

# Solid and Hazardous Waste/Recycling Developments: 2016 – 2017

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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

## Federal Legislation

### Water Infrastructure Improvements for the Nation (WIIN Act)/Amends Resource Conservation and Recovery Act Addressing Coal Ash

- Signed by President late 2016
- Focus on Water services/water quality activities but. . . .
- Establishes framework for EPA to approve state coal ash or coal combustion residuals state programs
- EPA rule was previously enforceable from a federal standpoint primarily by RCRA citizen suits (no EPA oversight)
- Regulated community expressed concern about uncertainty associated with enforcement by citizen suit
- Provides flexibility for states to use either:
  - (a) 2015 EPA standards,
  - (b) develop their own state specific criteria at least as protective EPA rule
- Not just relevant to electric utility facilities generating ash
- Significant percentage of this material is beneficially reused as product for various uses (construction, road building, etc.)

# Federal Legislation – “Zero Waste” Standard Bill Introduced

- Congressman Keith Ellison (Democrat – Minnesota) introduced H.R. 1034 which establishes a grant program for communities attempting to obtain “a zero waste” standard
- The bill is titled “The Zero Waste Development and Expansion Act”

# Federal Legislation – “Zero Waste” Standard Bill Introduced (Cont.)

- Legislation would authorize EPA to award grants for municipal solid waste prevention, reuse and recycling program development
- Funding would be provided to communities for infrastructure, technology, and community outreach
- Legislation has been referred to the U.S. House of Representatives Energy and Commerce Committee and outlook for passage is uncertain

# Hazardous Materials Transportation Act/ Common Law Action

## Federal Court Addresses Private Right of Action/Preemption Issues

- U.S. District Court March 1<sup>st</sup> decision addresses two issues in a common law damage action involving the Federal Hazardous Materials Transportation Act (“HMTA”) See *Chaves vs. Federal Express Corporation*
- Action against Federal Express Corporation and Federal Express Ground Package System, Inc. for injuries allegedly suffered while unloading an interstate shipment containing hazardous materials that exploded during delivery
- Sometimes statutes can be your friend

# Hazardous Materials Transportation Act/Common Law Action (Cont.)

- Plaintiffs alleged Federal Express violated the HMTA and federal regulations arguing a lack of hazardous material warning required by HMTA and also alleged:
  - Allowed an untrained and unregistered person to accept hazardous materials into interstate commerce
  - Failed to classify, require appropriate packaging, require appropriate shipping paperwork, require proper label marking and warning placards for the shipping
  - Failed to inspect, examine, scan or discover the hazardous materials in the containers



# Hazardous Materials Transportation Act/Common Law Action (Cont.)

- Federal Express moved to dismiss the HMTA claim arguing:
  - No private right of action under the HMTA
  - Negligence claim is preempted by the Airline Deregulation Act
- Court dismisses HMTA claim agreeing does not contain a private right of action
- Airline Deregulation Act claim was not necessarily preempted

# Superfund/CERCLA: EPA Final Rule Addressing Subsurface Intrusion to the Hazard Ranking System

- EPA issued a final rule on December 7<sup>th</sup> adding “subsurface intrusion” as a hazard that can qualify sites for the CERCLA/Superfund National Priority List
- EPA describes a subsurface intrusion as the migration of hazardous substances, pollutants or contaminants from contaminated groundwater or soil into an overlying building

# Superfund/CERCLA: EPA Final Rule Addressing Subsurface Intrusion to the Hazard Ranking System (Cont.)

- The CERCLA HRS is the principal mechanism that EPA uses to evaluate sites for placement on the NPL
- The HRS quantifies negative impacts to air, groundwater, surface water, and soil
- Only NPL sites are eligible to receive funding for long-term cleanup which can result in a permanent remedy
- EPA determined that an HRS assessment is not complete without an evaluation of threats posed by subsurface intrusion contamination (absence is deemed an omission of a known pathway of human exposure contamination)
- EPA states that since the HRS was revised in 1990 the technology to detect and evaluate subsurface intrusion threats has more fully developed

# RCRA/U.S. District Court (D.C.) Approves EPA/Environmental Integrity Project Consent Decree Addressing Oil and Gas Waste

- A U.S. District Court for the District of Columbia approved a December 28<sup>th</sup> Consent Decree between EPA and a number of environmental organizations (collectively “Environmental Integrity Project”) resolving allegations that the agency failed to fulfil certain nondiscretionary duties and provide revised regulations and guidelines for the disposal, storage, transportation, and handling of oil and gas waste
- EIP had previously filed a May 4<sup>th</sup> Complaint Declaratory Injunctive Relief alleging that EPA failed to meet continuing nondiscretionary duties “under RCRA to review and revise regulations to keep up with this growing source of wastes and the threats these wastes pose to human health and the environment”

Note: Almost every federal environmental statute has a “citizen suit” provision that enables a plaintiff (i.e., environmental group) to seek a court order to force EPA, etc., to fulfil non-discretionary (statutory/regulatory) duties.

