# Solid and Hazardous Waste/Recycling Developments: 2018 – 2019

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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

# Proposed/Final Rules

# Modernizing Ignitable Liquid Determinations/RCRA: U.S. Environmental Protection Agency Proposed Rule

The United States Environmental Protection Agency published an April 2nd Federal Register Notice proposing a rule to:

- update the regulations for the identification of ignitable hazardous waste under the Resource Conservation and Recovery Act ("RCRA"); and
- modernize the RCRA test methods that currently require the use of mercury thermometers.

See 84 Fed. Reg. 12539.

EPA states as its rationale for proposing a new flash point test method for ignitable liquids the fact that the current methods were published 40 years ago. The agency believes that newer technology is now available. This is stated to be due to scientific and technological advances.

# Modernizing Ignitable Liquid Determinations/RCRA: U.S. Environmental Protection Agency Proposed Rule (cont.)

Cited as an example is the fact that the methods require mercury thermometers – which are being phased out because of the environmental health and safety concerns.

EPA is also addressing:

- Revision to the Aqueous Alcohol Exclusion
- Revision to Codify Sampling Guidance for Multiphase Wastes
- Proposed Changes to the Definition of Ignitable Compressed Gas
- Proposed Revision to the Air Sampling and Stack Emissions Methods

# Commercial and Industrial Solid Waste Incineration (CISWI) Units

- Section 129 of the Clean Air Act required establishment of NSPS and Emission Guidelines for new and existing solid waste incineration units

- EPA amending standards in response to request for clarification

- Provisions affected include:

    1. Alternative equivalent emission limit for mercury (Hg) for the waste--burning kiln subcategory
    2. timing of initial test and initial performance evaluation;
    3. extension of the date by which electronic data reporting requirements must be met
    4. clarification of non-delegated authorities;
    5. demonstration of initial and continuous compliance when using a continuous emissions monitoring system (CEMS );
    6. continuous opacity monitoring requirements;
    7. other CEMS requirements;
    8. clarification of skip testing requirements
    9. deviation reporting requirements for continuous monitoring data; and
    10. clarification of air curtain incinerator (ACI) requirements.

# RCRA Listed Hazardous Waste/F006: U.S. Environmental Protection Agency Grants Delisting Petition

EPA published a September 12th Federal Register notice granting a petition to exclude ("Delist") hazardous waste generated by a particular facility from the Resource Conservation and Recovery Act ("RCRA") list of hazardous waste.

The materials being delisted are wastewater treatment sludge from the Sandvik Special Metals facility located in Kennewick, Washington.

The RCRA regulations provide generators the opportunity to petition EPA to delist a hazardous waste from the lists of hazardous waste. Such requests are done on a generator specific basis.

# Resource Conservation and Recovery Act Hazardous Waste Manifest System: February 8th U.S. EPA Federal Register Notice Addressing Information Collection

The United States Environmental Protection Agency published a February 8th Federal Register Notice addressing the federal agency's plan to submit an Information Collection Request addressing:

> . . . Requirements for Generators, Transporters, and Waste Management Facilities Under the RCRA Hazardous Waste Manifest System.

See 84 Fed. 2854.

EPA proposed and solicited comments and information to:

1. Improve the precision of waste quantities and units of measure reported in items 11 and 12 of the Hazardous Waste Manifest (both paper and electronic);
2. Enhance the quality of international shipment data reported on the manifest
3. Assist EPA with integrating e-Manifest and biennial reporting requirements

# Resource Conservation and Recovery Act Hazardous Waste Manifest System: February 8th U.S. EPA Federal Register Notice Addressing Information Collection (Cont.)

The issues addressed include:

- Improving precision of waste quantities and units of measure
  - Use of decimals (proposal to modify the manifest instructions to Item 11 of the manifest to grant manifest users the option to report waste quantities using decimals or fractions)
  - Alternative set of units of measure (addition/alternative to using decimals or fractions or precisely report waste quantity by also using smaller units of measure)
- Enhance quality of international shipment data
  - Addition of a new data field for consent numbers for import and export shipments (proposal to add a new data field on the paper and electronic manifest so hazardous waste stream consent numbers can be recorded in a separate, distinct field on a manifest)
  - Capturing exporter EPA ID number on the manifest
  - How to incorporate new fields on manifest and whether to consolidate with movement document
- Biennial reporting and e-Manifest integration

# EPA Finalizes RCRA Pharmaceutical Rule Affecting Health Care Providers

- EPA promulgated an RCRA Pharmaceutical Rule on December 8, 2018
- The rule will impose new requirements for healthcare providers including pharmacies and long-term care providers
- The rule also applies to forward and reverse distributors of pharmaceuticals
- Includes an example definition of “healthcare facility“
- Will give qualifying healthcare sector facilities in lieu of the obligations contained in 40 CFR § 262

# Coal Combustion Residuals: EPA State Developments

EPA issued July 18th revisions to the 2015 regulations for the disposal of coal combustion residuals from electric utilities and independent power producers.

CCR (also referred to as coal ash, fly ash, or bottom ash) is typically created when coal is combusted by power plants to produce electricity.

The initial set of revisions are described as:

- Providing utilities and states more flexibility in how CCR is managed
- Enabling states to tailor coal ash disposal requirements based on site-specific risk considerations
- Providing two types of alternative performance standards
- Revision of the Groundwater Protection Standard for constituents that do not have an established drinking water standard

# Coal Combustion Residuals: EPA State Developments (Cont.)

- Extension of the deadline to which facilities must cease placement of waste in coal ash units closing for cause in two specified situations

Several environmental organizations have filed a judicial challenge.

EPA approves Oklahoma program (challenges)
EPA disapproves portion of Missouri program
State of Arkansas?

# Coal Combustion Residuals: Virginia Electric and Power Company Recycling/Beneficial Use Assessment Business Plan

Virginia Electric and Power Company d/b/a Dominion Energy Virginia issued a document titled:

> *Coal Combustion Residuals Recycling/Beneficial Use Assessment Business Plan ("Plan")*

The Plan is stated to include an analysis of:

> . . . viable options for recycling of the ponded ash, recycled/beneficiated product market demand, quantity of CCR that can be recycled/beneficiated, and related costs.

## Coal Combustion Residuals: Virginia Electric and Power Company Recycling/Beneficial Use Assessment Business Plan (Cont.)

