

# ENVIRONMENTAL NEWS & HIGHLIGHTS

## MARCH 2019

Presented by:  
**EXCALIBUR GROUP, LLC**

*Environmental Consultants, Engineers & Liability Management Experts*  
**[www.excaliburgrpllc.com](http://www.excaliburgrpllc.com)**



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

### **Pennsylvania UST Facilities Must Navigate New Regulatory Requirements in 2019**



On December 22, 2018, revisions to Pennsylvania's Storage Tank and Spill Prevention Program regulations (25 Pa. Code Chapter 245) went into effect, strengthening many of the operation and maintenance ("O&M") requirements for underground storage tank ("UST") systems. In an article by Rodd W. Bender, & William Hitchcock's of Manko, Gold, Katcher & Fox, LLP changes are described which ensure that PA's regulations are no less stringent than the federal regulations, which were substantially updated in 2015. In addition to the strengthened O&M requirements, the updated regulations also create a new, intermediate certification level for tank installers, as well as significantly increasing the types of releases that must be reported to PADEP. The new O&M requirements – aim to prevent releases from tank systems by increasing the frequency of inspections and testing of release detection and spill prevention equipment; there are grace periods for tank owners and operators to achieve compliance; provides a new category of certified tank installers to perform minor modifications to UST systems in an attempt to offset some of the increased costs resulting from the expanded testing that is now required for many UST system components; and there are revisions that increase certain inspection obligations for ASTs. Most significantly are the new release reporting requirements that include releases to containment structures in many instances, even though such structures are typically designed to prevent releases from reaching the environment. Under the new rules, releases from regulated storage tank systems into containment structures are reportable if they equal or exceed reportable quantity or discharge thresholds established under the federal Superfund and Clean Water Act statutes. The

reporting requirements also include releases of petroleum to containment structures in any amount, except for releases less than 25 gallons or below the lowest penetration of a containment sump, when certain conditions are met. Certain UST sumps and spill containment buckets must be tested every three years and a failed test constitutes a suspected release requiring investigation. Storage tank system owners and operators should familiarize themselves with the new reporting requirements immediately, as there is no grace period for compliance with the new requirements, and the timeframe for reporting a qualifying release is as soon as practicable (and no later than 24 hours) after confirmation. [Read the entire article here.](#)

### **Phase I ESA Sampling May Help CERCLA BFPP Defense**

An article in Lexology written by Breazeale Sachse & Wilson, LLP ponders the need for collecting samples as part of the Phase I Environmental Site Assessments (ESAs) in support of real estate transactions. The authors debate whether sampling might be included as part of the ESA in order for a purchaser to obtain added legal protections. One protection or defense available under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to an owner of previously contaminated property is called the Bona Fide Prospective Purchaser (BFPP) defense, which allows for the acquisition of contaminated property without liability for response costs. In order to obtain and maintain the BFPP defense, adherence to all of the terms of the defense is necessary. One major requirement to obtain BFPP status is that, prior to the actual purchase, the purchaser must conduct “all appropriate inquiries” in conformance with EPA’s All Appropriate Inquiries Rule (40 CFR Part 312). EPA has deemed compliance with ASTM Standard E1527-13, Standard Practice for ESA: Phase I ESA Process, as compliance with most provisions of the rule. Under the rule and the ASTM standard, sampling is not required to fulfill the “all appropriate inquiries” requirement and obtain the BFPP defense. The ASTM standard makes clear in Section 7.4 that the standard “does not include any testing or sampling of materials (for example, soil, water, air, building materials).” The preamble to the rule states, “The final regulation does not require that sampling and analysis be conducted to comply with the all appropriate inquiries requirements” (70 FR 66089). Additionally, it states, “With regard to the conduct of sampling and analysis, today’s final rule does not require sampling and analysis as part of the all appropriate inquiries investigation” (70 FR 66101). The rule itself merely states that “sampling and analysis may be conducted to develop information to address data gaps” (40 CFR 312.20). EPA has clearly stated that sampling could occur “pre- or post-acquisition” and “prior to or after acquiring a property” (70 FR 66101-2). As a result, even if sampling is deemed necessary, it can be accomplished at some point after the purchase. While EPA thinks that sampling “may be valuable” in certain circumstances, EPA is equally clear that the rule “does not require that sampling and analysis be conducted as part of the all



appropriate inquiries investigation” (70 FR 66101). In summary, the authors opine that while environmental sampling is not necessarily required prior to purchase in order to obtain the BFPP defense, it may be helpful before or after the purchase to assist in maintaining the BFPP defense. [Read the article here.](#)