## RCRA/U.S. District Court (D.C.) Approves EPA/Environmental Integrity Project Consent Decree Addressing Oil and Gas Waste (Cont.)

- EIP argued that Congress mandated that EPA regularly review and revise RCRA Subtitle D regulations and state guidelines to “keep up with changes in industry practice and advances in understanding about public health and the environmental risks related to waste management”
- EIP alleged that the Subtitle D regulations and state guidelines are “outdated, contain generic provisions that do not specifically address the modern oil and gas industry, and fail to adequately protect against potential harm to human health and the environment resulting from oil and gas wastes”
- The December 28<sup>th</sup> Consent Decree requires that EPA review, and if necessary, revise its rules for the disposal and handling of oil and gas wastes by certain timelines

## RCRA Guidance: US EPA Addresses Engineered Fuel Processed from Municipal Solid Waste

EPA addressed in a November 8, 2016 letter a request from DMS Environmental Development asking whether:

. . .engineered fuel processed from municipal solid waste, called biomass derived fuel (“BDF”) is a non-waste fuel under the Non-Hazardous Secondary Materials Rule

- Federal NHSM Rule generally establishes standards and procedures for identifying whether non-hazardous secondary materials are solid waste when used as fuel or processed in combustion units
- In order for BDF to be designated as a non-waste fuel the regulations require that the processing of the NHSM meet the definition of “processing” and legitimacy criteria for fuels

# RCRA Guidance: US EPA Addresses Engineered Fuel Processed from Municipal Solid Waste (Cont.)

- EPA's analysis concludes that the BDM would be considered a non-waste fuel provided:
  - . . .specifications outlined in your submittal are maintained including a moisture content of two percent or less (verified by daily composite sampling); and an ash content of 25 percent or less (on a dry basis verified by daily composite sampling)

# RCRA Guidance: US EPA Addresses Engineered Fuel Processed from Municipal Solid Waste (Cont.)

- The EPA letter addresses:
  - Processing steps
    - Preliminary sorting and physical separation
    - Low temperature mechanical pyrolysis process
  
  - Legitimacy Criteria
    - Manage as a valuable commodity
    - Meaningful heating value and used as a fuel to recover energy
  - Comparability of contaminant levels



# RCRA Guidance: EPA Addresses Manufacturing Process Unit Exemption

- EPA addresses applicability of a manufacturing process unit exemption to filter canisters
  - EPA addressed in an October 3, 2016 memorandum the:
    - . . .applicability of the RCRA manufacturing process unit (“MPU”) exemption to hazardous waste generated in and remaining in filter canisters which may be disconnected from an associated manufacturing process.

# RCRA Guidance: EPA Addresses Manufacturing Process Unit Exemption (Cont.)

- The exemption excludes from RCRA regulatory requirements otherwise applicable to generators of hazardous wastes:
  - Hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit is not subject to regulation under Parts 262-265, 268, 270, 271 and 124 of this chapter or to the notification requirements of Section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw material.

## RCRA Guidance: EPA Addresses Manufacturing Process Unit Exemption (Cont.)

- The federal agency has described the MPU exemption as addressing the incidental hazardous waste generation during product or raw material storage, transport or manufacturing.
- The reason for the guidance appears to be questions that have arisen about applicability of the MPU exemption filter canisters after they have been disconnected from an associated manufacturing process

### Conclusion

EPA concludes that the hazardous waste generated and present in filter canisters do not qualify for RCRA regulatory exclusion under this exemption once such canisters are disconnected from their associated manufacturing process.

Superfund/CERCLA: U.S. Environmental Protection Agency  
Memorandum Addressing “Greener Cleanup Activities” in the  
Superfund Cleanup Process

- The United States Environmental Protection Agency Director of Office of Superfund remediation and Technology Innovation along with three other agency officials issued an August 2<sup>nd</sup> memorandum titled:  
*Consideration of Greener Cleanup Activities in the Superfund Cleanup process (“Memorandum”)*
- The *Memorandum* recommends approaches for regional remedial Superfund programs to consider when evaluating “greener cleanup activities” throughout the remedy selection process, including during response action selection and implementation
- The recommended approaches identified by EPA include use of best practices or activities viewed as having a potential to reduce or mitigate potential environmental impacts when implementing response actions under CERCLA

Superfund/CERCLA: U.S. Environmental Protection Agency  
Memorandum Addressing “Greener Cleanup Activities” in the  
Superfund Cleanup Process (Cont.)