Dominion states that it requested proposals from qualified bidders to conduct recycling or beneficial use projects or coal combustion residuals in the Chesapeake Bay watershed. The objective of the Request for Proposals was stated to provide the following information:

- Viable options for recycling of the ponded ash
- The quantity of CCR that may be suitable for recycling or beneficial use, including but not limited to encapsulated beneficial uses such as bricks or concrete
- The cost of recycling or beneficial use
- The potential market demand for material recycled or beneficially used

# Hazardous Materials Regulations Revisions: U.S. Pipeline and Hazardous Materials Safety Administration Addresses Industry Petitions

The United States Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a November 7th final rule amending the federal Hazardous Materials Regulations. See 83 Fed. Reg. 55792.

PHMSA stated it was amending the HMR in response to 19 petitions for rulemaking submitted by the regulated community to:

> . . . update, clarify, streamline, or provide relief from miscellaneous regulatory requirements.

PHMSA describes the rationale for the adoption of such amendments as allowing "more efficient and effective ways of transporting hazardous materials in commerce while maintaining an equivalent level of safety."

# Superfund/CERCLA National Priority List: Blog Post Notes Addition of Two Sites (Mississippi/Texas) Based Solely on Vapor Intrusion Risk

The United States Environmental Protection Agency added five sites to the Comprehensive Environmental Response Compensation and Liability Act ("Superfund") National Priority List ("NPL").

Two of the sites were added solely based on the risk posed by vapor intrusion.

EPA had previously issued a final rule adding "subsurface intrusion" as a hazard that can qualify for the Superfund NPL.

Subsurface or vapor intrusion is sometimes described as the migration of hazardous substances, pollutants or contaminants from contaminated groundwater or soil into an overlying building. The Superfund Hazardous Ranking System ("HRS") is the principal mechanism EPA uses to evaluate sites for placement on the NPL.

# Request to Become Arkansas Regional Solid Waste District: Carroll County Solid Waste Authority Arkansas Pollution Control & Ecology Commission Petition

The Carroll County Solid Waste Authority ("Carroll County Authority") submitted a Petition to the Arkansas Pollution Control & Ecology Commission ("Commission") to be designated the Carroll County Solid Waste District.

The Petition is being submitted pursuant to Ark. Code Ann. 8-6-707 which provides the Commission the authority to designate a county or counties within each district or counties within two or more districts as a new regional solid waste management district.

Carroll County Authority is currently a part of the Ozark Mountain Regional Solid Waste Management District. Arkansas has had in place since the late 1980s various statutory authorities whose intent is to stimulate recycling, or through various programs encourage regional approaches to solid waste management.

# Arkansas Medical Marijuana Rules/Waste Issues

Two of the issues relevant to the solid/hazardous waste management industry associated with Arkansas's enactment of the Medical Marijuana Amendment:

- Employee issues associated with the legal use of medical marijuana
- Medical marijuana cultivation and dispensary waste generation issues

The Arkansas Medical Marijuana Amendment decriminalizes from a state (Arkansas) standpoint certain use of marijuana. It establishes the regulation of cultivators and dispensaries. Marijuana is still illegal at the federal level as a DEA Schedule I controlled substance.

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

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

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

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

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

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

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

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

# Federal/State Enforcement

Civil

# Unmanned Aircraft Systems/Drones: Louisiana Department of Environmental Quality Notes Use in Environmental Protection Mission

The Louisiana Department of Environmental Quality has noted the addition of unmanned aircraft systems (also known as “drones”) as a tool in the agency’s environmental protection mission.

LDEQ states that three drones are currently employed by the agency.

The aerial abilities of drones are currently being used by LDEQ in agency activities such as:

- Surveillance
- Enforcement
- Permit Support Documentation
- Waste and Landfill Inspections
- Legal Dumping of Chemicals, Oil or Waste Tires
- General Emergency Response Functions Involving Facility Discharges, Train Derailments, Truck Accidents, Oil Spills
- Investigations of Unusual Events

# Landfill/Solid Waste Enforcement: Arkansas Department of Environmental Quality and City of Morrilton Enter into Consent Administration Order

The Arkansas Department of Environmental Quality and the City of Morrilton entered into a July 24th Consent Administrative Order addressed alleged violations of Arkansas Pollution Control and Ecology Commission Regulation No. 22 (Solid Waste Management Code). LIS 18-068.

Morrilton is stated to own and operate a Class 1 Landfill ("Facility") in Conway County, Arkansas.

An ADEQ inspector is alleged to have observed the following violations of Arkansas Pollution Control and Ecology Commission Regulation 22. The alleged violations are described as:

- Certain equipment at the landfill had not been routinely maintained and was in need of repairs at the time of the inspection: a compactor, two dozers, and a dirt hauler.
- Facility did not have adequate backup equipment.
- The active working face was not confined to the smallest practical area.
- The Facility did not have any surface water controls to control erosion on the west, east, and north slopes of the landfill.
- Erosion rills and cuts were observed in several areas throughout the landfill.
- Contour and leachate issues

# Landfill/Solid Waste Enforcement: Arkansas Department of Environmental Quality and City of Morrilton Enter into Consent Administration Order (cont.)

- The Order required that Morrilton address these various issues.
- $10,000 penalty of which $8,000 can be Supplemental Environmental Project.

# Industrial Wells/Acid Injection: Federal Appellate Court Addresses Request for Declaratory Judgment Regarding Illinois Environmental Protection Agency Jurisdiction

The United States Court of Appeals (Seventh Circuit) addressed in a January 16th opinion an appeal of a denial by the United States District Court regarding an issue associated with injection of hazardous waste acid into industrial wells. See *EOR Energy LLC v. Illinois Environmental Protection Agency*, 913 F.3d 660.

The request for the jurisdictional determination was undertaken by a company that unsuccessfully appealed a penalty assessment before the Illinois Pollution Control Board and the Illinois courts.

# Industrial Wells/Acid Injection: Federal Appellate Court Addresses Request for Declaratory Judgment Regarding Illinois Environmental Protection Agency Jurisdiction (cont.)

The Illinois Environmental Protection Agency had undertaken enforcement before the Board against EOR Energy, LLC, and AET Environmental, Inc., for alleged violations of the Illinois Environmental Protection Act. The alleged violations involved:

- Transporting hazardous waste acid into Illinois
- Storage of hazardous waste acid
- Injection of hazardous waste acid into EOR's industrial wells in Illinois

EOR challenged the enforcement actions on the basis that neither the IEPA nor the Board had jurisdiction over the injection of this material.

This argument was rejected by the Board and the Illinois courts.

