

Solid and Hazardous Waste/Recycling Administrative/Judicial Developments: 2022 – 2023

MITCHELL | WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.




Walter G. Wright
Mitchell, Williams, Selig, Gates & Woodyard

501-688-8839
wwright@mwlaw.com

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

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.

Never moved in the House.

Incineration Backlog/Hazardous Waste Storage: Indiana Department of Environmental Management and Fort Wayne Warehouse Enter into Agreed Order Providing Storage Time Limit Extension (cont.)

The Indiana Department of Environmental Management and Stoncor Group, Inc. entered into a February 22nd Agreed Order addressing issues associated with the storage of containerized hazardous waste. See Case No. 2023-29165-H.

The SGI Warehouse notified EPA as being a Large Quantity Generator of hazardous waste.

The AO notes that on August 10, 2021, EPA issued a Memorandum titled:

Regulatory Options for Addressing the Temporary Backlog of Containerized Hazardous Waste Needing Incineration

Incineration Backlog/Hazardous Waste Storage: Indiana Department of Environmental Management and Fort Wayne Warehouse Enter into Agreed Order Providing Storage Time Limit Extension (cont.)

It is further noted in the AO that:

. . . Facilities may be capable of storing backlogged containerized waste absent permit modifications if their permit allows storage of those types of containerized waste and waste codes and their RCRA permitted container storage capacity will not be exceeded. The incinerator backlog is expected to be limited in both duration and scope; current information indicates that extensions will not be needed beyond March 2022.

The AO provides SGI a 60-day extension for the accumulation of the hazardous waste destined for incinerator due to the backlog at the permitted incinerators.

Incineration Backlog/Hazardous Waste Storage: Indiana Department of Environmental Management and Fort Wayne Warehouse Enter into Agreed Order Providing Storage Time Limit Extension (cont.)

Provisions are further provided for potential additional extensions.

As a condition of the extension, until acceptance at an approved incinerator with available capacity, SGI is required to:

1. Ensure the hazardous waste containers are in good condition, compatible with the waste, and stored closed
2. Ensure emergency response equipment, including an internal communication or alarm system, a telephone or hand-held two-way radio, fire control equipment, spill control equipment, decontamination equipment, and water at adequate volume and pressure are in the designated storage area(s)
3. Conduct and document daily inspections of the greater than 90/180/270-day designated storage area(s)

East Palestine, Ohio, Train Derailment Site/U.S. Environmental Protection Agency Alert: Addressing Potential State Interference with Acceptance of Hazardous Waste Material

EPA issued a March 17th document to State Environmental Commissioners, Directors, and Secretaries titled:

Alert Regarding Disposal of Hazardous Waste Material from East Palestine, Ohio, Train Derailment Site

EPA is stated to have received information that some states could be seeking to block acceptance of out-of-state hazardous waste material from the East Palestine, Ohio, Train Derailment Site.

If so, the Alert states:

. . . this likely would be impermissible, as states cannot ban interstate transport of waste in these circumstances . . . states cannot unilaterally stop shipments of out-of-state hazardous waste material from the Site.

East Palestine, Ohio, Train Derailment Site/U.S. Environmental Protection Agency Alert: Addressing Potential State Interference with Acceptance of Hazardous Waste Material (cont.)

Cited in support of this statement:

- Supremacy Clause of the U.S. Constitution (i.e., state actions are preempted when they are an obstacle to executing Congress's purpose and objectives)
- Blocking the interstate movement of the waste may contravene the objectives of the Resource Conservation and Recovery Act
- Interference with the movement of hazardous waste material into or through another state may violate the Commerce Clause.

Oakland Athletics Strike Out: California Appellate Court Rejects Team's Petition Seeking Regulation of Metal-Shredding Operation Under California Hazardous Waste Law

A California Court of Appeal in a September 30th Opinion addressed The Oakland Athletics' argument that the California Department of Toxic Substances Control must regulate what is described as a scrap metal-shredding operation under the California Hazardous Waste Control Law. See 2022 WL 4591846.

