Solid and Hazardous Waste/Recycling Administrative/Judicial Developments: 2020 – 2021

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Discussion will address:

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

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

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

Three posts five days a week

Arkansas Medical Marijuana Rules/Waste Issues

REMINDER

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

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

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

Arkansas Medical Marijuana Rules/Waste Issues (Cont.)

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

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

Cannabis Industry Recycling/Sustainable Practices: Colorado Department of Revenue Stakeholder/Rulemaking Activities

The Colorado Department of Revenue held an August 11th Work Group titled "Sustainability/Science & Policy" addressing the cannabis industry in the state.

The Enforcement Division (Marijuana) of the Colorado Department of Revenue is gathering data regarding cannabis industry:

- Practices
- Barriers
- Recommendations

Cannabis Industry Recycling/Sustainable Practices: Colorado Department of Revenue Stakeholder/Rulemaking Activities

A key focus of the Work Group apparently involved waste management, waste reduction and recycling.

Important aspects of medical and nonmedical marijuana facilities in those states that have marijuana programs are the potential energy, environmental and safety issues and regulatory requirements. This is arguably particularly true in the case of marijuana cultivation, grow and processing operations. The potential environmental effects (i.e., solid/hazardous waste management/wastewater) and energy usage can be significant. Equally important are resource demands for such facilities such as water usage.

Cannabis Industry Recycling/Sustainable Practices: Colorado Department of Revenue Stakeholder/Rulemaking Activities

The August 11th Colorado Division of Revenue Work Group meeting discussed topics such as:

- Review of current Colorado rules
  - Rule 3-230-Waste Disposal
  - Rule 3-235-Transfers of Fibrous Waste
  - Rule 3-240-Collection of Marijuana Waste
- Destruction Processes and Composting Options
- Recycling or Reuse
- Packaging and Take-Back Programs

Other active states include California (focus on water use) and Massachusetts.

Recyclable Materials Franchise Agreement/Reno, Nevada: Federal Appellate Court Addresses Antitrust Challenge

The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in a May 18th unpublished opinion addressed a challenge to a Franchise Agreement between the City of Reno, Nevada, and a private company on antitrust grounds. See *Green Solutions Recycling, LLC v, Reno Disposal Company, Inc., et al.,* No. 19-15201.

Recyclable Materials Franchise Agreement/Reno, Nevada: Federal Appellate Court Addresses Antitrust Challenge

The Franchise Agreement granted the Reno Disposal Company, Inc. ("Reno Disposal") the exclusive right to collect both solid waste and many recyclable materials from businesses in the City of Reno.

Green Solutions Recycling, LLC ("GSR") competes with Reno Disposal for recyclables in the City of Reno.

The City of Reno and Reno Disposal argued that GSR was violating the Franchise Agreement because of its collection of recyclable materials for a fee.

Recyclable Materials Franchise Agreement/Reno, Nevada: Federal Appellate Court Addresses Antitrust Challenge

GSR filed an action in the United States District Court alleging that the City of Reno and Reno Disposal violated Section 1 of the Sherman Act because they restrained trade in the market for recyclable materials.

The United States District Court entered summary judgment in favor of the City of Reno and Reno Disposal. The basis for the ruling was its holding that the doctrine of state-action immunity is applicable to the activities of local government if undertaken pursuant to a clearly articulated and affirmatively expressed state policy statute to displace competition.

Recyclable Materials Franchise Agreement/Reno, Nevada: Federal Appellate Court Addresses Antitrust Challenge

The Ninth Circuit held that the City of Reno had the authority to undertake this requirement. It noted that the Nevada statutory term "other waste" is broad enough to encompass the recyclable materials covered by the Franchise Agreement (i.e., those recyclables collected and transported as a service).

Note, however, that the provision did not include those sold by the generator thereof directly to a buyer of recyclable materials at market price.

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

A United States District Court (W.D. Washington) ("Court") addressed in a January 14th Order a challenge to certain provisions of a solid waste flow control ordinance ("Ordinance"). See Skycorp LTD v. King County, 2021 WL 135846.

The provisions of the Ordinance being challenged involve the disposal of construction and demolition ("C&D") debris.

Flow Control

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

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 or other facility. The issue has been a subject of debate for years among local government, waste management and recycling industries, and environmental groups.

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

King County, Washington's Ordinance included a provision addressing the disposal of C&D debris. The Ordinance mandates that solid waste generated within the county's unincorporated area (or any other jurisdiction with a solid waste interlocal agreement with King County) be disposed of at a facility designated by King County to receive the particular waste.

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

In the case of C&D debris, the Ordinance requires that:

> . . . generators, handlers and collectors of mixed and nonrecyclable C&D waste generated within the county's jurisdiction deliver, or ensure delivery to, a designated C&D receiving facility specified by the division director. KCC § 10.30.20.

Plaintiff Skycorp LTD ("Skycorp") is stated to be in the business of demolishing buildings and removing C&D debris.

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

The King County Division of Solid Waste ("Division") issued a citation to Skycorp in July 2020 for an alleged violation of the referenced Ordinance. The citation alleged that Skycorp took C&D waste that the company generated within the territorial borders of King County to a site in Naches, Washington that had not been designated to accept such waste.

Construction and Demolition Debris/Flow Control: Federal Court Addresses Challenge to King County, Washington Ordinance

The Court noted that Skycorp is required to demonstrate that the Ordinance provision "serves no legitimate governmental purpose." It found that the Complaint made such a claim. However, it further held that the company failed to provide sufficient facts to support the allegation.

The Court also concluded that King County could establish a legitimate governmental purpose or, i.e., preserve and protect public health, welfare and safety through assuring that there will be C&D disposal facilities to serve King County.

Auto Shredder Residue/Non-Hazardous Secondary Materials: U.S. Environmental Protection Agency Addresses Request for Non-Waste Fuel Determination

The United States Environmental Protection Agency ("EPA") in a November 12th letter addressed a request to determine whether certain auto shredder residue ("ASR") burned in a cement kiln would be considered a solid waste.

The specific question was whether the material is a non-waste fuel product under the Non-Hazardous Secondary Materials ("NHSM") rule.

Motivation??

The applicable emissions standards under Section 129 of the Clean Air Act will apply to units that combust NHSM as fuels if they do not meet the previously referenced regulations. EPA continues to get these requests.

Auto Shredder Residue/Non-Hazardous Secondary Materials: U.S. Environmental Protection Agency Addresses Request for Non-Waste Fuel Determination

GCC is stated to have submitted information requesting that the ASR generated by Pacific Steel and Recycling is a non-waste fuel product, pursuant to 40 CFR 241.3(b)(4), when combusted in GCC's Rapid City, South Dakota cement kiln.

