

## BOOMERANG PROPERTIES: WHEN “CLEAN ENOUGH” SUDDENLY ISN’T

Presented by:

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*Member*

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**PRACTICE AREAS:**

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[Artificial Intelligence, Robotics,  
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**STATE ADMISSIONS:**

New Jersey

Pennsylvania

Michigan

**COURT ADMISSIONS:**

U.S. District Court for the  
Western District of Pennsylvania

U.S. District Court for the District  
of New Jersey

U.S. District Court for the Eastern  
District of Michigan

U.S. Court of Appeals for the  
Third Circuit

U.S. Court of Appeals for the  
Sixth Circuit

**EDUCATION:**

J.D., University of Virginia School  
of Law, 1993

B.A., with high honors, Rutgers  
College, Rutgers University,  
1990; Phi Beta Kappa



## David A. Rockman

### MEMBER

David Rockman helps clients manage environmental compliance and environmental risks. He helps clients understand and meet their legal obligations with respect to federal, state, and local environmental laws, regulations, and permits. David also defends clients facing enforcement actions, represents clients involved in environmental litigation, and provides representation with respect to environmental issues in the purchase and sale of businesses and property.

David has experience with all of the major environmental programs governing air, water, waste, and land issues, across a broad spectrum of industries and activities. Environmental compliance requires attention to the broad range of statutory and regulatory requirements, as well negotiation of appropriate permit requirements, and accounting for government guidance and policies. Managing compliance risks involves strategic attention to government agency inspections, information requests, and violation notices. Even the best intentioned and managed companies can find themselves the target of government enforcement or citizen suit litigation. Such situations require an unflinching assessment of the validity of the charges, an evaluation of available defenses, and a strategy that balances litigation, liability, and penalty risks.

David believes that an effective environmental compliance approach requires not only interaction with external elements such as government agencies and the public, but also with internal stakeholders at both the management and operational levels to help ensure understanding and appreciation of environmental obligations, opportunities, and consequences. He routinely helps clients manage these issues.

Environmental concerns must also be managed in the purchase and sale of properties and businesses. Strategic due diligence, with the context of the deal, is necessary for both buyers and sellers. David has experience advising both small and large businesses in the transactional context. Environmental legal issues often have significant scientific and technical components. David is experienced in retaining and working with environmental engineering consultants, expert witnesses, and auditors, in order to provide the best guidance to clients on the range of issues that they face.

## REPRESENTATIVE MATTERS

### Air:

- Provided counseling to a major manufacturing facility in connection with the revision and updating of Prevention of Significant Deterioration (PSD) permit limits.
- Helped numerous clients evaluate the potential applicability of New Source Review requirements.
- Defended government and citizen suit actions for alleged violations of Clean Air Act requirements on behalf of industrial and commercial clients.
- Participated in detailed compliance auditing of all Clean Air Act compliance requirements for a large manufacturing facility.
- Assisted several manufacturing, material handling, and energy sector clients evaluate and challenge source aggregation determinations.
- Assisted multiple clients in the negotiation of Title V permit conditions and in the development of Title V compliance certifications and deviation reports.
- Helped several manufacturing facilities determine major source status under the Title V and Maximum Achievable Control Technology Standards (MACT) air programs.
- Represented a manufacturing client in a court challenge to U.S. EPA MACT standard, and successfully obtained revisions to the standard.
- Assisted multiple clients in responding to Clean Air Act Section 114 information requests.
- Assisted clients in evaluating compliance requirements under Pennsylvania Department of Environmental Protection (DEP) regulations targeting the oil and natural gas sector.
- Assisted manufacturing and retail sector clients address indoor air and vapor intrusion issues.

