


# Arkansas Solid Waste Conference

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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

## 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.

# Arkansas Medical Marijuana Rules/Waste Issues Relevance to Solid Waste/Recycling Industry

## 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 are 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 continues. Topics should include:

- 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.


# Arkansas Amendment Non-Discrimination Provision

## Employer/Employee Issues

- Non-compliance with the Arkansas Medical Marijuana Amendment of 2016 (AMMA) can pose significant risks for an employer.
- Includes a non-discrimination provision directed at employers.
- The provision provides that:
  - “An employer shall not discriminate against an applicant or employee in hiring, termination, or any term or condition of employment, or otherwise penalize an applicant or employee, based upon the applicant’s or employee’s past or present status as a qualifying patient or designated caregiver.”

## Arkansas Medical Marijuana Act Non-Discrimination Provision (Cont.)

- Damages under the AMMA for an employment discrimination claim based on an applicant's or employee's past or present status as a qualifying patient or designated caregiver is capped in accordance with the statutory caps in the Arkansas Civil Rights Act.
- Liability for back pay is limited to no more than two years prior to the filing of an action and the period within in which an applicant or employee can bring such an action is one year from when the alleged discrimination occurred.



Particular concerns for EHS/solid waste/recycling facility professionals?


➤ Marijuana short term effects can include:

- Distorted perception
- Loss of coordination
- Memory and learning difficulty
- Problem solving difficulty
- Abstract reasoning
- Inattention to speed
- Manual dexterity issues



# Arkansas Medical Marijuana Rules/Waste Issues (cont.)

- The MMA poses particularly difficult issues for many employers in the solid and hazardous waste and recycling industries because of serious safety and environmental issues to both employees and public in the event of mistakes:
  - Exposure to heavy machinery and dangerous processes
  - May be long commutes to some facilities in a rural state such as Arkansas
  - Presence of hazardous materials requires vigilance
  - More difficult to find young employees because of strict drug policies
  - Sorting/collecting/processing machines requiring diligence



Employers will arguably have to be more vigilant about observing employees for signs of impairment.

Documentation of employee actions that cause suspicion of impairment.

Designation of “safety sensitive” positions as allowed by the AMMA will be a particularly important task that will involve the EHS professional.

Should contractors, consultants, etc., be addressed in your policies and procedures?

# Laws and Regulations

## Medical Marijuana/Reminder

- U.S. Department of Transportation/Federal Supersedes
  - Omnibus Transportation Employee Testing Act of 1991
    - Requires drug and alcohol testing of drivers, pilots, and other “safety-sensitive” jobs that are under the domain of the Department of Transportation (DOT)
    - The DOT has guidelines that prohibit the use of medical marijuana by transportation workers including pilots, school bus drivers, truck drivers, subway operators, ship captains and fire-armed transit security workers

Regardless of State Laws

# Federal Inflation Reduction Act Potential Relevance to Solid Waste Industry?

- Methane emission reduction activities (\$1.5 Billion)
- Expanded tax credits for biogas projects
- Clean hydrogen credits to produce/expand use of renewable natural gas
- Alternate fuel tax credit/credit for landfill gas construction
- Electric vehicle credits/grants

# Federal Recycling Legislation

The United States Senate passed S.3743 by unanimous consent which is titled:

## *Recycling and Composting Accountability Act (RCAA)*

The RCAA was introduced in the Senate Environment and Public Works Committee on March 3, 2022, by Senators John Boozman (R-AR), Tom Carper (D-DE), and Shelley Moore Capito (R-WV).

The RCAA would require that EPA collect and publish data on recycling and composting rates across the country. The objective would be to provide an accurate reflection of performance at both the national and state levels.

The data collected under the RCAA would play a role in standardizing U.S. recycling reporting rates.

The RCAA makes publicly available the recycling rates and recycling practices of all Federal agencies.

EPA would also be required to prepare a report on the capability of the United States to implement a national composting strategy for compostable materials for the purposes of reducing contamination rates for recycling.

# Modernizing Public Notice for RCRA Hazardous Waste Permitting/Other Actions

The United States Environmental Protection Agency published in the December 16th Federal Register titled:

*Modernizing Public Notice for RCRA Hazardous Waste Permitting and Other Actions*

The EPA RCRA Notice solicited comments on allowing modern electronic alternatives for public notifications in implementing Subtitle C of the Resource Conservation and Recovery Act.