CGG's Rapid City facility is stated to operate a pyroprocessing system. The fuels traditionally used in the unit include coal, coke, and natural gas.

GCC is planning to use ASR as an alternative fuel to supplement currently used fuels. In terms of the NHSM determination, GCC used coal as the comparison to ASR.

Auto Shredder Residue/Non-Hazardous Secondary Materials: U.S. Environmental Protection Agency Addresses Request for Non-Waste Fuel Determination

EPA states in its November 12th letter that based on the information provided it believes that ASR generated at Pacific Steel and Recycling and burned in GCC's cement kiln would constitute a non-waste fuel under 40 CFR Part 241. This is conditioned upon the previously provided specifications being maintained.

Waste Paper/Non-Hazardous Secondary Materials: U.S. Environmental Protection Agency Addresses Request for Non-Waste Fuel Determination

The United States Environmental Protection Agency ("EPA") in a July 10th letter addressed a request to determine that waste paper generated by Seaman Paper Operations at three facilities in Massachusetts is a non-waste fuel product pursuant to 40 C.F.R. 241.3(b)(1).

Tetra Tech in a September 26, 2019, letter on behalf of Seaman Paper Company described Seaman's waste paper generation process as processing and handling. The September 26th letter also contained contaminant comparison data to illustrate the company's view as to why its waste paper meets the NHSM legitimacy criteria.

EPA continues to receive these requests.

Waste Paper/Non-Hazardous Secondary Materials: U.S. Environmental Protection Agency Addresses Request for Non-Waste Fuel Determination

Based on the referenced information, EPA's July 10th letter states that the waste paper generated at the referenced facilities and burned in its combustion units for energy recovery constitute a non-waste fuel under 40 C.F.R. Part 241. This is subject to the caveat that the waste paper continue to meet the specifications as indicated by additional testing. Failure to do so is noted to risk EPA reaching a different conclusion.

Beneficial Use of Fill-Like Materials Survey: Association of State and Territorial Solid Waste Management Officials Report

The Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") has issued a February 2020 document titled:

> *Beneficial Use of Fill-Like Materials Survey Report ("Report")*

Non-hazardous residuals, debris and by-products can sometimes substitute for virgin resources. This may include the manufacture of new products, use of fuel for energy recovery, or utilization as construction projects.

Note – Arkansas legislation addressing steel slag/mill scale.

Beneficial Use of Fill-Like Materials Survey: Association of State and Territorial Solid Waste Management Officials Report

The states vary in how they address beneficial use. They may provide regulatory or statutory exclusions of certain materials. Other states may conduct an assessment and identify allowable beneficial uses where a prior determination has been undertaken by the state agency. These state reviews or mechanisms vary in terms of their formality.

The *Report* both summarizes the results of the survey and discusses such results. The fill-like materials that the *Report* addresses are stated to range from:

> . . . concrete and crushed glass to auto shredder waste and waste water treatment plant residuals.

Beneficial Use of Fill-Like Materials Survey: Association of State and Territorial Solid Waste Management Officials Report

The rationale for considering beneficial use of fill-like materials are described as (depending on the region):

- Cost of disposal can be costly
- Landfill capacity is finite
- Substituting a suitable fill-like material for virgin material saves natural resources
- Reduced energy use
- Reduced water use

Beneficial Use of Fill-Like Materials Survey: Association of State and Territorial Solid Waste Management Officials Report

Information and/or issues addressed in the Report include:

- List of Fill-Like Materials Surveyed
- List of Uses Surveyed
- Definitions
- Beneficial Use Approval Process
- Issues with Approved Beneficial Use of Fill-Like Materials
- Regulatory Oversight of Mildly Contaminated Fill-Like Materials
- Challenges to Beneficial Use of Fill-Like Materials
- Additional State Comments
- Beneficial Uses of Fill-Like Materials by EPA Region

Combustible By-Products/Electric Power Industry: U.S. Energy Information Administration Report Addresses Production/Recycling Rates

The United States Energy Information Administration ("EIA") released a March 29th report titled:

> *U.S. Electric Power Industry Produces Less and Recycles More Combustible By-Product ("Report")*

By way of summary, the EIA report states that combustible by-product ("CBP") production in the United States electric power industry decreased from 135.1 million short tons in 2010 to 88.7 million short tons in 2019.

Combustible By-Products/Electric Power Industry: U.S. Energy Information Administration Report Addresses Production/Recycling Rates

The *Report* defines CBPs as:

> Residues left over after the combustion of coal, petroleum coke, residual fuel oil, and wood or wood waste

The EIA *Report* states that the beneficial reuse rate of CBPs from operating power plans increased from 38 percent in 2010 to 44 percent in 2019. A cause for the decline in CBP production is reduced coal-fired capacity as coal-fired power plants are retired.

Defense to Responsibility for Scrap Metal Recycling: Texas Commission of Environmental Quality Findings and Legislative Recommendation

The Texas Commission on Environmental Quality ("TCEQ") issued a document titled:

> *Defense to Responsibility for Scrap Metal Recycling: TCEQ Findings and Legislative Recommendation Required by House Bill 3224 ("Recommendation")*

HB 3224 required that TCEQ conduct a study to evaluate the possibility of adopting a recyclable materials defense into the Texas Superfund law. The recyclable materials defense would be similar to the provision found in the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (i.e.,Superfund). See 42 U.S.C. § 9601 et seq.

Defense to Responsibility for Scrap Metal Recycling: Texas Commission of Environmental Quality Findings and Legislative Recommendation

The United States Congress amended Superfund a number of years ago to exempt certain recyclers from liability for clean-up costs. Further, such recyclers could be awarded costs and fees if they were found to have been improperly sued for contribution under CERCLA. Former United States Senator Blanche Lincoln of Arkansas was one of the key architects of the recycling exemption.

Defense to Responsibility for Scrap Metal Recycling: Texas Commission of Environmental Quality Findings and Legislative Recommendation

The rationale for the exemption were scenarios at a number of Superfund sites in which sellers of steel, metals, or other recyclable commodities were held liable under the "generator" or "arranger" provisions of CERCLA. See 42 U.S.C. § 9607(a)(3). The argument was made that virgin materials with the same characteristics were not encompassed by Superfund simply because they were deemed "products."

Arkansas was one of the first states to amend its Superfund legislation. The state amended the Arkansas Remedial Action Trust Fund Act shortly after enactment of the Superfund recycling exemption to exempt such transactions. Ark. Code Ann. 8-7-524. Arkansas's exemption utilizes language very similar to the federal Superfund provision.