- The *Memorandum* emphasizes that it neither amends nor modifies the CERCLA National Contingency Plan
- The *Memorandum* cites what it characterizes as “successful green cleanup practices” that can help achieve cleanup objectives by ensuring protectiveness, while decreasing environmental footprint of the cleanup activity itself as
  - Using equipment that emits less particulate matter into the air
  - Sizing equipment accurately to avoid wasted energy, water and material
  - Using renewable energy or recycled material to decrease greenhouse gas emissions and conserve resources

## Hazardous Waste Enforcement: U.S. Environmental Protection Agency Enforcement Actions Target Former Southwest Conference Schools?

- EPA announced in a November 28<sup>th</sup> news release settlements with three Texas universities that are former members of the old Southwest Conference for alleged RCRA violations
- The universities include:
  - Baylor University (Bears)
  - Texas A&M (Aggies)(Sorry Dr. Bob Blanz)
  - Texas Christian University (Horn Frogs)
  - (None for University of Arkansas – Go Hogs!)
- Colleges and universities often trigger RCRA violations as “generators” of hazardous waste
- Colleges and universities obviously trigger RCRA regulations as they engage in commercial and industrial activities

## Hazardous Waste Enforcement: U.S. Environmental Protection Agency Enforcement Actions Target Former Southwest Conference Schools? (cont.)

- Other school activities potentially triggering RCRA regulations include:
  - Operation of their laboratories (which can include small volumes of hazardous waste and many different waste streams at each of these points of generation)
- The three Southwest Conference schools alleged violations included examples such as:
  - Generation of more hazardous waste than allowed under certain criteria
  - Improper operations of large quantity generator
  - Failure to notify the State of Texas as a large quantity generator
  - Failure to make adequate or accurate hazardous waste determinations of a waste stream
  - Generation of acutely hazardous waste without proper notification
- Civil penalties ranging from \$11,330 to \$141,912 were assessed

## Returned Products/Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Whole Foods, Inc. Settle Alleged Violations by Arkansas/Texas/Louisiana/New Mexico/Oklahoma Facilities

- The United States Environmental Protection Agency reached a settlement with Whole Foods, Inc., addressing alleged RCRA hazardous waste regulation violations
- The alleged violations involved in part the classification of returned consumer products
- EPA alleges that Whole Foods:
  - . . .improperly identified or mishandled hazardous waste at company facilities throughout Texas, Arkansas, Louisiana, New Mexico and Oklahoma
- A year-long investigation and record review of Whole Foods' actions as a generator of hazardous waste allegedly determined that the company did not make proper hazardous waste determinations at various company facilities



## Returned Products/Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Whole Foods, Inc. Settle Alleged Violations by Arkansas/Texas/Louisiana/New Mexico/Oklahoma Facilities

- The company also allegedly improperly handled spent lamps (i.e., “universal” hazardous waste)
- Whole Foods stated:
  - The products in question, which are classified as hazardous waste when they can no longer be used for their intended purpose, include items like nail polish remover, certain products containing alcohol (i.e., hand sanitizer), liquor and certain vitamins. This often occurs when a product is opened and returned by a customer and can no longer be returned to the stores’ shelves

## Rail Car/Hazardous Waste Enforcement: EPA and South Carolina Hazardous Waste Facility Enter into Consent Agreement

- EPA and Geocycle, LLC enter into a December 8<sup>th</sup> Consent Decree addressing alleged violations of regulations involving hazardous waste storage
- Geocycle is described as the owner/operator of a hazardous waste storage facility in Holly Hill, South Carolina
- Geocycle is stated to have been issued a permit for the storage of hazardous waste in tanks and containers
- An EPA Compliance Evaluation Inspection allegedly determined that a monthly report of receipts for railcars managing hazardous waste indicated that Geocycle managed in excess of three railcars of hazardous waste outside of its permitted railcar storage area in excess of 300 days during a certain time period
- A civil penalty of \$75,000 is assessed