### Water and Drinking Water:

- Represented drinking water authority in litigation to prevent potential harmful impacts to its drinking water supply.
- Successfully defended a large manufacturing facility in a Clean Water Act citizen suit.
- Negotiation and implementation of complex consent decree for facility with significant water discharge violations.
- Helped several manufacturing clients negotiate National Pollutant Discharge Elimination System (NPDES) permits and win changes to proposed permit limits.
- Challenged NPDES permit limits in a final NPDES permit in successful state administrative action.
- Provided counseling to manufacturing client related to assessment of appropriate analytic methods for measuring wastewater compliance.
- Assisted clients in commenting on proposed Pennsylvania DEP regulations.
- Assisted energy sector clients in evaluating compliance obligations under existing and evolving Pennsylvania DEP regulations.

#### Waste Management, Land Use and Cost Recovery Litigation:

- Helped several very large manufacturing facilities conduct Resource Conservation and Recovery Act (RCRA) corrective action investigation and remediation.
- Routinely provides counseling to clients regarding the application of hazardous and solid waste regulations to ongoing and contemplated future activities.
- Assisted clients manage activities under Pennsylvania Act 2 and similar state program voluntary cleanup/brownfields programs.
- Prosecuted and defended numerous environmental cost recovery actions under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and analogous state laws for recovery of investigation and cleanup costs
- Assisted client manage response and compliance activities for a U.S. EPA RCRA order requiring emergency measures to protect wildlife from exposure to solid wastes.

#### EPCRA:

- Assisted numerous clients evaluate compliance and application of Tier II and Toxics Release Inventory (TRI) reporting requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA).

#### Due Diligence, Transactional and Financing:

- Provided counseling to multiple clients in connection with the purchase of real estate, including the applicability of the All Appropriate Inquiries defense, the use of Phase I and Phase II environmental site assessments, and the negotiation of purchase and sale terms and conditions and indemnities.
- Assisted clients evaluate the compliance and liability risks associated with the purchase of manufacturing facilities and equipment.
- Represented numerous clients in negotiation of lease terms pertaining to environmental issues and hazardous substance use and handling.
- Negotiation of environmental terms and conditions for financing and refinancing of loans.
- Assisted several clients manage indemnity rights in connection with the purchase of manufacturing facilities with a history of contamination .

#### Auditing and Self Disclosure:

- Represented clients in multi-facility and multi-jurisdictional audits under the US EPA voluntary audit self-disclosure program for Clean Air Act and Toxics Reduction Inventory compliance.
- Assisted numerous clients conduct self-audits and voluntary disclosures for single facility audits under the Emergency Planning and Community Right to Know Act.

## PROFESSIONAL AFFILIATIONS

- Chair, Allegheny County Bar Association Environmental and Energy Law Section
- Air & Waste Management Association
- American Iron and Steel Institute, Environment Committee
- ASTM, Environmental Assessment, Risk Management and Corrective Action Section

## COMMUNITY INVOLVEMENT

- Reading is FUNdamental Pittsburgh, elementary school reading mentor

## AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers – Rising Star*

## NEWS AND INSIGHTS

### PUBLICATIONS

- ["How Artificial Intelligence Will Change Environmental Compliance,"](#) *Bloomberg Environment*, October 2018.
- "Protecting Surface Water Supplies From Commercial and Industrial Dischargers," *Journal of the American Water Works Association*, October 2017.
- Insider Source for "Limit Liability in Lease with Environmentally Risky Tenant" in *Commercial Lease Law Insider*, August 2015.
- "Tenants Now Eligible for Environmental Liability Protection Under New U.S. EPA Policy," *Eckert Seamans' Environmental Alert*, January 2013; *Joule*, the Duquesne Energy & Environmental Law Journal.
- "EPA Proposes Revised Cooling Water Intake Rules For Existing Power Plants And Manufacturing Facilities," *Eckert Seamans' Environmental Alert*, April, 2011.
- "Climate Change Impacts Financial Disclosure, Reporting Obligations," *Eckert Seamans' Legal Update*, Fall 2010.
- "Climate Change Impacts Financial Disclosure, Reporting Obligations," *The Legal Intelligencer*, May 2010.
- "Common Law Claims For Greenhouse Gas Emissions Allowed To Proceed," *Eckert Seamans' Environmental Alert*, November, 2009.
- "EPA Announces Proposed Rule Requiring Permitting For Major Sources Of Greenhouse Gas Emissions," *Eckert Seamans' Environmental Alert*, October, 2009.
- "Federal Greenhouse Gas Reporting Rules Issued," *Eckert Seamans' Environmental Alert*, September, 2009.