# Modernizing Public Notice for RCRA Hazardous Waste Permitting/Other Actions (cont.)

The RCRA Notice asked whether online mechanisms that might not typically be viewed as newspapers (i.e., bulletins or newsletters published online by state environmental agencies) could also satisfy such requirements.

EPA's conclusion in the RCRA Notice is that the agency can, in what it describes as "appropriate cases," authorize state regulations providing for equivalent notice mechanisms other than newspaper publications for actions other than permit issuance.

Cited as an example are RCRA permit modifications.

ASTSWMO expressed support.

# EPA RCRA Guidance Compendium

## 2021-2022 Additions

- Regulatory Options for addressing the temporary backlog of containerized hazardous waste needing incineration (addressing generator options facing accumulation timing issues)
- Alcohol-Based Sanitizers: U.S. Environmental Protection Agency Addresses Options for Repurposing/Recycling (pandemic related question addressing oversupply of sanitizers and potential disposal options for a bulk commercial chemical product)
- Applicability of RCRA Organic Emission Standards to Equipment and/or Closure Devices Subpart BB v. Subpart CC
- Land Disposal Restrictions – RCRA Permits/ Waste analysis Plan/Inspection Sampling
- Frequently asked questions about Large Quantity Generator Quick Reference Guides



# RCRA Post-Closure

The Association of State and Territorial Solid Waste Management Officials issued a position paper titled:

## *Post-Closure Care Beyond 30 Years at RCRA Subtitle C Facilities*

RCRA Subtitle C regulations require certain actions when a hazardous waste management facility 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.

Closure of units or facilities can happen in one or 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])

## RCRA Post-Closure (cont.)

Note that post-closure applies only to land disposal facilities and cannot decontaminate (or clean close) all equipment, structures, and soils.

An ASTSWMO Position Paper notes that the Subtitle C regulations establishing a 30-year post-closure care period can be extended or shortened.

The 30-year period may be expanded or shortened if the EPA Regional Administrator or state Director of an authorized program:

. . . “finds that the extended period is necessary to protect human health and the environment” and may be shortened if the Regional Administrator or State Director finds that a reduced period is sufficient to protect human health and the environment.

The Position Paper states that various facilities in the United States are approaching (or have already reached) the end of the initial 30-year post-closure period.

Notes that many states are “grappling with the issue of how to address this situation” and are asking EPA for guidance.

# PFAS/PFOS

National Waste and Recycling Association and SWANA are requesting an exemption from the Comprehensive Environmental Response, Compensation, and Liability Act for PFAS chemicals designated as hazardous substances.

Final designation (already proposed for 2 chemicals) of PFAS as a CERCLA hazardous substance would trigger certain corresponding requirements such as:

- Application of the potentially responsible liability categories (i.e., current owner or operator, former owner or operator [in certain circumstances], transporter [in certain circumstances], and generators)
- Hazardous substance release reporting requirements (if reportable quantities are released)
- SWANA/NWRA asks that Congress provide municipal solid waste landfills and other passive receivers with:
  - ... a narrow exemption from liability if certain PFAS are designated as hazardous substances under CERCLA (which two have been).

## PFAS/PFOS (cont.)

The arguments put forth in support of this exemption include:

- Landfills neither manufacture nor use PFAS but instead receive discarded materials containing PFAS that are ubiquitous in residential and commercial waste streams
- Landfills are essential public services that are subject to extensive federal, state, and local environmental, health, and safety requirements and are important to managing and limiting PFAS in the environment.
- Permitting authorities often require landfills to accept waste streams containing PFAS
- Landfills rely on wastewater treatment facilities for leachate management and wastewater and drinking water facilities rely on landfills for biosolids management (efforts to address PFAS at municipal solid waste landfills in drinking water and wastewater facilities must avoid disrupting such interdependence among essential public services)