# Industrial Wells/Acid Injection: Federal Appellate Court Addresses Request for Declaratory Judgment Regarding Illinois Environmental Protection Agency Jurisdiction (cont.)

EOR subsequently filed a request in the United States District Court for the issuance of a declaratory judgment that under the relevant federal statutes neither IEPA nor the Board had jurisdiction over future hazardous waste acid injection activities.

The federal court dismissed holding that if EOR intends to ignore the state court's rulings and inject the same kinds of hazardous waste acid into the same kinds of wells, then it will have to account for its actions before the state authorities.

# Beneficial Reuse/Clean Soil: February 20th Order Addressing Los Angeles County Department of Public Works Solid Waste Fee Determination

A February 20th Order was issued by a Los Angeles County Department of Public Works Hearing Officer addressing the appeal of an enforcement order/administrative penalty alleging that the Chiquita Canyon Landfill failed to comply with reporting requirements regarding the quantity of beneficial reuse materials being received, processed, and disposed.

The Order considers the Los Angeles County Department of Public Works contention that CCL underreported the amount of Solid Waste Management Fees that should have been collected because of classification of certain waste as beneficial reuse materials/clean soil.

The Order assessed a penalty of $2,701,121.24 and fee owed of $2,434,910.82. These amounts were based on an alleged failure to report 772,133 tons of clean soil.

PW contended that the beneficially reused material (i.e., clean soil) was inappropriately classified by CCL as such and should have in fact paid the fee.

# Beneficial Reuse/Clean Soil: February 20th Order Addressing Los Angeles County Department of Public Works Solid Waste Fee Determination (cont.)

The definition of Solid Waste in the Los Angeles County Code includes:

> . . . all putrescible and nonputrescible solid, semisolid and liquid wastes, such as trash, refuse, garbage, rubbish, paper, ashes, industrial waste, demolition and construction wastes, abandoned vehicles and parts thereof, discarded home and industrial appliances, manure, vegetable or animal solid and semisolid wastes, and other discarded solid, semisolid, and liquid wastes.

If soil is used in a beneficial way, the February 20th decision notes that it is exempt.

The Hearing Officer stated:

> . . . there is no other conclusion than that the Fee is not for clean soil that is not disposed of as solid waste.

# Hazardous Waste Enforcement: California and Target Agree to Revise Final Judgment/Permanent Injunction on Consent

The California Attorney General and 24 local government attorneys entered into a settlement with Target Corporation ("Target") addressing alleged violation of laws associated with the disposal of retail hazardous waste.

The alleged violations in the 2012 to 2016 time period are stated to have included improper disposal of hazardous waste into landfills. The hazardous waste allegedly included items such as:

- Electronics
- Batteries
- Aerosol cans
- Compact fluorescent lightbulbs
- Metal waste (including syringes)
- Over-the-counter and prescribed pharmaceuticals

# Hazardous Waste Enforcement: California and Target Agree to Revise Final Judgment/Permanent Injunction on Consent (Cont.)

Some of the alleged violations in 2012 and 2014 were stated to have been identified through the inspection of Target trash compactors.

The current Judgment includes terms such as:

- $3.2 million (civil penalty)
- $300,000 for Supplemental Environmental Projects (including $50,000 to conduct education classes/programs for owners and operators of small businesses located in low income and minority areas in California)
- Expenditure of at least $3 million to conduct three annual inspections and audits of 12 facilities with reports to the Attorney General and local prosecutors
- Implementation of a customer trash receptacle inspection and management program
- $900,000 for attorneys' fees and costs of investigation enforcement

Note: New EPA RCRA pharmaceutical rules.

## Hazardous Waste/Air Enforcement: Mississippi Commission on Environmental Quality and Columbus, Mississippi Furniture Manufacturing Facility Enter into Agreed Order

The Mississippi Commission on Environmental Quality ("MCEQ") and Johnston-Tombigbee Furniture Manufacturing Company (Columbus, Mississippi) entered into a June 25th Agreed Order ("AO") addressing alleged violations of a Clean Air Act Title V Air Permit and Mississippi hazardous waste regulations. See Order No. 6868 18.

# Hazardous Waste/Air Enforcement: Mississippi Commission on Environmental Quality and Columbus, Mississippi Furniture Manufacturing Facility Enter into Agreed Order (cont.)

Alleged violations of certain hazardous waste regulations are alleged to include:

- Failure to label a 5-gallon bucket used to collect spent acetone (a hazardous waste label on the container was stated to have been subsequently placed)
- Failure to label a 55-gallon drum used as a satellite accumulation container for the acetone waste (a hazardous waste label was stated to have been subsequently placed)
- Failure to label a 55-gallon drum equipped with fluorescent tube crusher (a hazardous waste label was stated to have been subsequently placed)
- Failure to keep 55-gallon drum sealed (a bolted locking ring was stated to have been subsequently placed on the drum)
- Failure to keep two 55-gallon drums in the paint mixing room (a bolted locking ring was stated to have been subsequently placed on the drum)
- Failure to keep fluorescent tube crusher sealed when not in use (the bulb crusher was stated to have been subsequently immediately sealed)
- Failure to indicate the date of accumulation on either container in the paint mixing room (only one 55-gallon drum for satellite accumulation is stated to now be in the paint mixing room)
- Failure to maintain aisle space in the 90-day accumulation area ( the drums are stated to have been rearranged in the 90-day accumulation area into single rows that are accessible)

The AO assessed a civil penalty of $14,290.

# Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Detroit, Michigan Facility Complaint and Compliance Order

The United States Environmental Protection Agency ("EPA") and DCI Aerotech Inc. ("DCI") executed a Complaint and Compliance Order ("Order") addressing alleged violations of the Resource Conservation and Recovery Act ("RCRA") hazardous waste regulations. See Docket No. RCRA-05-2019-0001.

DCI is stated to operate a facility in Detroit, Michigan, some of which activities are subject to the RCRA regulations.

The Order alleges certain violations that were described as involving:

- Operating as Storage Facility without a RCRA Permit or Interim Status and included the failure to meet certain conditions
  - Contingency Plan
  - Personnel Training
- Biennial Reporting
- Notification of Change of Hazardous Waste Activity

The Order assesses a civil penalty of $10,526. Further, the Order requires the implementation of a Supplemental Environmental Project ("SEP") which is described as being designed to:

> . . . reduce the amount of liquid cyanide bearing waste shipped off-site. Respondent will treat the copper strip solution, recover the cooper, and discharge the treated wastewater removed resulting in the reduction of the amount to be disposed from approximately 10,000 pounds per year to approximately 188 pounds per year.