- "U.S. EPA Proposes Amendments To New Source Performance Standards Subparts OOO and Y," *Eckert Seamans' Environmental Alert*, June, 2008.
- "Nanotechnology: Environmental And Health Risks May Not Be Small," *The Legal Intelligencer*, April, 2006.
- "New EPA Boiler And Process Heater Regulations To Affect Thousands Of Facilities," *Eckert Seamans' Environmental Alert*, September, 2004.
- "EPA To Increase Enforcement Of Stormwater Rules For Construction Sites," *Eckert Seamans' Environmental Alert*, July, 2004.
- "What To Do When The Inspector Calls," *Eckert Seamans' Environmental Alert*, March, 2003.
- "Release Reporting For Air Emissions: EPA's New Guidance," *Eckert Seamans' Environmental Alert*, October, 2002.
- "EPA Compliance Initiative For The Baking Industry," *Eckert Seamans' Environmental Alert*, March, 2002.

#### MEDIA COVERAGE

- "EPA's particulate matter regulations may create more permit complication," *SNL Coal*.

#### SPEAKING ENGAGEMENTS

- "Emerging Technology and the Future of EHS Compliance, Enforcement and Risk Management," webinar presentation for Bloomberg Environment, June 2019.
- "Environmental Sampling 101: Water Sampling and Analysis," organizer and moderator, Allegheny County Bar Associated Environmental & Energy Law Section, March 2018.
- "Manufacturing Law: Environmental Health & Safety and OSHA Issues," presented for the National Business Institute, August 2017.
- "Agency Ethics, Overreach, Sue and Settle and the Misuse of Science," Air and Waste Management Association Annual Conference, June 2017.
- "Environmental Considerations in Real Estate Transactions," presented at the National Business Institute program *Real Estate Transactions From A to Z*, March 2016.
- "Ethical Issues in Environmental and Energy Law," moderator, Allegheny County Bar Associated Environmental & Energy Law Section, April 22, 2015.
- "Environmental Law 102: Latest Developments, Practice Pointers and Strategy Tips for Regulatory Compliance and Due Diligence," co-presenter, Western Pennsylvania Chapter of the Association of Corporate Counsel, April 10, 2014.
- "Legal Ethics in Energy Law," *Fracking Law*, National Business Institute, August 13, 2012.
- "Environmental Regulatory Issues," *Marcellus 101*, Pennsylvania Council of Professional Geologists, June 27, 2012.
- "Clean Air Law And Emerging Developments," National Business Institute, July 27, 2010.

- "Air Quality Issues & Marcellus Shale Development," Air & Waste Management Association, May 12, 2010.
- "Air Quality Issues," *2010 Technical & Environmental Issues*, Pennsylvania Independent Oil and Gas Association, April 7, 2010.
- "Environmental Due Diligence In Real Estate," National Business Institute, June 9, 2009.
- "Fundamentals Of Real Estate Due Diligence: Environmental Issues," National Business Institute, December 10, 2008.
- "Business Succession: Buy Sell Agreements," Westmoreland Chamber of Commerce Small Business Round Table, February 1, 2008.
- "The Heat Is On: Emerging Issues For Global Warming And Greenhouse Gases," co-presenter, Eckert Seamans' Continuing Legal Education (CLE), August 16, 2007; co-presenter, Western Pennsylvania Chapter of the Association of Corporate Counsel, January, 2008.
- "Environmental Issues," Pennsylvania Bar Institute's CLE, "Fundamentals of Real Estate Practice," August, 2006.
- "Homeland Security and Hazardous Materials," August 11, 2005.
- "MS4 Update," The Building Industry Trade Show Residential Construction Management Conference, February 23, 2005.
- "Nine Steps To Avoiding Legal Pitfalls For Small And Medium Sized Businesses," *Navigating The Legal Highway: Avoiding Major Potholes*, Westmoreland County Chamber of Commerce, October 19, 2004.