### **PFAS to Drive Environmental Enforcement in 2019**



According to Pepper & Hamilton, LLP, environmental regulators will be increasingly focused on regulating perfluoroalkyl substances (PFAS) in 2019. PFAS are a group of manmade chemicals used in commercial, industrial and consumer products which are persistent in the environment including human blood. Some states, including Michigan, have imposed drinking water PFAS limitations that are more stringent than current federal regulations. In 2016, EPA issued drinking water lifetime health advisories for two PFAS compounds — perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) — at 70 parts per trillion, individually or combined. At the moment, these standards are unenforceable, nonregulatory values aimed at providing information to the public about health risks of exposure to PFAS. As reported in JDSUPRA, only a handful of states has promulgated criteria related to PFAS substances. According to the article, both federal and state regulators will be continuing to address PFAS in surface and drinking water in 2019. EPA has reportedly committed to taking four significant actions to address PFAS: i) establish maximum contaminant levels for PFOA and PFOS in drinking water; ii) designate PFOA and PFOS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); iii) consider making groundwater cleanup recommendations for PFOA and PFOS; and iv) collaborate with federal and state partners to develop draft toxicity values for additional PFAS compounds, including GenX and perfluorobutane sulfonic acid (PFBS). When the PFAS compounds are discovered, owners and operators should expect to receive additional regulatory requirements, including the imposition of more stringent effluent limitations and corresponding treatment requirements. The authors suggest the regulated community should pay close attention in the coming months so it can be best prepared to address potential regulatory liabilities due to the widespread existence of PFAS in many manufacturing processes. [Read the entire article here.](#)

### **Virginia Streamlines Its Voluntary Remediation Program**

Virginia recently announced it has further streamlined its voluntary remediation program under the state’s Voluntary Remediation Regulations (9 VAC-160). The Voluntary Remediation Regulations provide a framework to facilitate cleanup and reuse of contaminated sites (also known as “Brownfields”) that otherwise might remain contaminated and idle. Virginia Department of Environmental Quality (VDEQ) staff had identified beneficial changes to the regulation that would clarify



requirements and facilitate the process. The changes included adding definitions, providing new details concerning the applicability of fees for sites that conduct phased remediation, and on issuance of multiple site certificates. VDEQ Land Protection and Revitalization Division Director Justin Williams stated "...This regulatory amendment will help streamline the process to address contaminated sites through our Voluntary Remediation Program..." Furthermore, the director stated, "The Voluntary Remediation Program helps not only address contamination, but also supports economic development and brownfield revitalization efforts throughout Virginia..." Read the VDEQ [news release here](#).

### No Slowdown in Asbestos Claims



According to a recent article by A.M. Best's Market Segment Report, A.M. Best has raised its estimate of net ultimate environmental losses for the U.S. property/casualty (P/C) industry to \$46 billion, up \$4 billion over its previous estimate. The increase is due to the continued development on original sites that have been found to be more toxic than originally thought, and the associated increase in cleanup and defense costs. Total A&E net paid loss & loss adjustment expense in 2015 was \$3.8 billion, in 2016 was \$3.9 billion, and in 2017 was \$3.3 billion. The top five insurance groups who paid out U.S. asbestos and environmental between 2013 and 2017 was Travelers Group (11%), Chubb INA Group (10%), American International Group (8%), Hartford Insurance Group (8%), and Swiss Reinsurance Group (6%). P&C industry reported an average of \$1.9 billion in additional asbestos losses per year from 2013 to 2017. [Read more here](#).

### EPA Announces Comprehensive Nationwide PFAS Action Plan

USEPA announced on 2/14/19, a polyfluorinated alkyl substances (PFAS) action plan purportedly responding to extensive public interest and input on PFAS the agency has received over the past year. According to USEPA, this represents the first time EPA has built a multi-media, multi-program, national communication and research plan to address an emerging environmental challenge like PFAS.



USEPA's Action Plan identifies both short-term solutions for addressing these chemicals and long-term strategies that will help provide the tools and technologies states, and local communities need to provide clean and safe drinking water to their residents and to address PFAS at the source. The plan includes; moving forward with the maximum contaminant level (MCL) process in the Safe Drinking Water Act; listing PFAS and PFOs as hazardous substances; USEPA will use existing enforcement tools to address

PFAS exposure; it will propose monitoring PFAS in the nation's drinking water under the next Unregulated Contaminant Monitoring Program; EPA will develop new analytical methods so that more PFAS chemicals can be detected in drinking water, in soil, and in groundwater; develop a PFAS risk communication toolbox; and EPA will continue to work in close coordination with multiple entities, including other federal agencies, states, local governments, water utilities, industry, and the public. See this and other [EPA announcements here](#).