The Athletics alleged that the Department failed to comply with amendments to the HWCL that subjected metal shredders to certain provisions of the statute.

Schnitzer Steel Industries, Inc. ("SSI") was identified in a Petition for Writ of Mandate ("Petition") filed by the Athletics as the Real Party in interest.

SSI is stated to maintain a metal-shredding operation ("Facility") in West Oakland, California.

The Athletics maintain business operations near the Facility.

Further, they stated that the team was:

. . . in the process of seeking approvals to build a ballpark for major league baseball games and other events in close proximity to the Facility.

Oakland Athletics Strike Out: California Appellate Court Rejects Team's Petition Seeking Regulation of Metal-Shredding Operation Under California Hazardous Waste Law (cont)

The Petition requested that the Superior Court of California (for the County of Alameda) require that the Department rescind the “f letter” for the previously referenced class of facilities.

The Court of Appeal stated that metal shredders must comply with the HWCL in full.

It also stated, once a legislatively-mandated study by the Department confirmed that metal-shredding waste has been appropriately treated, that it could be safely handled and disposed of as nonhazardous.

Oakland Athletics Strike Out: California Appellate Court Rejects Team's Petition Seeking Regulation of Metal-Shredding Operation Under California Hazardous Waste Law (cont)

The Department had undertaken such study.

The Court of Appeal referenced the study and stated that there is:

. . . no threat to human health or the environment from managing treated metal-shredder waste as nonhazardous.

STRIKE 3.

PFAS/Safe Drinking Water Act: U.S. Environmental Protection Agency Proposes Primary Drinking Water Standards

The United States Environmental Protection Agency on March 14th issued proposed Safe Drinking Water Act National Primary Drinking Water Standards for six PFAS which include:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctane sulfonic acid (PFOS)
- Perfluorononanoic acid (PFNA)
- Hexafluoropropylene oxide dimer acid (HFOP-DA)
- Perfluorohexane sulfonic acid (PFHxS)
- Perfluorobutane sulfonic acid (PFBS)

PFAS/Safe Drinking Water Act: U.S. Environmental Protection Agency Proposes Primary Drinking Water Standards (cont.)

In particular, EPA is proposing an enforceable maximum contaminant level for:

- PFOA and PFOS as four parts per trillion (referenced as a level that can be reliably measured)
- An enforceable limit on a combination of PFNA, PFHxS, PFBS, and GenX chemicals, which is described as placing limits on any mixture containing one or more of PFNA, PFHxS, PFBS, and/or GenX chemicals (i.e., water systems are stated to use an approach called a hazard index to determine if the combined levels of these PFAS pose a potential risk.)
- The SDWA standards for PFAS will have implications for others besides public water systems.
- For example, CERCLA requires remedial actions to achieve a level of cleanup that would attain MCLs established for current or potential sources of drinking water under the SDWA.

PFOA/PFOS/CERCLA: U.S. Environmental Protection Agency Proposal to Designate as Hazardous Substances

EPA issued a proposed rule that would designate two of the per- and polyfluoroalkyl substances (“PFAS”) as Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) hazardous substances.

CERCLA authorizes EPA to promulgate regulations designating as hazardous substances:

. . . elements, compounds, mixtures, solutions, and substances which, when released into the environment, may present substantial danger to the public health or welfare or the environment.

This designation as hazardous substances, if finalized, would trigger certain corresponding CERCLA 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)

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

EPA RCRA Guidance Compendium

2022-2023 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 Wastewater Treatment Unit Exemptions

RCRA Listed Hazardous Waste/K051: U.S. Environmental Protection Agency Proposes to Grant Delisting Petition

The United States Environmental Protection Agency published a January 23rd Federal Register Notice proposing to grant a petition to delist up to 2,409 cubic yards of K051 API (separator sludge) from the List of Resource Conservation and Recovery Act hazardous wastes. See 88 Fed. Reg. 3945.