# Hazardous Waste Enforcement: EPA and Geismar, Louisiana Manufacturing Facility Enter into Consent Decree

- EPA and Innophos, Inc. entered into a January 12<sup>th</sup> Consent Decree addressing alleged violations of RCRA
- Innophos manufactures purified phosphoric acid
- The Consent Decree requires that the facility cease shipments of certain waste to a facility that is allegedly not authorized to receive it
- The facility allegedly sent hazardous waste streams to a neighboring phosphoric acid manufacturing plant that produces acid from phosphate ore and that this plant is not authorized to receive it
- The Consent Decree also requires that the facility modify the way a certain waste stream is handled by disposing waste only in disposal ways that are authorized by treating the waste on-site
- The company is stated to be pursuing an underground injection control well permit for the disposal of this waste stream

# RCRA Criminal Enforcement: Federal District Court Addresses Challenge to Criminal Charges Involving a Fireworks Explosion (“Knowing Violations”)

- A United States District Court in Hawaii addressed a challenge to Resource Conservation and Recovery Act criminal charges that arose out of an explosion of confiscated fireworks that killed five workers in Hawaii
- Defendants, which included Donaldson Enterprises, Inc. and two of its executives, were charged with treating, storing, and disposing of hazardous waste without a permit in violation of RCRA
- One of the arguments that they made in attempting to eliminate the RCRA charges was that the definition of “reactivity” was unconstitutionally vague
- The company was hired as a government subcontractor to transport, store and dispose of illegal fireworks that had been seized by the government
- The Opinion describes a certain emergency permit that had been issued in regards to the illegal fireworks

## RCRA Criminal Enforcement: Federal District Court Addresses Challenge to Criminal Charges Involving a Fireworks Explosion (Cont.)

- An explosion occurred involving stored black powder and flash powder resulting from the treatment of fireworks at a storage bunker
- The Defendants were charged with:
  - Conspiracy to treat and store hazardous waste without a RCRA permit
  - Treatment of hazardous permit without a permit
  - Storing hazardous waste without a permit
- The Opinion describes confusion over a governmental memo discussing whether permission was given to proceed without a permit

## RCRA Criminal Enforcement: Federal District Court Addresses Challenge to Criminal Charges Involving a Fireworks Explosion (Cont.)

- As to the reactivity argument, the Defendants argued that because it was unclear what was meant by “readily capable” of detonation, explosive decomposition or reaction “at standard temperature and pressure” hazardous waste could mean anything from soft drinks to cottage cheese, both of which may explode when heated under confinement
- Defendants cited these examples as an indication that the definition of reactivity is too vague to give them sufficient notice that their conduct was illegal

## RCRA Criminal Enforcement: Federal District Court Addresses Challenge to Criminal Charges Involving a Fireworks Explosion (Cont.)

- The Court rejected the argument and noted that because Defendants business involved the storage and disposal of hazardous waste, it believed they should have understood the fireworks were reactive and hazardous
- The Court noted that household waste such as cottage cheese, soft drinks, hairspray, etc. were not relevant because they are specifically excluded from RCRA's definition of hazardous waste and such waste, even if in the possession of a commercial entity rather than a household, must still exceed a designated volume to be considered hazardous
- Defendants Motion to Dismiss the Indictment was rejected

## Resource Conservation and Recovery Act: Federal Court Addresses Whether a Methane Gas Leak Constitutes Solid Waste/Citizen Suit Notification Requirements

- A federal district court (Northern District – Illinois) addressed whether methane gas leaking from a pipeline is “solid waste” as defined in Section 1004(27) of RCRA
- The issue arose in a RCRA citizen suit action brought by the City of Evanston, Illinois, against two gas companies, Northern Illinois Gas Company and Commonwealth Edison
- The City of Evanston alleged that the companies improperly disposed of methane gas and waste oil in violation of RCRA
- The statute addresses the treatment, storage and disposal of solid and hazardous waste



## Resource Conservation and Recovery Act: Federal Court Addresses Whether a Methane Gas Leak Constitutes Solid Waste/Citizen Suit Notification Requirements (Cont.)

