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 regulated industries and environmental projects regionally and nationally.

Revised PA UST Regulations
Effective on December 22, 2018

Pennsylvania Department of Environmental Protection (PADEP) amendments to the Storage Tank (UST) Program Regulations (25 Pa Code, Chapter 245) will take effect on Dec. 22, 2018, upon publication in the Pennsylvania Bulletin. This final-form rulemaking will affect approximately 7,000 storage tank owners at nearly 12,600 storage tank facilities. Select revisions affecting UST owners, but not inclusive include: the overfill prevention equipment is to be evaluated at least once every three years to ensure that the equipment is set to activate at the correct level and will activate when the regulated substance stored reaches that level; spill prevention equipment is to be tested once every three years to ensure the equipment is liquid-tight; 41% of UST systems will be affected by the containment sump testing requirement. Containment sump testing is only required when the containment sump is used for interstitial monitoring of piping and is to be tested, once every three years to ensure the equipment is liquid-tight; prohibits ball float valves as an option for overfill prevention when these devices need to be replaced; and all UST systems will be required to perform annual operability testing of automatic tank gauges and other controllers, probes and sensors, automatic line leak detectors, vacuum pumps and pressure gauges, and hand-held electronic sampling equipment associated with groundwater and vapor monitoring.

Property Owner Liable Under CERCLA for Cleanup Costs Incurred Prior to Purchase

In a recent case, JD SUPRA describes, PADEP v. Trainer Custom Chemical LLC, No. 17-2607, interpreting the Federal CERCLA and PA's Hazardous Site Cleanup law (HSCA), a Third Circuit U.S. Court of Appeals panel ruled that a landowner was responsible for all environmental cleanup costs incurred by PADEP, including those incurred prior to the landowner's purchase of the contaminated property. In conjunction with an agreement of sale that recognized existing contamination, Trainer Custom Chemical, LLC (Trainer) acquired a former chemical manufacturing site (Site) for $20,000 in a tax lien sale. The prior owner had not only defaulted on taxes, but its environmental responsibilities as well. As a result, prior to the tax sale, PADEP incurred over $818,000 in environmental cleanup costs at the Site, most of which were electricity costs associated with treatment operation. Following the sale, Trainer is alleged to have exacerbated the contamination. PADEP sued Trainer for violations under CERCLA and sought to recover all of its response costs related to the Site, regardless of when those costs arose. Trainer did not invoke the innocent landowner or bona fide purchaser defense. The Third Circuit's ruling affects both prospective purchasers and current owners of contaminated properties. Prospective purchasers of contaminated property must now consider not only the possibility that they may be responsible for cleaning up existing contamination they did not cause, but also that they can be held to reimburse the government for all response costs incurred at the property, including those incurred prior to their ownership. With regards to statutory defenses, such as the innocent landowner and bona fide purchaser defense, prospective purchasers will need to factor the meaning of "all costs" into the transaction. Read the article **here.**

Sixth Circuit Rejects Groundwater Hydrological Connection Theory for CWA Jurisdiction

On September 24, 2018, the Sixth Circuit held that the Clean Water Act (CWA) does not apply to pollutants that travel through groundwater before entering navigable waters in TN Clean Water Network, et al. v. TN Valley Authority, Case No. 17-6155. As described in the Lexology article, the defendant in this case, Tennessee Valley Authority (TVA), operates a coal-fired power plant that produces coal ash as a waste product. TVA disposes of the coal ash (which is mixed with water) in ponds adjacent to the Cumberland River. While some of this coal ash wastewater is permitted to be discharged through a pipe to the Cumberland River, some wastewater is alleged to leak through the coal ash ponds into groundwater, which then traveled to the Cumberland River. The TVA's permit covered the direct discharge from the pipe to the Cumberland River; it did not cover the indirect discharge to the

Cumberland River (i.e. the discharge from the ash ponds to groundwater, and then groundwater to the Cumberland River). The district court found that because the groundwater was "hydrologically connected" to the Cumberland River, and TVA did not have a permit to discharge wastewater from its coal ash ponds, it violated the CWA. As a matter of law, the district court determined that discharging without a permit from a point source through hydrologically connected groundwater to navigable waters is a CWA violation when the hydrological connection is "direct, immediate, and can generally be traced." In the recent decision, the Sixth Circuit disagreed with the "hydrological connection theory" and reversed the district court decision, holding that the CWA only applies to discharges made directly to a navigable water. The court adopted reasoning from the companion case, Kentucky Waterways Alliance, v. Kentucky Utilities Co., Case No. 18-5115, issued the same day, that the basis of the CWA's regulatory power creates a requirement that discharges be directly into navigable waters. The CWA regulates "effluent limitations," which are defined as restrictions on pollutants that may be "discharged from point sources into navigable waters." The court reasoned that the use of the word "into" indicates directness and a point of entry and therefore the CWA can only apply when pollutants are added directly to navigable waters. The two Sixth Circuit decisions create a circuit split, as the Fourth and Ninth Circuits have applied the hydrologically connected theory and determined that the fact that a pollutant traveled through groundwater before reaching a navigable water did not preclude CWA liability. The split among the Circuit Courts makes the groundwater hydrological connection theory ripe for Supreme Court review. **Read here.**

China's Waste Paper Import Ban Prompts 17 N.A. Paper Mills to Expand Capacity to Use Recycled Paper