### **EPA Issues New RCRA Waste Rules for Hospitals, Medical Clinics and Pharmacies**



The U.S. EPA recently issued new regulations for managing pharmaceutical waste under the Resource Conservation and Recovery Act (RCRA). The rules specify new requirements for hazardous waste management for healthcare facilities that generate pharmaceutical wastes. As described in King & Spalding LLP's article, these changes will impact a broad range of healthcare facilities, defined under the regulations to include hospitals, medical clinics, and retail pharmacies. They also apply to pharmaceutical manufacturers who act as reverse distributors. The new rules will take effect on Aug. 21, 2019 starting a six-month window for companies to update their compliance procedures ([JDSUPRA Final Rule Article here](#)), however certain requirements will require adoption by the states. Because hazardous waste determinations must be made at the point of generation, healthcare workers will require careful training to comply with the new rules. For example, certain containers with residues can be considered hazardous waste even when the entirety of the medication was dispensed. Failure to adhere to RCRA and underlying regulations can result in penalties of up to \$72,718 per violation per day. [Read more here.](#)

### **New TSCA Inventory Identifies “Active” & “Inactive” Chemicals**

For the first time ever, EPA has released the updated TSCA Chemical Substance Inventory, with “active” and “inactive” designations as required by the 2016 Amendments to the Toxic Substances Control Act (TSCA). An article prepared by Kelley Drye & Warren LLP in JD Supra, explains that out of 86,228 chemicals on the Inventory, less than half (40,655 or 47% ) are designated as “active.” The majority of chemicals listed in the inventory are “inactive”.

These inactive chemicals will not be able to be manufactured or imported into the U.S. without going through EPA's pre-manufacture notice (PMN) and review process. The authors point out that PMN is something to avoid, particularly after the 2016 amendments shifted the burden of proof to require that EPA now make an affirmative finding that the substance does not pose an unreasonable risk to health or the environment before allowing



it on the market. The “active” and “inactive” designations are based on reporting by chemical manufacturers, importers, and processors, which concluded on October 5, 2018, under the agency’s TSCA Inventory Notification (Active-Inactive) Rule. For processors (i.e., companies that use chemicals), it is imperative to confirm with suppliers that the chemicals they receive from them are designated as “active.” Manufacture, import or use of (or placement on the market of a product containing) an “inactive” substance can incur serious penalties. Companies that wish to start using an “inactive” substance must submit to EPA, within 90 days prior to the anticipated start of such use, a Notice of Activity (Form B) to EPA to change the Inventory designation from “inactive” to “active.” [Read the article here.](#)

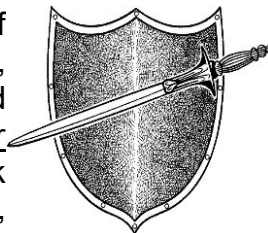
### **As Business Grows, So Does Risk Aversion & So Goes Innovation**

**SMALL  
BUSINESS BIG  
IMPACT**

In a recent article, Mr. R. Gandhi, founder of Studio Graphene compares his experiences to those of Peter Thiel’s in his international best seller, Zero to One. Like Thiel, Gandhi sees innovation and creativity diminish as companies grow and become more risk averse. The author opines that innovation in the corporate world comes with risk, and larger companies are often so risk averse that creativity is often stunted. He notes that successful large organizations tend to team with smaller innovator companies creating synergies while utilizing a larger company’s execution capability, geographical reach, capital and infrastructure. The author states based on his firm’s experience that corporate-startup partnerships may in fact be the future of business structures, since it takes advantage of each organization’s strengths. Gandhi also suggests success and risk cannot be viewed in isolation. According to the author, without a chance of failure, there is no reward, and the same can be said about innovation. The author claims that innovation rarely happens organically, which means there needs to be a clear commitment by an organization to accept risks that come with developing innovative solutions that will serve its interests in the long-term. He concludes that business success may be best achieved through teaming arrangements between larger, established corporations and smaller, more nimble businesses eager to try and risk new approaches. [Read the article here.](#)

### **Pennsylvania Council of Professional Geologists (PCPG) Publication Features EXCALIBUR GROUP, LLC**

In their most recent bulletin, the Pennsylvania Council of Professional Geologists (PCPG) features Excalibur Group, LLC. The article in Issue 4th Qtr / 2018 highlighted EXCALIBUR noting that it is celebrating its 20th year providing environmental consulting, engineering and risk management services to quality-oriented commercial,



industrial and insurance business customers. The PCPG write-up identifies a key EXCALIBUR tenet guiding their decades of success – EXCALIBUR takes a multidimensional approach to problem solving, focusing more on *why* clients have an environmental need, than the process required to meet the need. The PCPG composition goes on to reveal how the firm believes its successes stem from being able to distinguish itself by tailoring environmental solutions to clients’ specific business needs and finding cost-effective alternatives to often intractable environmental problems. One attribute EXCALIBUR believes is fundamental to its success is the firm’s sensitivity to the often unnecessarily high cost of environmental compliance and asset restoration but that EXCALIBUR’s management does not buy into the bureaucracy or corporate administrative burden practiced at larger environmental firms. One of EXCALIBUR’s mantras presented in the article is that EXCALIBUR works hard to obtain clients’ business, and even harder to retain it, starting with reasonable pricing. Managing Partner Stephen Wendt sums it up in the PCPG feature explaining “Clients don’t hire us to provide environmental services; they hire us to make their problems disappear. In our business, the best ideas win.” [Read more here.](#)



# EXCALIBUR GROUP, LLC

ENVIRONMENTAL CONSULTANTS, ENGINEERS & LIABILITY MANAGEMENT EXPERTS  
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