Arkansas Recycling Tax Credit Program: Reminder

The Arkansas General Assembly through Act 748 of 1991 established a tax credit program for facilities establishing or expanding processes that utilize recyclables. Administered by ADEQ.

The recycling tax credit has been very beneficial to Arkansas manufacturing and processing facilities that have substituted scrap materials or recyclables in lieu of virgin feedstocks.

Facilities establishing or expanding processes that utilize recyclables are potentially eligible for 30% tax credit on certain capital costs. See Ark. Code Ann. § 26-51-506 et seq.

Arkansas Recycling Tax Credit Program: Reminder

The tax credit is provided for waste reduction, reuse or recycling equipment.

Waste reduction, reuse or recycling equipment is defined as:

. . . new or used machinery or equipment located in Arkansas on the last day of the taxable year which is operated or used exclusively in Arkansas to collect, separate, process, modify, convert, or treat solid waste so that the resulting product may be used as raw material or for productive use or to manufacture products containing recovered materials.

Criminal Enforcement/Hazardous Waste: California Water Bottler Sentenced for Alleged Storage/Transportation Violations

The United States Attorney's Office for the Central District of California ("U.S.") issued an August 5th news release stating that C.G. Roxane LLC ("Roxane") was sentenced to three years of probation and ordered to pay criminal penalties of $5 million for allegedly illegally storing and transporting hazardous waste.

The company is stated to produce Crystal Geyser Natural Alpine Spring Water.

Roxane is stated to operate a spring water production facility ("Facility") in Olancha, California.

Criminal Enforcement/Hazardous Waste: California Water Bottler Sentenced for Alleged Storage/Transportation Violations

The news release states that the company obtained water by drawing groundwater from the eastern slope of the Sierra Nevada mountains. Such water is stated to contain naturally occurring arsenic.

The Facility is stated to have used sand filters to reduce the concentration of arsenic so the water would meet federal drinking water standards. In order to maintain the effectiveness of the sand filters the company is stated to have back-flushed the filters with a sodium hydroxide solution. This is stated to have generated arsenic-contaminated wastewater.

Criminal Enforcement/Hazardous Waste: California Water Bottler Sentenced for Alleged Storage/Transportation Violations

Roxane is stated to have discharged the arsenic-contaminated wastewater into a manmade pond. A California Regional Water Quality Control Board is stated to have informed the company after sampling the pond that arsenic concentrations were more than eight times the hazardous waste limit.

The U.S. alleges that Roxane used contractors to remove the hazardous waste and transport it without the proper manifest and without identifying the wastewater as a hazardous material. The contaminated wastewater is stated to have been transported to a facility not authorized to receive or transport hazardous waste.

Criminal Enforcement/Clean Water Act: Industrial Wastewater Operator Pleads Guilty to Alleged Landfill Leachate Discharges

The United States Department of Justice ("DOJ") issued a January 14th news release stating that Robert J. Massey of Brighton, Michigan pleaded guilty before a United States District Court in the Eastern District of Michigan to alleged violations of the Clean Water Act.

Oil Chem is alleged to have illegally discharged landfill leachate totaling more than 47 million gallons into Flint Michigan's sanitary sewer system over an eight-year period.

The Oil Chem facility is stated to have held a Clean Water Act permit allowing discharge of industrial waste pursuant to certain permit terms. Such terms are stated to have not included the discharge of landfill leachate waste.

Criminal Enforcement: Former Electronics Recycling Company President Sentenced for Alleged Hazardous Waste Violations

The United States Attorney for the Western District of Wisconsin issued a November 19th news release stating that James Moss ("Moss") of Ladysmith, Wisconsin, was sentenced by a U.S. District Judge to 18 months in federal prison.

Moss is described as having been responsible for managing all plant operations which included shipping, receiving, trucking, sales, de-manufacturing, warehousing, accounting, and payroll.

Criminal Enforcement: Former Electronics Recycling Company President Sentenced for Alleged Hazardous Waste Violations

Moss and others are alleged to have conspired to:

1. store hazardous waste (i.e, broken and crushed CRT glass that contained lead) at unpermitted facilities in Catawba and Glen Flora in Wisconsin, and in Morristown, Tennessee;
2. transport the hazardous waste without a required manifest; and
3. conceal the above violations from state regulators in Wisconsin and Tennessee, as well as auditors with a nationwide recycling certification program (R2).

Beverage Containers/California Redemption Value Program: Seven Individuals Indicted for Alleged Fraud – Seinfeld Episode

The California Department of Justice ("DOJ") filed a Felony Complaint ("Complaint") in the Superior Court of the State of California (County of San Bernardino) on April 14th against seven individuals (collectively "Individuals") for alleged involvement in a fraud scheme to bring ineligible empty beverage containers into the State of California.

The Complaint alleges that ineligible beverage containers were collected from Las Vegas, Nevada, casinos and improperly redeemed through the California Redemption Value ("CRV") program.

Beverage Containers/California Redemption Value Program: Seven Individuals Indicted for Alleged Fraud – Seinfield Episode

Under the State of California's empty beverage container recycling program. Only material from California is eligible for redemption under CRV. The CRV program provides a five or ten cent return on eligible beverage containers deposited at privately-owned centers.

The individuals are alleged to have both:

- Illegally imported thousands of pounds of beverage containers from out of state for redemption in California
- Filed fraudulent CRV claims for nonexistent empty beverage containers
- Sold previously redeemed empty beverage containers back into the marketplace to be re-redeemed

Expanded RCRA Enforcement Addressing Hospitals, Pharmacies, Colleges, Labs, Retail Facilities (reverse distribution)

The United States Environmental Protection Agency ("EPA") and Western Illinois University ("Western") entered into a February 11th Consent Agreement and Final Order ("CAFO") addressing alleged violations of the Illinois Administrative Code and Resource Conservation and Recovery Act ("RCRA") addressing hazardous waste regulations. See Docket No. RCRA-05-2021-0010.

Expanded Enforcement Addressing Hospitals, Pharmacies, Colleges, Labs, Retail Facilities (reverse distribution)

Western is stated to have conducted chemistry and biology research and teaching in research and class laboratories. As relevant to the time periods addressed in the CAFO, Western's collection of laboratory chemicals generated hazardous waste, which Western is stated to have collected in laboratory bottles, 2-liter bottles, and 55-gallon containers, and stored in the hazardous waste storage areas of the Facility.

Western is further stated to have temporarily stored containers of waste collected from various laboratories, maintenance areas, and other areas, as well as discarded materials, before the material was shipped elsewhere for treatment, storage, disposal, burning or incineration.

