

# ENVIRONMENTAL NEWS & HIGHLIGHTS

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Presented by:

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

### USEPA Releases 2014 Toxics Release Inventory Report



Toxic Release Inventory data released by the USEPA for 2014 showed a 6% decrease in total disposal or other releases to the environment in comparison to 2013. Air releases from industrial facilities declined by 4% year over year and by 55% since 2003. In total, 84% of the 25 billion pounds of toxic chemical waste managed by industrial facilities in 2014 was not released into the environment through the use of recycling, energy recovery, and treatment. The Toxics Release Inventory celebrates its 30<sup>th</sup> anniversary in 2016. [TRI Nat'l Analysis.](#)

### Proposed Changes to the Hazard Ranking System

On 2/29/16, the U.S. Environmental Protection Agency (USEPA) proposed to add assessments of vapor intrusion (VI) (referred to as subsurface intrusion in the proposed rule) to the Hazard Ranking System (HRS) that is used to evaluate sites for placement on the National Priorities List (NPL). The listing of a site on the NPL is a necessary step in the designation of a site for federal Superfund funding. Previously, an NPL

listing considered exposure to contaminated soil, migration of contaminated groundwater and surface water, and the air migration pathway, but there was no direct evaluation of the VI pathway. The Agency states, “[This addition] expands the number of available options for EPA and state and tribal organizations performing work on behalf of EPA to evaluate potential threats to public health from releases of hazardous substances, pollutants, or contaminants... and allows an HRS evaluation to directly consider human exposure to hazardous substances, pollutants, or contaminants that enter regularly occupied structures through subsurface intrusion in assessing a site’s relative risk...” Opponents to the proposed rule believe the new criteria will identify few sites for NPL listing that would have not been listed otherwise, and also assert that the HRS process is not suited to addressing sites where VI concerns may pose an imminent human health risk. The comment period was completed on 4/29/16. [Contact Info.](#)



### The New UST Rules: Looking Ahead



The December 2015 issue of the *LUSTLine* newsletter offers one recognized expert's predictions as to what unanticipated and unintended consequences may result from the recently published revisions to the federal UST rule. The author, Marcel Moreau, speculates that: (1) inspecting overfill prevention devices will prove challenging; (2) ball float valves, which can no longer be used for overfill

prevention, will continue to cause problems whether the ball float is removed or left in place; (3) the substituted flapper valves will have their own issues; (4) the requirement to test secondary containment may create incentives to use less expensive alternatives (e.g., line-leak detection and line-tightness testing) where secondary containment is not required; (5) requiring all new tanks to be double-walled may keep single-walled tanks in service longer in states where the closure of single-walled tanks has not been mandated by a set deadline; and (6) creating detailed checklists for the required walkthrough inspections may actually prompt UST owner/operators to simply "check off" the inspection items rather than take the time to actually inspect. [L.U.S.T. Line Download.](#)

### **Pennsylvania Hydraulic Fracturing Groundwater Contamination Case Nets \$4.2 Million Jury Award**

On 3/10/16, two plaintiffs were awarded \$4.2 million after alleging that hydraulic fracturing operations undertaken by Cabot Oil & Gas near Dimock, PA, had caused methane gas to contaminate nearby drinking water wells. [See *Ely v. Cabot Oil & Gas Corp.* 38 F. Supp. 3d 518, 519 (M.D. Pa. 2014).] The verdict, which Cabot Oil & Gas says it intends to appeal, rested solely on the plaintiff's



negligence and private nuisance claims, which were the only claims to survive a partial summary judgment rendered in favor of Cabot Oil & Gas under the plaintiff's other claims, including strict liability and others. However, as the article from Daniel Kavouras of BakerHostetler notes, perhaps the most important precedent may have been the court's comments on whether to consider hydraulic fracturing "abnormally dangerous" thereby making it subject to strict tort liability. In its ruling, the court declined to "take a step which no court in the United States has chosen to take, and declare hydraulic fracturing to be an ultra-hazardous activity that gives rise to strict tort liability." [Read More.](#)

