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.

Appeals Court Rules No "Free" Environmental Insurance

On 9/1/16, a case involving insurance coverage for long-term environmental damage was decided by a NY intermediate appellate court (*Keyspan Gas East Corp. v. Munich Reins. Am., Inc.*). The policyholder had argued (and a motion court had agreed) that "the insurer was required to assume risk for losses that occurred during periods when environmental liability insurance was not available in the marketplace." The appellate court, while agreeing that a *pro rata* allocation between the parties could be appropriate, "the insurer did not have to indemnify the insured for losses attributable to periods of time when liability insurance was unavailable in the marketplace" because the "*pro rata* allocation based on the insurer's time on the risk was consistent with the policy language" limiting coverage to accidents or occurrences during the policy period. Therefore, according to the author, while courts have split on apportioning costs between the insurer and the insured for risks incurred when no insurance coverage was available, the policy language restricting coverage to the policy period in this case was controlling and unambiguous. **Article Link.**

Underground Storage Tank (UST) Leak Detection Weak Spots

The June 2016 issue of the *L.U.S.T. Line* newsletter describes "three holes in the fabric of our leak detection systems" for USTs. The three weak spots identified by the author, Marcel Moreau, are: (1) the inappropriate use of periodic automatic tank gauging (ATG) leak detection systems at stations with continuously operating USTs; (2) the inability of continuous ATG leak detection systems to distinguish between large leaks and the dispensing of fuel; and (3) where mechanical and electronic detectors cannot "see" piping leaks. Excalibur has had experience with UST sites in PA where the second of these three weaknesses has been in play resulting in substantive fuel losses. Mr. Moreau notes that failure modes in what are, for the most part, in-service fiberglass USTs today tend to be unlike the pinhole-sized leaks that plagued bare steel tanks. Mr. Moreau states that fiberglass tanks can (though infrequently) crack suddenly resulting in leak rates that the ATG system may assume equates to continuous dispensing activity. As Mr. Moreau observes,

"*Because the ATG* [system] *presumed that non-stop dispensing was going on, it eventually produced a warning that there was 'no idle time,' meaning that there was no time when the fuel level was stable enough for the ATG* [system] *to gather data for a tightness test*." Download the latest PDF issue of L.U.S.T. Line using **this link**; see page 12 for the specific article.

USEPA Study Identifies Significant Incidence of Internal Corrosion Issues in USTs Storing Diesel Fuel

In July, the USEPA released a research report advising owners and operators of both metal and fiberglass USTs that a study of 42 diesel fuel USTs across the country had discovered unexplained corrosion of the metal components *inside* (i.e., within) the vapor (ullage) space in 83% of the tanks examined. At this time, the Agency has no confirmed theory as to the root cause(s) of the observed corrosion, nor does it know of a confirmed solution to the phenomenon. Until more is known, the Agency is advising UST owners/operators to check for corrosion inside vapor space of their diesel fuel UST systems by means of a visual/video inspection, and checking for indications of sludge and particulate matter in dispenser fuel filters. Diesel UST owners/operators are also encouraged to have their service companies check for corroded equipment and/or conduct additional (i.e., more frequent) functionality testing of the overfill prevention devices, leak detection equipment, and automatic tank gauges. Additional integrity testing of both single-wall and double-wall fiberglass USTs is also recommended. **More.**

New Vapor Intrusion Guidance in Ohio: A Harbinger of Things to Come?

New vapor intrusion guidance released by the Ohio EPA on 8/24/16 may prove a game changer for responses to vapor intrusion issues. For the first time, the new guidance requires taking immediate corrective action when measured contaminant levels exceed "trigger levels" set in the guidance for sub-slab and indoor air samples. Actions must be taken within a matter of days in cases where the "trigger levels" for trichloroethylene (TCE) are exceeded. As noted in the article posted by Tucker Ellis, the new guidance does not have the force of law, but the Ohio EPA "recommends its use to outside stakeholders," including within the context of remedial actions undertaken pursuant to the Voluntary Action Program. The article contains a link to tables outlining the response times for various common indoor air contaminants. As the article notes, "What is unprecedented about this new guidance is the requirement to take immediate action, within days in some cases, based upon risk-based screening values. Historically, vapor intrusion risks were vetted through sampling and analysis, a process that could take a year or more before the cleanup was implemented." **Article.**

