



THE GEI MGP Reporter

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Insurance Coverage Litigation Involving MGP Claims

By Dave Elkind, Dickstein Shapiro, LLC

Insurance coverage litigation involving MGP claims is extraordinarily complex, often involving years of insurance coverage and numerous technical, legal and factual issues. One of the most important litigated issues is whether the MGP contamination was caused intentionally by the operating utility. If the contamination was caused intentionally, the insurance company may be able to defeat coverage.

Insurance normally covers the unintended negative results of intentional acts. In MGP insurance coverage litigation, the question of whether MGP-related contamination was intentionally caused often results in the classic “battle of the experts,” with both sides’ experts reviewing contemporaneous plant records and site investigation reports to opine on how the contamination was caused.

Unfortunately, it is not uncommon for MGP environmental consultants to speculate in reports, memos, and/or email (to clients) as to

the cause of MGP contamination. This may be justified when there is a continuing source of contamination (i.e., a pipe that is currently leaking tar). Just as often; however, speculation is inaccurate and harmful to the utility’s position in its insurance coverage litigation.

For example, in one MGP insurance coverage action, the utility’s environmental consultant generated a memorandum that “lined-up” sediment contamination with discharge pipes leading from the site to the body of water. This implied that the impacts were caused by intentional discharges of wastewater that contained coal tar. The insurance company pointed to the memorandum and asserted that the sediment contamination was caused by intentional disposal activities. Fortunately, the utility’s expert witness was able to demonstrate technically that the sediment impacts were caused by subsurface tar migration from the landside portion of the site.

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Editorial

The Sweet Success of Tar

By Bill Hoynack, Northeast Utilities

The age of the gaslight industry faded away many years ago, but its legacy lives on, in fact, for many of us, it thrives.

All of those pesky environmental regulations, voluntary cleanups, consent orders, involuntary cleanups and lawsuits have allowed a host of hydrologists, geologists, biologists, chemists, engineers, CAD specialists, lawyers, regulators, utility staff and management, and let's not forget all the drillers, analytical laboratories, surveyors, support vendors and environmental cleanup contractors, to earn a decent living and be gainfully employed for a very, very, long time.

As I look back on my 25-year career, it's hard to believe that the "black goo" I sampled in the field many years ago is still around and that these MGP "gifts" have caused financial reserves to soar to the astronomical accounting levels we currently have today. (Oh yeah, I forgot the accountants who are supported by coal tar too). Try as we might, the MGP sites just keep hanging around and even when we do remediate them, the post-remediation monitoring goes on and on and on.

At some point, maybe the gaslight legacy will fade away forever, but until then, it will continue to support many of us and our families, just as the gas works did during its operational days. In the meantime, don't forget to cash those paychecks (ka-ching)!!!!

MGP Reporter

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Newsbriefs

Hamilton Port Authority – Striving for Green

Canada's Hamilton Port Authority (HPA) has been commended for pushing environmentally responsible activity on its agenda. Recent movements to remain involved in the Hamilton Harbor Remedial Action Plan and its creation of an environmental manager position have been especially noteworthy.

Hamilton Harbor Remedial Action Plan is an effort to restore Hamilton Harbour (near Lake Ontario) to its original natural state. Currently, Hamilton Harbour is included on Canada's list of Great Lakes toxic hot spots. Sewage discharged into the harbor from residential and industrial development initiating in the early 1900's has closed the beaches

and devastated the fishing industry there.

Earlier this year, the HPA hired Marilyn Baxter as its new Environmental Manager. Ms. Baxter is the former executive director of the nonprofit Bay Area Restoration Council. She intends to be involved in the \$90 million project to contain toxic coal tar located on Randle Reef while at the same time creating a new shipping facility near Sherman Avenue. This work is seen as essential for removing Hamilton Harbour from the list of Great Lakes toxic hot spots. The work is anticipated to start next year pending federal and provincial government funding. (*The Hamilton Spectator*, Ontario, Canada; <http://www.hamiltonharbour.ca/rap/faq.htm>)



GASWORKS EUROPE

March 4-6, 2008
Dresden, Germany

Redevelopment, Site Management and Contaminant Issues of former MGPs and other Tar Oil Polluted Sites

This international conference on the redevelopment of Manufactured Gas Plants (MGP) in Dresden addresses the remediation of such sites by focusing on appropriate remediation technologies, risk assessment and legal issues, case studies, integrated strategies and fit for purposes approaches as well.

The objective of this conference is to exchange experiences and ideas concerning the management of abandoned tar contaminated sites in general (MGP, wood preserving sites, coking plants). It will provide a platform for problem owners, site managers, companies being active in the field of remediation technologies, and community stakeholders.

Special Sessions, round table and panel discussions will be offered according to the demand. An exhibition will provide information on the state of the art of remediation.

Find further information on the internet at: www.mgp2008.com.

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In another MGP coverage action, an early site investigation report noted that tar was found a few feet below grade in an area far removed from operations. The report concluded that the tar was “deposited” there. Again, the insurance companies argued that the report found intentional contamination. The utility’s expert; however, relying on subsequent site investigations, successfully demonstrated that subsurface migration along a confining layer was responsible for tar at the far-removed location identified in the earlier report.

Use of such words as “disposal,” “dumping,” “burial” and similar pejoratives in environmental site reports and other communications is usually unnecessary, often inaccurate, and frequently problematic to the utility’s attempt to gain insurance coverage for its liabilities. Worse, such communications may weaken the consultant’s and utility’s technical standing. In the worst case scenario, the consultant’s investigation work is suddenly suspect and becomes the central focus of the insurance company’s defense to the claim.

