

# A Legal Viewpoint: Top Ten Issues Impacting Environmental Risk Management Today

Chicago Due Diligence at Dawn

Rosemont, IL

November 29, 2018

# Top Ten Environmental Issues

- Emerging Chemicals
- Bona Fide Prospective Purchaser (BFPP) Updates
- USEPA Audit Disclosure Updates
- Soil Vapor Intrusion/Indoor Air
- Environmental Due Diligence (EDD) Needs
- Environmental Insurance Coverage
- EDD Cost-Related Considerations
- ACM/Lead/Mold/Fill Materials
- In The News/Community Involvement
- Recent Illinois Developments

# Emerging Chemicals

- Perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS) and 1,4 dioxane, among others
- Often are more mobile, less degradable, with lower standards and much more costly to treat
- Creates greater uncertainty in transactions and new concerns associated with closed/active cleanups
- IEPA is proposing a new Part 620 groundwater standard of 0.07 ug/L for PFOA/FPOS and possibly adding to water supply sampling program requirements
- A number of states have established groundwater and water supply thresholds for 1,4 dioxane

# BFPP Updates

- Provides an affirmative defense to a qualified BFPP to minimize the potential for CERCLA liability traditionally imposed upon owners and operators
- BUILD Act of 2018 expanded these protections to qualified tenants — USEPA previously relied upon its enforcement discretion to provide BFPP protection to qualified tenants
- To qualify as a BFPP, parties must conduct All Appropriate Inquiries (AAI) regarding a property in the form of a Phase I environmental site assessment and meet other legal requirements
- *See* USEPA AAI Final Rule at 40 CFR Part 312

# USEPA Audit Disclosure Updates

- USEPA announced a renewed emphasis in May 2018 to encourage entities to voluntarily discover, promptly disclose, expeditiously correct and take steps to prevent reoccurrence of environmental violations
- *eDisclosure System*
- *New Owner Audit Policy*
- *New Owner Clean Air Act Audit Program (Oil & Natural Gas Sector)*
- Self-disclosures meeting USEPA requirements eliminate 100% of the gravity-based civil penalty and allow the Agency to waive civil penalties associated with economic gain

# USEPA Existing Audit Policy Conditions

1. Systematic Discovery
2. Voluntary Discovery
3. Prompt Disclosure (within 21 days)
4. Discovery, Disclosure Independent of Government/Third Party
5. Correction and Remediation
6. Prevent Recurrence
7. No Repeat Violations
8. Some Violations Excluded (serious actual harm/imminent & substantial endangerment)
9. Cooperation

# Soil Vapor Intrusion/Indoor Air Quality

- Beginning in the 1980s with radon concerns, soil vapor intrusion has emerged as a key EDD consideration in site cleanups and redevelopment projects
- 2015 *USEPA Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air* (OSWER Publication 9200.2-154, June 2015) applies to CERCLA and RCRA sites
- *Vapor Intrusion Screening Level Calculator and Resident Vapor Intrusion Screening Levels* (May 2018)
- Easily managed with ongoing cleanups but remains a serious concern related to offsite impacts and community outreach

# What Kind of EDD Really Is Needed?

- Completion of a Phase I Environmental Site Assessment may not be the right course of action for every transaction—there are other options
- Parties to a merger or stock deal may not benefit from BFPP protections so a Phase I report may be less relevant, unless contractually required or requested by lenders
- Consider other possible options:
  1. Baseline Environmental Assessment
  2. EDR Report
  3. Reliance upon existing environmental due diligence
  4. Environmental contractual protections



# Environmental Insurance Coverage

- Environmental insurance coverage often plays a vital role in managing environmental risks by mitigating potential liabilities
- Finding the right broker is key to successfully obtaining meaningful coverage in a timely manner
- Despite market fluctuations, third-party PI/BD is readily available in 3 yr., 5 yr. and sometimes 10 yrs. policies with SIR in the \$50,000-\$100,000 range for \$10M-\$20M in coverage
- Other environmental coverages are available depending upon the risks to be managed

# EDD Cost-Related Considerations

All Costs Must Factor Into Any Overall Environmental Strategy:

1. IEPA SRP costs \$10,000-\$15,000
2. Assess hidden costs (hazmat disposal, used/discarded equipment/machinery, underground process lines, septic fields)
3. Groundwater ordinance
4. Soil, groundwater or soil vapor sampling
5. IL Drycleaner Environmental Trust Fund—other sources of funding
6. Expedited timing to meet deal or construction schedules

# Costly Issues Beyond Phase I Reports

What is the end use of the property, will any buildings or structures be demolished and will redevelopment require new construction?

- ACM
- Lead Paint
- Mold
- PCB Wood Block Floors
- Onsite Fill Materials
- Fluorescent Light Ballasts
- Wetlands

# In The News/Community Involvement

- Environmental matters take on a different posture with community engagement, environmental groups and/or plaintiffs' lawyers
- Understanding the parties' motivation is key:
  1. CWA citizens suits in IL against coal industry
  2. Prop 65--60 Day Notices of Violation
- Is the site of special interest or concern to the community or nearby residents?

# Recent Illinois Environmental Developments

- Stormwater Management—Chicago River
- Ethylene Oxide--Willowbrook
- Water Quality/Scarcity—Peoria and Northern Illinois
- Manganese—Chicago Southeast Side
- NEPA—Amtrak Hiawatha Service Expansion Chicago to Milwaukee
- Water Scarcity—Great Lakes' Water Allocation for New Wisconsin Industry

# Top Ten EDD Issues

**Questions?**

**E. Lynn Grayson**

Nijman Franzetti LLP

[lgrayson@nijmanfranzetti.com](mailto:lgrayson@nijmanfranzetti.com)

(312) 262-6007