The delisting request was filed by ExxonMobil Baytown Refinery located in Baytown, Texas.

RCRA Listed Hazardous Waste/K051: U.S. Environmental Protection Agency Proposes to Grant Delisting Petition (cont.)

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

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

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

Polyvinyl Chloride (PVC) Resource Conservation and Recovery Act: U.S. Environmental Protection Agency Addresses Center for Biological Diversity Petition to List

EPA in a January 12th Federal Register Notice responded to a rulemaking Petition from the Center for Biological Diversity requesting that discarded polyvinyl chloride be listed as a hazardous waste under the Resource Conservation and Recovery Act. See 88 Fed. Reg. 2089.

CBD and EPA previously entered into a subsequent Consent Decree requiring that the federal agency make a listing decision no later than January 20, 2023, pursuant to 40 C.F.R. 260.20(c).

EPA states it has tentatively decided to deny the Petition but is soliciting public comment on this initial decision.

Polyvinyl Chloride (PVC) Resource Conservation and Recovery Act: U.S. Environmental Protection Agency Addresses Center for Biological Diversity Petition to List

EPA puts forth the reasons for its tentative denial of the CBD Petition as including:

- 1) Petition Does Not Adequately Support Regulation of Discarded PVC Under RCRA (stating there is not sufficient evidence that a listing would have a meaningful impact on reducing exposure to phthalates [including phthalates used as plasticizers in some PVC products])
- 2) EPA States it has Higher Priorities for Limited Available Resources (stating that listing hazardous waste is a resource-intensive process and the agency must carefully consider the 11 regulatory factors in 40 C.F.R. 261.11(a)(3)[arguing that the Petition discusses the factors but conflates exposure from the use of PVC with potential hazards from the treatment storage and disposal of PVC])

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

U.S. Environmental Protection Agency National Enforcement and Compliance Document for Years 2024-2027: Association of State and Territorial Solid Waste Management Officials Comments

U.S. Environmental Protection Agency National Enforcement and Compliance Document for Years 2024-2027: Association of State and Territorial Solid Waste Management Officials Comments (cont.)

EPA states its objective is to align all existing and proposed NEClS with two of what it describes as “overarching Strategic Plan goals:”

1. Tackle the climate crisis
2. Take decisive action to advance environmental justice

EPA is proposing two new NEClS which include:

1. Mitigating climate change
2. Addressing PFAS contamination

U.S. Environmental Protection Agency National Enforcement and Compliance Document for Years 2024-2027: Association of State and Territorial Solid Waste Management Officials Comments (cont.)

- ASTSWMO notes recommendations from individual states for potential areas of focus for future NEICs:
 - Non-waste determinations and nonhazardous waste determinations at hazardous waste treatment, storage or disposal facilities (TSDFS, drum reconditioners, and railcar/tank facilities)
 - Waste Analysis Plans at TSDFs, especially focused on non-waste determinations
 - Facilities operating under the Definition of Solid Waste (DSW)/Hazardous Secondary Materials (HSM) rule (especially focused on the transfer-based exclusion)
 - Land Disposal Restriction (LDR) compliance at waste consolidations facilities
 - Focus on Non-notifiers, identification of facilities that should be in the RCRA hazardous waste program
 - Specific industry sector initiatives including electronic waste handlers, wood preserving facilities, electroplating facilities, universal waste lamp destination facilities

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

Enforcement

- The Region 6 Office of the United States Environmental Protection Agency entered into 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.)

Enforcement

- 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.

Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Lowe's Home Centers, LLC, Enter into Consent Agreement Addressing 243 Stores (Including 21 Ark. Facilities

Enforcement

The United States Environmental Protection Agency (Region 6) and Lowe's Home Centers, LLC, entered into a November 17th Consent Agreement and Final Order addressing an alleged violation of the Resource Conservation and Recovery Act regulations. See Docket No. RCRA-06-2023-0901.

