

## The Environmental Corner

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### Going, Going.....Gone!

**Changing Laws and Economic Climate Affect Drycleaner Decisions To Deal With Contamination Issues**

Over the years, I've written about the opportunity to utilize historical Comprehensive General Liability (CGL) insurance policies to assist in funding legal work, site investigation activities and remediation in response to claims made by environmental agencies and landlords. When I first started meeting with dry cleaners to discuss the notion that historical insurance policies were valuable assets, most business owners wouldn't acknowledge that they had accidental spills of cleaning solvents which contaminated or may have contaminated their site. Early on, the regulatory agencies were not aggressively focusing on the dry cleaning industry as a central theme in regional and local groundwater pollution problems. The agencies were not trying to phase out PERC; and indoor vapor intrusion from dry cleaning solvents was more of a hypothetical discussion than a regulated action.

Today, the wheels continue to turn as agencies have tightened their grip on phasing out PERC and are evaluating potential risks to residences and workers where solvents have been detected in soil gas and indoor air. Court decisions involving complex environmental liability matters continue to change. Where certain state and federal courts once construed the law to allow dry cleaners to use general liability insurance policies to defend against environmental li-

ability claims, those rulings are today being distinguished so as to reduce their precedential authority. While the occasional state court decision favors the policyholder, the rulings now usually favor the insurer's argument that it has no duty to defend, or if they do, they are limited as to the time period in which they insured the business.

Also, when you consider the cur-

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## *As Seen In...*

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rent state of the insurance industry, which is constricting by merger and acquisition, plus some disturbing findings regarding the solvency of some of the carriers, it becomes apparent that dry cleaners need to think proactively about how to address the problem of long-tail environmental liability.

In March 2010, an article in Business Insurance forecast the liquidation of Kemper Insurance Company within the next few months. When Kemper officially goes into a state managed run-off, there will be a small window of time in which policyholders will be allowed to file claims to qualify for cents on the dollar in coverage. Following the end of this run-off period, there will be no coverage under these policies. They will effectively have gone from valuable to valueless in a matter of months.

What will this mean for dry cleaners? Kemper Insurance Company's lead insurance unit, Lumbermen's Mutual Casualty Company, marketed its special multi-peril and general liability insurance policies to the dry cleaning industry quite successfully in the 1970's and 1980's. Lumbermen's Mutual policies were sponsored by dry cleaning associations in various states. Some state

dry cleaners associations like the former California Fabricare Institute even purchased a master policy from Lumbermens Mutual for its members and then issued subscriptions to individual dry cleaners. If those dry cleaners covered under these policies wait until their landlords or neighboring landowners discover groundwater contamination traceable to their former operations, it will likely be too late for them to use these historical insurance policies to obtain defense against these claims. They will be required to pay legal fees, and environmental engineering costs out of their own pockets.

Self-preservation requires that dry cleaners act now to pull together their historical insurance policies; that they act now to determine whether contamination in soil or groundwater exists on their business properties. This dangerous environment also demands that they associate themselves with environmental consultants with knowledge of these matters, professionals who know how to guide and assist them in using all the resources at their disposal now to prevent catastrophes from overwhelming, even bankrupting their businesses. side-by-side at the same time. One sample will be labeled with information pertaining to its location

and sampling specifics, while the other will be submitted to the laboratory "blind" to provide a means of spot-checking the accuracy of the laboratory. Your work plan should include a protocol for these Quality Assurance and Quality Control (QA/QC) measures.

In summary, vapor intrusion is the hottest new focus in the environmental arena. A higher amount of grant monies and financial resources by states are being earmarked for evaluating indoor air at homes and businesses near contaminated sites, although the party responsible for the spill is likely also financially responsible for the vapor intrusion sampling. Sampling is expensive, but the ramification of having bad data that is not truly representative of vapors emanating from a groundwater plume or soil source, has a much greater consequence. Collecting good quality data is critical and can be accomplished if your consultant is following the proper procedures. Don't go cheap when it comes to collecting vapor samples. Make sure your consultant is experienced, that your work plan is approved (if practical), and that the analytical laboratory provides useful data.