# Hazardous Waste Enforcement: U.S. Environmental Protection Agency and Detroit, Michigan Facility Complaint and Compliance Order (Cont.)

The Order assesses a civil penalty of $10,526. Further, the Order requires the implementation of a Supplemental Environmental Project ("SEP") which is described as being designed to:

. . . reduce the amount of liquid cyanide bearing waste shipped off-site. Respondent will treat the copper strip solution, recover the cooper, and discharge the treated wastewater removed resulting in the reduction of the amount to be disposed from approximately 10,000 pounds per year to approximately 188 pounds per year.

# Release Reporting/CERCLA Enforcement: U.S. Environmental Protection Agency and Waseca, Minnesota, Facility Enter into Consent Agreement

EPA and Birds Eye Foods, LLC, entered into a December 13th Consent Agreement and Final Order addressing alleged violations of the Comprehensive Environmental Response, Compensation and Liability Act and Emergency Planning and Community Right-to-Know Act.

The CAFO provides that Birds Eye violated Section 103(a) of CERCLA and Section 304(a) of EPCRA.

The alleged violations are stated to have been due, respectively, to a failure to immediately notify the National Response Center of a release which occurred at the facility between June 21 and July 19, 2013, and failing to immediately notify the Minnesota State Emergency Response Commission ("SERC") of the same release by failing to provide a written follow-up emergency notice to the Minnesota SERC as soon as practicable after the June 21 – July 19, 2013, release occurrence.

# Release Reporting/CERCLA Enforcement: U.S. Environmental Protection Agency and Waseca, Minnesota, Facility Enter into Consent Agreement (cont.)

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

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

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

The CAFO assesses a civil penalty of $75,000 for the CERCLA violation and $75,000 for the EPCRA violation.

# Emergency Planning and Community Right-to-Know Act (EPCRA) Enforcement: U.S. Environmental Protection Agency and Tampa, Florida Erecting Company Enter into Consent Agreement

The United States Environmental Protection Agency and Tampa Steel Erecting Company entered into an October 16th Consent Agreement and Final Order to address alleged violations of the Emergency Planning and Community Right-to-Know Act. See Docket Number: EPCRA-04-2018-2026(b).

Section 313 of EPCRA created the Toxic Release Inventory program which requires that all covered United States facilities meet certain reporting requirements through the submission of data to EPA and the relevant state annually.

The CAFO provides that Tampa Steel operates a facility in Tampa Bay, Florida. The company Facility is stated to be classified under SIC Code 3441 and otherwise used propylene in excess of the 10,000 pound threshold quantity for the chemical established under Section 313(f) of EPCRA during the calendar years 2016, 2015, and 2014. Tampa Bay was required to submit Form Rs for propylene by July 1 of 2016, 2015, and 2014 (and allegedly failed to do so).

# Used Oil/Hazardous Waste Enforcement: EPA and South Lyon, Michigan Metal Heat Treating Facility Enter into Consent Agreement

EPA and Sun Steel Treating entered into a June 21st Consent Agreement and Final Order addressing alleged violations of Resource Conservation and Recovery Act ("RCRA") regulations. See Docket No. RCRA-05-2018-0014.

The CAFO provides that Sun is the owner of a metal heat treating facility in South Lyon, Michigan.

The CAO alleges certain violations which include:

- Storage of Hazardous Waste without a License or Interim Status (referencing a failure to place pieces of hazardous waste castable in a container, tank, or on a drip pad, therefore failing to meet a license exemption requirement)
- Failure to Keep Hazardous Waste Containers Closed (referencing a roll-off box equipped with a tarp cover but the cover was not secured when waste was not being added or removed)

# Used Oil/Hazardous Waste Enforcement: EPA and South Lyon, Michigan Metal Heat Treating Facility Enter into Consent Agreement (cont.)

- Failure to Close and Label Satellite Containers (referencing a fiber pack drum labeled as "Hazardous Waste" but lacked the hazardous waste number or chemical name of the waste)
- Failure to Provide Annual Personnel Training (referencing a failure by Sun's representatives to demonstrate that annual training had occurred in 2014, 2015, and absence of attendance records for such dates)
- Failure to Minimize Releases (referencing hazardous waste liquid being observed splashing outside of a roll-off box during the addition of waste to the container)
- Failure to Label Containers of Used Oil (referencing a failure to label certain containers as "Used Oil"

A civil penalty of $44,600 is assessed.

# OSHA Enforcement: U.S. Department of Labor Cites Alabama Tank Cleaning Company for Alleged Violations

The United States Occupational Safety and Health cited American Remediation and Environmental Inc. for alleged violations related to confined space, fire and explosion hazards.

OSHA proposed $171,281 in penalties for the Chunchula, Alabama, tank cleaning company.

OSHA inspectors are alleged to have determined that AREI allowed employees to enter a tank without testing for atmospheric hazards. The company was cited for:

- Allowing employees to use a non-explosion proof vacuum in a tank that transported a highly hazardous chemical;
- Failing to provide appropriate personal protective clothing;
- Authorizing employees to enter a permit-required confined space without a retrieval system;
- Failing to ensure confined space testing and monitoring equipment was property maintained

# Criminal Enforcement

Federal/State

# Criminal Enforcement: Louisiana Department of Environmental Quality References Guilty Plea of Orleans Parish Individual for Alleged Illegal Disposal of Waste Tires

The Louisiana Department of Environmental Quality ("LDEQ") issued a January 23rd news release stating that Bryant Joseph Ballard pleaded guilty on January 18th in Orleans Parish Criminal District Court for illegal disposal of waste tires and unauthorized use of a movable.

Mr. Ballard is stated to have been arrested by the New Orleans Police Department officers in February 2018 for theft of a U-Haul truck and an outstanding LDEQ warrant for illegal disposal of waste tires in New Orleans East.

Mr. Ballard is stated to have been sentenced to the statutory minimum of two years in prison for unauthorized use of a movable and to the statutory maximum of one year for illegal disposal of waste tires. The sentences are to be served consecutively.

# Criminal Enforcement/Hazardous Waste: U.S. Department of Justice References Guilty Plea of Madison Heights, Michigan, Individual/Electro-Plating Company

The United States Department of Justice issued a February 14th news release stating that Gary Alfred Sayers and his company, Electro-Plating Services Inc. pleaded guilty to a felony charge of illegal storage of Resource Conservation and Recovery Act ("RCRA") hazardous wastes.