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# Boomerang Properties: When Clean Enough Suddenly Isn't

Presented by:  
David A. Rockman, Esq.

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## Boomerang Properties



What is a Boomerang Property:

Any property previously cleaned-up or otherwise determine to be free of environmental contamination, or where such contamination has been adequately address, that has unexpectedly become subject to new contamination concerns or clean-up requirements.



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## What are the risks/consequences



- Why care about this issue ?
- Cleanup Costs
- Property (De)valuation
- Business Interruption
- Government enforcement
- Citizen suits/neighboring property owners



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## What are the risks/consequences (cont.)



- Financial reserve requirements
- Financial reporting and disclosures
- Loan/financing covenants and requirements
- Complicates landlord/tenant relationships
- Employee health risks and concerns
- Public perception and reputation



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## What Types of Properties



- Generally: Properties that received a “No Further Action Letter”, an Act 2 approval from PA DEP, or other regulatory determination of being clean enough.
  - Concept applies to facilities with a “clean” Phase II, but that have not been subject to regulatory oversight.
  - Would not really include a property with just a “clean” Phase I Environmental Assessment.



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## What triggers a Boomerang?



- How can this occur?
  - How missed/how found/causes
- Newly discovered information about the property
  - Unaddressed areas of the property
  - Untested pollutants are discovered
  - Errors in prior testing and analysis
  - Discovery on neighboring properties



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## What triggers a Boomerang? (cont.)



- Renewed Agency Focus
  - Changed (lowered) cleanup levels
  - More sensitive laboratory detection levels
- Possible Triggers
  - Property development
  - Change in use (i.e. industrial to residential)
  - Renewed investigation (due diligence, financing, etc.)



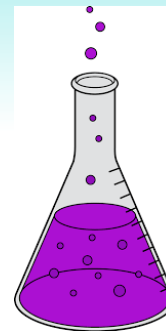
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## New and emerging pollutants



- The most interesting route to a Boomerang situation
  - Other triggers are easier to control
  - Emerging pollutants harder to plan for
- Two key examples
  - Vapor intrusion
  - PFAS



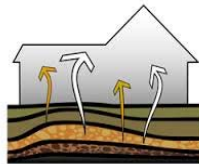
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# Emerging Issue – Vapor Intrusion



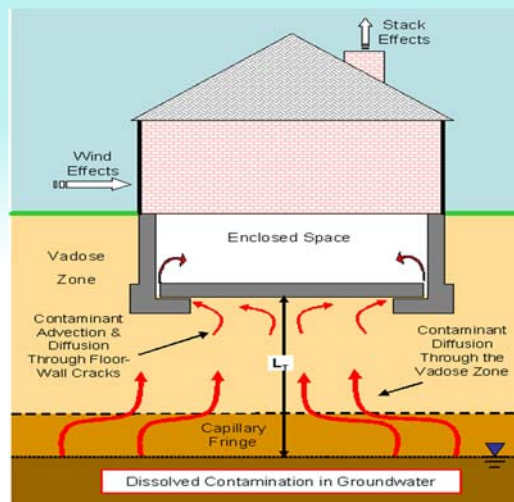
- An Indoor Air problem
- Results from Subsurface contamination
  - Primarily volatiles and solvent contamination
  - Analog to radon
- Increasing scrutiny and stricter standards
- 2018 – First Superfund site listing due solely to Vapor Intrusion



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# Vapor Intrusion



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## Vapor Intrusion – What changed?



