ENVIRONMENTAL NEWS & HIGHLIGHTS
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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.

Delays Implementing New UST Sump & Spill Protection Testing & Inspection Requirements – Top USEPA Concern

The USEPA's latest compliance advisory for facilities required to adhere to EPA's underground storage tank (UST) regulations highlights major UST owner and operator responsibilities and potential compliance concerns as EPA implements their 2015 UST regulations. EPA, states, and territories regularly conduct compliance inspections to identify potential compliance violations and releases. As of October 2018, approximately 550,000 underground storage tanks nationwide store petroleum or hazardous substances. The greatest potential threat from a leaking UST is contamination of groundwater, the source of drinking water for nearly half of all Americans. The federal petroleum UST regulations were promulgated in the late 1980s and described installation, design, operational, release reporting, financial assurance, closure, and related standards for equipment that owners and operators of USTs must adhere to. The federal UST regulations were the subject of significant revisions in 2015, the first significant revisions since the original promulgation of the regulations. The compliance concerns identified in EPA's compliance advisory are: i) Failure to complete required sump testing on time; ii) Failure to complete required spill prevention equipment testing on time; iii) Failure to complete required overfill inspection on time. A copy of the Compliance Advisory can be found **here.**

Biofuel Mandate - Found Environmentally Destructive

According to the National Wildlife Federation report, the U.S. Renewable Fuel Standard (RFS) and its implementation are leading to environmental disaster that includes the destruction of the monarch butterfly habitat, climate change acceleration, and drainage of western aquifers, amongst other problematic impacts. The research referred to in the NWF report was prepared by the University of California-Davis, University of Wisconsin, and Kansas State University. Scientists at the aforementioned institutions have assessed the direct connection between the U.S. biofuels policy and specific economic and field-level environmental changes since RFS' inception ten years ago. The report summarizes some of these connections and outlines measures Congress and the Administration must take to prevent further damage. The complete report can be found **here**.

Two Often Overlooked Due Diligence Inquiries

Due diligence conducted when acquiring assets in a commercial transaction, whether the assets include property with existing operating facilities or undeveloped property on which a facility is to be constructed, is absolutely essential to ensuring the property does not contain unknown environmental liabilities and is suitable for the buyer's intended use. The article by Breazeale Sachse & Wilson in Lexology also points out that the level of due diligence and the time and money spent on it will vary depending on the size and nature of the acquisition. But it should never be less than enough to obtain sufficient information about potential liabilities and future uses so a buyer may make an informed decision. Phase I Environmental Site Assessments (ESAs) are routinely done as part of the purchase of developed and undeveloped property. Environmental sampling can also provide information about the extent of contamination and the steps necessary to address the existing contamination. There are two often overlooked components to environmental due diligence for existing facilities; 1) the history of opposition from neighboring communities, whether in the form of complaints, opposition to permits or citizen suits, should be investigated

because it's important to understand possible future opposition to permit renewals, facility modifications or facility expansions; 2) Local governments are increasingly enacting land use ordinances that require an approval for certain types of industrial or commercial use and impose conditions on that use. These ordinances may apply to expansions for developed facilities or the initial development of undeveloped property. These are just a few of the many considerations that should be integral parts of proper environmental due diligence efforts. With proper due diligence, necessary information can be obtained and evaluated, allowing informed decisions to be made. **Read more here.**

USEPA Sues Sellers for CERCLA Cleanup After PCB Contaminated Buildings Sold Without Telling Buyers

The US 8th Circuit Court recently decided that a tire company and its affiliate could be held liable under the Comprehensive Environmental Response, Compensation and Liability Act at 42 U.S.C. § 9601 et seq. ("CERCLA") for selling property knowing that the PCB contaminated buildings thereon would be demolished. In an article published in JD Supra, Dico, Inc. ("Dico") owned several old industrial buildings in Des Moines, Iowa. The buildings were all well past their commercially useful lives and needed costly repairs and upkeep. The buildings soon came to the attention of the EPA, which ordered Dico to address the PCBs and submit a long-term maintenance plan for review. EPA also required ongoing testing, annual reports, and immediate notification if changes in site conditions threatened further release of PCBs. Without performing any remediation of its own, Dico, through its corporate affiliate, Titan Tire Corporation ("Titan"), sold the buildings to Southern Iowa Mechanical ("SIM") with the understanding that it would demolish the PCB-laden structures. Dico and Titan did not inform SIM of the PCBs, and they did not inform EPA of the sale. Instead of incurring a $1 million remediation, Dico and Titan saw a $100,000 profit. Thereafter, EPA undertook its own PCB remediation, and later sued Dico and Titan under CERCLA on the theory that they had arranged for the disposal of hazardous substances. The 8th Circuit concluded that Dico and Titan were liable as arrangers. There was enough evidence that Dico and Titan planned to dispose of the PCB contaminated buildings through the sale to SIM. Indeed, despite knowing that the buildings were contaminated and subject to an EPA order, Dico and Titan never related these facts to SIM. This indicated Dico and Titan intended to rid themselves of known PCB contamination. Other facts also evidenced the intent to dispose. The 8th Circuit decision makes clear that courts are willing to consider a wide

variety of facts and circumstances when considering arranger liability. Further, disposal does not require active disposal. Inaction coupled with intent to dispose was enough to impose CERCLA liability in this case. **Full article here.**

