Solid and Hazardous Waste/Recycling Administrative/Judicial Developments: 2019 – 2020

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Discussion will address:

- A variety of federal and state decisions, litigation, rulings, regulations, policies, etc. either directly or indirectly related to solid or hazardous waste (including recycling) that have arisen over the last 12 months or so.

Source of information that often addresses issues relevant to solid/hazardous waste and recycling issues:

Arkansas Environmental, Energy and Water Law Blog
http://www.mitchellwilliamslaw.com/blog

Three posts five days a week

Arkansas Medical Marijuana Rules/Waste Issues

REMINDER

A process has been established in which a "Qualifying Patient" can use medical marijuana. The AMMA does restrict an employer's ability to discriminate against a Qualifying Patient. Safety sensitive positions can exclude Qualifying Patients.

ABC regulations require that medical marijuana being disposed of (i.e., waste) be rendered "unusable." Medical marijuana wastes and other wastes generated by the cultivation and dispensary processes were identified:

- Plants (including stalks, roots/soil) and unusable marijuana liquid concentrate or extract
- Solid concentrate or extract
- Examples:
    - Trim and solid plant material used to create an extract
    - Waste solvent
    - Laboratory waste
    - Extract that fails to meet quality testing
    - Used reactants
    - Residual pesticides/fertilizers
    - Cleaning solution
    - Lighting ballasts

Arkansas Medical Marijuana Rules/Waste Issues (Cont.)

ABC Regulation 18.1 specifically addresses disposal of marijuana by cultivation facilities and dispensaries. Key provisions of this rule require that medical marijuana is rendered unusable by grinding and incorporating the cannabis plant waste with other ground materials so the resulting mix is at least 50% non-cannabis waste by volume. If so, such materials can be transferred to a solid waste landfill, incinerator, etc., or compostable to such facilities.

The need for solid waste management facilities and companies to address from a contractual standpoint medical marijuana waste generated issues was discussed. Topics included:

- Potential liability for improper disposal of medical marijuana wastes
- Need to allocate liability in service agreements
- Generator warranty/certification that waste meets definition of unusable
- Use of waste profile
- Provisions for indemnity, rejection, expense for sending back, etc.

Brownfields/Arkansas: U.S. EPA Announces Pulaski County and Southwest Arkansas Planning and Development District Grants

Federal and State (including Arkansas) incentive provisions, liability exemptions, funding programs, and action/cleanup standards have been utilized for a number of years to attempt to reduce the barriers for reuse or redevelopment of brownfield properties.

Goal of the Brownfield Programs is to encourage redevelopment investment in such properties to increase the local tax base, facilitate job growth, utilize existing infrastructure, encourage infield, and take pressure off greenspace.

Brownfields/Arkansas: U.S. EPA Announces Pulaski County and Southwest Arkansas Planning and Development District Grants (cont.)

Pulaski County and Southwest Arkansas Planning and Development District Awarded $300,000 each

The Southwest Arkansas Planning & Development District states that it will target the City of El Dorado's Hillsboro Street Gateway Corridor in regards to the brownfield grant. This area is stated to be located within a Qualified Opportunity Zone. Priority sites are stated to include:

- A former automotive repair and filling station
- A former tractor dealership and repair business

Commercial Dry Cleaners: Arkansas Department of Environmental Quality and Pulaski County, Arkansas Facility Enter into Elective Site Clean-Up Agreement

The Arkansas Department of Environmental Quality and Oak Forest Cleaners and Laundry, Inc. entered into a July 18th Elective Site Clean-Up Agreement . See LIS No. 19-065.

The ESCA addresses an Oak Forest commercial dry cleaning and laundry facility in Little Rock, Arkansas, that is stated to have operated since 1986.

Agencies may be willing, in some circumstances, to provide “blessing” (subject to certain caveats) of a site’s conditions if they deem contaminants adequately delineated and/or isolated from potential exposure.

Commercial Dry Cleaners: Arkansas Department of Environmental Quality and Pulaski County, Arkansas Facility Enter into Elective Site Clean-Up Agreement (cont)

The Arkansas ESCA program is an example.

The ESCA states that Oak Forest's consultant Trileaf Corporation completed a Phase I Environmental Assessment ("EA") at the Facility.

The EA is stated to have determined that dry cleaning solvents were used on the Facility as follows:

- Valcene 1986 - 1990
- Perchloroethylene 1990 – 2012
- DF-2000 and Solvon K4 dry cleaning solvents – Currently

Commercial Dry Cleaners: Arkansas Department of Environmental Quality and Pulaski County, Arkansas Facility Enter into Elective Site Clean-Up Agreement (cont)

Oak Forest on January 29, 2019, through correspondence to ADEQ, entered into an ESCA to remediate Chemicals of Concern from the soil and groundwater, including volatile organic compounds (VOCs).

The ESCA provides sequential tasks for Oak Forest to undertake (delineation, remediation if necessary, institute institutional controls if necessary, etc.

Upon approval of the Completion Report, and receipt of deed restrictions if required, ADEQ will issue a "No Further Action" determination to Oak Forest (which is related to the identified areas of concern and conditioned on specific site uses).