The alleged illegal storage is stated to have taken place at EPSI's Madison Heights, Michigan, facility.

The RCRA hazardous waste is stated to have been utilized by EPSI in its electroplating activities. The materials are alleged to have become hazardous wastes after they no longer fulfilled their industrial purposes.

The individual is stated to have "almost never sent those wastes away for proper disposal, preferring to keep them on site indefinitely."

# Criminal Enforcement/Hazardous Waste: U.S. Department of Justice References Guilty Plea of Madison Heights, Michigan, Individual/Electro-Plating Company (cont.)

The alleged knowing RCRA violation is derived from the allegation that the individual knew that such storage was illegal because he also managed the company's former Detroit facility. The news release further notes:

> . . . where he kept hazardous wastes illegally until 2005 – and because the Michigan Department of Environmental Quality (MDEQ) repeatedly sent him warnings. In 2005, Sayers was charged with and pleaded guilty to illegally transporting hazardous wastes. During the ensuing years, MDEQ attempted to get Sayers and Electro-Plating Services to properly manage the amounts of hazardous wastes piling up at the Madison Heights location. MDEQ issued numerous Letters of Warning and Violation Notices to the company regarding its hazardous wastes.

# Citizen Suit Activity

Two Types

- Citizen Enforcement Against an Alleged Violator
- Against EPA, Corps of Engineers, etc., for alleged failure to undertake non-discretionary duty

Environmental groups have ramped up both during Trump Administration.

# Municipal Solid Waste Landfills/Clean Air Act: Federal Court Addresses States of California/New Mexico Action Alleging EPA Failure to Implement Emission Guidelines

The United States District Court (Northern District California) addressed in a December 21st Order an issue involving the Clean Air Act Municipal Solid Waste ("MSW") Landfill Emission Guidelines. See *State of California, et al., v. United States Environmental Protection Agency*, 2018 WL 6728009.

The states of California and New Mexico filed an action against the United States Environmental Protection Agency ("EPA") seeking to have the Court:

> . . . issue a declaratory judgment that, by failing to implement and enforce the Emission Guidelines, EPA has violated the Clean Air Act; and issue a mandatory injunction compelling EPA to implement and enforce the Emission Guidelines.

# Municipal Solid Waste Landfills/Clean Air Act: Federal Court Addresses States of California/New Mexico Action Alleging EPA Failure to Implement Emission Guidelines (Cont.)

California and New Mexico submitted implementation plans. EPA is stated to have neither approved or disapproved the plans nor promulgated a federal plan.

The Court first rejects EPA's argument that dismissal is warranted because the citizen suit provision of the Clean Air Act does not unequivocally waive the sovereign immunity of the United States for duties imposed by the agency's regulations.

The Court also rejected a request by EPA to stay the case pending conclusion of a rulemaking that EPA has initiated. EPA proposed rules that are stated to amend the regulations involved in the litigation.

# Citizen Suit Action/RCRA: Federal Court Addresses Request to Enjoin Dredging Contaminated Sediment

Edison Wetlands Association, Inc. and Raritan Baykeeper, Inc. filed a Resource Conservation and Recovery Act ("RCRA") citizen suit action in United States District Court (New Jersey) which includes a Motion for Preliminary Injunction ("Motion"). See *Raritan Baykeeper, Inc., et al. v. NL Industries, Inc., et al.,* 2018 WL 4509496 (September 20 ,2018).

The Motion argued that the construction of a marina by North American Properties ("NAP") through dredging will:

> . . . bring historical sediment that contains "higher levels of contamination" to the surface, thereby "exacerbating" harm to "the public, construction workers, and the environment."

# Citizen Suit Action/RCRA: Federal Court Addresses Request to Enjoin Dredging Contaminated Sediment (Cont.)

To prevail under RCRA citizen suit provision, the Court notes it must be proven:

1. that the defendant is a person, including, but not limited to, one who was or is a generator or transporter of solid or hazardous waste or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility;
2. that the defendant has contributed to or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste; and
3. that the solid or hazardous waste may present an imminent and substantial endangerment to human health or the environment

The Court states the "operative word . . . [is] "may". . . .

The Court holds Plaintiffs failed to carry their burden because:

- proof that construction will occur is speculative
- conceded that start date is unknown

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The Court holds Plaintiffs failed to carry their burden because:

- proof that construction will occur is speculative
- conceded that start date is unknown

# Public Employees for Environmental Responsibility/U.S. Environmental Protection Agency Region 4 Overfile Request: Tampa, Florida, Wastewater Treatment Plant

The Public Employees for Environmental Responsibility ("PEER") sent a February 4th Overfile Request to the Region 4 Office of the United States Environmental Protection Agency requesting action against the Howard F. Curren Advanced Wastewater Treatment Plant that serves the City of Tampa, Florida.

PEER stated that it was seeking EPA's action because of alleged violations of the Plant's Clean Water Act National Pollutant Discharge Elimination System permit issued by the Florida Department of Environmental Protection (under its delegated authority pursuant to the Clean Water Act).

The Request asks that EPA, pursuant to its response authority under the Clean Water Act, immediately assert primary jurisdiction over the NPDES permit and, with full public participation, take action to comprehensively assess and mitigate the imminent and substantial threat to public health and environmental harm caused by what are described as numerous violations in connection with the Plant's wastewater discharges.

PEER alleges that the Plant has been in noncompliance for 6 of the past 12 quarters and SNC for 2 of the past 12 quarters. Referenced violations include pH and IC25 violations.

# Transactions/Litigation

# Environmental Reporting: Federal Court Addresses Employee First Amendment/Public Employer Retaliation Claim

A United States District Court (M.D. Fla.) addressed a Motion to Dismiss related to a First Amendment employment retaliation case. See *Chustz v. City of Marco Island*, 2019 WL 277705.

The Court's January 22nd opinion discusses litigation involving an employee who alleged his termination was due to reporting environmental violations by a public employer.

Chadd Chustz ("Plaintiff") was stated to be an environmental specialist employed by Defendant City of Marco Island.

# Environmental Reporting: Federal Court Addresses Employee First Amendment/Public Employer Retaliation Claim (Cont.)

In May 2017 Plaintiff is stated to have encountered environmental protection violations which involved alleged false mangrove and wetland environmental reports.

Stated to have reported the violations to his immediate supervisor who failed to take action.