Small Businesses Exceed Expectations

A recent article by Benchmark Capital partner, Behance CEO and former Adobe Vice President Scott Belsky debunks the myth that it is "safer" to patronize large companies. He writes that large businesses struggle more in hard economic times since they are less in touch with the granularity of their business. In efforts to cut expenses, the giants make significant compromises in quality and service and according to this CEO, the layers of bureaucracy provide a numbing lag between action and consequence. The author suggests that small businesses succeed in customer satisfaction where larger businesses fail because "….*the value of an individual customer is always greater for small businesses than for large corporations*…". Additionally, because small business can feel their own pulse, Mr. Belsky claims they can more routinely exceed customer expectations being free of the shackles of rigid corporate polices. A number of small businesses creativity and adaptability competitive advantages are identified in the article including: (a) preserving creativity amidst less bureaucracy; (b) focus on results not "face time"; (c) measuring meeting success based on action, not attendance; (d) focus on macro- rather than micro-management; (e) regular feedback exchange among smaller teams; and (f) in tune with customer needs, adapting as necessary. **Full Article.**

Managing an Environmental Crisis: Five Rules

An article from Peter Briggs, Esq. of Herbert Smith Freehills LLP, offers some helpful advice for managing environmental incidents and offers five rules to help "ensure the organization acts legally, transparently, and competently." The rules are: (1) be prepared/have a response plan; (2) do no further harm; (3) be nice to regulators (engage proactively and positively); (4) assemble a team and assign responsibilities (marshal your resources); and (5) have a document protocol (make your due diligence evident). **Read More.**

Two New Drinking Water Health Advisories Issued by USEPA

On 5/16/16, the USEPA issued drinking water health advisories for perfluorooctanoic acid (PFOA; also known as C8) and perfluorooctane sulfonate (PFOS) setting the acceptable life-time level of 70 parts per trillion for these chemicals combined in drinking water. These chemicals are used in consumer products, as well in industry (e.g., PFOA is used in the manufacture of Teflon®, in ski wax, and in producing stain-resistant carpeting), and are sufficiently stable and persistent in the environment to bio-accumulate. While these health advisories are not federal drinking water standards or cleanup standards, some states do have drinking water guidelines for PFOA or PFOS. **Additional Info.**

USEPA Looks to Restrict or Ban Trichloroethylene (TCE) Under the Amended TSCA

A new proposed rule from the USEPA sent to the Office of Management & Budget (OMB) for review in late July looks to ban or substantively restrict the use of TCE given its perceived health risks. Under the amended TSCA legislation, chemicals are to be evaluated to determine whether they pose an "unreasonable risk" to human health or the environment under specified conditions of use without considering cost. This will be the safety standard that the USEPA proposes to apply to the use of TCE in both industrial and commercial applications. If the USEPA determines there are "unreasonable risks," the Agency must take final risk management action within two years to manage those risks at which time costs may be considered. These actions can range from an outright and immediate ban to a phased withdrawal, but whatever the action, the USEPA must undertake its risk management action within five years of reaching the "unreasonable risk" determination. Following OMB review, the proposed rules for TCE (In spot cleaning/aerosol degreasing and in vapor degreasing) are expected to be issued in October and December 2016, respectively, with final rules issued approximately one year later. **Read More.**

Liability for Cleanup Costs under CERCLA—Timing of Property Ownership is Important

A recent court case in the District Court for the Eastern District of Pennsylvania has affirmed that a current owner of a contaminated site is not liable for cleanup costs incurred prior to ownership. In an article posted by Riker, Danzig, Scherer, Hyland & Perretti, LLP, a court case decided by the Third Circuit, relying heavily on a prior Ninth Circuit case, is examined because it limits a current owner's liability under CERCLA to only those response costs incurred after the owner took title to the contaminated site. In *Commonwealth of Pennsylvania Department of Environmental Protection v. Trainer Custom Chemical*, the government had argued that as the current owner of the property, Trainer Custom Chemical was liable for all costs incurred in cleaning up its contaminated property both before and after taking title to the property in 2012. The defendant acknowledged it was liable for remediation of its property as a responsible party under CERCLA, but that it was not liable for response costs incurred by the government prior to its taking ownership of the property. The court agreed indicating that there is a "temporal" limitation on liability under CERCLA for a current owner. The court noted that while CERCLA imposes strict liability, it does not impose limitless liability, which meant the government could not recover past costs from a party that neither caused the contamination nor owned the facility when the past remedial activities took place. The decision is being appealed. **Full Article.**

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. For more informaiton on Excalibur, visit **www.excaliburgrpllc.com** or email us at info@excaliburgrpllc.com.