- One issue presented to the court was:
  - whether the leaked methane gas could be considered “solid waste” under RCRA, even though methane gas constitutes “an uncontained gaseous material”
- The Court noted in addressing whether methane gas is a RCRA solid waste that the statute defines the term as:
  - . . .other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities. . .
- The Court found that methane gas does not fit within the definition of “solid waste”
- The Court determined that this RCRA definition is ambiguous as to whether an uncontained gas, such as methane, should be considered a solid waste.
- The Court noted that EPA, along with numerous courts, have concluded in rulemakings and judicial decision, respectively, that uncontained gases do not fall within the scope of the RCRA term “solid waste”

## State Enforcement

### E-Waste Enforcement: Seattle, Washington Electronics Recycler Assessed \$444,000 Penalty for Alleged Violations

- The Washington Department of Ecology assessed Total Reclaim, Inc. a \$444,000 penalty for allegedly illegally disposing of flat-screen televisions and monitors with fluorescent tubes containing mercury
- TI is stated to be a Seattle, Washington-based electronics recycler
- The company is alleged to have shipped flat-screens to Hong Kong which were allegedly broken apart in the open by unprotected workers
- BAN (a nonprofit group) attached GPS tracking beacons to electronics which were dropped off at recycling facilities and tracked some materials to Hong Kong and filmed the dismantling and disposal of the flat-screens.

# State Enforcement

## Hazardous Materials Spill/Notification Enforcement

Massachusetts Department of Environmental protection assessment of penalties against Springfield chemical supply company.

- Various states have spill/release notifications that supplement federal requirements such as the Superfund/Clean Water Act 311 reporting requirements.
- Note Arkansas's special requirements (Arkansas Department of Emergency management/prior AEF discussion) involving a hazardous materials release, various accidents, etc.
- A February 2<sup>nd</sup> example involves a Springfield, Massachusetts facility that discovered:
  - . . .several drums of divinylbenzene had reacted, expanded and/or breached drums, likely due to elevated temperature in the warehouse.

## State

### Hazardous Materials Spill/Notification Enforcement (Cont.)

- The company is stated to have cleaned up a small amount of the material that spilled on the warehouse floor and ventilated the building
- The company stabilized the drums
- The company did not contact the public safety officials or state environmental agency
- Because of an anonymous complaint to EPA the state discovered the release and assessed a \$5,000 penalty for failure to notify

Note: Criminal enforcement possible with federal CERCLA/Clean Water Act 311

## State Enforcement

### Hazardous Waste Enforcement: California Environmental Protection Agency and Apple, Inc. Enter into Settlement Agreement

- The California Environmental Protection Agency – Department of Toxic Substances Control and Apple, Inc. entered into a November 29<sup>th</sup> Settlement Agreement addressing alleged hazardous waste violations at company facilities in Silicon Valley, California
- The Settlement Agreement addresses alleged violations that the California agency is stated to have found from the inspection of Apple facilities
- The California Environmental Protection Agency is stated to have determined that Apple opened, operated and then closed an electronic waste shredding facility from 2001-2012 without:
  - CEPA's knowledge
  - Complying with the universal waste regulations (including the mismanagement of metal dust from shredder operations)

## State

### Hazardous Waste Enforcement: California Environmental Protection Agency and Apple, Inc. Enter into Settlement Agreement (Cont.)

- The company is stated to have processed about 1.1 million pounds of electronic waste at the Apple facility before it closed
- The company is alleged to have dismantled, shredded and disposed of more than 800 pounds of electronic waste before notifying the California agency of the plant's existence and complying with all universal waste regulations
- The alleged violations included:
  - Transportation of hazardous waste without a proper manifest
  - Failure to report and track exports of hazardous waste
  - Failing to label or otherwise mark used containers as "hazardous waste"
  - Failing to provide notice of closure of the facility
  - Failing to submit a written closure plan and cost estimate for closing the facility
  - Failure to demonstrate assurance to fund eventual closure of two facilities

## State Activities

### 1,4-dioxane New York Letter to EPA Requesting Drinking Water Standard

(Will states become more active in traditional federal areas?)

- New York Governor Cuomo sent a February 11<sup>th</sup> letter to EPA asking for a Safe Drinking Water Act Maximum Contaminant Level to be set for 1,4-dioxane
- The letter states that New York and other states are working to address emerging unregulated contaminants like 1,4-dioxane, a compound stated to be used in industrial activity and found in a wide range of everyday products.