Environmental consultants and engineers (from field technicians taking notes to project managers reviewing reports) who investigate MGP sites should behave as though they WILL become witnesses in litigation concerning insurance coverage for the clean-up of the site. Environmental consultants and their utility clients must understand that any report, memorandum, or e-mail may have to be produced in pre-trial discovery, and may be used as an exhibit at trial. Environmental consultants should not use pejorative language or stray into areas of “forensic” analysis beyond the scope of the assignment. Counsel for the engineering firm can be consulted if there is uncertainty about using the “right” words. Finally, when in doubt, leave it out.

The opinions expressed are those of the author and not necessarily those of GEI. We invite comment from those with differing opinions. The author may be contacted at ElkindD@dicksteinshapiro.com.

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MGP Futures

By John Ripp, GEI Consultants

Utility representatives expect the MGP investigation/remediation industry to be around for at least another 20 years, according to an informal industry survey conducted by GEI earlier this year. In fact, 20 years is a conservative estimate, based on comments from 25 utility program managers.

The last fifteen years has primarily been an era of site investigation, one that will continue as lower risk sites move up the ladder to receive more attention. Of the 916 MGP sites represented in the survey, investigation is completed at approximately 65% of them, but most utilities report that remediation is complete at less than 40% of their sites. As such, the next 20 years are expected to be the era of remediation.

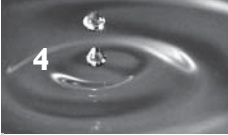
It was no surprise that 80% of chosen remedial technologies consisted of excavation and offsite disposal to landfills or thermal treatment facilities. Thermal treatment appears to be an East Coast preference while landfilling is popular in the Midwest. Other technologies such as in-situ chemical oxidation, in-situ thermal, and solidification/stabilization are being tried and evaluated, but none of these stands out.

There is apparent consensus from survey responders that they would rather pay today and eliminate the risk, even if by expensive low-tech methods, rather than implement uncertain technologies. Most, however, are keeping an open mind with regard to new approaches for site remediation.

Fifty-four percent of the sites reported are not owned by the utility so it is not surprising that the largest challenge to site managers is dealing with third parties (other owners, neighbors, local municipalities, community groups, etc.). Meeting soil, sediment and groundwater cleanup criteria is the second most challenging area facing the utilities, with groundwater standards dominating the issue.

The industry survey was coupled with a review of the Securities and Exchange Commission reports that indicate an industry-wide MGP remediation reserve of \$4.36 billion dollars. In canvassing the utility audience at the EPRI MGP 2007 Symposium, this estimate is widely considered low because of the definitions applied in the 10K reports. Many managers believe the MGP reserve should be closer to \$10 billion. This estimate may still be low due to the fact that many of the largest and most complex sites have yet to be cleaned up and real-time costs are just beginning to be seen for the more difficult sites.

The bottom-line from the survey is that there are still many challenges to overcome and opportunities for creative solutions applied to site management. On average, if a site manager is 45 years or older he should have MGP job security at least for the next 20 years.



SpeakUp

Festival Park in Fayetteville, NC (former MGP site)

We recently heard from a reader who attended the opening of Festival Park in Fayetteville, North Carolina, a former MGP site. In her words, "There wasn't a Kayak Run, a huge tower or a prominent water feature running through the Park, but it was impressive nonetheless. There was a concert stage, indoor rest rooms, concessions stands, a paved parking lot, and a bridge across the creek. It will be a nice venue for mid sized concert events." Thanks to Kerry A. MacPherson of Progress Energy for keeping us informed. Find out more at: <http://www.faydogwoodfestival.com/fayetteville.html> and <http://www.wral.com/news/local/story/1364483/>



Coal Tar & Pavement Sealers (Part III)

By Jerry Zak, GEI Consultants

We have been tracking and reporting developments regarding an Austin, Texas city-wide ban on use of pavement sealers containing coal tar. The ban was enacted after the City and the United States Geological Survey (USGS) concluded that coal tar based pavement sealers are a significant source of polycyclic aromatic hydrocarbons (PAHs) in some sediments in some city waterways.

A relevant website has sprung up on the internet; www.truthaboutcoaltar.com contains information regarding the modern methods of coal tar production and coal tar chemical composition. The site also describes "flaws" in the USGS/City of Austin study, including:

- apparent lack of EPA or ASTM sampling methodologies/standards;
- analytical samples which contained pieces of asphalt;
- lack of information acknowledging that PAHs are ubiquitous in urban environments; and
- sampling locations close to other potential sources.

The site does not name its owner/operators, but the contact information phone number was for Cooper's Creek Chemicals, a refiner of crude coal tar.

A separate website run by the Center for Regulatory Effectiveness (http://www.thecre.com/quality/2007/20070328_quality.html) claims that USGS "...has acknowledged it will revise some of [the] results released concerning refined coal tar sealer and that errors were made in calculations relating to coal tar sealers and pavement runoff in a study the USGS conducted for the City of Austin, TX."

MaryLynn Musgrove, at USGS in Austin confirmed that USGS had issued a revised version of the report. The revision was in response to a November 7, 2006 *Complaint About Information Quality* letter from Bracewell and Guliani, LLC. Bracewell and Guliani generated the letter on behalf of ten "affected persons", including Cooper's Creek Chemical Corporation; however, Ms. Musgrove pointed out that USGS had not changed their "major conclusions".

All of the USGS details, including the complaint letter and USGS responses to it, are available at <http://tx.usgs.gov/>.



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