## PFAS/PFOS (cont.)

- Landfill leachate typically represents a minor proportion of the total quantity of PFAS received at wastewater treatment facilities from all sources in contrast to PFAS manufacturers or users (generating significant litigation costs)
- Removing PFAS from landfill leachate would require advanced treatment techniques which are prohibitively expensive
- Without a CERCLA exemption, manufacturers and heavy users of PFAS compounds will bring claims for contribution against landfills and other passive receivers
- The United States Environmental Protection Agency exercise of enforcement discretion regarding CERCLA cost recovery actions would not insulate landfills from the previously referenced contribution litigation

## PFAS/PFOS (cont.)

- Costs addressing PFAS by municipal solid waste landfills will be passed along to communities
- Absent a CERCLA exemption landfills may be forced to restrict inbound waste and/or increase disposal costs for media with elevated levels of PFAS
- Food waste may contain PFAS due to contact with PFAS-lined packaging materials

Note: Blake Whittle recently undertook a presentation at the Arkansas Environmental Federation Convention on PFAS discussing the formation of an Arkansas Inter-Agency task force.

# RCRA Manufacturing Process Unit Exemption Addressed

A United States EPA Administrative Law Judge Christine Donelian Coughlin interpreted the Resource Conservation and Recovery Act (“RCRA”) term “manufacturing process unit” (“MPU”) in an August 15th decision.

See *In the Matter of ISP Freetown Fine Chemicals, Inc.*, Docket No. RCRA-01-2018-0062.

The importance of the term MPU is that it, under appropriate circumstances, can constitute an exemption from certain provisions of the RCRA regulations.

The ALJ in her Decision granted ISP’s MAD and denied EPA’s for the following reasons:

- The MPU exemption exempts ISP’s distillation units from RCRA regulations
- ISP’s distillate receiver tanks are part of its distillation units
- Because ISP’s distillate receive tanks are part of its manufacturing process, its distillate receiver tanks are exempt under the MPU exemption
- The policy and purpose of RCRA and the MPU exemption support applying the exemption to ISP’s distillate receiver tanks

# Municipal Solid Waste Landfills/ Emission Factors

Three environmental organizations sent a Notice of Intent to Sue to the United States Environmental Protection Agency alleging a failure to perform nondiscretionary duties required by the Clean Air Act.

Sierra Club alleges that EPA has failed to determine whether it is necessary to revise the emission factors used to quantify certain pollutants emitted from municipal solid waste landfills (“MSWLs”) that include:

- Volatile Organic Compounds (“VOCs”)
- Oxides of Nitrogen (“NOx”)
- Carbon Monoxide (“CO”)

EPA is stated to have not revised the emission factors for MSWLs in Chapter 2.4 of the agency’s AP-42 compendium of emission factors since 1998.

The specific issues cited include:

- Underestimate the emissions of almost all pollutants by about 25 percent
- Underestimate VOC emissions from a significant number of landfills in the United States by approximately 60 percent
- Failure to address emissions of nitrous oxide



# Environmental Criminal Enforcement: Recent Examples

- Tennessee environmental consulting firm CEO pleads guilty to submitting fraudulent DMRs. (Note recordkeeping/monitoring reports are more often a focus than substantive standards)
- Kentucky oil lease tank battery operator indicted for purposeful discharge of oil and brine water into creek (i.e., “knowingly”)
- Sioux City, Iowa, individual pleads guilty to RCRA violations for unlawful storage/transportation of hazardous waste related to CRTs/electronics
- Seattle barrel reconditioner pleads guilty to making false statement regarding dumping caustic waste into sewer (importance of “certifications”)

# Environmental Criminal Enforcement (cont.)

- Risk Management Plan/Cape Cod Ice fined \$90,000 and three years probation for allegedly failing to implement a RMP for Rhode Island facility to address accidental release of anhydrous ammonia.
- Negligent Endangerment/U.S. Minerals admitted to a count of negligent endangerment under Clean Air Act relating to allegedly negligently releasing inorganic arsenic that exposed employees.
- Negligent Endangerment/Hydro Extrusion USA aluminum processing facility charged with Clean Air Act negligent endangerment because:
  - . . . While operating, air emissions from the company's furnaces were open to the interior of the building and did not pass through any pollution control devices before reaching employees or being vented to ambient air

-Note-

- Impact on or endangering employees can be a trigger for federal environmental criminal enforcement (often in combination with OSHA)

# Hazardous Waste Storage/RCRA: EPA Announces Multi-Party Settlement Involving Forth Smith, Arkansas Warehouse

- The Region 6 Office of the United States Environmental Protection Agency issued an August 3rd news release describing a settlement regarding alleged hazardous waste violations at what the agency denominates the “US technology Corporation” site in Fort Smith, Arkansas.
- EPA states that the settlement alleges:
  - ... several companies generated hazardous waste that was proposed for recycling but was instead stored by the owner and operator of UST without a Resource Conservation and Recovery Act (RCRA) permit.