A number of factors, including:

- Changes in the perceived toxicity of TCE triggered the re-evaluation of vapor intrusion screening levels
- US EPA (Region 9) established trigger and action levels for TCE in indoor air
- Reducing the attenuation factor from soil to indoor air has resulted in the lowering of the screening level



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## VI: Reassessment of Closed Sites



- **Who:** US EPA or State Agencies
- **When:**
  - VI not previously addressed
  - VI standards more stringent
- **How:** VI assessment has grown more complex (EPA 2015 Guidance)
- **What:** Cleanup or mitigation. Enforcement possible, but less likely.
  
- **Also:** VI now an element of a Phase I



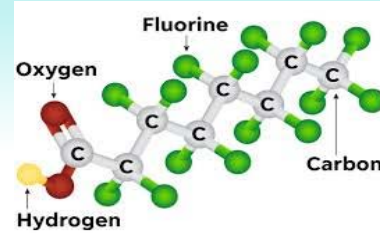
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## Emerging Issue – PFAS



- Per- and Polyfluoroalkyl Substances (PFAS)
  - Includes Perfluorooctanoic Acid (PFOA)
- Synthetic Chemicals
  - Used since the 1940's
  - Thousands of different chemicals
  - Toxic and Bioaccumulative
    - Resistant to degrading
  - Primary human exposure concern is ingestion



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## PFAS - Uses



- Water repellent, temperature resistant, friction reducing
- PFAS are everywhere:
  - Fire-fighting chemicals
  - Non-stick and stain resistant products
  - Food packaging
  - Consumer products
  - Electronics
  - Paints, waxes and coatings
  - Medical supplies
  - Etc.



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## PFAS regulation



- Not designated as a federal hazardous substance (yet)
- No federal drinking water standards for PFAS (yet)
- No comprehensive federal regulation of PFAS (yet)
  - US EPA – “Action Plan” - February 2019
- Patchwork of state regulation
  - A mix of cleanup, exposure and drinking water standards.
  - Set at very low (PPT) levels



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## PFAS in PA



- PFAS Action Team
  - Formed September 2018
  - Public meetings and email lists
- PA DEP Statewide Sampling Plan
  - One year program, beginning in May 2019
- PA DEP – list of about 20 sites under investigation
- PA following US EPA on drinking water



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## PFAS Challenges Ahead



- Not previously looked for
  - Ripe for classic boomerang situation
- Many PFAS variants
  - Which do you look for?
  - Challenging laboratory standards
- Predicting where it will be found is difficult
- No established remediation tools
  
- Key focus: Wells and drinking water levels



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## Other Potential Emerging Pollutants



- Chromium VI
  - ??? But, *Erin Brockovich*
  - Updated toxicity, better laboratory detection
- 1,2,3-Trichloropropane
- 1,4-Dioxane
- Pharmaceuticals/Personal Care products
- Nanomaterials



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## Strategies to Avoid Boomerang Risks



- For a Buyer/Lessee of property:
  - Optimal time to plan is before buying
- Phase I – All Appropriate Inquiries
- Careful due diligence
- Contract terms
  - Allocation of risk and indemnities
- Deal/corporate structure
- Ground-up lease
- Insurance



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## Strategies to Avoid Boomerang Risks



- As a Seller of Property:
  - Sale process introduces new risks
  - Could be left worse off than before
- Manage
  - Buyer's access
  - Scope of Buyer's investigation
  - Use and distribution of Buyer information
  - Third-party activities
    - Avoid consultants who might have independent reporting obligations



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## Strategies to Avoid Boomerang Risks



- As an Owner of property:
  - How do you stop something you don't know about?
- Property Management
  - Don't create a trigger
  - Manage third-party activities
  - Understand property history and where there may be traps
- Follow environmental covenants and deed restrictions
- Insurance



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## Managing a Boomerang Situation



- Hurry up or slow down?
  - Is time working for you or against you?
- Craft an appropriate response plan
  - Identify pathways of concern
- Understand/mitigate potential exposures
  - Implement activity and use limitations
- Figure out who else to blame
- Liability avoidance – Insurance? Bankruptcy?



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## Questions?



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