Expanded Enforcement Addressing Hospitals, Pharmacies, Colleges, Labs, Retail Facilities (reverse distribution)

The CEI is stated to have identified certain alleged violations:

- Storage of hazardous waste for more than 90 days
- Storage of hazardous waste in containers that were not marked with the start date of accumulation
- Failure to mark or label containers holding hazardous waste clearly with the words “Hazardous Waste”
- Failure to test and maintain fire protection to assure its proper operation in time of emergency
- Failure to amend the contingency plan when the list of emergency coordinators had changed
- Failure to provide Facility personnel with the initial required RCRA training, without applying for or obtaining a permit

Note a significant activity in California involving retail stores.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Morrilton Vehicle Repair Facility Enter into Consent Administrative Order

Access/Warrant Issue

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") and D.E. Jones, Inc., ("DEJI") entered into an April 8th Consent Administrative Order ("CAO") addressing alleged violations of Arkansas Pollution Control and Ecology Commission ("APC&EC") Regulation 23 (Hazardous Waste Regulations). See LIS No. 21-031.

The CAO provides that DEJI owns and operates a vehicle repair facility and a vehicle towing facility (collectively, "Facility") in Morrilton, Arkansas.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Morrilton Vehicle Repair Facility Enter into Consent Administrative Order

DEQ is stated to have received an anonymous complaint on September 18, 2019, alleging that DEJI had been discarding used oil, diesel, and antifreeze on the ground of the Facility for over 10 years. The complaint is also stated to have alleged that DEJI had allowed the area surrounding the Facility's oil tank to become saturated with oil and was covering this oil with gravel, tires, and wrecked automotive vehicles.

The CAO states that upon DEQ's arrival at the Facility on October 16, 2019, DEQ was denied access to the Facility by DEJI. Such denial of access is stated to have prevented DEQ from conducting the Complaint Investigation that morning.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Morrilton Vehicle Repair Facility Enter into Consent Administrative Order

The CAO provides that:

> This denial of access prevented DEQ from conducting the complaint investigation that morning. Denying access to a facility in order to impede a complaint investigation violates Ark. Code Ann. § 8-7-225(c), which states "The division or any authorized employee or agent thereof may enter upon any public or private property for the purpose of obtaining information or conducting surveys or investigations necessary or appropriate for the purposes of this subchapter." Denying access to the facility also violates Ark. Code Ann. § 8-7-205(1).

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Morrilton Vehicle Repair Facility Enter into Consent Administrative Order

DEQ is stated to have obtained an administrative search warrant from the Circuit Court of Conway County, Arkansas, on October 16, 2019. Such administrative search warrant was granted and DEQ personnel performed the investigation on October 16, 2019. No additional significant violations were stated to have been observed during the investigation.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Hot Springs Sawmill Equipment Manufacturing Facility Enter into Consent Administrative Order

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") and Timber Automation, LLC ("TA") entered into a December 17th Consent Administrative Order ("CAO") addressing alleged violations of Arkansas Pollution Control and Ecology Commission Regulation No. 23 (Hazardous Waste Regulations). See LIS 20-200.

The CAO provides that TA is a sawmill equipment manufacturing plant ("Facility") located in Hot Springs, Arkansas.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Hot Springs Sawmill Equipment Manufacturing Facility Enter into Consent Administrative Order

The Facility is stated to generate characteristic and listed hazardous waste through painting and cleaning operations performed on fabricated steel components. It is also stated to generate hazardous waste through the cleaning of paint guns and brushes with lacquer thinner. In addition, it is stated to generate used oil and universal waste consumer electronic items.

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Hot Springs Sawmill Equipment Manufacturing Facility Enter into Consent Administrative Order

DEQ is stated to have received on December 7, 2018, two anonymous complaints regarding TA's Facility. These complaints alleged:

- TA was storing sandblasting material in a parking lot on the side of the building
- The TA Facility had a mobile crane that had leaked a full reserve of hydraulic oil onto the ground and the soil beneath the replacement crane

Hazardous Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Hot Springs Sawmill Equipment Manufacturing Facility Enter into Consent Administrative Order

The CAO provides that based on the findings of the CEI and the sampling event, DEQ allegedly identified the following violations of Arkansas Pollution Control and Ecology Commission Regulation 23. Some of the alleged violations included:

- Failure to keep hazardous waste containers properly closed
- Failure to properly label hazardous waste containers
- Failure to properly mark hazardous waste containers with accumulation start dates
- Failure to adequately mark hazardous waste storage containers
- Failure to submit an annual report on time

Universal Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Crittenden County Electronics Salvaging/Reselling Facility Enter into Consent Administrative Order

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") and Upper Edge Technologies, Inc. ("Upper Edge") entered into an October 13th Consent Administrative Order ("CAO") addressing alleged violations of Arkansas Pollution Control and Ecology Commission Regulation 23 (Hazardous Waste Regulations). See LIS No. 20-181.

The CAO provides that Upper Edge is an electronic salvaging and reselling facility ("Facility") located in Crittenden County, Arkansas.

Universal Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Crittenden County Electronics Salvaging/Reselling Facility Enter into Consent Administrative Order

The Facility is stated to collect, dismantle, and evaluate consumer electronics for the purpose of facilitating the recycling, reclamation and reuse of individual components. Further, the Facility is stated to be a Large Quantity Handler of Universal Waste ("LQHUW") as defined by Regulation 23 § 273.9.

Universal Waste Enforcement: Arkansas Department of Energy and Environment – Division of Environmental Quality and Crittenden County Electronics Salvaging/Reselling Facility Enter into Consent Administrative Order

The CEI and information from the conference call are alleged to have identified the following violations of Regulation 23:

- Failure to notify DEQ and receive an EPA Identification Number before meeting or exceeding the 5,000 kilogram storage limit
- Failure to make a waste determination
- Failure to properly and timely dispose of waste
- Failure to demonstrate waste accumulation time
- Failure to provide necessary training
- Failure to provide records of waste received
- Failure to maintain the soundness of containers
- Failure to properly label waste

Solid Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Miller County Property Owner Enter into Consent Administrative Order

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") and Mack Armstrong ("Armstrong") entered into a September 10th Consent Administrative Order ("CAO") addressing alleged violations of Arkansas Pollution Control and Ecology Commission Regulation No. 22 (Arkansas Solid Waste Management Code). See LIS 20-172.

The CAO provides that Armstrong owns property located in Miller County, Arkansas.

