

# Emerging Issues in Environmental Liability



# Panelists

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# 9 Things to Think About

- ✓ Climate Change
- ✓ Vapor Intrusion
- ✓ Mold
- ✓ MTBE/Fuel Additives
- ✓ Global Environmental Liability
- ✓ All Appropriate Inquiry
- ✓ Fin 47/Sarbanes-Oxley
- ✓ “Cost Cap” Insurance Options
- ✓ Expanding Suite of Regulated Pollutants and Persistent Chemicals

# Climate Change

- Legal
  - Real or not, regulation is coming
  - Investor groups are watching
- Insurance
  - Early stages of exposure assessment and potential product development
  - Carbon sequestration brings new risks
- Technical
  - Cap and trade or tax-based will slow new projects
- Links
  - [http://www.ceres.org/news/news\\_item.php?nid=267](http://www.ceres.org/news/news_item.php?nid=267)

# Vapor Intrusion

- Technical
  - Low screening levels often lead to investigation
  - Investigation/Institutional Controls required on undeveloped sites
- Legal
  - Leading to more medical monitoring claims
  - Increased “re-opener” risk
- Insurance
  - An increasingly frequent reason why insurance is purchased

# Mold

- Technical
  - Mold is naturally occurring; problem arises when present indoors significantly above outside ambient levels
- Insurance
  - Not all coverages are equal
  - Lack of government standards creates complications
- Legal
  - Personal injury claims have largely been unsuccessful; property damage are only viable claims
- Links
  - <http://www.epa.gov/mold/>

# MTBE/Fuel Additives

- Legal
  - Products liability cases are moving forward
- Insurance
  - Cleanup and BIPD coverage continues to be available
- Technical
  - widespread, fast moving, more costly remediation
  - Ethanol (E-85) blends enhance corrosion
- Links
  - <http://www.atsdr.cdc.gov/tfacts91.html>
  - <http://www.epa.gov/mtbe/>

# Emerging Chemicals of Concern

- Legal
  - Some states and EPA considering lowering of MCLs for certain compounds
  - Expanding suite of regulated pollutants
- Technical
  - Higher O&M costs; Cleanups will get longer and more expensive
- Insurance
  - Typical pattern-covered, then excluded, then covered with conditions
  - Increased claims activity possible
- Links
  - <http://www.epa.gov/safewater/contaminants/index.html#organic>

# Global Environmental Liability

- Technical
  - Variable enforcement appetite and capacity
- Insurance
  - Government enforcement is a key trigger of coverage
- Legal
  - In US swing to the left means more focus on environmental enforcement
  - New global focus on environment

# All Appropriate Inquiry

- Legal
  - New standard for “innocent purchaser defense” under CERCLA
- Technical
  - Standard has practical difficulties
  - Expanded Phase I Scope and Reduced Shelf Life
- Insurance
  - Due diligence somewhat stronger, potentially reducing risk profile
  - Potentially greater professional liability exposure for preparers
- Links
  - [http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE\\_PAGES/E1527.htm?L+mystore+zbfh2361](http://www.astm.org/cgi-bin/SoftCart.exe/DATABASE.CART/REDLINE_PAGES/E1527.htm?L+mystore+zbfh2361)
  - <http://www.epa.gov/swerosps/bf/regneg.htm>

# Fin 47/Sarbanes Oxley

- Legal
  - What must be reported, and when
- Insurance
  - Ramifications of disclosure triggering insurance purchases
  - May lead to cost containment and surplus asset disposal efforts
- Technical
  - Estimates of future remediation must be more precise
- Links
  - <http://www.fasb.org/pdf/fin%2047.pdf>

# Insurance Market Developments

- Insurance
  - Price “softening” in certain product lines
  - Increasingly restrictive coverage for certain products or issues
- Technical
  - “GIGO” – environmental risk is not so easy to define
- Legal
  - Without cost cap insurance, how do you contain a remediation liability?
- Links
  - [www.brownfields2006.org/proxy/SessionDocument.1796.aspx](http://www.brownfields2006.org/proxy/SessionDocument.1796.aspx)

# Expanding Suite of Regulated Pollutants

- Technical
  - require new investigative/remediation technologies
  - case reopeners
- Insurance
  - Typical pattern: Covered, then excluded, then covered with conditions
- Legal
  - More pollutants = more regulation + more liability
- Links
  - [clu-in.org/contaminantfocus/default.focus/sec/1,4-Dioxane/cat/Overview/](http://clu-in.org/contaminantfocus/default.focus/sec/1,4-Dioxane/cat/Overview/)
  - <http://www.epa.gov/oppt/pfoa/>

# Persistent Chemicals

- Technical
  - Water/wastewater treatment systems remove only a fraction of contaminants in water – you're drinking the rest
- Legal
  - Personal injury? Products liability?
- Insurance
  - Often drives financial exposure more than toxicity
  - Underscores need for coverage
- Links
  - <http://www.epa.gov/pbt/>
  - <http://toxics.usgs.gov/regional/emc/index.html>

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Thank You