## State Activities

### 1,4-dioxane New York Letter to EPA Requesting Drinking Water Standard (Cont.)

- The letter contends that New York has been given “shifting, contradictory guidance from the federal government, which has left communities anxious, fearful, and confused”
- New York is developing resources to address what it characterizes as an “inadequate federal monitoring program” to implement an aggressive action plan to ensure sampling of all public water systems on Long Island no matter their size
- The letter asks EPA for “actionable guidance” on best practices for removing the compound from drinking water, investment and cutting edge treatment technologies and the setting of a MCL



## Arkansas Medical Marijuana Cultivation/Processing – Environmental/Safety Issues? (Cont.)

- Arkansans recent passage of the Arkansas Medical Marijuana Amendment of 2016 has set in motion fast-paced efforts to promulgate rules for cultivation, processing and dispensing of marijuana for medicinal related consumption
- The Arkansas Medical Marijuana Commission must develop both facility structural and operational standards for marijuana cultivation, processing and dispensing activities.
- Besides facility security, financial capability, quality control, product consistency, etc. the AMMC and two other Arkansas agencies (ABC and ADH) will at some point, along with the other relevant agencies such as the Arkansas Department of Environmental Quality, have to consider the potential environmental and safety controls potentially applicable to these facilities.

## Arkansas Medical Marijuana Cultivation/Processing – Environmental/Safety Issues? (Cont.)

- The potential environmental effects of marijuana production are typical of similar horticultural or agricultural facilities.
- There are clearly material issues for cultivation/processing facilities that will require investment in terms of both thought and expense

# Arkansas Medical Marijuana Cultivation/Processing – Environmental/Safety Issues? (Cont.)

- The issues involved will likely include:
  - Air
  - Water
  - Wastewater
  - Odor
  - Fire Prevention
  - Explosion
  - Occupational Exposure
  - Waste Management (Solid and Hazardous), etc. (including special tracking requirements)
  
- A nine-page outline has been prepared to address these issues in some detail

## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation

- A New Jersey appellate court addressed in an October 31<sup>st</sup> opinion certain issues arising in litigation regarding responsibility for environmental contamination of a commercial property
- Two key issues involved spoliation of evidence
- Plaintiff company, 18-01 Pollitt Drive, sought recovery of costs incurred in investigating and remediating contamination discovered after it had purchased a commercial property consisting of 9.14 acres in an industrial park located adjacent to a federal Superfund site
- The site received the designation because of the presence of tetrachloroethylene and another chemical in municipal supply wells

## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation (Cont.)

- Defendants were individuals or entities that, at various times since 1956, held interest in the property
- Timing and source of certain discharges that contaminated the property was a key issue
- The Plaintiff attempted to introduce three items into evidence
- Approximately two years before filing suit Plaintiff had discarded a pipe that had originally been located beneath a building slab
- Plaintiff's metallurgy expert relied on photographs of the pipe and a sample replacement or "coupon" from a different pipe to conclude that the original pipe had been breached in 1971 due to corrosion and other defects

## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation (Cont.)

- Defendants' experts challenged the scientific soundness of these conclusions arguing that:
  - Determining the timing and source of discharge using only photographs and coupon samples did not ensure accuracy
  - The original pipe was needed to test his theory
- Plaintiff disclosed that it had lost the first replacement coupon and proffered another replacement
- The Defendants filed a Motion to Dismiss
- Second and third pieces of destroyed evidence pertained to structures within an acid dilution sump pit and a concrete slab floor

## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation (Cont.)

- Plaintiff's expert, a hydrogeologist and remediation professional reported that shortly after the building on the property was erected in 1956 an acid dilution sump system, which collected and neutralized waste, was installed
- The expert concluded the printing activities caused contamination and corroded drains beneath the concrete slab but these structures had been excavated and destroyed by Plaintiff
- The expert opinions were based solely on photographs of the structures and data derived from the sludge

## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation (Cont.)

- Defendants argued that Plaintiff had spoliated material evidence (i.e., a party is hidden, destroyed or lost relevant evidence therefore impairing another party's ability to defend against the action)
- There is a duty to preserve evidence when there is:
  - Pending or probably litigation
  - Knowledge by the Plaintiff of the existence or likelihood of litigation
  - A likelihood that discarding evidence would be prejudicial to Defendants
  - Evidence relevant to litigation



## Common Law Environmental Litigation: New Jersey Addresses whether Destruction of Pipe/Sump Pit Constitutes Evidence Spoliation (Cont.)