# Hazardous Waste Storage/RCRA: EPA Announces Multi-Party Settlement Involving Forth Smith, Arkansas Warehouse (cont.)

- An investigation of the site in 2018 is stated to have determined that the UST facility included a warehouse containing an estimated 10,000 drums and 1,200 super sacks of waste containing:
  - . . . a blend of spent, blast, and related material that when recycled is used to make concrete products known as SBM, totaling about 6,854,400 pounds of material.
- Ten companies, out of the dozens that are stated to have hazardous waste located at the site, agreed to work with EPA to remove quantities of waste beyond their allocated amounts to prevent potential environmental impacts.

# Cannabis Company Accused of Illegally Dumping Hazardous Waste

Federal prosecutors say the owner and administrator of a local marijuana production facility arranged the illegal disposal of more than 1,500 pounds of hazardous waste on public and private property in San Diego county. The seven-page indictment alleges that Lunar Loussia, a part-owner of WellgreensCA, and company administrator Nadia Malloian conspired to illegally dump 28 drums filled with contaminated ethanol, which was used for the production of THC oil.

According to the June 19 indictment, the defendants used an unlicensed garbage hauler to remove the 55-gallon drums of ethanol from the company's headquarters on Trade Street, near Miramar Road. Each drum held 55-gallons of the toxic fuel.

The defendants allegedly paid the hauler in cash to dispose of the dangerous material at unlicensed sites, without filing the required paperwork, according to the complaint.

# Environmental Justice Actions

- ❑ Both federal authorities (EPA and U.S. Department of Justice) actions are increasingly considering disproportionate environmental impacts on low income communities and people of color.
  
- ❑ Examples of Federal/Environmental Actions/Petitions:
  - Sierra Club petition to EPA alleging deficiencies in TCEQ air program related to public participation and environmental justice.
  - Earthjustice request for action by EPA per Title VI of the Civil Rights Act alleging violations by Louisiana Department of Environmental Quality. (Alleging black residents of St. John Parish subject to disproportionate impacts from ethylene oxide facility)
  - EPA accepts Title VI Administrative complaint from Southern Environmental Law Center alleging violation by North Carolina Department of Environmental Quality (Alleging discriminatory impacts on Black/Latino populations in two counties in permitting three swine management facilities)
  - U.S. Department of Justice environmental justice investigation into City of Houston's operations, policies and practices related to illegal dumping and possible discrimination against Black and Latino communities.

# Tank Cleaning/Confined Space Dangers: OSHA Announces Regional Emphasis Program for Region 6 (Arkansas, Louisiana, Texas, Oklahoma)

The Occupational Safety and Health Administration issued an August 2nd news release announcing a Regional Emphasis Program that will target the transportation tank cleaning industry in its Region 6. See Directive Number CPL 2 02-00-032.

The Regional Emphasis Program will seek to protect workers from confined space dangers.

OSHA states that Region 6 has investigated, since 2016, 36 fatalities in the transportation and cleaning industry. Concern is expressed about the failure to follow confined space entry requirements to prevent workers from inhaling harmful substances.

The Regional Emphasis Program is stated to be focused on raising awareness among employers engaged in tank cleaning activities in industries such as:

- Trucking
- Rail and road transportation
- Remediation services
- Material recovery and waste services

# CalRecycle Bottle/Can Redemption Program: Six Individuals Charged for Alleged Arizona-to- California Recycling Fraud Scheme

CalRecycle (officially known as the Department of Resources, Recycling and Recovery) issued a news release stating that:

. . . six people face felony recycling fraud and grand theft charges connected to a suspected multi-state scheme to defraud California's Beverage Container Recycling Program.

The CalRecycle investigators are stated to believe that the suspects illegally smuggled over nine tons of empty bottles and cans from Arizona to the Los Angeles area to fraudulently redeem recycling deposits.

