

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.

The Bona Fide Prospective Purchaser Defense under CERCLA



There are statutory-derived defenses available to purchasers of contaminated property, including the “bona fide prospective purchaser” (BFPP) defense under CERCLA. In order to take advantage of the BFPP defense, the purchaser must establish that it: (1) purchased the property after the contamination occurred; (2) made “all appropriate inquiries” before purchasing the property; (3) provided all legally required notices about the contamination; and (4) took steps to stop any ongoing contamination, prevent future contamination, and limit exposure from past contamination. In this article from Holland & Hart, LLP, two court cases are discussed that have interpreted what necessary and appropriate due diligence must be undertaken to assert the BFPP defense. The author notes these cases “demonstrate the need for purchasers to take specific steps to protect against a past release and to prevent any threatened future release...” [More Informatin.](#)

CERCLA 104(e) Information Request Triggers Insurer’s Duty to Defend

In a recent case before the U.S. Court of Appeals for the Ninth Circuit, the receipt of a CERCLA 104(e) information request from the U.S. Environmental Protection Agency (USEPA) was determined to be a trigger sufficient to engage an insurer’s duty to defend the policyholder for attorney’s fees and related costs. Typically, under primary CGL policies the insurer agrees to defend any “suit” against the insured seeking damages potentially covered by the policy. The 5/11/16 decision in *Ash Grove Cement Company v. Liberty Mutual Insurance Company, et al.* was apparently based on a prior 9th Circuit decision that declared a 104(e) request was the “functional equivalent” of and met the general definition of a “suit” under Oregon law because it compels the recipient to provide information that might expose the recipient to liability as a potentially responsible party at a Superfund cleanup site. In issuing its ruling, the 9th Circuit rejected the insurer’s arguments that: (a) the 104(e) letter was not a “suit” under Oregon law; (b) its insurance policies distinguished between a “claim” and a “suit;” and (c) the 104(3) letter did not require the insured to take any cleanup action and, therefore, was not a “suit.” Overall, various federal and state courts have differed historically as to whether a CERCLA 104(e) request is



a “suit” triggering an insurer’s duty to defend, but more and more state courts have recently agreed with the “functionally equivalent” perspective applied in this case.. [Additional Info.](#)

End of the CERCLA & RCRA Exemptions from the Site Remediation National Emission Standards for Hazardous Air Pollutants (NESHAPs) Proposed



On 5/13/16, the USEPA published a proposed rule amendment that would eliminate the current NESHAPs exemption for site remediation performed under CERCLA and RCRA authority. Back in 2003, when the NESHAP requirements for site remediation activities was finalized, the USEPA believed the exemption was appropriate given that CERCLA and RCRA cleanup programs served as “functional equivalents” of NESHAP. Now, in its proposed rule, the USEPA has changed its position. As a result, remediation at “major source” sites that entail cleaning up one megagram per year or more of certain organic hazardous air pollutants (HAPs) will be subject to the requirements of the Site Remediation Rule. Emitting more than 10 tons per year of any one HAP or 25 tons per year of any combination of HAPs qualifies an emission source as “major.” Therefore, at such sites, eliminating the prior exemption, if finalized, means new emission limitations and work practice standards for (a) process events; (b) remediation material management units; and c) equipment leaks. The NESHAP for site remediation also includes monitoring, recordkeeping, and reporting requirements. The USEPA is also proposing to remove the current rule that made a remediation site subject to the Site Remediation NESHAP only if it was co-located with a facility that was otherwise regulated by NESHAPs. As a result, if the site remediation constitutes a “major source” of HAPs, on its own, it will be subject to the Site Remediation NESHAP requirements. Comments on the proposed rule were due to the USEPA on 6/27/16. [Full Article.](#)

U.S. Supreme Court Declines to Hear ExxonMobil’s Appeal of 2013 MTBE Contamination Judgment

On 5/16/16, the U.S. Supreme Court declined to hear an appeal of a \$236M judgment against Exxon Mobil Corp. in a groundwater contamination case brought in 2003 by the State of New Hampshire. In 2003, the state’s Attorney General brought suit against 22 oil companies for their use of the additive methyl tertiary butyl ether (MTBE) in gasoline in light of the resulting groundwater contamination caused by MTBE. Prior to the trial, all the other defendants except for Exxon Mobil settled for \$136M. In 2013, a jury did not accept various arguments raised by Exxon Mobil, including that MTBE contamination in groundwater was not its fault. In seeking an appeal, Exxon Mobil claimed a violation of its due process rights because the state had not proven Exxon Mobil was liable for the pollution in groundwater at each individual site. [Read More.](#)