- The Court determined that probable litigation, rather than intent to bring suit, triggers the obligation to preserve evidence noting that:
  - Plaintiff knew before purchasing the property in 2006 that the site had hosted printing activities for decades and that those operations had relied on chemical substances
  - In 2008 prior to destruction of evidence it had been confirmed that high concentration of VOCs were on the property
- The Plaintiff was held to have had an obligation to preserve the lateral pipe, dilution sump and concrete floor materials and that their destruction was spoliation of relevant evidence

## Construction Demolition Debris/Industrial Solid Waste: Federal Court Addresses Private Hauler's Challenge of Solid Waste Ordinance

- The Sixth Circuit Court of Appeals addresses in a November 18th opinion a challenge by Burkhead & Scott, Inc. ("BSI") to the City of Hopkinsville, Kentucky Solid Waste Ordinance
- BSI is described as a firm that collected and hauled construction demolition debris and industrial solid waste within the City of Hopkinsville
- Since BSI's origination in 1990 both the company and its customers were informed by the City that its operations were illegal (But BSI continued to operate, apparently believing it was exempt from the ordinance because of the nature of its operation)

## Construction Demolition Debris/Industrial Solid Waste: Federal Court Addresses Private Hauler's Challenge of Solid Waste Ordinance (Cont.)

- BSI received in 2011 a letter from the Hopkinsville Solid Waste Authority stating that the company had five days to remove its equipment from the City noting that the ordinance states:
  - It shall be unlawful for any person or firm except pursuant to temporary collection service permits, to engage in or conduct any collection of trash or building material within the City's corporate limits. Any individual or firm providing the service without proper consent shall be in violation of this chapter and subject to a civil penalty as established here. . .
- BSI argued that the ordinance did not apply to the material it was handling because it included hauling construction demolition debris and such construction solid waste was not encompassed by the ordinance

## Construction Demolition Debris/Industrial Solid Waste: Federal Court Addresses Private Hauler's Challenge of Solid Waste Ordinance (Cont.)

- The company took the position that the ordinance encompassed commercial refuse and garbage (which it stated it did not haul)
- BSI's court action against the City and Solid Waste Authority asserted two causes of action:
  - The flow control provisions of the City's Solid Waste Ordinance violated the commerce clause by discriminating against the interstate market for solid waste disposal services
  - The Defendants tortuously interfered with business relationships between BSI and its current prospective clients

## Construction Demolition Debris/Industrial Solid Waste: Federal Court Addresses Private Hauler's Challenge of Solid Waste Ordinance (Cont.)

- The Federal Appellate Court addressed whether BSI could sustain each of the required elements of a tortious interference claim
- The City and Solid Waste Authority had argued that one of the elements to recover under Kentucky law for tortious interference involves the existence of a valid business relationship or expectancy (arguing that BSI had no valid business relationship or expectancy because its operations violated the City's Solid Waste Ordinance)
- BSI responded that despite the fact it never obtained a permit, its collection and disposal of industrial waste and construction demolition debris fell outside the scope of the ordinance

## Construction Demolition Debris/Industrial Solid Waste: Federal Court Addresses Private Hauler's Challenge of Solid Waste Ordinance (Cont.)

- The Federal Appellate Court upheld a judgment for the City and Solid Waste Authority stating:

Construction demolition debris plainly constitutes “building material” under the ordinance’s definition: “Solid waste which results from the collection, remodeling, repair and demolition of structures. . .because BSI collected building materials out of permit in violation of the Ordinance, BSI could not show that it had a valid business relationship or expectancy or that the Defendants acted with malice in advising its customers that its activities were illegal

## North American Industry Classification System: National Waste & Recycling Association Issues Solid Waste and Recycling Industry Guidance

- The National Waste & Recycling Association issued a November 2016 White Paper described as assisting:
  - . . . organizations in the waste and recycling industry to properly identify their NAICS codes for reporting purposes to various government agencies, some of which are Bureau of Labor Statistics (BLS), Occupational Safety & Health Administration (OSHA), Bureau of the Census, and others.
- The North American Industry Classification System is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing and publishing statistical data related to the United States business economy
- The Standard Industrial Classification system is still frequently utilized by a number of state environmental agencies, including Arkansas

North American Industry Classification System: National Waste & Recycling Association Issues Solid Waste and Recycling Industry Guidance (Cont.)

- The six waste and recycling industry NAICS codes referenced in the White Paper as representing the industry's core operations are:
  - NAICS 562111 Solid Waste Collection
  - NAICS 562119 Other Waste Collection
  - NAICS 562212 Solid Waste Landfill
  - NAICS 562213 Solid Waste Combustors and Incinerators
  - NAICS 562219 Other Nonhazardous Waste Treatment and Disposal
  - NAICS 562920 Materials Recovery Facilities



North American Industry Classification System: National Waste & Recycling Association Issues Solid Waste and Recycling Industry Guidance (Cont.)