### **Recent PA Supreme Court Decision on the Meaning of "The Insured" in an Insurance Contract.**



A recent court decision in Pennsylvania (*Mutual Benefit Insurance Company v. Politsopoulos*) has highlighted the importance of making sure the meaning of every word in an insurance contract is very clear. In this case, a standard lease agreement had required the lessee to name the property owners as additional insureds on the lessee's

commercial general liability (CGL) policy. Back in 2007, one of the lessee's employees had fallen on stairs at the property and suffered injuries. Since the employee was precluded from filing a personal injury claim for negligence against his employer (because the injured employee was eligible to receive workers' compensation benefits), the employee filed a negligence claim against the property owners. Since the property owners were listed as an additional insured on the lessee's CGL policy, they sought coverage from the lessee's insurer who denied the claim. The insurer noted that, as in most CGL policies, the employer exclusion states the insurer will not cover the insured if the employee files a personal injury lawsuit. The insurer went on to argue that the policy did not cover an injury to "an employee of the insured" and that "the insured" included the property owners since they were listed as additional insureds. The property owners argued that the term "the insured" was singular, not plural, and therefore only barred coverage for claims from the employees of the specific insured holding the CGL policy. Noting that the language was indeed ambiguous, the PA Supreme Court nevertheless ruled that the term "employees of the insured" could be interpreted to exclude only the direct employer (the lessee) from coverage, not all the insured parties covered by the policy, which might have been the case if the policy had referenced "any insured." Consequently, the property owners received coverage under the policy as ambiguities in the insurance contract were decided in favor of the insured. [Opinion Details.](#)

#### **USEPA Agrees to Extend the Spill Prevention, Control and Countermeasures (SPCC) Program to Cover Hazardous Substances**

The USEPA has agreed to begin developing a rule to expand the SPCC program beyond its current application to oil and other petroleum products to also cover hazardous substances under Section 311(i)(1) of the Clean Water Act. As a result, the requirements of the expanded SPCC program would be extended to thousands of facilities in the U.S. The agreement comes in settling a lawsuit filed by several environmental groups last July. Per the settlement agreement, the USEPA has committed to finalize its rulemaking by mid- to late 2019. An article from Kelley Drye & Warren LLP summarizes the background of the lawsuit and the "groundbreaking settlement" and offers strategic suggestions to those industries and manufacturers who could be subject to the anticipated rule. [Read Article.](#)



#### **Proposed Rules Seek to Update the Federal Hazardous Waste Generator Regulations**



The USEPA has announced its intent to propose changes to its Chemical Safety rules—specifically the regulations pertaining to the Risk Management Program (RMP)—that will require companies in several key industries to consider using safer chemicals and production technologies. Facilities that use and distribute

hazardous chemicals in these three industries would appear most affected by the rule changes: paper manufacturing, chemical manufacturing, and petroleum & coal products. The USEPA believes the proposed regulatory changes will improve chemical process safety and the response and planning of local agencies to hazardous chemical release incidents. The proposed changes vary for facilities assigned to three different program levels (1, 2, and 3). Under the new rule, facilities with processes in the Program 2 or 3 categories must retain an independent third party to conduct a compliance audit subsequent to a reportable release. Facilities in these two categories must also complete root cause analyses while investigating a catastrophic release or a "near-miss"

incident. Facilities in the chemical manufacturing, paper manufacturing, and petroleum/coal products industries with Program 3 processes would need to modify their process hazard analysis to consider using inherently safer technologies and chemicals. Some observers believe the proposed changes to the RMP regulations do not go far enough as there are no changes to how the USEPA evaluates chemicals as hazardous, the universe of regulated facilities is unchanged, and there is no requirement to actually use inherently safer chemicals and product technologies. [News Release.](#)

### Potential UST Leak Scenarios for the Storage of Ultra-Low Sulfur Diesel Fuel

An article in the December 2015 issue of *LUSTLine* describes potential UST leak scenarios believed to be linked to lowering the sulfur content of various diesel fuels in response to regulatory requirements. These ultra-low sulfur diesel (ULSD) fuels for highway vehicles began to be produced in 2006, and, since 2014, all highway, non-road, locomotive, and marine diesel sold in the U.S. should be ULSD. The article describes how, beginning in 2006, UST inspectors noticed seeps and leaks around incompatible gaskets in the older UST systems storing ULSD. Once these incompatible gaskets were changed for gaskets more compatible with ULSD, the leaks stopped. Tank owners/operators also found that they had to change out fuel filters in the ULSD dispensers more frequently due to particulate or biomass fouling. Tank and line monitoring and leak detection equipment also began to operate erratically due to corrosion of the metal parts. Subsequent investigations established that the cross-contamination of the ULSD with ethanol from gasoline (probably during transport of these fuels) provided a food source for bacteria to produce acetic acid, which, in turn, corrodes the metal components. Many of these metal components are internal and not easily observable within an UST system, such as submersible turbine pump shafts, automatic tank gauging probes, drop tubes, and springs inside mechanical line leak detectors. The author concludes, "Microbiologically influenced corrosion likely plays a significant role in the prevalence of the corrosion seen in ULSD UST systems across the country." He adds, "Biodiesel is more susceptible to oxidative degradation than petroleum diesel, and may contribute to increased biological growth during storage." Up to 5 percent biodiesel can be blended into ULSD absent any customer disclosure at the dispenser. [L.U.S.T. Line Download.](#)