Final Methane Emission Standards for Oil & Gas Operations



On 5/12/16, the USEPA issued three rules intended to reduce methane emissions from new, reconstructed, and modified sources in the oil and gas industry by 2025. This article from Stinson Leonard Street LLP notes that the new rules apply immediately to new and modified oil & gas wells, and will now apply to even low-producing wells (i.e., wells producing <15 barrels per day). Companies face requirements

for more frequent compressor station inspections; upgrading pumps and compressors; and expanding the use of “green completion” technology at gas and oil wells to capture the gas surge from newly fracked wells. However, regulated entities would have a year to submit leak detection and repair plans. One of the three rules amends and sets new source performance standards for volatile organic compounds (VOCs) and methane. The second rule clarifies what constitutes a single stationary source under the Nonattainment New Source Review, Prevention of Significant Deterioration, and Title V operating permit programs. The third rule finalizes the federal implementation plan for minor sources and modifications of oil & gas facilities in Indian Country. At the same time, the USEPA released a proposed Information Collection Request, which observers believe signals the Agency’s intent to eventually regulate emissions of methane and VOCs from existing oil & gas sources. The Agency also anticipates completing Control Technique Guidelines for reducing VOC emissions from existing oil & gas sources in ozone nonattainment areas. [Full Article.](#)

Reform of the Toxic Substances Control Act (TSCA) Passes the House and Senate

On 5/24/16 and 6/7/16, respectively, the House of Representatives and Senate passed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which represents the first reform of TSCA in 40 years. The bill was subsequently signed into law by President Obama on 6/22/16. The number of revisions and changes to the



TSCA law are substantive and numerous. For example, for the first time, the USEPA will now conduct prioritized and systematic risk evaluations of all existing chemicals, and have the authority to require additional product testing. Chemical risks would be evaluated under expected conditions of use and exposure. The articles accessible through these links offer comprehensive summaries of the changes embodied in the legislation. These amendments become effective immediately as the legislation contains no effective date. Provisions in the legislation have effective dates tied to the date of enactment, while other actions have no mandated start date. The table accessible through this link- [Table](#) lists the deadlines for various actions in the statute. [Complete Article.](#)

Small Business Advantages Touted

SMALL
BUSINESS **BIG
IMPACT**

What are the possible advantages of working with a small business? In this article, the author claims small businesses are more likely to: (1) stay true to the company’s vision; (2) provide more avenues for employees to share ideas and be part of any troubleshooting initiative; (3) value trust with their

customers as a linchpin for enjoying repeat sales; (4) foster accountability for individual performance; (5) respond more quickly to changing needs and conditions; and (6) provide more of a connection to the local community.

[Additional Info.](#)

Curtailing Fracking & Insurance Coverage Disputes

In this article, Matthew Grashoff at Brouse McDowell argues that legal and other efforts to limit hydraulic fracking, including the disposal of fracking byproducts in underground injection wells, could result in more insurance claims and coverage disputes in that context. He points out that efforts (or proposals) to impose a strict liability standard in an alleged causal link between increased



earthquake damage and fracking/injection wells could trigger more tort claims against energy companies and, therefore, give rise to more insurance claims.

[Article.](#)

Coal Companies in PA Face Lawsuit for Alleged NPDES Permit Violations



In late April 2016, the U.S. Department of Justice (USDOJ) and the Pennsylvania Department of Environmental Protection (PADEP) filed a civil lawsuit in the Western District of Pennsylvania alleging more than 1,500 violations of NPDES permits held by five coal companies. According to this article from Jones Day, coal mining operations in three counties in Pennsylvania have resulted in discharges to surface water exceeding permit limits

for a variety of pollutants. The authors note that this lawsuit may be among the first of a series of joint enforcement actions to be undertaken by the USDOJ and the PADEP. [Article.](#)

Newly Proposed Renewable Fuel Volume Requirements

On 5/18/16, the USEPA proposed to increase the renewable fuel volume requirements under the Renewable Fuel Standard (RFS) program for all biofuels in 2017 and for biomass-based diesel in 2018. Although less than the volumes proposed for 2017 in Section 211 of the Clean Air Act, the proposed renewable fuel volume requirements and percentage standards are higher than recent historical levels. For



example, total renewable fuel volumes would grow by almost 700M gallons between 2016 and 2017. Other volume increases would apply to advanced renewable fuel, the conventional fuels portion of total renewable fuels, biomass-based diesel, and cellulosic biofuel. Comments on the proposed were due by 7/11/16, with the Agency intending to finalize the rule by 11/30/16. [Read More.](#)

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