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Russellville Engine Camshaft Manufacturer Enter into Consent Administrative Order

RCRA Enforcement Continues

The CAO provides that Mahle operates a facility ("Facility") in Russellville, Arkansas that manufactures various types of engine camshafts for large diesel engines from raw steel billets.

DEQ is stated to have conducted a Compliance Evaluation Inspection ("CEI") on March 6, 2019 at the Facility. The CEI allegedly identified the following violations of Regulation No. 23:

- Failure to make a hazardous waste determination prior to shipment as described in § 262.11
- Failure to prepare a manifest for hazardous waste prior to transport as described in § 262.20(a)(1)

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Russellville Engine Camshaft Manufacturer Enter into Consent Administrative Order (cont)

Mahle responded in August 7, 2019 correspondence to DEQ that the oily water was evaluated and determined to qualify for the used oil exemption listed in 40 C.F.R. 279, given the TCLP analytical sampling taken on December 14, 2018 reported chromium at 9.25 ppm, below the maximum allowable limit of 10 ppm identified in 40 CFR 279.11. Further, the company is stated to have indicated the oily water was transported by Heritage Crystal Clean to their facility in Little Rock, Arkansas, offloaded into their tank farm, and then transported to their Kilgore, TX facility. At this facility the treatment process is stated to have included the removal and dewatering of the used oil. The used oil was stated to have then been sent to the Crystal Clean re-refinery for recycling into a base lube product.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Russellville Engine Camshaft Manufacturer Enter into Consent Administrative Order (cont)

The CAO further provides APC&EC Regulation No. 23 § 279.11 applies to used oil burned for energy recovery, and any fuel produced from used oil. Mahle states the used oil is being sent for re-refining into a base lubricant product. The used oil is not being burned for energy recovery or being produced as a fuel, therefore, APC&EC Regulation No. 23 Section 279.11 is not applicable.

DEQ is stated to have completed a review of the August 7, 2019 response and determined that Mahle did not make a proper waste determination in accordance with Regulation No. 23 Section 262.11.

Solid Waste Enforcement: Arkansas Department of Environmental Quality and Independence County, Arkansas School District Enter into Consent Administrative Order

The Arkansas Department of Environmental Quality and Southside School District entered into a June 6th Consent Administrative Order addressing alleged violations of Arkansas Pollution Control and Ecology Commission Regulation 22. See LIS No. 19-053.

ADEQ is stated to have observed the presence of multiple piles of construction and demolition ("C&D") waste including metal, lumber, wires, plastic, roofing material, and carpet.

ADEQ is stated to observed certain alleged violations during the inspection which include:

- Failure to obtain a valid permit from ADEQ to operate a solid waste disposal site
- Failure to dispose of solid waste at a site or facility with a permit from ADEQ
- Failure to properly dispose of solid waste pursuant to the rules and regulations and/or in a manner as to not create a public nuisance or public health hazard

Tire Enforcement/Request for Injunctive Relief: Arkansas Department of Energy and Environment - Division of Environmental Quality Faulkner County Circuit Court Filing

Tires – A Continuing Issue

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") filed a March 19th Verified Complaint and Request for Injunctive Relief ("Complaint") against Ward Tire and Auto, LLC, ("Ward") and several individuals. See 23 CV-20-450.

The Complaint alleges violations of the:

- Tire Act, Ark. Code Ann. § 8-9-401 et seq.
- Arkansas Pollution Control and Ecology Commission Regulation 36
- Ark. Code Ann. § 8-6-201 et seq.
- Arkansas Pollution Control and Ecology Commission Regulation 22

Most DEQ enforcement actions are pursued through an agency administrative process. Those procedures are incorporated in Arkansas Pollution Control and Ecology Commission Regulation No. 8. However, DEQ has authority to seek judicial remedies through several of the statues implemented.

Tire Enforcement/Request for Injunctive Relief: Arkansas Department of Energy and Environment - Division of Environmental Quality Faulkner County Circuit Court Filing (cont)

The Arkansas General Assembly enacted legislation a number of years ago whose purpose is to ensure the appropriate management of waste tires. Amendments were made to this legislation in the 91st Arkansas General Assembly. The Complaint's reference to Regulation No. 22 is the Solid Waste Management Code.

The Complaint describes property for which DEQ is alleged to have received a complaint regarding tires being dumped. Investigative activities related to alleged tire transporting and solid waste disposal are also described. Whether or not tire rim removal fees were paid to the Arkansas Department of Finance and Administration or accurately reported was also investigated.

DEQ seeks remediation of what it describes as a waste tire site and that real property ownership and the solid waste thereon be determined by the Circuit Court and penalties assessed/tires removed.

Judicial Enforcement: Arkansas Department of Energy and Environment Pulaski County Circuit Court Action Filed Against Storage Tank Owner/Operator

Underground Storage Tanks

The Arkansas Department of Energy and Environment, Department of Environmental Quality filed an October 7th Complaint against Routh Wrecker Service, Inc. stating it was seeking injunctive relief and to compel compliance with a previously executed Consent Administrative Order.

The CAO is stated to have resolved Routh's alleged violations of environmental laws and regulations regarding its two underground storage tanks located in Little Rock, Arkansas.