Solid Waste Enforcement: Arkansas Department of Energy and Environment - Division of Environmental Quality and Miller County Property Owner Enter into Consent Administrative Order

DEQ is stated to have conducted an investigation on February 28, 2019, pertaining to alleged illegal solid waste disposal activities at the property. The following alleged violations are identified in the CAO:

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

Solid Waste/Water Enforcement: Arkansas Department of Energy and Environment and Sites Owner Enter into Consent Administrative Order

Multimedia (Chips)

The Arkansas Department of Energy and Environment – Division of Environmental Quality ("DEQ") and A & B Timber, Inc. ("A & B") entered into a February 1st Consent Administrative Order ("CAO") addressing alleged violations of certain Arkansas solid waste and water pollution provisions. See LIS No. 21-017.

> . . . improperly disposed of solid waste and caused pollution of waters of the state at a site located northwest of the intersection of Calhoun 53 and Calhoun 235, Hampton, Calhoun County, Arkansas ("Site 1 ") and at another site located at 5865 Calhoun 40, Hampton, Calhoun County, Arkansas ("Site 2").

Solid Waste/Water Enforcement: Arkansas Department of Energy and Environment and Sites Owner Enter into Consent Administrative Order

Investigation allegedly indicated the following violations:

- Disposal of solid waste in such a manner as to cause or be likely to cause water pollution
- Failure to apply for National Pollution Discharge Elimination System permit coverage for discharges to waters of the state
- Operating Sites 1 and 2 as a disposal site for hardwood chips and sawdust without having obtained a permit from DEQ, allegedly constituting unpermitted disposal violating Arkansas Pollution Control and Ecology Commission Regulation 22.1502(a)
- Disposing of solid waste at a disposal site or facility other than a disposal site or facility for which a permit has been issued by DEQ

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

The United States Court of Appeals for the Ninth Circuit ("Court") addressed in a June 3rd Opinion an issue arising under a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") cost recovery action. See *Mission Linen Supply v. City of Visalia*, 2020 WL 2917272 (9th Cir.).

The issue addressed was whether the United States District Court ("District Court") utilized appropriate factors in allocating responsibility for the costs of cleaning up subsurface contamination that originated from a dry-cleaning facility.

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

The City of Visalia, California ("City") appealed from the District Court's equal allocation of responsibility for future cleanup costs between the City and Mission Linen Supply ("Mission").

Between 1971 and 1983 Mission and the previous owner of the property in question, Star Laundry & Dry Cleaning ("Star"), operated dry-cleaning facilities that discharged perchloroethylene ("PCE") into the City's sewers. Mission and the City were stated to have not disputed that the City's sewers were installed below industry standards and contained multiple defects – e.g., broken pipes, exposed soil, cracks, sags, separated joints, missing pipes, root intrusion, debris, and blockages.

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

The parties also agreed that, but for the defects in the sewers, the wastewater would have reached the City's treatment facilities. This was alleged to be due to the City's alleged failure to properly maintain the sewers and restrict the dumping of PCE into the sewers.

PCE leaked out of the sewers and created a large underground pollution plume in the vicinity of Mission's property.

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

The District Court was tasked with allocating responsibility in a CERCLA cost recovery action for the underground pollution that originated near Mission's property. It allocated 50% of the responsibility for future cleanup costs to Mission and 50% to the City—Star was no longer in existence and not a party to the action.

The City argued on appeal that the District Court abused its discretion when it selected certain factors to use to allocate responsibility for the underground pollution.

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

The Court noted that CERCLA gives district courts discretion to allocate costs among liable parties using equitable factors that are deemed appropriate. It held that the District Court did not abuse its broad discretion in identifying the three principal considerations on which it based its allocation division.

Superfund/Cost-Recovery Action: Federal Appellate Court Addresses Challenge to Allocation Methodology

Those considerations included:

1. How to divide up the pollution plume by its geographic features—i.e., which portions of the plume counted as being on Mission's property and which counted as off-site;

2. How to assign responsibility for off-site portions of the plume; and

3. How to allocate the "orphan" responsibility of Star.

Petroleum/Spill Release: Texarkana, Arkansas, Retail Motor Fuel Operator Files Cost Recovery Action

Pilot Travel Centers, LLC, ("Pilot") on June 14th filed a Complaint in Miller County, Arkansas, Circuit Court addressing an alleged spill of diesel fuel.

The Complaint seeks a recovery of certain costs from Fed-Ex Ground Package System, Inc., ("Fed-Ex"), Triple G, LLC, an individual and three John Does.

Pilot operates a retail motor fuel outlet ("Store") in Texarkana, Arkansas.

Petroleum/Spill Release: Texarkana, Arkansas, Retail Motor Fuel Operator Files Cost Recovery Action

It is alleged that on July 14, 2017, a vehicle owned by Fed-Ex spilled “diesel gasoline” at the Pilot Store. It is further alleged that Pilot paid the costs and expenses of cleaning up the spilled diesel gasoline.

Pilot is stated to have hired an environmental consulting firm to clean up the spilled diesel gasoline and undertake certain paperwork requirements. The costs of cleaning up the spilled gasoline is stated to be $9,724.72.

Petroleum/Spill Release: Texarkana, Arkansas, Retail Motor Fuel Operator Files Cost Recovery Action

The Complaint states that Pilot informed Fed-Ex of the spill and requested reimbursement of the associated costs and expenses. It is further alleged that Fed-Ex has not provided reimbursement for such costs.

Pilot alleges that the referenced Defendants' were negligent and the sole and proximate cause of the spill.

The Complaint provides that $9,724.72 in damages is requested.

Oakland Athletics v. California Department of Toxic Substances Control: Petition Filed Seeking Regulation of Metal-Shredding Operation by California Hazardous Waste Law

The Oakland Athletics (The Athletics Investment Group LLC) ("Athletics") filed an August 5th Verified Petition for Writ of Mandate ("Petition") to compel the California Department of Toxic Substances Control ("Department") to regulate what it describes as a metal-shredding operation under the California Hazardous Waste Law ("HWCL").

The Athletics allege that the Department has failed to comply with amendments to the HWCL that subject metal shredders to the provisions of the statute.

Example of Citizen Suit Utilization

Oakland Athletics v. California Department of Toxic Substances Control: Petition Filed Seeking Regulation of Metal-Shredding Operation by California Hazardous Waste Law

Schnitzer Steel Industries, Inc is stated to maintain a metal-shredding operation ("Facility") in West Oakland, California. The Athletics state they maintain business operations near the Facility. Further, they are stated to be:

> . . . in the process of seeking approvals to build a ballpark for Major League Baseball games and other events in close proximity to the Facility.

The Athletics allege that in 2014 the California legislature enacted a bill requiring the Department to apply the HWCL to facilities that shred automobiles. The bill is stated to have included a legislative directive that the Department rescind any operative "f letters."