Non-California consumers do not pay California Redemption Value ("CRV") deposits on beverage purchases.

Consequently, such containers are not eligible for CRV redemption. 32



# CalRecycle Bottle/Can Redemption Program: Six Individuals Charged for Alleged Arizona-to- California Recycling Fraud Scheme (cont.)

The California Beverage Container Recycling and Liter Reduction Action provides that specified containers are subject to a CRV.

The CRV is five cents for containers less than 24 ounces and 10 cents for containers 24 ounces or larger.

The California Department of Justice's Division of Law Enforcement along with CalRecycle are stated to have uncovered evidence of the recycling fraud ring over the course of a six-month investigation.

# Flow Control/Refuse-Derived Fuel

The United States Court of Appeals Eighth Circuit (“Eighth Circuit”) addressed in a May 27th Opinion issues arising out of a judicial challenge to a Minnesota County ordinance addressing solid waste management. See *Paul’s Industrial Garage, Inc., et al. v. Goodhue County, et al.*, 2022 WL 1695533.

The challenged ordinance included provisions requiring that certain solid wastes be transferred to a state-owned plant where it would be processed into refuse-derived fuel.

Goodhue County, Minnesota, enacted an ordinance requiring all garbage be deposited at a state-owned plant in Red Wing, Minnesota.

The material was then processed into refuse-derived fuel and sold to Northern States Power Company (“Xcel”) where it would be utilized to produce electricity.

Paul’s Industrial Garage (“PIG”) (a Wisconsin-based waste hauler) and other waste haulers and processors filed a judicial action in the United States District Court for the District of Minnesota against the County.

Argued that the ordinance violated the United States Commerce Clause because it benefited an in-state company, Xcel, at the expense of out-of-state haulers and processors.

The County ordinance can be described as utilizing “flow control.”

As a result, PIG’s and the other plaintiffs’ dormant Commerce Clause claim is deemed deficient because they did not allege inability to convert garbage into refuse-derived fuel.

Stated to have failed to allege the ability to burn refuse-derived fuel to create electricity. Consequently, they are not competitors with either the Plant of Xcel and the Eighth Circuit holds their claims must fail.

# Flow Control/Municipal Ordinance: Shreveport, Louisiana, Judicial Action Filed Alleging Waste Haulers' Failure to Use Designated Landfill

The City of Shreveport, Louisiana, filed a September 30th judicial action in the 1st District Court/Caddo Parish against six waste haulers alleging a failure to utilize a designated landfill.

A local government's directing the movement or disposition of refuse or waste is often denominated "flow control."

Flow control describes a scenario in which local government utilizes a law or regulation to direct one or more types of solid waste to a particular disposal, processing, transfer, landfill, or other facility.

The subject is often a subject of debate among local government, waste management, transportation companies, recycling facilities, and environmental groups.

Many flow control disputes have been addressed by the courts.

# Flow Control/Municipal Ordinance: Shreveport, Louisiana, Judicial Action Filed Alleging Waste Haulers' Failure to Use Designated Landfill (cont.)

The Shreveport Petition cites Code of Ordinances 74-53 as requiring that:

... any person who hauls waste from any place of business for hire within the city limits of Shreveport to obtain a permit from the City.

It further cites 74-52.1 as requiring (with limited exceptions) that:

... all persons required to obtain a permit pursuant to Sec 74-53 "shall dispose of" all solid waste only at Woolworth Road Landfill.

# Flow Control/Municipal Ordinance: Shreveport, Louisiana, Judicial Action Filed Alleging Waste Haulers' Failure to Use Designated Landfill (cont.)

The Woolworth Road Landfill is owned by Shreveport.

Shreveport states that every private hauler that hauls waste within its city limits enters into a contract with Shreveport.

The contract requires that the Waste Haulers dispose of all waste collected within the city limits of Shreveport at the Woolworth Road Regional Solid Waste Facility (i.e., the designated landfill).

# Construction Debris/Waste Hauling: Texas Supreme Court Addresses Validity of Municipality's Imposition of Gross Revenue License Fee

The Supreme Court of Texas addressed in a May 20th opinion an issue arising out of certain licensing and related requirements imposed by a general-law municipality on a firm that removes solid waste (often denominated “construction debris”) from construction sites. See *Builder Recovery Services, LLC v. Town of Westlake, Texas*, 2022 WL 1591976.