DEQ and Routh are stated to have entered into the CAO on June 13, 2017, to resolve violations of Ark. Code Ann. § 8-7-801 et seq. and Arkansas Pollution Control and Ecology Commission Regulation 12.

The Complaint alleges that Routh has not complied with certain provisions of the CAO, which include:

- Submitting documentation to DEQ indicating that a certified Class A and Class B operator has been designated at the Site
- Payment of certain UST annual registration fees
- Payment of a civil penalty

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: Ozark Mountain Solid Waste District Receiver's Notice of Appeal

The Receiver (Geoffrey B. Treece) for the Ozark Solid Waste Management District ("District") filed a Notice of Appeal of the Arkansas Pollution Control and Ecology Commission's ("Commission") decision to designate the Carroll County Solid Waste Authority as a Carroll County Solid Waste District.

The Carroll County Solid Waste Authority previously submitted a Petition to the Commission to designate Carroll County as a Regional Solid Waste District.

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: Ozark Mountain Solid Waste District Receiver's Notice of Appeal (cont)

The Receiver petitioned to intervene in the proceedings before the Commission and opposed the Petition. Administrative Law Judge Charles Moulton ("ALJ") had issued a Recommended Decision granting the Petition. The Commission subsequently upheld the ALJ's Decision granting the Petition.

The Receiver has filed a Notice of Appeal in the Circuit Court of Pulaski County, Arkansas (Civil Division) asking that the Commission's Decision be reversed and that the Petition be denied.

Trafalgar Stump Dump: Arkansas Pollution Control and Ecology Commission Addresses Bella Vista Property Owners Association, Inc.'s Request for Hearing to Set Aside Consent Administrative Order

The Arkansas Pollution Control and Ecology Commission ("Commission") addressed at its January 24th meeting a request by the Bella Vista Property Owners Association ("POA") that it conduct an adjudicatory hearing to review the Consent Administrative Order ("CAO") issued by the Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") in the matter of Thomas Fredericks and Fredericks Construction Company, Inc. (collectively "Fredericks").

The site has been further described as real property which is leased to Thomas Fredericks for what is referenced as a stump, brush, rock, concrete, stump and dirt dump. The site suffered an underground fire which was the subject of a DEQ emergency order in 2018. The POA and DEQ subsequently entered into a CAO in which the POA agreed to take responsibility for remediating the site pursuant to the Arkansas Remedial Action Trust Fund Act.

Trafalgar Stump Dump: Arkansas Pollution Control and Ecology Commission Addresses Bella Vista Property Owners Association, Inc.'s Request for Hearing to Set Aside Consent Administrative Order (cont)

The POA challenged the CAO subsequently entered into between DEQ and Fredericks related to the site.

Fredericks responded in subsequent pleadings arguing that nothing in the POA filings identifies “any new, material piece of evidence that Director Keogh failed to consider when executing Mr. Frederick’s CAO.”

The Commission, after hearing arguments from counsel for Fredericks, the POA, and DEQ issued Minute Order No. 20-07.

Trafalgar Stump Dump: Arkansas Pollution Control and Ecology Commission Addresses Bella Vista Property Owners Association, Inc.'s Request for Hearing to Set Aside Consent Administrative Order (cont)

The Minute Order cites Arkansas Pollution Control and Ecology Commission Regulation 8.406(B) which states:

> "[a]ny person who comments on a proposed Consent Administrative Order settling an enforcement action may petition the Commission within thirty (30) calendar days of the effective date of the Order to set aside the order and provide an adjudicatory hearing. That person shall file a Request for Hearing with the Commission Secretary. If the evidence presented by the petitioner is material and was not considered in the issuance of the order, and the Commission finds in light of the new evidence that the order is not reasonable and appropriate, it may set aside the order and provide an adjudicatory hearing. If the Commission denies an adjudicatory hearing, it shall give the petitioner notice of its reasons for the denial. The denial of a hearing shall constitute final Commission action."

Trafalgar Stump Dump: Arkansas Pollution Control and Ecology Commission Addresses Bella Vista Property Owners Association, Inc.'s Request for Hearing to Set Aside Consent Administrative Order (cont)

After hearing oral argument and reviewing the pleadings and exhibits submitted by the parties, the Commission voted to find that Petitioner (POA) had presented material evidence that should have been considered by the DEQ in the issuance of CAO LIS-19-005.

As a result, the POA's request for an adjudicatory hearing was granted and Administrative Law Judge Moulton was instructed to hold a hearing to establish a procedural schedule and hold an adjudicatory hearing on the request to set aside the Fredericks' CAO.

Managing Debris from Declared Disasters: Arkansas Department of Environmental Quality Guidance Document

The Arkansas Department of Environmental Quality ("ADEQ") issued a guidance document titled:

Managing Debris from Declared Disasters ("Guidance")

ADEQ states that the document is being issued in response to the June 2019 flood disaster in Arkansas.

Addition of Certain Per- and Polyfluoroalkyl Substances/Community Right-to-Know Act: U.S. Environmental Protection Agency Advance Notice of Proposed Rulemaking

The United States Environmental Protection Agency issued a pre-publication Advance Notice of Proposed Rulemaking discussing the possibility of adding certain per- and polyfluoroalkyl substances to the Toxics Release Inventory Chemical List under Section 313 of the Emergency Planning and Community Right-to-Know Act and Section 6607 of the Pollution Prevention Act.