Oakland Athletics v. California Department of Toxic Substances Control: Petition Filed Seeking Regulation of Metal-Shredding Operation by California Hazardous Waste Law

The Petition states that the Facility's metal shredder has for a number of years been exempted from the HWCL because of a variance issued by the Department from the HWCL. This variance is described as an "f letter."

The Petition requests 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.

Pollution Exclusion/Insurance Coverage: U.S. District Court Addresses Applicability to Heating Oil Tank Release

A United States District Court (Eastern District Pennsylvania) ("Court") addressed in a January 19th Memorandum and Order insurance coverage issues associated with a claim related to a heating oil tank spill. See *Dorothy Biela v. Westfield Insurance Company,* 2020, WL 181432.

Dorothy Biela ("Plaintiff") utilized a 275 gallon outdoor, above-ground oil tank ("Tank") at her home in Line Lexington, Pennsylvania. She called a contractor in January 2019 to inspect the Tank because oil was smelled in the house. It was discovered that the Tank had lost half of its contents.

The estimated cost for investigating and remediating the basement, soil and groundwater is $265,000 to $273,000.

Pollution Exclusion/Insurance Coverage: U.S. District Court Addresses Applicability to Heating Oil Tank Release

Plaintiff filed a claim with Westfield Insurance Company ("Westfield"). An engineer hired by Westfield reported that patches of surface corrosion were found throughout the surface of the Tank. The engineer concluded that the leak in the heating oil Tank was the result of long-term corrosion.

Pollution Exclusion/Insurance Coverage: U.S. District Court Addresses Applicability to Heating Oil Tank Release

The insurance company denied based on exclusion language:

> We do not insure, however, for loss...[c]aused by...[a]ny of the following...[d]ischarge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril insured against under Coverage C.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

Pollution Exclusion/Insurance Coverage: U.S. District Court Addresses Applicability to Heating Oil Tank Release

Plaintiff argued that the home heating oil was not considered a pollutant under Pennsylvania law.

The Court distinguishes the cited cases noting that there is a report from an environmental consultant referencing soil samples taken at the Plaintiff's property. Various substances found in the soil such as benzene were referenced and identified as pollutants by federal law and regulations. Also noted is the environmental consultant's recommendation of extensive investigation and remediation consistent with pollutant contamination and reference to benzene in his report.

Case law on this exclusion varies by state, including Arkansas.

Resource Conservation and Recovery Act Guidance: U.S. Environmental Protection Agency Addresses Management of Waste Elemental Mercury

The United States Environmental Protection Agency ("EPA") responded in a July 1st letter to questions regarding the:

> . . . appropriate management of waste elemental mercury and how mercury handling requirements may have changed over the past several years as different aspects of the Mercury Export Ban Act ("MEBA") have been progressively implemented.

RCRA Compendium continues to be supplemented.

Resource Conservation and Recovery Act Guidance: U.S. Environmental Protection Agency Addresses Management of Waste Elemental Mercury

Mr. Case asked whether:

. . . a recycling facility for mercury (e.g., retort facility) is exempt from Resource Conservation and Recovery (RCRA) permitting if some or all elemental mercury is sent to the MEBA-required Department of Energy ("DOE") long-term mercury storage repository.

Resource Conservation and Recovery Act Guidance: U.S. Environmental Protection Agency Addresses Management of Waste Elemental Mercury

The second question posed is whether treatment, storage, and disposal facilities can store elemental mercury at their RCRA-permitted facilities rather than sending it to the DOE long-term storage facility. The question is stated to have arisen because MEBA authorizes RCRA-permitted treatment storage disposal facilities ("TSDFs") to store surplus/waste elemental mercury on an extended, interim basis, in the event that the MEBA-required DOE storage facility is unable to accept mercury on the effective date of the export ban.

Use of Polymerization as Treatment Method: U.S. Environmental Protection Agency RCRA Guidance

The United States Environmental Protection Agency ("EPA") addressed in a December 4, 2020, letter a request for a regulatory determination on hazardous waste generator activities associated with polymerization ("POLYM") as a treatment method.

Use of Polymerization as Treatment Method: U.S. Environmental Protection Agency RCRA Guidance

EPA characterizes the regulatory determination as encompassing guidance on the following:

1. The use of indirect heat to activate and support the catalyst used for POLYM treatment of scrap resins in a container is not classified as thermal treatment of hazardous wastes and can be conducted without a RCRA permit when hazardous waste container management standards are met; and
2. Closure of hazardous waste containers undergoing POLYM treatment with an unsecured lid or alternative covering (i.e., a no visible opening standard) is appropriate during onsite generator accumulation when applicable hazardous waste Subpart CC standards are met.

Municipal Solid Waste Landfills/NESHAP: U.S. Environmental Protection Agency Proposes Technical Revisions/Clarifications

The United States Environmental Protection Agency ("EPA") published in the April 13th Federal Register proposed technical revisions and clarifications addressing a Clean Air Act National Emission Standard for Hazardous Air Pollutants ("NESHAP"). See 86 Fed. Reg. 19176.

The technical revisions and clarifications address the Municipal Solid Waste Landfills NESHAP that was published on March 26, 2020.

The March 26, 2020, final rule issued for the Municipal Solid Waste Landfills was the Residual Risk and Technology Review of the NESHAP.

Municipal Solid Waste Landfills/NESHAP: U.S. Environmental Protection Agency Proposes Technical Revisions/Clarifications

The April 13th Federal Register Notice states that the proposed technical revisions/clarifications address inadvertent errors such as:

- Wellhead monitoring requirements for the purpose of identifying excess air infiltration
- Delegation of authority to state, local, or trial agencies for “emission standards”
- Applicability of the general provisions to affected municipal solid waste landfills
- Handling of monitoring data for combustion devices during periods of monitoring system breakdowns, repairs, calibration checks and adjustments

Municipal Solid Waste Landfills/NESHAP: U.S. Environmental Protection Agency Proposes Technical Revisions/Clarifications

EPA also states that the proposal includes additional amendments to the Municipal Solid Waste Landfills New Source Performance Standards (40 C.F.R. Part 60, Subpart XXX) to clarify the timing of compliance for certain requirements for existing Municipal Solid Waste Landfills that have modified, but previously triggered, the requirement to install a gas collection and control system under related Municipal Solid Waste Landfill rules.