Plaintiff was stated to have reported the violations to the Florida Department of Environmental Protection and United States Army Corps of Engineers. Such outside disclosures were not part of Plaintiff's ordinary job duties.

Plaintiff alleged that his supervisor both threatened to fire him and issued a written reprimand because of the outside disclosures. Further, he was given a negative performance review which explicitly mentioned the disclosures to state and federal authorities.

The City Motion to Dismiss was denied and the action was allowed to process.

# Demolition Contract: New York Appellate Court Addresses Whether Imposition of Flow Control Constitutes a Significant Change

A New York Appellate Court addressed in a January 9th opinion the effect of flow control by a local governmental authority on a demolition contract.

The focus of the decision was whether a general contractor was entitled to additional compensation because of the imposition of flow control fees after the contract was executed.

Stephen J. Mignanao was hired as the general contractor for a New York State Department of Transportation ("DOT") bridge reconstruction/replacement project.

Demolition and disposal related work was subcontracted to L.M. Sessler Excavating & Wrecking, Inc.

Demolition debris were initially deposited in a permitted solid waste landfill by the Subcontractor.

The Subcontractor was paid for the recycled value of the material.

# Demolition Contract: New York Appellate Court Addresses Whether Imposition of Flow Control Constitutes a Significant Change (Cont.)

The Rockland County Solid Waste Management Authority subsequently enacted Local Law No. 2-2008 which instituted "flow control."

Flow control is a legal provision that allows governments to designate the places where municipal solid waste and recyclables are taken for processing, treatment, or disposal. Governments often engage in flow control for economic reasons.

The Law required that the Subcontractor dispose of the demolition material at the Authority facility and imposed a fee for disposal. The Contractor sought additional compensation from DOT on behalf of the Contractor.

DOT refused.

The Contractor argued that:

> . . . enforcement of the Flow Control Law constituted a "significant change in the character of work," entitling the claimant to

# Demolition Contract: New York Appellate Court Addresses Whether Imposition of Flow Control Constitutes a Significant Change

The Court noted that the contract both required the Contractor to comply with all applicable laws (with the costs of compliance included in the contract price) and addressed the disposal of waste at permitted facilities.

- Reference to the disposal of waste was deemed an acknowledgement as to the value of removed waste to the claimant (i.e., Contractor) as a commodity that could be sold to permitted facilities for beneficial reuse, recovery, or recycling purposes.

- Referenced was language indicating that nothing prevented the Contractor from removing the waste to appropriate facilities for such purposes and limited reference to other disposal site requirements.

- Such provisions were deemed to raise some ambiguity as to whether the Contractor would be required to deposit waste at the Authority since it had no such facilities at the time the parties entered into a contract.
- The Court determined that extrinsic evidence of the parties' intent could be considered.

# Demolition Contract: New York Appellate Court Addresses Whether Imposition of Flow Control Constitutes a Significant Change (Cont.)

Contractor was also noted to have submitted evidence that the Authority had no facility at the time to recycle concrete and was not enforcing the Law in regard to any DOT projects.

DOT is stated to have failed to controvert the previously referenced evidence raising a triable issue of fact regarding the scope of the work and whether there was a significant change in the character of the work triggering entitlement to compensation.

# Is Recycling Constitutionally Protected Political Speech? Federal Court Addresses Standing Issue

Plaintiff Randall S. Krause filed a pro se Complaint in the United States District Court (Nebraska) alleging that recycling is constitutionally protected political speech. See *Krause v. Metropolitan Entertainment & Convention Authority*, 2019 WL 108881 (January 4, 2019).

Plaintiff Krause's Complaint alleged that he placed a recyclable item into a recycling bin at TD Ameritrade Park ("Park") in Omaha, Nebraska. The Park is stated to be operated by MECA.

Plaintiff Krause contended that it is MECA's practice to throw "all of the recycling away into two compactors that are emptied at a landfill."

# Is Recycling Constitutionally Protected Political Speech? Federal Court Addresses Standing Issue (Cont.)

The Complaint asserted that:

- Recycling is political speech because it is an expression of support for the environmental movement
- MECA's recycling program abridges his freedom of speech in violation of the First and Fourteenth Amendments by penalizing political speech without due process of law

The Complaint sought:

> . . .an order that MECA must actually recycle if it places recycling bins.

# Is Recycling Constitutionally Protected Political Speech? Federal Court Addresses Standing Issue (Cont.)

MECA asserted that even if placing a recyclable item in a recycling bin was political speech – Krause was able to engage in that political speech. The organization further states:

> . . . that the plaintiff's expression of support for the environmental movement, as reflected in his use of the recycling bin, was complete once he placed the item in the container and the later handling of the recyclable is of no consequence to the expression.

Krause conceded that MECA did not prevent him from "speaking." He stated he was "penalized for what he said and is no longer free to speak in the same manner at TD Ameritrade Park". . . therefore, constituting an injury.

The Motion to Dismiss for Lack of Jurisdiction was granted.

# Train Derailment/Residential Evacuation: Federal Court Considers Applicability of Hazardous Materials Act Preemption Provision to Class Action

The United States District Court for the Western District of Pennsylvania addressed in an October 1st opinion whether the Hazardous Materials Transportation Act preempted state tort law claims in relation to a train derailment that resulted in the mass evacuation of residents near the derailment site. See *Diehl v. CSX Transportation, Inc.*, 2018 WL 4705781 (W.D. Penn. 2018).

A train operated by CSX Transportation, Inc ("Defendant") derailed on August 2, 2017, near the town of Hyndman, Pennsylvania.

Some of the derailed train cars contained substances classified as hazardous material under the HMTA. The substances included propane and molten sulfur.

# Train Derailment/Residential Evacuation: Federal Court Considers Applicability of Hazardous Materials Act Preemption Provision to Class Action (Cont.)

The Court found that, because the Plaintiff's allegations did not "deal[] with classifying and packaging hazardous materials. . ." nor "designing containers for the transportation of those materials," but, rather, with the Defendant's response to the derailment, the HMTA did not preempt the Plaintiff's claims.

# PERC/Dry Cleaners: Wisconsin Appellate Court Addresses Degree of Spill or Release Constituting Breach of Lease

The Court of Appeals of Wisconsin in a September 28th opinion addressed whether a tenant breached a commercial lease because of contamination originating from its dry cleaning operation. See *In Re the Writ of Restitution: RJR ML LLC. v. Keyhan Sheikholeslami, D/B/A Ognden Cleaners*, 2018 WL 4621179 (Wis. Ct. App. 2018).