The Proposal also indicates that EPA is considering establishing reporting thresholds for PFAS chemicals that are lower than the usual statutory thresholds.

Addition of Certain Per- and Polyfluoroalkyl Substances/Community Right-to-Know Act: U.S. Environmental Protection Agency Advance Notice of Proposed Rulemaking (cont)

PFAS consist of a large group of man-made chemicals. Their properties include resistance to heat, water, and oil. They have been described as persistent in the environment and resist degradation.

The compounds have been used in various industrial applications of consumer products such as:

- Fabrics for furniture
- Paper packaging for food and other material resistant to water, grease, or stains
- Firefighting at airfields
- Utilization in several industrial processes

Potential exposure to PFAS includes pathways through drinking water, air, and food.

PFOA/PFOS: U.S. Environmental Protection Agency Interim Recommendations

The United States Environmental Protection Agency ("EPA") issued a memorandum on December 19th titled:

Interim Recommendations for Addressing Groundwater Contaminated with Perfluorooctanoic Acid and/or Perfluorooctanesulfonate ("Memorandum")

Several states have initiated rulemaking or issued guidance to establish ambient groundwater standards and legislation has been introduced to designate PFAS as a Comprehensive Environmental Compensation and Liability Act hazardous substance.

PFOA/PFOS: U.S. Environmental Protection Agency Interim Recommendations (cont.)

The December 19th EPA Memorandum provides interim recommendations for addressing groundwater contaminated with perfluorooctanoic acid ("PFOA") and/or perfluoroctanesulfonic ("PFOS") at sites being evaluated and addressed under federal cleanup programs such as:

- Comprehensive Environmental Response, Compensation, and Liability Act
- Resource Conservation Recovery Act

The Memorandum recommends:

- Using a screening level of 40 parts per trillion (ppt) to determine if PFOA and/or PFOS is present at a site and may warrant further attention.
  - Screening levels are risk-based values that are used to determine if levels of contamination may warrant further investigation at a site.

PFOA/PFOS: U.S. Environmental Protection Agency Interim Recommendations (cont.)

- Using EPA's PFOA and PFOS Lifetime Drinking Water Health Advisory level of 70 ppt as the preliminary remediation goal (PRG) for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal MCL or other applicable or relevant and appropriate requirements (ARARs) are available or sufficiently protective.
    - PRGs are generally initial targets for cleanup, which may be adjusted on a site-specific basis as more information becomes available.

Perchloroethylene: U.S. EPA Issues Draft Risk Evaluation

The United States Environmental Protection Agency ("EPA") issued a draft risk evaluation ("Draft") for perchloroethylene ("PERC").

EPA concludes that risks identified in the Draft, including those associated with the chemical's use in dry cleaning, do not require action.

PERC is a man-made chemical that can be a liquid or gas. It is also called tetrachloroethylene or tetrachoroethene.

The primary use of PERC has been in dry cleaning activities.

It has also been used for metal degreasing and general anesthesia.

Perchloroethylene: U.S. EPA Issues Draft Risk Evaluation (cont.)

The Draft preliminarily found an unreasonable risk to workers, occupational non-users, consumers, bystanders, and the environment from certain uses.

The primary health risk stated to have been identified in the Draft was neurological effects from short- and long-term exposure to the chemical.

The Draft addresses:

- Using products safely
- Public participation, peer review , and next steps
- Supporting Documents

UO19 (Benzene) U220 (Toluene/Delisting Petition for One-Time Amount: April 8th U.S. EPA Federal Register Final Rule

RCRA Hazardous Waste
Delisting

The United States Environmental Protection Agency ("EPA") published an April 8th Federal Register Notice proposing to finalize a rule delisting a one-time amount up to 20,100 cubic yards of Resource Conservation and Recovery Act ("RCRA") listed hazardous waste U019 (benzene) and U220 (toluene).

The wastes are described as a one-time amount up to 20,100 cubic yards of mixed materials. Further, they are limited to those associated with the closure of hazardous waste management units at three facilities owned and operated by Fire Mountain Farms, Inc., pursuant to closure plans approved by the Washington State Department of Ecology.

UO19 (Benzene) U220 (Toluene/Delisting Petition for One-Time Amount: April 8th U.S. EPA Federal Register Final Rule (cont)

The closure site is in Lewis County, Washington.

The RCRA Subtitle C regulations provide a procedure to exclude or delist a waste in 40 C.F.R. 260.20 and 260.22. The procedure involves the submission of a petition to EPA (or a RCRA authorized state) demonstrating a specific waste from a particular generating facility should not be regulated as hazardous.

UO19 (Benzene) U220 (Toluene/Delisting Petition for One-Time Amount: April 8th U.S. EPA Federal Register Final Rule (cont)

A petitioner is required to demonstrate that a waste does not meet any of the criteria for a listed waste in 40 C.F.R. 261.1. In addition, the waste cannot exhibit any of the hazardous waste characteristics which include:

- Ignitability
- Reactivity
- Corrosivity
- Toxicity

The granting of the two delisting petitions for the specific identified waste will then exclude this material from the list of hazardous waste so long as the conditions in the delisting are met.