The CAFO addresses Lowe's stores/distribution centers in five states that include Arkansas.

An investigation is stated to have determined that Lowe's generates several solid wastes streams from certain of its facilities.

Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Lowe's Home Centers, LLC, Enter into Consent Agreement Addressing 243 Stores (Including 21 Ark. Facilities (cont.))

The violation alleged in the CAFO is:

- Failure to File Subsequent Notifications re appropriate generator status

The CAFO contains a Compliance Order which requires that Lowe's undertake a number of activities by certain deadlines regarding implementation of standard operating procedures such as:

- Addressing job responsibilities
- Employment of independent third-party review
- Coordinate with third-party vendors
- Correction of the alleged violations

Release Reporting/CERCLA: U.S. Environmental Protection Agency and Canton Township, Michigan, Facility Enter into Consent Agreement

Enforcement

EPA and Canton Renewables, LLC, entered into a December 16th Consent Agreement and Final Order addressing an alleged violation of the CERCLA/Superfund. See Docket No. CERCLA-05-2023-0003.

Section 103 of CERCLA requires a Facility to immediately notify the National Response Center of any release of hazardous substances in an amount equal to or greater than the reportable quantity (“RQ”) 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 RQ for that particular hazardous substance
- Occur within a 24-hour period

Release Reporting/CERCLA: U.S. Environmental Protection Agency and Canton Township, Michigan, Facility Enter into Consent Agreement (cont.)

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

The CAFO provides that on April 14, 2021, at or about 1:07 p.m., a release occurred from Canton’s Facility of approximately 275 pounds of anhydrous ammonia (i.e., the “Release”).

The Release of anhydrous ammonia is stated to have exceeded 100 pounds in a 24-hour time period. Such release is stated to have included approximately 275 pounds emitted, discharged, or escaped into the ambient air.

Canton is stated to have had knowledge of the Release on April 14, 2021, at approximately 1:07 p.m.

The Release is alleged to have required notice under Section 304(a) of EPCRA.

Canton did not immediately notify the National Response Center as soon as it had knowledge of the Release, therefore violating Section 103 of CERCLA.

Environmental Criminal Enforcement: Recent Examples

Enforcement

- 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.)

Enforcement

- 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)

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

Enforcement

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

Cigarette Filter Waste/Cigarette Manufacturers: Baltimore, Maryland, Files Judicial Action Seeking to Recover Alleged Cleanup Costs/Damage to Natural Resources

The City of Baltimore, Maryland, filed a November 21st Complaint in the Circuit Court for Baltimore City against five cigarette manufacturers and a distributor in regard to alleged losses/costs associated with tobacco product litter.

Certain allegations in the Complaint state that cigarette filters:

- Are the most common form of litter in the world
- Are made of a non-biodegradable material
- Contain toxic heavy metals and nicotine
- Are expensive to clean up and such cost is externalized to the cities and towns
- Are the largest number of individual items collected by Baltimore's trash wheel program
- Constitute a public nuisance

Cigarette Filter Waste/Cigarette Manufacturers: Baltimore, Maryland, Files Judicial Action Seeking to Recover Alleged Cleanup Costs/Damage to Natural Resources (cont.)

Baltimore seeks to recover:

- Cleanup and disposal costs
- Damage to natural resources
- Diminution in property values
- Loss of revenue
- Fines for litter dumping

Cigarette Filter Waste/Cigarette Manufacturers: Baltimore, Maryland, Files Judicial Action Seeking to Recover Alleged Cleanup Costs/Damage to Natural Resources (cont.)