RJR ML LLC, alleged that Keyhan Sheikholeslami, d/b/a Ognden Cleaners breached the commercial lease:

. . . by causing or permitting the release or spill of hazardous substances… and by failing to timely remediate such releases.

The hazardous substance at issue was perchloroethylene.

# PERC/Dry Cleaners: Wisconsin Appellate Court Addresses Degree of Spill or Release Constituting Breach of Lease (Cont.)

The Court concluded the lease contains plain and unambiguous language which:

1. Defines hazardous substance in a way that includes PERC;
2. Prohibits the Tenant from causing or permitting any hazardous substance to be spilled or released and the prohibition applies to any spill, not just high-volume spills;
3. Requires the Tenant to promptly take all investigatory and/or remedial action reasonably recommended for the cleanup of any contamination that was caused or materially contributed to by the Tenant; and
4. Provides the lease permits the Tenant to use hazardous substances for dry cleaning, but does not permit the spilling or releasing of them

# PERC/Dry Cleaners: Wisconsin Appellate Court Addresses Degree of Spill or Release Constituting Breach of Lease (Cont.)

Tenant argued that no breach had occurred, stating:

1. Under the lease, merely detectable levels found in the sludge do not constitute a spill or release of a hazardous substance.
2. To constitute a breach of the lease, a spill or release must have a component of damage, potential injury or liability
3. The determination of a breach was based on an incorrect interpretation of the lease as meaning "that the Tenant breaches the lease by not removing residue even if the Tenant did not cause the purported spill or release."

## CERCLA Liability: Federal Appellate Court Addresses Whether Current Owner Can Be Responsible for Pre-acquisition Cleanup Costs

The United States Court of Appeals for the Third Circuit addressed in an October 5th opinion a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") liability issue. See *Pa. Dep't of Envtl, Prot. v. Trainer Custom Chem., LLC*, 906 F.3d 85 (3rd Cir. 2018).

The question addressed was whether the owner of property could be liable under CERCLA or the Pennsylvania Hazardous Substances Sites Cleanup Act for environmental cleanup costs incurred prior to its acquisition.

Trainer Custom Chemical, LLC acquired a property known as the Stoney Creek Site after the Pennsylvania Department of Environmental Protection ("DEP") had incurred environmental cleanup costs at the Site.

## CERCLA Liability: Federal Appellate Court Addresses Whether Current Owner Can Be Responsible for Pre-acquisition Cleanup Costs (Cont.)

The Court found that Trainer is the owner of the Site. As a result, it was at a minimum liable for environmental response costs incurred after ownership. The Court also considered whether the meaning of "all costs" as stated in § 107(a) of CERCLA includes response costs incurred before Trainer acquired the Site.

The Court found that a current owner may be liable for all response costs, whether incurred before or after acquiring the property.

The term "all costs" does not distinguish between costs that were incurred before ownership and afterwards; therefore, Trainer was deemed liable under CERCLA and the HSCA for removal costs on the Site regardless of when the costs were incurred.

# CERCLA/Superfund Action: Federal Court Addresses Owner/Operator Issue

A United States District Court (Eastern District of California) addressed in a June 27th decision an issue involving the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") terms "Owner" and "Operator." See *City of West Sacramento et. al. v. R and L Business Management, et. al.,* No. 2:18-cv-900 WBS EFB.

The question presented in the context of a motion to dismiss was whether sufficient facts were pled to establish CERCLA direct or presumed ownership or operator liability on two individuals' own actions.

# CERCLA/Superfund Action: Federal Court Addresses Owner/Operator Issue (Cont.)

Defendants Sharon and Richard Leland were described by Plaintiffs as "individuals, former owners, operators, officers, directors, and/or shareholders of Capitol Plating, a metal plating business that operated at the property from 1961 to at least 1985, and current owners, officers, directors, and/or shareholders of R and L Business Management."

The Court granted the Defendants' motion to dismiss the CERCLA owner liability claim. It held that the Plaintiffs did not provide enough facts to establish they were owners. Simply establishing an individual is a shareholder in the company and owned the facility was stated to not constitute CERCLA ownership. The Court also granted Defendants' motion to dismiss the CERCLA operator liability claim. It concluded that insufficient facts were shown that the shareholders (i.e., Defendants/Lelands) were involved in directing or managing the facility

Note: Recent 8th Circuit case addressing "arranger" liability for sale of PCB contaminated building

# Landfill Lease Agreement: New Jersey Appellate Court Addresses Indemnity Provision

The Superior Court of New Jersey, Appellate Division addressed in a July 26th opinion the Town of Kearny, New Jersey's claim for contractual indemnification against The New Jersey Sports and Exposition Authority regarding remediation costs of a local landfill.

The property at issue was a landfill on land owned by both John P. Keegan and the Town of Kearny.

The landfill became non-operational and was left uncapped and leaked heavy metals and pollutants into nearby bodies of water.

# Landfill Lease Agreement: New Jersey Appellate Court Addresses Indemnity Provision (Cont.)

The Town of Kearny leased a landfill property to New Jersey Sports and Exposition Authority, formerly known as the New Jersey Meadowlands Commission which accepted sole financial responsibility for capping and remediating the landfill and surrounding bodies of water.

New Jersey Sports and Exposition Authority subsequently condemned Mr. Keegan's property and recovered nearly $900,000 in a cost-recovery action under the New Jersey Spill Compensation and Control Act.

Mr. Keegan filed for contribution from the Town of Kearny.

The Town filed a third-party complaint against the New Jersey Sports and Exposition Authority arguing that its lease agreement provided the Town would bear no expenses from the remediation plan, and that the New Jersey Sports and Exposition Authority would be completely financially responsible for the project.

# Landfill Lease Agreement: New Jersey Appellate Court Addresses Indemnity Provision (Cont.)

The Town of Kearny identified several provisions in the New Jersey Sports and Exposition Authority lease agreement that specified New Jersey Sports and Exposition Authority's acceptance of all financial responsibility and it would bear no cost.

None of the provisions used the term "indemnity," which is a contract law term requiring unambiguous language to ensure there is mutual assent. Indemnification agreements are interpreted in accordance with the general rules of contract interpretation.

The provisions the Town of Kearny identified were deemed ambiguous and were construed against the indemnitee.

# Joint Advisory on Designing Contracts for Processing of Municipal Recyclables: SWANA/National Waste & Recycling Association August 1st Update (cont.)