Criteria and Process for Objecting to Requests to Import Hazardous Waste to a U.S. Facility: January 8th Resource Conservation and Recovery Act Guidance Document

RCRA Guidance

The United States Environmental Protection Agency ("EPA") issued a January 8th Resource Conservation and Recovery Act ("RCRA") guidance document ("Guidance") titled:

> *Criteria and Process for Objecting to Requests to Import Hazardous Waste to a U.S. Facility*

Why is Guidance important (see RCRA Compendium)?

The Guidance was authored by Kathleen Salyer, Deputy Director, Office of Resource Conservation and Recovery and transmitted to Land, Chemicals and Redevelopment Division Directors and Enforcement and Compliance Assurance Division Directors.

Post-Closure Care at Hazardous Waste Units : U.S. EPA Office of Inspector General Project Notification

The United States Environmental Protection Agency ("EPA") Office of Inspector General ("OIG") issued a March 23rd Project Notification titled:

> *Post-Closure at Hazardous Waste Units Closed with Waste in Place ("Notification")*

The stated objective is to evaluate:

> . . . whether the EPA's oversight of hazardous waste units closed with waste in place verifies continued protection of human health and the environment.

Post-Closure Care at Hazardous Waste Units : U.S. EPA Office of Inspector General Project Notification (cont)

The Resource Conservation and Recovery Act ("RCRA") Subtitle C regulations require certain actions when a hazardous waste management ceases receipt of waste at the end of its active life. The unit must be remediated, monitored and maintained in accordance with the closure and post-closure care requirements. These requirements are found in the closure and post-closure sections of the RCRA regulations.

Post-Closure Care at Hazardous Waste Units : U.S. EPA Office of Inspector General Project Notification (cont)

Closure of units or facilities can happen in one of two ways:

- A clean closure (receipt of all waste from the unit and decontaminated to remove all equipment, structures and stranded soil)
- A closure with waste In place (closure method for facilities or units that cannot meet the clean closure requirements [i.e., all waste and contamination could not be removed])

The closure in place method is being addressed by the Notification.

Resource Conservation and Recovery Act/Clean Water Act Citizen Suit Action: Southern Environmental Law Center Alleges Violations by Charleston County, South Carolina, Plastic-Pellet Packager

Plastics – A New Issue?

The Southern Environmental Law Center ("SELC") filed a March 19th Complaint for Declaratory Injunctive Relief ("Complaint") against Frontier Logistics, L.P., ("Frontier") alleging violations of the Resource Conservation and Recovery Act ("RCRA") and Clean Water Act ("CWA").

The Complaint describes Frontier as providing supply chain management services to the plastics industry. As part of such services, SELC states that Frontier has operated the Union Pier Terminal Facility ("Facility") in Charleston County, South Carolina, since at least April 2007. The Facility is stated to receive plastic pellets via rail and package them in bulk bags for shipment overseas.

Resource Conservation and Recovery Act/Clean Water Act Citizen Suit Action: Southern Environmental Law Center Alleges Violations by Charleston County, South Carolina, Plastic-Pellet Packager (cont)

The Complaint alleges that the Facility has released into the environment small pre-production plastic pellets described as "nurdles." Charleston Waterkeeper is stated to have collected:

> . . . over 14,000 plastic pellets from the Cooper River, Charleston Harbor, and other Charleston area waterways, beaches, and parks since the organization began sampling in July of 2019.

Resource Conservation and Recovery Act/Clean Water Act Citizen Suit Action: Southern Environmental Law Center Alleges Violations by Charleston County, South Carolina, Plastic-Pellet Packager (cont)

It is claimed that pellets remain in Charleston waters and that Frontier is the likely source of the pollution.

The alleged violations include:

1. that Frontier has contributed and is contributing to the past or present handling, storage, treatment, transportation, or disposal of solid waste which may present an imminent and substantial endangerment to health or the environment in violation of RCRA, and
2. that Frontier is discharging pollutants into waters of the United States without a National Pollutant Discharge Elimination System permit in violation of the CWA.

The RCRA and CWA Federal District Court actions are brought pursuant to the citizen suit provisions of those statutes.

Trend?

Release Reporting/CERCLA Enforcement: U.S. Environmental Protection Agency and Erie, Pennsylvania Chemical Manufacturing Facility Enter into Consent Agreement

Reminder – Tight Reporting Deadlines

The United States Environmental Protection Agency ("EPA") and BASF Corporation ("BASF") entered into a February 13th Consent Agreement ("CA") addressing alleged violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). See CERC-EPCRA-03-2020-0062.

The CA provides that BASF is the owner of a chemical manufacturing facility ("Facility") in Erie, Pennsylvania.

BASF is stated to be in charge of the Facility. Further, it is stated to be classified as a Facility as defined by Section 101(9) of CERCLA.

The CA states in part:

. . . Beginning at or around 5:50 p.m. on September 20, 2016, and continuing until approximately 1:00 a.m. on September 21, 2016, approximately 10 ,000 gallons of wastewater, classified as a RCRA F005 waste, were discharged from Building 300 when the Maleic Sewer Tank (T-320) overflowed due to a pump malfunction. As a result, 2,000 gallons of wastewater was discharged to the surface of the ground in the gravel lot adjacent to Building 300, and 8,000 gallons flowed to the Building 100 concrete trench, which drains to the site's storm sewer system and ultimately to Motsch Run and Lake Erie (the "Release "). According to EPA' s calculation, 2000 gallons of the wastewater equals approximately 16,680 pounds, and 8,000 gallons equals approximately 66,720 pounds.