### Small Firms: Better Communicators / Know their Customers Better

**SMALL  
BUSINESS BIG  
IMPACT**

The authors of *Roadside MBA: Backroad Wisdom for Executives, Entrepreneurs, and Small Business Owners* found small firms are better communicators and know their customers better. "Size is a double-edged sword. Big firms have squads of salesmen, massive marketing budgets and loads of

leverage at the bargaining table. Size makes many important business activities easier... [h]owever, size makes other valuable activities harder, and smart entrepreneurs can drive a wedge into these big-business cracks to create profitable markets for small business." Other observers of small businesses point to the nimbleness and lean structure common to most small business firms. "Larger companies are not as nimble and swift as small businesses. There are fewer...layers of management [and] having fewer layers of management makes decision times much quicker, allowing for flexibility and adaptability that a larger company does not have. [E]very employee can be



*much closer to the business and the customer, allowing for both an understanding of how your company works and increased customer satisfaction.” [Article.](#)*

### **US Supreme Court Grants Motion to Stay Implementation of Federal Clean Power Plan.**

On 2/9/16, the US Supreme Court split 5-4 in granting a motion to stay implementation of the USEPA’s Clean Power Plan. This plan sets state-by-state limits on carbon dioxide emissions from existing fossil fuel-fired power plants. Each state must then develop its own compliance plan for how to reach the required emissions reductions. Overall, the plan, which is a key element of the U.S.’s current climate change policy,



requires existing coal-burning power plants to cut carbon emissions by 32% by 2030 in comparison to 2005 levels. The stay will remain in effect until consolidated lawsuits filed by 29 states and various industry groups (including 20 energy companies) and that are pending before the U.S. Court of Appeals for the D.C. Circuit is resolved. States are required to submit final implementation plans for the Clean Power Plan rule by 9/6/16. [Read More.](#)

### **States Urge Congress Not to Undo State Regulation of Toxic Chemicals in Seeking to Reform the Federal Toxic Substances Control Act (TSCA)**



Twelve state attorney generals have written Congress to not allow discussions of TSCA reforms to undermine state-level efforts to regulate toxic chemicals. Presently, a conference committee is working to reconcile separate TSCA reform bills passed by the U.S. Senate and House of

Representatives in 2015. Basically, the twelve states are urging Congress not to preempt toxic chemical regulations at the state level and believe the U.S. House Representatives’ version of the bill is preferable to the Senate bill in this regard. Specific recommendations for reconciling the two bills is also offered. Both federal bills also receive kudos from the 12 state attorney generals in that they: (1) allow states to co-enforce the federal standards if the state law contains identical requirements; (2) exempt long-standing state chemical programs from preemption such as California’s Proposition 65; and (3) exempt state water quality, air quality, and waste treatment/disposal laws from preemption. Similar comments were expressed in a letter to Congress from the executive directors of the National Governors Association, National Conference of State Legislatures, Environmental Council of the States and Association of State and Territorial Health Officials. [TSCA Letter.](#)

### **Managing Hazardous Waste Pharmaceuticals: What Now?**

In an article by Pepper Hamilton, LLP, the authors suggest possible compliance strategies for those businesses likely to be affected by the USEPA’s proposed Management Standards for Hazardous Waste Pharmaceuticals rule published in September 2015. Major components of the proposed rule examined in the article include: (1) the broadening of the definition what is a “pharmaceutical” to include supplements and items containing pharmaceutical residues; (2) considering pharmaceuticals returned to the manufacturer to be discarded and therefore



subject to the proposed new requirements; (3) banning the discharge of pharmaceuticals into public sewage treatment plants; and (4) expanding coverage of the rule beyond hospitals and pharmaceutical distributors to “other health care facilities,” which could include doctor, dentist, and veterinary offices, pharmacies, outpatient clinics, and continuing care retirement communities. [See Text.](#)

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