At Least 19 Million US Residents Are Exposed to Contaminated Drinking Water With PFAS Toxic Chemicals

According to the Environmental Working Group (www.EWG.com), the known extent of contamination of American communities with PFAS continues to grow. As of March 2019, at least 610 locations in 43 states are known to be contaminated, including drinking water systems serving an estimated 19 million people. The latest update of an **interactive map** by EWG and the Social Science Environmental Health Research Institute at Northeastern University, documents publicly-known pollution from PFAS chemicals nationwide, including public water systems, military bases, military and civilian airports, industrial plants, dumps and firefighter training sites. In July 2018, there were 172 contaminated sites in 40 states. This update draws from new data sources, so it is not directly comparable with the previous edition. However, as new data becomes available and states begin their public water system testing, the number of sites is likely to grow. **Report can be found here.**

EPA's Year Round Ethanol Rule Heightens Corrosion & Spill Risks

On May 30, 2019, EPA finalized regulatory changes to allow gasoline blended with up to 15 percent ethanol (E15) to take advantage of the 1-psi Reid Vapor Pressure (RVP) waiver that currently applies to E10 during the summer months. EPA is also finalizing regulatory changes to modify certain elements of the renewable identification number (RIN) compliance system under the Renewable Fuel Standard (RFS) program, in order to bring greater transparency to the market and deter price manipulation. Under the finalized expansion, E15 will be allowed to be sold year-round without additional RVP control rather than just eight months of the year (see the article **here**). In a separate article by Mitchell Williams in JD Supra, they explain that the new rule will rely on the federal UST rules, 40.C.F.R. 280.32 that requires owners and operators to use UST systems that are fully compatible with the substance stored in the UST system – no matter the substance being stored. Further, the provision requires owners and operators of UST systems who wish to store greater than 10 percent ethanol demonstrate that the systems are compatible with the substances stored and document compatibility for as long as the UST system is storing the substance. A few key points presented in their article affecting UST owners are: 1) States could be impacted because of the increased potential for corrosion resulting in new leaking UST sites; 2) Stating compatibility requirements for UST systems storing ethanol blended fuels over E10 are not limited to newly installed systems, but also include

all existing systems; and 3) UST systems will have a greater potential for aqueous phase liquid within the system (generating approximately twice the amount of such phase liquid, thereby creating a greater potential for microbial-induced corrosion). **Read JD Supra article here**.

PFAS and Public Water Supply in PA: Challenges & Opportunities

The PA Department of Environmental Protection (DEP) is currently tracking approximately 19 sites with known contamination with PFOA and PFOS. Nine are federal Superfund sites and three are addressed under the state's Hazardous Sites Cleanup Act. Several involve public water authorities. These known sites, however, may presage additional future sites and many new challenges. On April 12, 2019, the DEP announced a PFAS sampling plan, targeting 300 public water supplies with elevated potential for contamination and testing for six PFAS compounds. Challenges facing PA include: chemical, toxicological, sampling and analytical barriers, multiple and varied sources, evolving cleanup technologies, and the rapidly changing regulatory landscape. The summary for each was presented by Cozen O'Connor in their JDSupra article dated May 23, 2019 and also elaborated on the opportunities such as state support and funding, potential superfund hazardous substance designation, potential pursuit of cleanup and cost recovery through tort law, and natural resources. **Read more here.**

CA City Held Responsible for PCE CERCLA Cleanup Costs - Failed to Maintain Sewer System Infrastructure

In Mission Linen Supply v. City of Visalia, the Eastern District of CA addressed the proper apportionment of future response costs for perchloroethylene (PCE) contamination from former dry-cleaning operations. The plaintiff, Mission Linen Supply, was a former owner of a dry cleaner in Visalia, CA and was actively remediating the PCE contamination, and brought a CERCLA contribution action against the city for contributing to the spread of contamination off-site. The city owned and operated three sanitary sewer lines and two storm sewer lines running next to or through the former dry cleaner property. The sewer lines were installed at various times, beginning as early as in the 1920s. The sewer was installed "below general industry standards,"

because the pipes did not slope downward and were buried too shallow, meaning that they would not have adequate supporting strength. The city also did not properly maintain the sewers in accordance with general industry practices. The city was also aware that the sewers contained levels of PCE exceeding drinking water limitations, yet the city did nothing to address those levels. In a surprising ruling, the court found the city liable for fifty percent of all off-site necessary future response costs. Based on the testimony and evidence provided, the court held that PCE was released into the environment as a result of the sewer installation and maintenance defects, and therefore the city is responsible for a portion of the cleanup costs. Significantly, cities and towns in states like Indiana that don't enforce the absolute pollution exclusion in CGL policies are likely to have an alternative source of funding available via historical insurance policies. **Read here.**