Release Reporting/CERCLA Enforcement: U.S. Environmental Protection Agency and Erie, Pennsylvania Chemical Manufacturing Facility Enter into Consent Agreement (cont)

Section 103 of CERCLA requires facilities to immediately notify the National Response Center of any release of hazardous substance in an amount equal to or greater than the reportable quantity for that substance. In order for a release to be considered reportable under CERCLA, there are three criteria that must be met which include the following:

- Be into the environment
- Be equal to or exceed the reportable quantity for a particular substance
- Occur within a 24-hour period

The terms “environment” and “facility” are very broadly defined by CERCLA.

Release Reporting/CERCLA Enforcement: U.S. Environmental Protection Agency and Erie, Pennsylvania Chemical Manufacturing Facility Enter into Consent Agreement (cont)

F005 waste released is stated to be a CERCLA hazardous substance. Further, the CA contends that the Facility released a hazardous substance in a quantity equal to or exceeding a reportable quantity for that hazardous substance, requiring immediate notification to the National Response Center.

BASF is stated to have been first aware that the release was occurring at approximately 5:50 p.m. on September 20, 2016. It is stated to have reported the release to the National Response Center at approximately 1:11 p.m. on September 21, 2016. As a result, it is alleged that BASF failed to immediately notify the National Response Center of the release as soon as BASF knew or should have known that a release of hazardous substance had occurred at the Facility in an amount equal to or exceeding the applicable reportable quantity.

Solid/Hazardous Waste Criminal Enforcement: 2019/2020 Examples

- Besides civil enforcement provisions, almost every state (including Arkansas) and federal environmental media program includes potential criminal enforcement penalties.

- Generally speaking, criminal enforcement is potentially imposed when there is a “knowing” violation of a statute or regulation.

- Environmental criminal enforcement more often occurs at the federal level.

Solid/Hazardous Waste Criminal Enforcement: 2019/2020 Examples (cont.)

- Below are a few random examples of federal criminal environmental enforcement from 2019/2020:
  - Illegal storage of hazardous waste/RCRA – Chemist sentenced in Illinois for alleged abandonment of various chemicals at a facility that required hundreds of thousands of dollars to remediate
  - Illegal dumping of caustic waste/Clean Water Act – Washington State drum reconditioner allegedly used a hidden drain to dispose of caustic chemicals (high Ph level) into an adjacent storm sewer

Solid/Hazardous Waste Criminal Enforcement: 2019/2020 Examples (cont.)

- Illegal hazardous waste storage/RCRA – Kansas laboratory found guilty of storing hazardous waste without a license after facility closed and failed to undergo a decommissioning decontamination process
- Illegal transportation/RCRA – California coatings facility pleads guilty to illegally transporting hazardous waste from its facility without a manifest

Solid/Hazardous Waste Criminal Enforcement: 2019/2020 Examples (cont.)

- Making a false statement – Water system operator in Kansas sentenced for allegedly making a false statement and a report to a state environmental agency which contained falsely represented water samples at a water treatment plant
- Illegal storage of hazardous waste/RCRA – Company and individual sentenced for allegedly storing hazardous waste in various drums and containers (including a pit dug in the ground in the lower level of a building) to avoid legitimate transportation/disposal

Solid Waste/Criminal Enforcement: Louisiana Department of Environmental Quality Announces Arrest of Orleans Parish Disposal Contractor for Alleged Illegal Dumping

The Louisiana Department of Environmental Quality issued a September 10th news release stating that an Orleans Parish individual was arrested for allegedly violating environmental laws and criminal trespassing.

The Criminal Investigation Division of LDEQ arrested the individual.

The charges include:

- Felony camp of dumping solid waste into waters of the state
- Two misdemeanor counts of allegedly illegally disposing of solid waste
- Twelve misdemeanor counts of criminal trespassing

Solid Waste/Criminal Enforcement: Louisiana Department of Environmental Quality Announces Arrest of Orleans Parish Disposal Contractor for Alleged Illegal Dumping (cont)

LDEQ's Criminal Investigation Section is stated to have received complaints in March 2019 about illegal dumping in New Orleans East. Investigators, with assistance from Louisiana State Police, are stated to have performed aerial surveillance of the dumpsite.

Note LDEQ uses drones for aerial surveillance and enforcement

The investigation allegedly determined that the individual was dumping construction and demolition debris on the ground and in wetland areas.

Metal Processing Operations/California Hazardous Waste Control Law: West Coast Chapter-Institute of Scrap Recycling Industries Judicial Challenge to DTSC Jurisdiction

The West Coast Chapter of the Institute of Scrap Recycling Industries, Inc., and several scrap facilities filed a November 26th Complaint for Declaratory and Injunctive Relief against the California Department of Toxic Substances Control regarding an interpretation of that state agency that affects metal processing operations.