The question addressed was whether The Town of Westlake, Texas had the authority as a general-law municipality to impose a percentage-of-revenue licensing fee on construction trash-hauling companies.

Waste haulers were required to COL remit a monthly license fee of 15% of their gross revenue generated within Westlake to the town.

The lawsuit alleged that Westlake, as a general-law municipality, lacked both the statutory authority to require BRS to obtain a license to haul construction waste and the statutory authority to impose a licensing fee based on a percentage of BRS's revenue.

The district court agreed with BRS. It ruled the 15% license fee was invalid.

# Soil Importation/Gravel Quarry: Massachusetts Appellate Court Addressing Zoning Issue

The Appeals Court of Massachusetts (“Court”) addressed in a May 13th Opinion the interpretation of certain zoning laws to the importation of soil (which included some man-made materials). See *Immanuel Corp. v. Zoning Board of Appeals of Uxbridge*, 2022, WL 1509728.

The question addressed was whether soil importation for deposit in a gravel quarry (“Quarry”):

- Was allowed by certain zoning bylaws
- Was allowed under the terms of prior permits for gravel excavation

Immanuel Corp. (“Immanuel”) allowed RHR, LLC (“RHR”) to deposit more than 330,000 cubic yards of materials on a property (“Property”) in the town of Uxbridge, Massachusetts (“Town”) that was formerly used as a Quarry.

# Soil Importation/Gravel Quarry: Massachusetts Appellate Court Addressing Zoning Issue (cont.)

The Town issued a cease and desist order to Immanuel stating that the soil importation violated the zoning bylaws. The Town's Board of Appeals ("Board") upheld the order and a subsequent hearing by a trial judge concluded that the Board acted within its discretion.

The Court's Appellate Opinion describes the Quarry as encompassing 133 acres. It had operated pursuant to a series of annual earth removal permits issued by the Town.

Approximately three million tons of sand and gravel had been removed.

Immanuel was required to restore any areas no longer in use for excavation by covering them with loam and vegetation. Immanuel had authorized RHR to deposit soil and other non-soil materials on a five-acre area of the property.



# Soil Importation/Gravel Quarry: Massachusetts Appellate Court Addressing Zoning Issue (cont.)

The Town's earth removal permits required restoration by grading and leveling (and then covering) with:

. . . “suitable topsoil” and planting it with “suitable ground cover.”

Neither of the earth removal permits are stated to have authorized commercial importation of soil and other materials to the Property.

Zoning bylaws cited by the Court included a prohibition of the use of land as a commercial landfilling operation and/or dumping ground. Further, the bylaws prohibited the removal, importation, or filling of any material to or from any parcel of land in the Town unless a written permit was obtained.

Immanuel was paid more than \$600,000 for allowing RHR to deposit the soil in the Quarry.

# Soil Importation/Gravel Quarry: Massachusetts Appellate Court Addressing Zoning Issue (cont.)

The Court also rejected Immanuel's argument that the earth removal permits authorized its importation of soil to the Property. These permits did require revegetation and grading and leveling the excavated area. This included covering with no less than four inches of suitable topsoil and planting with suitable ground cover.

Nevertheless, the Court agreed with the lower court's determination that:

. . . neither of those earth removal permits authorized Immanuel to import soil and other materials to the Property, in any event what Immanuel imported was "not soils," but rather, "man-made or construction debris."

The Court upheld the lower court's determination that the soil importation was prohibited.

# Waste to Energy Facilities

The United States Energy Information Administration (“EIA”) issued an August 30th report titled:

*U.S. Capacity to Convert Waste to Energy Declines After Remaining Steady Since 1994 (“Report”)*

WTE plants typically refer to facilities that burn municipal solid waste to produce steam in a boiler to generate electricity. Municipal solid waste can include various energy-rich material such as paper, plastics, yard waste, and products derived from wood.

The August 30th EIA Report states that WTE electric-generating capacity has:

. . . recently started to decline after averaging around 2,219 megawatts (MW) for 24 years, according to our June 2022 Preliminary Monthly Electric Generator Inventory.

