management of environmental liabilities when a property or business is transferred to a new owner (including issues arising under the Connecticut Transfer Act). Each of these issues is addressed in greater detail. **Read the full article.**

States and Environmental Groups Sue to Prevent EPA Delay of RMP Rule

A recent article prepared by Taft Stettinius & Hollister LLC reported one day after the EPA delayed the effective date of the updated Risk Management Plan ("RMP") rule, thirteen environmental groups (including the Clean Air Council, Sierra Club and the Union of Concerned Scientists) filed suit to prevent the delay. Five weeks later, eleven states, NY, IL, IA, MN, MD, MA, NM, OR, RI, VT, and WA filed their own challenge to the delay. The original effective date for the rule was March 14, 2017. However, the EPA delayed the effective date as part of the Trump administration's regulatory "freeze." On March 13, 2017, after receiving a petition from several industry groups, new EPA Administrator Scott Pruitt began reconsidering the RMP rule amendments. On April 3, 2017, the EPA proposed a rule to delay the effective date until February 19, 2019 (the "Delay Rule") so the EPA can fully evaluate the various petitions for reconsideration and take public comments on issues in question. The Delay Rule was finalized on June 14, 2017. Environmental groups joined by the United Steelworkers ("USW") filed a petition for review of the EPA's Delay Rule with the D.C. Circuit Court of Appeals, arguing that the Delay Rule is inappropriate because RMP-regulated chemicals pose a real and immediate threat to USW members and their families who work, reside or recreate near these facilities. The environmental groups and the USW then moved to stay the Delay Rule until the court takes full review of it, arguing that a stay is warranted because the Delay Rule postpones critical protections from chemical disaster. The D.C. Circuit has yet to weigh in on the respective petitions**.** **Read full article.**

White Paper: Superfund 2017 - Cleanup Accomplishments and the Challenges Ahead

A white paper has been issued addressing the remediation aspects of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or "Superfund" program. "The purpose of the White Paper is to provide information on: i) The overall progress of the Superfund remedial program; ii) The number and types of CERCLA National Priority List ("NPL") sites added since FY 2000; iii) Key measures of program success; and iv) Program funding. The focus of the White Paper is only NPL sites that are non-federal (from FY 2000 through FY 2006)". See the post by Mitchell Williams Selig Gates & Woodyard PLLC. **Read article here.**

Sustainability Efforts on the Rise

In legal news, JDSUPRA (www.jdsupra.com), the author draws from the 2017 Sustainability Report prepared by Lucid that summarized views of over 100 surveyed sustainability professionals as they look at sustainability in 2017 and beyond. In light of the changing administration's views, positive signs were demonstrated by the responses received when "only 5% of private companies surveyed expect to decrease their commitment to sustainability programs in 2017, while 74% expect no change and 21% expect an increase in their commitments. Growing concern about climate change have presented companies with the opportunity to lead the way by increasing their sustainability efforts." Evidenced based factors prepared by MIT Sloan Management Review are presented, along with examples of corporation's commitments to pursue sustainability practices. **Read the article here.**

TSCA Inventory Reset

In an article written by Beveridge & Diamond PC, "Virtually all manufacturers and importers of chemicals for the past 11 years are now subject to a new TSCA reporting requirement known informally as the TSCA Inventory Reset. Reports are due by February 7, 2018. All processors of chemicals have an opportunity and an incentive to report as well, and may do so by October 5, 2018. The final Inventory Reset rule was published on August 11, 2017, and is effective immediately. The final rule will be codified as 40 C.F.R. Part 710, Subpart B. Unlike the other framework rules under the amended TSCA that EPA published on July 20, 2017, the Inventory Reset rule (known formally as "TSCA Inventory Notification (Active-Inactive Requirements)") imposes immediate reporting obligations on all manufacturers and importers of chemical substances in the United States. It may affect almost all companies across the manufacturing supply chain. The article lays out the basic Inventory Reset framework, explains what information must be reported to EPA and by whom, and provides recommendations for what companies can do to make sure they meet their compliance obligations." **Read full article.**

Vapor Intrusion: Acute Exposure Regulatory Developments and Litigation Trends

An article prepared by Hutton & Williams explores the evolution of vapor intrusion regulation, particularly developments addressing acute risk, as well as trends in vapor intrusion related litigation. “Over the last decade, regulators have accelerated their focus on vapor intrusion risk at hazardous cleanup sites. This has led to new cleanup standards, policies and guidance to evaluate potential risks, environmental investigation requirements for brownfield redevelopments, and the reopening of previously closed remedial actions. Recently, attention has turned from chronic to acute vapor intrusion risk. Although protection of human health is paramount, this recent focus has been plagued with concerns about the validity of the underlying science and a lack of comprehensive guidance from regulators on how to respond.” **Read the article here.**

New Presidential and Interior Orders Target Environmental Permitting, NEPA Reviews, and Flood Risk Standards for Infrastructure and Energy Projects

A recent Executive Order (EO) published 8/24/17 rescinds federal flood standards by removing requirements for federal agencies developed based on climate change projections to entirely avoid, or mandate higher base elevations for, development within 100-year and 500-year floodplains.The timing of the August 2017 EO was inopportune, however, given the occurrence of Hurricanes Harvey and Irma only weeks later. The Dept. of the Interior EO on 8/31/17 imposes uniform page and time limits on NEPA documents and it remains to be seen “whether these latest actions actually result in quicker and successful environmental reviews and permitting” says the authors, Beveridge & Diamond PC. The Interior’s EO seeks to streamline both environmental reviews and ultimate permitting for an array of energy, transportation, water, and other “infrastructure projects.” Several of its provisions replicate existing government initiatives, including tracking projects on a public “dashboard,” setting timetables and deadlines, fostering prompt and effective dispute resolution among agencies, and forcing agencies to coordinate and share best practices for NEPA reviews. **Read the article here.**

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.