The Scrap Facilities challenge the Department's utilization of the Hazardous Waste Control Law to require that such facilities obtain hazardous waste facility permits for metal processing operations conducted at metal shredding facilities

Metal Processing Operations/California Hazardous Waste Control Law: West Coast Chapter-Institute of Scrap Recycling Industries Judicial Challenge to DTSC Jurisdiction (cont)

The Complaint describes "metal processing operations" as:

- the reduction in size of scrap metal through the use of an electric hammermill or other shredding device
- the subsequent separation, sorting and removal of ferrous and non-ferrous metal commodities from the shredded material exiting the hammermill or shredding device
- the related receipt, stockpiling and handling of raw material feedstocks, intermediates and finished metal products

Referenced facilities are argued to fall outside of the scope of the Department's jurisdiction under the Law.

The Complaint alleges that the Department is attempting to:

. . . regulate metal processing operations as "treatment" of "hazardous waste" contrary to applicable laws, regulations and long-standing DTSC policy and practice.

Metal Processing Operations/California Hazardous Waste Control Law: West Coast Chapter-Institute of Scrap Recycling Industries Judicial Challenge to DTSC Jurisdiction (cont)

The Scrap Facilities arguments for the Department's absence of regulatory authority include the proposition that metal processing conducted for the purpose of separating and removing valuable ferrous and non-ferrous metals from exempt scrap metal does not involve any form of waste management. The Department's jurisdiction is stated to be limited to facilities that treat, store, or dispose of hazardous waste.

Solid Waste Incineration: U.S. District Court Addresses Challenge to Baltimore Ordinance

Preemption Issue – Can city displace state air rules?

The United States District Court for the District of Maryland addressed in a March 27th opinion a challenge to Baltimore's regulation of solid waste incineration facilities in the city. See Wheelabrator Baltimore, L.P., v. Mayor and City Council of Baltimore, No. GLR-19-1264, 2020 WL 1491409 (D. Md. Mar. 27, 2020)

Solid Waste Incineration: U.S. District Court Addresses Challenge to Baltimore Ordinance (cont)

The bases for the challenge included alleged causes of action such as preemption and equal protection.
The initial suit was filed after the Baltimore City Council passed Ordinance 18-0306.

The Ordinance is known as the Baltimore Clean Air Act ("BCAA" or the "Ordinance"). The Ordinance limits permissible emissions of certain pollutants, requires Continuous Emissions Monitoring Systems ("CEMS") for certain pollutants, mandates that CEMS must be continuously active at all times a facility is operational, imposes penalties for lapses in CEMS exceeding thirty minutes, and establishes criminal penalties for violations.

The Ordinance's strict liability penalties made certain conduct unlawful despite the fact that it was allowed under state law.

The Court held that "the Ordinance is conflict preempted because it virtually invalidates the facilities' state-issued Title V permits."

Landfill Expansion: Alabama Appellate Court Addresses Application of Groundwater Requirements

The Court of Appeals of Alabama addressed in a December 13th opinion a challenge to a Alabama Department of Environmental Management decision to grant a permit allowing the expansion and modification of a solid waste landfill. See Gipson v. Alabama Department of Environmental Management, 2019 WL 6798567.

Several individuals challenged the renewal and modification of the landfill's Solid Waste Permit arguing it violated certain ADEM Rules.

The Petitioners argued that the landfill did not comply with the groundwater requirements established for landfills by the ADEM rules.

Landfill Expansion: Alabama Appellate Court Addresses Application of Groundwater Requirements (cont)

ADEM rules require that a landfill be designed so that the bottom elevation is a minimum of five feet (if measured during February, March, or April) or ten feet (if measured during the remaining nine months) above the estimated groundwater level beneath the landfill. Further, the rules define "groundwater" as "water below the land surface in the zone of saturation." The "saturated zone" is defined as "that part of the earth's crust in which all voids are filled with water."

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ADEM interpreted this provision to mean that in order for a zone to be saturated it must be 100% filled with water. Also, even if water is present it must be interconnected and constitute a continuous zone of saturation.

ADEM reasoned that the rule's purpose is to prevent the spread of contaminants. If the groundwater is not interconnected and continuous, contaminants cannot spread.

The possibility that groundwater was within the zone was admitted., However, there was not a sufficient showing of interconnectedness or the existence of a well that was 100% saturated. Therefore, the Petitioner's appeal failed.

Contamination Limit/Recyclables: MRF Operator Lawsuit Alleging Connecticut Authority Violation of Sorting/Marketing Agreement

FCR, LLC ("FCR") filed a May 28th Complaint in Superior Court (Judicial District of Hartford) alleging that Materials Innovation and Recycling Authority ("MIRA") has violated a Recycling Facility Operations and Maintenance Agreement ("Agreement").

The alleged violations by MIRA include failure to prevent excessive levels of contamination in incoming recyclables.

MIRA is stated to have agreed that FCR would not need to process loads of recyclables that were contaminated, which were defined as:

> . . . loads that consisted of more than five percent unrecoverable materials, or that originated from more than one municipality.

FCR alleges that these requirements were integral to ensuring its revenue (i.e., compensation under the Agreement). In other words, the company stated that the more contaminated the incoming recycling, the greater processing costs it incurred to refine the stream into salable sorted recyclables.