Contradicting Juries, USEPA Maintains Weed Killer Chemical Glyphosate Is Not a Cancer Agent

In his Insurance Journal article, Tom Polansek summarizes EPA's assertions on April 30, 2019 that glyphosate, a chemical in many popular weed killers, is not a carcinogen, contradicting recent decisions by U.S. juries that found that it caused cancer in people. The EPA announcement reaffirms earlier findings from the agency about the safety of glyphosate, the key ingredient in Bayer's Roundup. "EPA continues to find that there are no risks to public health when glyphosate is used in accordance with its current label and that glyphosate is not a carcinogen," the agency said in a statement. The EPA did previously find ecological risks from the chemical and has proposed new measures to protect the environment from glyphosate use by farmers and to reduce the problem of weeds becoming resistant to it. But critics of the chemical disputed the EPA's assurances. "Unfortunately American consumers cannot trust the EPA assessment of glyphosate's safety," said Nathan Donley, a senior scientist at the environmental group Center for Biological Diversity. In 2015, the World Health Organization's cancer arm classified glyphosate as "probably carcinogenic to humans." But the EPA in 2017 said a decades-long assessment of glyphosate risks found the chemical was not likely carcinogenic to humans. **Read the article here.**

TSCA Risk Assessments Prompt Ban of Methylene Chloride for Consumer Paint & Coating Removal

EPA recently published a final rule restricting the manufacture, processing, and import of methylene chloride in the United States for consumer paint and coating removal. According to the article, it will be unlawful after November 22, 2019, to manufacture (including import), process, or otherwise distribute into commerce methylene chloride for consumer paint and coating removal. On that same date, retailers are banned from selling methylene chloride for consumer paint and coating removal, including any products used for that purpose that contain methylene chloride. The rulemaking is a result of risk assessments completed under the Toxic Substance Control Act (TSCA). Although EPA has proposed a determination of unreasonable risk from the use of methylene chloride in *commercial* paint and coating removal, the final rule does not ban commercial uses of methylene chloride in paint and coating removal. Full article can be **found here.**

Environmental Insurance Marketplace Shifts in 2019

A recently published article by Gabriele Crognale, PE, highlights current conditions of the environmental insurance marketplace in 2019 based on interviews of industry professionals. Key takeaways from the article include:

- Despite recent huge losses from flooding, fires and other disasters linked to climate change, few insurance providers are introducing climate change or force majeure exclusions that limit cleanup and remediation coverage or liability resulting from specific insurance products.
- Environmental insurance provider competition is strong, holding down rate increases in 2019 for contractor's pollution liability (CPL) and basic environmental impairment liability (EIL), however, certain segments like mold exposures, and fire and water restoration, which show signs of pricing movement due to claim activity.
- Environmental insurers are facing stiff competition with new entrants bringing robust capacity in the marketplace with estimates of between 40 to 50 markets providing one or more insurance coverages.
- The most prevalent claims over the past 18-24 months have reportedly been from mold or microbial matter (e.g., legionaella) impacting both CPL and PLL usually connected with the hospitality industry, apartments, healthcare facilities, schools and universities.
- Soil and groundwater contamination claims are reportedly only second to indoor air claims; spills during loading or unloading, or due to poor

housekeeping; contaminated run-off from construction sites; spills during transportation; and disturbance of asbestos-containing building materials.

- PFOA/PFOS exclusions on PLL quotes and policies are starting to be used but only for specific exposures.
- Mold and microbial matter claim exposures are reportedly addressed via the use of mold exclusions, particularly during renovations or capital improvements.
- Although there have been well-publicized verdicts against the makers of Roundup and the chemical glyphosate linked to cancer, the environmental insurance marketplace has yet to react, the manufacturer has been the principal target even though mis-application of the product could potentially lead to claims of soil and groundwater exposure issue.

Read more here.

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. Be sure to check out **EXCALIBUR's** B.I.D. process that has cumulatively saved customers millions of dollars - **here**. Read what our customers say at **Customer Commendations**. For more information on **Excalibur**, visit **www.excaliburgrpllc.com** or email us at **info@excaliburgrpllc.com**.