Closed Hazardous Waste Units: U.S. Environmental Protection Agency Office of Inspector General Report

The United States Environmental Protection Agency ("EPA") Office of Inspector General ("OIG") issued a March 29th report titled:

> *EPA Does Not Consistently Monitor Hazardous Waste Units Closed with Waste in Place or Track and Report on Facilities That Fall Under the Two Responsible Programs ("Report")*

OIG initiated the project to evaluate whether EPA's oversight of hazardous waste units closed with waste in place verified continued protection of human health and the environment.

Closed Hazardous Waste Units: U.S. Environmental Protection Agency Office of Inspector General Report

OIG states that it determined that EPA did not consistently verify continued protection of human health and the environment at hazardous waste units that had been closed in place.

339 of 687 treatment storage and disposal facilities (RCRA units) that closed with waste in place were not inspected at a frequency in conformance with EPA policy.

Closed Hazardous Waste Units: U.S. Environmental Protection Agency Office of Inspector General Report

EPA regional oversight of RCRA-delegated states was addressed.

Five of the 10 EPA regions incorporate inspection requirement commitments in RCRA grant negotiations with the states.

Used to verify that authorized states are complying with the inspection policy. Further stated is that:

- Two regions have similar processes but they do not include all their states
- Three regions do not have any process in place to verify compliance

Landfill Permitting: Conservation Law Foundation Complaint Alleging New Hampshire Failure to Establish/Update Solid Waste Plan

The Conservation Law Foundation ("CLF") filed a February 14th Complaint for Declaratory Judgment, A Writ of Mandamus, and Injunctive Relief ("Complaint") against the New Hampshire Department of Environmental Services ("NHDES") alleging:

- Failure to comply with certain mandatory, non-discretionary duties that are essential to the management of solid waste in New Hampshire.

The alleged failure is stated to include:

- The duty to establish and update a solid waste plan for the state
- The duty to rely on that solid waste plan in determining whether to grant permits for proposed waste disposal facilities

Landfill Permitting: Conservation Law Foundation Complaint Alleging New Hampshire Failure to Establish/Update Solid Waste Plan

The organization contends that absent a valid updated state solid waste plan, that NHDES cannot lawfully or reasonably render a substantial-public-benefit determination. As a result, it argues that the agency cannot lawfully and reasonably issue permits for new or expanded solid waste facilities.

Continued Role of citizen suits/environmental groups

Odor Control/RCRA Subtitle D Landfills: Association of State and Territorial Solid Waste Management Officials Report

The Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") issued a December 2020 report titled:

Odor Control at RCRA Subtitle D Landfills ("Report")

Topics addressed in the Report include:

- Typical gases generated at landfills
- Conditions that affect gas generation and migration
- Potential remedies to landfill odor issues
- Summary of results from a nationwide survey on regulatory requirements regarding landfill odor
- Case studies in landfill odor management

Toxics Release Inventory/Community Right-to-Know: U.S. Environmental Protection Agency Announces Plan to Address Environmental Justice

The United States Environmental Protection Agency ("EPA") issued an April 29th news release outlining a plan to "update the Toxics Release Inventory to advance Environmental Justice."

EPA states that it will be undertaking activities related to the Toxics Release Inventory ("TRI") to:

- Advance Environmental Justice
- Improve transparency
- Increase access to environmental information

Toxics Release Inventory/Community Right-to-Know: U.S. Environmental Protection Agency Announces Plan to Address Environmental Justice

The TRI is a publicly available database that contains information on toxic chemical releases and other waste management activities reported annually to EPA by certain covered industry groups as well as federal facilities.

Specific components described in the EPA news release include:

- TRI Facility Expansion to Include Certain Contract Sterilizers using EtO
- TRI Reporting for Natural Gas Processing Facilities
- TRI Reporting for Additional Per-and Polyfluoroalkyl Substances (PFAS)

Toxics Release Inventory/Community Right-to-Know: U.S. Environmental Protection Agency Announces Plan to Address Environmental Justice

- TRI Reporting for Toxic Substance Control Act Workplan and High-Priority Chemicals
- Enhancing TRI search tools to include a "Demographic Profile" section displaying a map showing information like the income profile and the racial makeup surrounding TRI facilities
- Providing a Spanish version of the TRI website
- Promoting the Use of Pollution Prevention Information as a tool for communities to engage with reporting facilities on workable solutions for building community health by encouraging facilities to reduce their use and releases of toxic chemicals . . .

Closed Landfills/PFAS: Minnesota Pollution Control Agency Announces Sampling Results

The Minnesota Pollution Control Agency ("MPCA") addressed in a March 18th news release per- and polyfluoroalkyl substances ("PFAS") groundwater sampling results at a number of closed landfills.

Groundwater is stated to have been sampled at 59 closed landfills in 41 Minnesota counties.

The potential presence of PFAS on or about active or closed landfills, because of their acceptance of materials that may contain PFAS, is being assessed in some instances. For example, California State Water Resources Control Board issued a March 20th Order that directed a list of California landfill facilities to submit information regarding PFAS.

Closed Landfills/PFAS: Minnesota Pollution Control Agency Announces Sampling Results

The MPCA states in its March 18th news release that groundwater at the 59 closed landfills exceeded the Minnesota Department of Health's health-based guidance values for PFAS. It further states that:

> . . . Overall, the MPCA has found PFAS contamination in groundwater at 98 of the 101 tested sites in the closed landfill program.

PFAS Monitoring Requirements for Bulk Storage Terminals/Refineries: California Water Resources Control Board Order

The State of California State Water Resources Control Board ("Board") entered Order No. WQ 2021-0006-DWQ titled:

> *Water Code Sections 13267 and 13383 Order for the Determination of the Presence of Per- and Polyfluoroalkyl Substances at Bulk Fuel Storage Terminals and Refineries ("Order")*

The *Order* requires the referenced facilities to monitor for per- and polyfluoroalkyl ("PFAS") substances.

PFAS Monitoring Requirements for Bulk Storage Terminals/Refineries: California Water Resources Control Board Order

The *Order* states that the release of PFAS, which may be found in aqueous film-forming foams and/or other materials used at bulk fuel storage terminals and refineries, into the environment or the disposal of waste containing PFAS other than to a permitted facility constitutes a discharge of waste as defined in referenced sections of the water code.

A similar order has been issued for landfills and POTWS.

PFAS Monitoring Requirements for Bulk Storage Terminals/Refineries: California Water Resources Control Board Order

The *Order* requires that the referenced facilities:

- identify the PFAS-containing materials in the facility;
- identify the areas where PFAS-containing materials are stored, used, and/or disposed;
- detail the various potential pathways (current and historic) for discharge of PFAS from the facility and the nature of potential PFAS contamination in the surface and subsurface soil, groundwater, stormwater, and if the facility operates an onsite wastewater treatment plant, the plant influent and effluent; and
- describe a proposed sampling plan for the environmental matrices.