The Complaint includes claims for relief based on alleged:

- Violation of the Maryland Illegal Dumping Litter Control Law
- Violation of various Baltimore City Codes
- Continuing Trespass
- Strict Liability for Design Defect
- Negligent Design Defect
- Public Nuisance
- Strict Liability Failure to Warn
- Negligent Failure to Warn

94th Arkansas General Assembly/Petroleum Storage Tank Trust Fund: Senate/House of Representatives Enact Legislation Increasing Corrective Action Reimbursement Limits

The Arkansas State Senate and House of Representatives have passed legislation (HB1520) which raises the limit for payment for corrective action per occurrence pursuant to the Arkansas Petroleum Storage Tank Trust Fund.

HB 1520 raises the limit for payment for corrective action per occurrence (for petroleum underground storage tank releases) from \$1.5 million to \$2.0 million.

94th Arkansas General Assembly/Petroleum Storage Tank Trust Fund: Senate/House of Representatives Enact Legislation Increasing Corrective Action Reimbursement Limits (cont.)

The State of Arkansas was one of the first states to receive delegation of the federal UST program.

The Arkansas Oil Marketers Association advocated for HB1520 noting that, because of inflation and other factors, a \$1.5 million limit was likely to be exceeded in the future by a number of petroleum UST release sites.

94th Arkansas General Assembly/Petroleum Storage Tank Trust Fund: Senate/House of Representatives Enact Legislation Increasing Corrective Action Reimbursement Limits (cont.)

The Association cited the fact that the rate of inflation had increased 61.30% since the previous corrective action cap was set in 2003.

Existing Trust Fund corrective action cap was deemed to:

- No longer be actuarially sound for addressing future cleanups
- Possibly fail to prevent small business UST owners from having to obtain unaffordable insurance
- Lead to fewer UST owner or operator managed cleanups which tend to be somewhat more efficient in addressing petroleum releases

Arkansas Recycling Tax Credits: Reminder

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

Hazardous Waste/Water Enforcement: Arkansas Department of Energy & Environment – Division of Environmental Quality Files Sebastian County Circuit Court Action Addressing Fort Smith Used Oil Processing Facility

Enforcement

The Arkansas Department of Energy & Environment – Division of Environmental Quality filed an October 17th Complaint and Request for Injunctive Relief in the Circuit Court of Sebastian County, Arkansas against the following parties:

- Fort Smith Petro Environmental, LLC
- Florida Oil Investment Group, LLC
- Sanon Holdings, LLLP
- Ashish Sanon and Ritu Sanon (Personally and in their official capacity)

Fort Smith Petro was previously described by DEQ in an Emergency Order as operating a used oil processing facility in Fort Smith, Arkansas.

Hazardous Waste/Water Enforcement: Arkansas Department of Energy & Environment – Division of Environmental Quality Files Sebastian County Circuit Court Action Addressing Fort Smith Used Oil Processing Facility (cont)

Enforcement

The Complaint alleges the following violations of law or harms:

- Violation of the Arkansas Water and Air Pollution Control Act
- Violation of the Arkansas Hazardous Waste Management Act
- Violation of the Arkansas Pollution Control & Ecology Commission Rule 6
- Violation of the Arkansas Pollution Control & Ecology Commission Rule 23
- Violation of state statutes and Arkansas Pollution Control & Ecology Commission Rules
- Causing irreparable harm to the environment and endangering human health

Storage Tank Contractor Enforcement: Arkansas Department of Energy & Environment – Division of Environmental Quality and Searcy Company Enter into Consent Administrative Order

Enforcement

The CAO provides that TLP failed to do the following:

- Notify the owner or DEQ of a suspected release (at a Vilonia, Arkansas, facility)
- Perform spill bucket testing (at a Conway County, Arkansas, facility)
- Provide the seven-day notice for installation or replacement (at a White County, Arkansas, facility)

The CAO requires TLP:

- Perform all installations, repairs, upgrades, closures, and testing in accordance with 40 CFR § 280, APC&EC Rule No. 12 and all other applicable state and federal rules and regulations
- Submit all records and notices to DEQ in a timely manner, maintain complete and accurate records as required by rule or statute, include dates on all such records, and where appropriate or required, include signatures on records.
- Employ appropriate testing materials and methods and perform all testing and sampling in accordance with APC&EC Rule 12 and all other applicable state and federal rules and regulations

Storage Tank Contractor Enforcement: Arkansas Department of Energy & Environment – Division of Environmental Quality and Searcy Company Enter into Consent Administrative Order

Enforcement

The Arkansas Department of Energy & Environment - Division of Environmental Quality and Terry Price, DBA TLP Enterprises entered into a January 19th Consent Administrative Order (“CAO”) addressing alleged violations of the Underground Storage Tank contractor licensing rules.. See LIS No. 23-007.

The CAO describes Terry Price as both a Contractor and a Tester pursuant to Arkansas Pollution Control & Ecology Commission Rule No. 12.

The referenced licensing rules authorize the performance or repairs, installations, maintenance, and testing on UST systems in the State of Arkansas.

Fort Smith Residential-Recycling Program: Arkansas Supreme Court Addresses Illegal Exaction/Unjust Enrichment Claims

The Supreme Court of Arkansas addressed in a March 16th Opinion issues associated with the City of Fort Smith, Arkansas's ("Fort Smith") residential recycling program. See *City of Fort Smith, Arkansas, v. Jennifer Merriott, Individually and on Behalf of Those Similarly Situated*, 2023 Ark. 51.

The issues considered were whether Fort Smith's continued collection of monthly sanitation charges (which purportedly included fees for recycling) was an illegal exaction and that Fort Smith had been unjustly enriched.

Fort Smith Residential-Recycling Program: Arkansas Supreme Court Addresses Illegal Exaction/Unjust Enrichment Claims (cont.)

Fort Smith set the residential fee for the collection and disposal of solid waste by ordinance. This included curbside pickup of:

- Trash
- Recyclables
- Yard waste

A unified sanitation fee of \$13.28 per month was collected. A separate charge was not collected for curbside recycling.

The fees were deposited into the Fort Smith Sanitation Enterprise Fund which supported the Sanitation Department's operating expenses.

Fort Smith Residential-Recycling Program: Arkansas Supreme Court Addresses Illegal Exaction/Unjust Enrichment Claims (cont.)

The public learned in 2017 that Fort Smith was sending all the residents' recyclables to a landfill.

Plaintiff Merriott filed a class-action lawsuit against Fort Smith for misuse of sanitation fees raising two causes of action:

- Illegal exaction – alleging the sanitation fees constituted an illegal exaction because they included recycling services but the citizens did not receive this benefit
- Unjust enrichment – alleging Fort Smith received the benefits of the fees for recycling and those paying the fees expected to have their waste recycled but those activities did not take place

Fort Smith Residential-Recycling Program: Arkansas Supreme Court Addresses Illegal Exaction/Unjust Enrichment Claims (cont.)

The SCT notes that government levy of any charge is subject to an illegal-exaction claim unless it meets both elements of the following two-prong test:

1. It is fair and reasonable; and
2. It bears a reasonable relationship to the benefits conferred on those receiving its services

The SCT held that Fort Smith used the fee for its intended purpose.

Fort Smith Residential-Recycling Program: Arkansas Supreme Court Addresses Illegal Exaction/Unjust Enrichment Claims (cont.)

This was due to its setting a single fee for the cost of residential collection and disposal of solid waste, recycling, and yard waste. No evidence indicated the fee did not bear a reasonable relationship to the benefits conferred.

In addressing the unjust enrichment claim, the SCT notes that a party must have received something of value to which it is not entitled and which it must restore.

Plaintiff Merriott's restitution evidence was held to be merely speculative.

She was stated to have failed to meet the burden of showing what unjust benefit Fort Smith gained and it must return.

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

Flow Control

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).

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

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.

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