China's ban on importing mixed paper (~9 million metric tons of paper & pulp in 2011) and mixed plastics-the mainstays of residential recycling programs—went into effect in March 2018. In response, 17 North American paper mills announced plans to expand their capacity to use recycled paper. While old corrugated containers (e.g., cardboard boxes) are the primary beneficiary, one-third of the new projects will include residential mixed paper as a feedstock. Georgia Pacific (GP) plans to run a commercial-scale demo on proprietary technology to deal with mixed and food-contaminated packaging. Extracted fiber is fed back into the paper-making process. Meanwhile, Andritz, Kadant, Voith and others are working on improving stock preparation equipment to clean and screen mixed paper to increase domestic use. Cascades, based in Quebec, will convert an Ashland, Va., mill to a container board mill that will include a mixed paper system. And Green Bay Packaging in Wisconsin is replacing an existing container board mill with a new, larger one and will put in

a mixed paper processing system. GP is running a pilot to prove out technology it has developed involving wraps, food containers, paper cups and materials like metals and plastics that are collected in public venues. Bales containing these materials are fed into GP's process that removes commodities to send to respective markets, breaks down food and removes coatings. Remaining fiber is extracted to make new paper. The eventual plan is to take waste directly from venues like fast food restaurants, stadiums and businesses. **Read more here.**

New Federal Law Requires Widespread Testing for Unregulated Contaminants

On October 23, 2018, the Trump Administration signed into law America's Water Infrastructure Act of 2018 which, in addition to authorizing federal funding for water infrastructure projects, also requires drinking water systems serving more than 3,300 people to test for unregulated contaminants pursuant to U.S. EPA's Unregulated Contaminants Monitoring Rule (UCMR) as reported by Jenner & Block LLP. Prior to this new law, only drinking water systems that served more than 10,000 people were required to monitor for unregulated contaminants. Contaminants covered by the UCMR include PFOA, PFOS, 1,2,3-TCP, hexavalent chromium and 1,4-dioxane. This new testing requirement, which goes into effect in 2021, is expected to add more than 5,000 drinking water systems to the list of systems that are required to test for these unregulated contaminants. The challenge that continues to be faced by drinking water systems across the country is what to do if these contaminants are in fact found in the drinking water supply. As their name would imply, U.S. EPA has yet to set drinking standards for these contaminants although many states and local entities continue to enact a patchwork of regulatory requirements often without regard to the technical feasibility of treating these chemicals and/or the health risks actually posed by these chemicals. Unfortunately, until such time as U.S. EPA takes action to enact a federal standard, the regulated community will continue to be subject to this regulatory quagmire and now, with the new testing requirements, more drinking water systems will be forced to struggle with this issue without any clear regulatory guidance. **Read the article here.**

Proposed North Carolina Order Requires Chemours to Pay $12M Fine

The Insurance Journal reported that state environmental officials have proposed a consent order calling on a North Carolina chemical plant to reduce emissions of a compound and pay a $12 million civil penalty. The N.C. Department of Environmental Quality said in a news release Nov. 21 the order requires Chemours to reduce GenX air emissions and provide permanent replacement drinking water supplies. The proposed consent order is between DEQ, Cape Fear River Watch and Chemours. "People deserve access to clean drinking water and this order is a significant step in our ongoing effort to protect North Carolina communities and the environment." said DEQ

Secretary Michael S. Regan. “Today’s announcement advances the science and regulation of PFAS compounds and gives North Carolina families much needed relief.” In addition to the civil penalty, the order calls for Chemours to pay an additional $1 million for investigative costs. Additional penalties will apply if Chemours fails to meet the conditions and deadlines established in the order. Comments on the proposed order were accepted until Dec. 21. **Read more here.**

Rust-Oleum Settles Over Hazardous Waste Violations at Williamsport, MD Facility

The U.S. Environmental Protection Agency (EPA) announced a settlement with the Rust-Oleum Corporation to address alleged violations of hazardous waste regulations at its paint manufacturing facility in Williamsport, Maryland. EPA cited the Rust-Oleum Corporation for violating the Resource Conservation and Recovery Act (RCRA), the federal law governing the treatment, storage, and disposal of hazardous waste. RCRA is designed to protect public health and the environment, and avoid long and extensive cleanups, by requiring the safe, environmentally sound storage and disposal of hazardous waste. Under terms of the settlement, Rust-Oleum will pay a $168,000 penalty, and has ensured EPA it will properly contain and manage hazardous waste in the future. The settlement reflects the company’s compliance efforts, and its cooperation in the investigation. As part of the settlement, Rust-Oleum has not admitted liability for the alleged violations but has certified its compliance with RCRA requirements. Inspectors from EPA and the Maryland Department of Environment identified numerous monitoring, record keeping and hazardous waste storage violations during an inspection. The facility, which has been in operation at this location since 1978, manufactures paints that are primarily contained in aerosol cans. The facility uses a variety of mills and tanks to mix, grind, and thin the types of paints it generates. Read more about EPA’s **hazardous waste rules here**.

N.C.’s Longest River, Drinking Water Source is Contaminated with Industrial Chemicals

As reported in the Insurance Journal, a study performed for a chemical-maker accused of polluting North Carolina’s longest river finds the entire waterway used by thousands for drinking water is laced with industrial compounds. The Cape Fear Public Utility Authority reported that the deal between Chemours and the state environmental agency to cut chemical emissions of GenX does too little for its customers. The September report says Chemours is responsible for about half the chemicals detected near the river intake providing drinking water to about 200,000 customers around Wilmington. Consultants testing the river for 10 months found other industrial chemicals entered the river upstream of the

Chemours chemical plant south of Fayetteville. Chemours said the report posted on its web site was provided previously to state environmental officials and academic researchers. **Read more here.**

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