Arkansas Underground Storage Tank Program: U.S. Environmental Protection Agency Public Notices Approval of Revisions

The United States Environmental Protection Agency ("EPA") published a January 7th Federal Register Notice stating that it is taking direct final action to approve revisions to the State of Arkansas's underground storage tank ("UST") program. See 86 Fed. Reg. 977.

EPA also is codifying approval of the state program's incorporation by reference of certain regulations that were determined to meet the requirements for approval.

Arkansas Underground Storage Tank Program: U.S. Environmental Protection Agency Public Notices Approval of Revisions

Revisions promulgated in 2015 were the first set of comprehensive changes since the original 1988 promulgation. The 2015 rule was intended to:

- Improve operation and maintenance along with the reduction of petroleum releases
- Address certain UST systems that were deferred in the 1988 regulations
- Update the regulations to include new technologies and fuel blends
- Provide regulations for previously unregulated areas

EPA has determined that Arkansas revisions satisfied all requirements needed for program approval.

UST Finder/National Underground Storage Tanks: U.S. Environmental Protection Agency/ASTSWMO Release Web Map

The United States Environmental Protection Agency ("EPA") and the Association of State and Territorial Solid Waste Management Officials ("ASTSWMO") released in early October what they denominate "UST Finder."

The UST Finder is described as a:

> . . . flexible web map application containing a comprehensive, state-sourced national map of underground storage tank (UST) and leaking UST (LUST) data.

UST Finder/National Underground Storage Tanks: U.S. Environmental Protection Agency/ASTSWMO Release Web Map

The UST Finder provides the attributes and locations of active and closed USTs, along with UST facilities and LUST sites. The information is current as of 2018-2019. In other words, it does not reflect real time data. However, EPA states it will be updated.

The UST Finder provides information about proximity of UST facilities and LUST sites to:

- Surface and groundwater public drinking water protection areas
- Estimated number of private domestic wells and number of people living nearby
- Flooding and wildfires

93rd Arkansas General Assembly: Petroleum Storage Tank Trust Fund Balance Revision

House Bill 1519 (“HB1519”) was introduced on February 22nd which would amend the Arkansas Petroleum Storage Tank Trust Fund Act (“Trust Fund”).

The Trust Fund is financed by an annual registration fee paid by tank owners and operators and a 0.3 per gallon petroleum environmental insurance fee. The fee is remitted by a motor fuel distributor supplier.

93rd Arkansas General Assembly: Petroleum Storage Tank Trust Fund Balance Revision

When the balance of the Trust Fund reaches $15 million, the Arkansas Pollution Control and Ecology has an obligation to consider a reduction in the environmental insurance fee. Because the cap was set using 1989 dollars, there is a significant concern that the Trust Fund will be inadequately funded at some point in the future.

HB1519 adjusts the trigger for considering reduction of the environmental insurance fee from $15 million to $30 million. The legislation would amend Arkansas Code § 8-7-906(g)(2)(A) by substituting $30 million for $15 million. It would not increase either the tank registration fees or the petroleum environmental insurance fees.

93rd Arkansas General Assembly: Petroleum Storage Tank Trust Fund Balance Revision

An objective of the legislation is to ensure an adequate monetary balance is in place. In the event of an inadequate balance, there is a risk that EPA could determine that the Trust Fund can no longer serve as a mechanism to meet the financial assurance requirements. This would potentially force thousands of Arkansas UST owners or operators to close or cease utilization of tanks that are an integral part of their businesses.

Contamination/Asset Purchase Agreement: Federal Appellate Court Interprets Indemnification Provision

Neither Northern States nor WDNR are stated to have threatened to take legal action against either railroad during the 10 year claim period.

Wisconsin Central filed a breach of contract action against Soo Line arguing that the environmental claims were asserted during the claim period. As a result, it sought indemnification for the amount it had paid in the settlement (plus interest, fees, and costs). Soo Line counterclaimed arguing no claim was asserted until after the 10 year claim period expired.

Contamination/Asset Purchase Agreement: Federal Appellate Court Interprets Indemnification Provision

On appeal, Wisconsin Central argued that the environmental claims against the railroads were first asserted during the claim period and that Soo Line's indemnity obligation was triggered for the entire cost of the claims.

The Court notes that in this instance WDNR took no actions against the railroads during the claim period. It contrasted Northern States' lawsuit and the fact that EPA named the railroad as PRPs after the expiration of the claim period. No suits were filed or threatened during the claim period.

Contamination/Asset Purchase Agreement: Federal Appellate Court Interprets Indemnification Provision

Soo Line agreed to retain liability and indemnify Wisconsin Central for:

> . . . all claims for environmental matters relating to ownership of the Assets or the operation of LST that are asserted within ten years of the closing of the deal (the "claim period").

Northern States claimed that the responsibility for certain contamination should be assigned to both Soo Line and Wisconsin Central.

Contamination/Asset Purchase Agreement: Federal Appellate Court Interprets Indemnification Provision

The United States Court of Appeals for the Seventh Circuit ("Court") addressed in a March 31st Opinion the indemnification provision of an Asset Purchase Agreement ("APA") involving contamination that was identified subsequent to closing. See *Wisconsin Central Ltd. v. Soo Line Railroad Co.*, No. 19-3129.

One of the questions involved whether a claim had occurred within the meaning of the APA triggering indemnification.

In 1987 Wisconsin Central, Ltd. ("Wisconsin Central") entered into an APA with the Soo Line Railroad Company ("Soo Line") to purchase certain rail lines. The APA allocated responsibility between the parties for future environmental liabilities.

Hazard Communication Standard: Occupational Safety and Health Administration Proposed Revisions/Update

The Occupational Safety and Health Administration ("OSHA") announced on February 5th a prepublication proposed rule to update and revise its Hazard Communication Standard ("HCS").

OSHA state that the purpose of the proposed rule is to modify the HCS to:

- Maintain conformity with the United Nations' Globally Harmonized System of Classification and Labelling of Chemicals (GHS) (Revision 7)
- Align certain provisions with Canada and other United States agencies
- Address issues that have arisen since implementation of the 2012 HCS standard

Hazard Communication Standard: Occupational Safety and Health Administration Proposed Revisions/Update

The proposed rule also includes incorporating in the regulations certain enforcement policies (i.e., current compliance directives).

Revisions were undertaken in regards to mandates for the transportation of hazardous chemicals.

Small containers labelling provision alternatives are provided.

In addition, Material Safety Datasheet requirements are addressed.