- The codes described as representing ancillary operations include:
  - NAICS 562112 Hazardous Waste Collection
  - NAICS 562211 Hazardous Waste Treatment and Disposal
  - NAICS 562910 Remediation Services
  - NAICS 562991 Septic Tank and Related Services
  - NAICS 562998 All Other Miscellaneous Waste Management Services
- The White Paper includes descriptions intended to assist in identifying which NAICS codes are applicable to a certain waste or recycling activity

## Colony South Shopping Center (Little Rock, AR): Arkansas Department of environmental Quality and Family Limited Partnership Enter into Elective Site Clean-up Agreement

- The Arkansas Department of Environmental Quality and the Doyle Rogers Family Limited Partnership entered into a November 1<sup>st</sup> Elective Site Clean-up Agreement
- The ESCA addresses the Colony South Shopping Center in Little Rock, AR
- ADEQ describes an ESCA as a means to allow participants to address historic contamination on a site without penalty and with known objectives
- Various federal and state programs (including the ESCA and others in Arkansas) use risk-based correction action remediation standards to tailor clean-up levels according to site-specific factors
- Such programs often take into account criteria such as to what extent the site is characterized and/or future land use

Colony South Shopping Center (Little Rock, AR): Arkansas Department of environmental Quality and Family Limited Partnership Enter into Elective Site Clean-up Agreement (Cont.)

- Typically, superimposed upon these various procedures are site-specific analyses and a requirement that the standards be protective of human health and the environment
- 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
- The approval of site conditions will likely be based on a combination of acceptability under applicable screening levels and/or whether the property uses are compatible with these conditions

Colony South Shopping Center (Little Rock, AR): Arkansas Department of environmental Quality and Family Limited Partnership Enter into Elective Site Clean-up Agreement (Cont.)

- The incorporation of enforceable institutional controls (i.e., deed restrictions, restrictive covenants or easements) or controls such as barriers (pavement in a certain area, etc.) may be used to ensure continued adherence to the restrictions by the current and future real property owner
- The Colony South ESCA notes the presence of a dry cleaner and describes existing information along with activities to be undertaken to obtain a “No further action” determination

## State/Recycling

### Glass Recycling/Wisconsin Report Recommending Actions to Enhance Recovery Rates

- Efforts at the state and federal level continue to attempt to increase the recycling of byproducts, waste, etc.
- Waste glass is a material that has been recycled for years
- Glass is still one of the materials that can be somewhat more difficult to recycle from an economic/complexity standpoint and efforts to enhance its use continue (A key issue is attracting contaminant-free materials)
- The Associated Recyclers of Wisconsin issued a report in 2016 recommending options for enhancing glass recovery reuse rates

## State

### Glass Recycling/Wisconsin Report Recommending Actions to Enhance Recovery Rates (Cont.)

- The recommendations address issues such as:
  - Materials recovery facility technology
  - Industry standardization and specifications
  - Non-cullet uses
  - Regulatory and Legislative
  - Partnerships
- The report quite logically concludes that the regulatory recommendations are important but:
  - ...supply and demand within the free market system, along with quality, will dominate glass recycling in the foreseeable future. . .

# DOT Pipeline and Materials Safety Administration Interpretive Letters: Recent Examples

United States Department of Transportation's Pipeline and Hazardous Materials Safety Administration issues on a monthly basis interpretations of questions put to the agency involving the federal Hazardous Materials Transportation Act ("HMTA")

The hazardous material regulations have been promulgated to implement the HMTA

- Recent examples of interpretive letters issued by the Pipeline and Hazardous Materials Safety Administration include:

# DOT Pipeline and Hazardous Materials Safety Administration Interpretive Letters: Recent Examples (Cont.)

(1.)

Markings applicable to combustible liquids (Applicability of the hazardous materials regulations to the shipment of non-bulk combustible materials)

(2.)

Tank car inspection question (Does an offeror of a tank car have to inspect the tank car's running gear component or safety appliances as identified by 49 CFR Part 231 for defects prior to offering the tank car into transportation?)

(3.)

§ 172.506(a) addressing providing hazardous materials placards to motor carriers (addressing the meaning of the word "provide")

(4.)

Exception for aqueous solutions of alcohol (is an aqueous solution of alcohol with a small concentration of other hazardous materials eligible for the exception in § 173.150(a)(2)?)

(5.)

The definition of "offeror" in the sale of crude oil (addressing a scenario in which a producer of crude oil sells to a purchaser and the ownership of the oil passes [under contract] to the purchaser as it flows through the valve on the producers storage tank)

(6.)

Addressing issues associated with reverse logistics (return of shipments of certain hazardous materials from retail facilities to manufacturing or distribution facilities)