Cathode Ray Tubes/Warehouse: Federal Court Addresses Superfund Corporate Veil Piercing Issue

The United States District Court for the Southern District of Ohio ("Court") addressed in a November 13th Order an issue arising out of a Superfund cost recovery action. See Garrison Southfield Park LLC v. Closed Loop Ref. and Recovery Inc., No. 2:17-cv-783, 2019 WL 5962684, slip copy (S.D. Ohio Nov. 13, 2019).

The action stems from the alleged improper disposal of electronic waste in a leased warehouse.

The plaintiff, Garrison Southfield Park ("Garrison"), initially filed suit alleging that multiple defendants caused environmental contamination at two of Garrison's warehouses in Columbus, Ohio. According to Garrison, the warehouses contain more than 64,000 tons of hazardous electronic waste.

Moshe Silagi, was the former managing member of MS-South, LLC, the company that sold the warehouses to Garrison. An option was provided to lease the other warehouse.

Cathode Ray Tubes/Warehouse: Federal Court Addresses Superfund Corporate Veil Piercing Issue (cont)

Garrison alleges that under the lease agreement, Closed Loop was required to comply with federal and state hazardous waste laws.

Closed Loop allegedly misrepresented that it qualified for the conditional exclusion by processing CRTs through disassembly and glass breaking but then storing most of the crushed CRT glass in one of the warehouses. According to Garrison, Closed Loop improperly accumulated massive amounts of crushed CRT glass and intact CRTs at the warehouses.

Defendant Silagi allegedly exercised total control over MS-South and made misrepresentations to Garrison in connection with the sale of the warehouses. These allegedly included the claim that the properties were not used for storage, treatment, or disposal of hazardous substances. Further, Silagi dissolved MS-South in an effort to avoid liability, according to Garrison.

Garrison brought claims under CERCLA.

Cathode Ray Tubes/Warehouse: Federal Court Addresses Superfund Corporate Veil Piercing Issue (cont)

Silagi argued that Garrison failed to plead one of the elements of a CERCLA claim—that Silagi is a potentially responsible party (i.e, "PRP") under Section 107 of the statute. Silagi's specific contention was that Garrison failed to plead sufficient facts to plausibly pierce MS-South's corporate fail and hold Silagi personally liable.

There is a three-prong test for determining whether the corporate veil has been pierced. Individual shareholders may be held personally liable when:

(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own,

(2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and

(3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Cathode Ray Tubes/Warehouse: Federal Court Addresses Superfund Corporate Veil Piercing Issue (cont)

With respect to the first prong of the test, the Court noted that Garrison alleged that Silagi was the sole member of MS-South, Silagi signed the lease agreement between MS-South and Closed Loop, Silagi made representations in the purchase and sale agreement between MS-South and Garrison, Silagi was named as the guarantor in the purchase and sale agreement, and Silagi dissolved MS-South. Such allegations were sufficient to meet the first prong.

The complaint alleged Silagi falsely represented that the warehouses had not been used for the storage, treatment, or disposal of hazardous substances; Silagi had knowledge that hazardous waste was being disposed of on the property because he signed the lease agreement; and Silagi falsely represented that he had made due inquiry into the truth of the representations.

Rider/Real Property Contract: New Jersey Appellate Court Addresses Whether Seller Must Undertake Groundwater Remediation

The Superior Court of New Jersey – Appellate Division ("Appellate Court") addressed in a June 10th opinion whether a rider to a real estate contract requiring the Seller to undertake certain environmental remediation was enforceable. See Miguel A. Hector v. Super Car Wash limited Liability Company, et al., 2019 WL 2418917.

Super Car Wash limited Liability Company and its managing member, Ali Musa (collectively "Musa") entered into a real estate contract to sell its commercial lot and carwash business (collectively "Property") to Miguel A. Hector ("Hector").

The sale of the property was subject to an environmental inspection.

Hector could terminate the real estate contract if an inspection revealed contamination.

Rider/Real Property Contract: New Jersey Appellate Court Addresses Whether Seller Must Undertake Groundwater Remediation (cont)

Hector's environmental consultant identified contamination in the soil and recommended further investigation.

A negotiated rider provided that the Seller had "agreed to remediate all such contamination prior to closing. . . at the expense of the Seller." The Seller agreed to perform the "cleanup of any additional contamination that may be discovered during the course of this remediation."

Musa discovered that the groundwater was contaminated during his remediation of the soil. Hector sued for specific performance which Musa refused to clean the groundwater. The lower court concluded that the rider was unambiguous and required remediation of the groundwater.

U.S. - Based Scrap Recycling Industry: 2019 Institute of Scrap Recycling Industries Economic Impact Study (Including Arkansas)

The Institute of Scrap Recycling Industries ("ISRI") issued a report titled:

2019 – Economic Impact Study, U.S.-Based Scrap Recycling Industry ("Report")

The Report includes state-specific data (including Arkansas) in regards to the impact of the scrap recycling industry in terms of jobs, wages, and output.

As to Arkansas, jobs created include:

Direct - 1,252
Supplier - 1,198
Induced - 1,181

Economic Impact for Arkansas is:

Direct - $262,580,300
Supplier - $247,919,300
Induced - $197,532,300