## Waste to Energy Facilities (cont.)

For the time period 2018 to 2022, 188 MW of WTE capacity is stated to have been retired. The Report projects another 36 MW is expected to retire by 2027. The reason given for the decrease includes:

- Low electricity prices
- Local opposition
- Continued policy concerns about emissions

WTE plants constitute a small portion of United States electric generating capacity.

# Power Sector Combustion Byproducts: U.S. Energy Information Administration Report Notes Beneficial Use Exceeded Material Disposal in 2020

A May 26th United States Energy Information Administration report has been issued titled:

*Beneficial Use of Power Sector Combustion Byproducts Exceeded Material Disposed in 2020*

The EIA Report notes that in 2020, for the first time (since 2008) greater amounts of power sector byproducts were beneficially used rather than being disposed of.

Coal-fired facilities produce combustion byproducts which include fly ash and bottom ash.

Fly ash is the lighter ash that arises in the boilers' flue gases.

Bottom ash is the heavier ash that collects at the bottom of the boilers.

# Power Sector Combustion Byproducts: U.S. Energy Information Administration Report Notes Beneficial Use Exceeded Material Disposal in 2020 (cont.)

Beneficial uses include:

- Use in manufacturing products such as concrete and wallboard
- Application in structure fills
- Utilization to produce gypsum wallboard

# Oil Contamination/Remediation: New York Court Considers Potential Liability of Insurance Company/Environmental Consultant

The New York Supreme Court – Appellate Division (Second Department) addressed in an October 20th Decision & Order alleged damages associated with the remediation of oil contamination. See *Bennett v. State Farm Fire and Casualty Company*, 2021 WL 4888734.

Certain insureds' whose properties was affected by the oil contamination alleged that their insurance company (“insurer”) and the environmental consultant were liable for additional damage allegedly caused by the remediation process.

State Farm engaged Holzmacher, McLendon and Murrell, P.C. as an environmental consultant.

HMM was tasked to oversee the work of Milro Associates, Inc.

Milro was undertaking remediation after being retained by the Plaintiffs.

State Farm was paying for Milro’s services.

# Oil Contamination/Remediation: New York Court Considers Potential Liability of Insurance Company/Environmental Consultant (cont.)

Plaintiffs alleged that State Farm, HMM and Milro caused additional damage to the property beyond what had occurred in the initial oil contamination incident.

HMM argued that it submitted evidence indicating it did not breach any duty owed to the Plaintiffs.

The environmental consultant contended it was not the proximate cause of the exacerbation of the residual oil contamination. This argument was premised on the idea that its underlying role was limited to ensuring that the remediation work paid for by State Farm satisfied the requirements of the New York DEC.

HMM further asserted it did not direct, control, or supervise Milro in the performance of the remediation.

The Court held that even if such duties were limited and performed in accordance with DEC's requirements, etc., that HMM did not establish prima facie that its duties were so limited and that it did not, in fact, direct, control, and supervise the investigation or remediation.



# Aluminum Recycling Plant/Little Rock, Arkansas: Alter Trading/Toyota Tsusho America Joint Venture Begins Operation

*Recycling Today* reported that the Altech Recycling plant in North Little Rock, Arkansas, has begun operation.

Altech is a joint venture between Alter Trading Corporation and Toyota Tsusho America, Inc.

TAI noted in a prior news release that it established the joint venture with Alter to:

. . . participate in upstream business aiming to strengthen its aluminum value chain, and is promoting the aluminum recycling business.

The North Little Rock joint venture facility process includes the separation and processing of:

. . . post shredder mixed metals (referred to as Zorba) collected from Alter and other shredder businesses to produce Twitch, a high-grade aluminum product.

Because of global efforts to achieve carbon neutrality and the growth of electric vehicles, demand is stated to be increasing for aluminum parts that are needed for material substitution to reduce vehicle weight.

# Arkansas Recycling Tax Credits: Reminder

The Arkansas Recycling Tax Credit is a state income tax credit found at Ark. Code Ann. § 26-51-506 et seq.

- 30% of the cost of eligible machinery and equipment can be deducted from Arkansas state income tax
- Can increase demand for recyclables or generate supply
- Can support the use of alternative materials to reduce feedstock, waste disposal, or energy costs