Components of the Advisory include:

- The Changing Waste Stream
- The Contracting Process

Establishing Contract Procurement Protocols
  - Expressions of Interest
  - Request for Qualifications
  - Request for Proposals
  - Tender
- Obtaining Initial Feedback
- Content of Bid Documents
  - Changes in Law
  - Labor Disturbances
  - Acts of God, etc.
- Prescribing Performance Specifications and Standards
  - Contract Documents
  - Fundamental Contract Provisions

# Guidance/Notices

# RCRA Guidance: July 19th U.S. Environmental Protection Agency Memorandum Addressing Automotive Airbag Inflators/Fully Assembled Airbag Modules

EPA issued a July 19th memorandum interpreting certain Resource Conservation and Recovery Act ("RCRA") regulations titled:

> *Regulatory Status of Automotive Airbag Inflators and Fully Assembled Airbag Modules ("Memorandum")*

The Institute of Scrap Recycling Industries had sought from EPA clarification of the regulatory status of undeployed automotive airbag modules and airbag inflators.

- Criteria identified for determining exclusion for states as hazardous waste.

The Memorandum addresses those issues, including those devices that have never been installed in a vehicle and those removed from vehicles.

Reminder that RCRA Compendium is source of interpretation and continues to be updated.

# Superfund/CERCLA: EPA Protection Agency Announces One-Year Anniversary Task Force Accomplishments

EPA issued a July 24th news release describing what it characterized as the “One-Year Anniversary Accomplishments.”

The news release also reviewed the federal agency’s plan for year two.

EPA commissioned a task force in 2017 to provide recommendations on how the agency could streamline and improve the Superfund program. A task force report had been issued on July 25, 2017, which included 42 recommendations.

# Superfund/CERCLA: EPA Protection Agency Announces One-Year Anniversary Task Force Accomplishments

Highlights of EPA's stated progress in carrying out the recommendations stated to include:

- Achieving Key Milestones at Sites on the Administrator's Emphasis List
- Moving More Sites Toward Deletion/Partial Deletion
- Improving Information on Human Exposure Status
- Promoting Redevelopment and Community Revitalization at Targeted Sites
- Developing Tools and a Process to Encourage Third-Party Investment
- Engaging with Partners and Stakeholders

# Superfund/CERCLA: EPA Protection Agency Announces One-Year Anniversary Task Force Accomplishments (Cont.)

EPA projects that it will complete implementation of the task force recommendations by 2019 which includes projects that over the next year it will:

- Continue to expedite cleanups and move sites towards deletion.
- Use adaptive management on a more structured and broader scale and formally implement adaptive management principles at select pilot sites by the end of calendar year 2018.
- Collaborate with our state partners through the Environmental Council of States, Association of State and Territorial Solid Waste Management Officials to complete a thorough evaluation of groundwater beneficial use policies with a focus on beneficial use determinations.

# Superfund/CERCLA: EPA Protection Agency Announces One-Year Anniversary Task Force Accomplishments (Cont.)

- Continue to reinvigorate responsible party cleanup and reuse by using best practices and modifying model enforcement language to reduce responsible party cleanup negotiation time frames and shorten potentially responsible party lead cleanups.
- Encourage private investment in the cleanup and reuse of contaminated sites by finalizing guidance and developing new model work agreements and comfort letters to create certainty and assist third parties in identifying investment opportunities at Superfund sites.
- Implement the Superfund Remedial Acquisition Framework to reduce cleanup costs, foster innovation, and increase efficiency.
- Continue to focus on stakeholder and partner engagement during all Superfund cleanup process phases, including improving risk communication at Superfund sites with long-term stewardship requirements.

# Solid Waste Environmental Excellence Protocol (SWEEP): Draft Municipal Standard Issued

The Solid Waste Environmental Excellence Protocol ("SWEEP") issued a December 14th document titled:

*The SWEEP Municipal Standard ("Municipal Standard")*

The Municipal Standard is characterized as evaluating the environmental, economic, and social aspects of delivering municipal solid waste activities.

The SWEEP describes itself as a market transformation standard targeting municipalities and waste management service providers to identify and reward leaders in Sustainable Materials Management.

SWEEP is modeled after the LEED standard for green buildings.

The Municipal Standard is composed of six performance categories which include:

- Sustainable Material Management Policy
- Waste Generation and Prevention
- Solid Waste Collection
- Post-Collection Recovery
- Post-Collection Disposal
- Innovation

# Solid Waste Environmental Excellence Protocol (SWEEP): Draft Municipal Standard Issued (Cont.)

Credit is provided in the performance categories for "specific measurable and verified actions." They are organized by what are described as key performance indicators, which include:

- Efficiency and Effectiveness
- Environmental Performance
- Economic Performance
- Public Participation
- Working Conditions and Social Impact

The draft standard was developed by SWEEP volunteer committees.

# Measuring Recycling: Solid Waste Association of North America Issues "Technical Policy"

The Solid Waste Association of North America announced a technical policy citing the need for entities to measure recycling progress and encourage the development of a consistent methodology.

The document is cited as:

T-6.4 SWANA Technical Policy (“Policy”)

The organization states that its position on this issue includes:

- Development of a formalized approach to measuring and communicating recycling measurements as part of a sustainable materials management program
- Such approach undertaken within an integrated solid waste management system
- A focus on measuring the amount and type of materials recycled (e.g. tons)
- Once the material being recycled is quantified, recognition there are multiple methods that can be applied to evaluate recycling
- No specific approach for determining methods or benefits is assumed

# Solid Waste Landfill Post-Closure Care: NWRA/SWANA Technical Policy/Position Paper

The National Waste & Recycling Association and Solid Waste Association of North America jointly issued two documents addressing closed Municipal Solid Waste landfills and the issue of post-closure care.

The two documents are:

- T-9.3 SWANA Technical Policy – Termination of Municipal Solid Waste Landfill Post-Closure Care Requirements
- Position Statement – Performance-Based Approaches to Evaluate Determination of Landfill Post-Closure Care Requirements

The documents are described as recommending a major shift in the process states use to determine when closed MSW landfills are ready to end PCC.

The Associations are requesting that the length of required post-closure care be determined on a site-specific basis, rather than set by regulation at a single pre-determined number of years for all closed MSW landfills in all 50 states.

# Miscellaneous

# ADEQ Elective Site Clean-Up Agreements

- Continuing ADEQ Brownfield type
- Encourage Reuse of potentially or contaminated property
- If agency stated issues delineated/quantified NFA
- Enforcement Covenants/Controls
- Risk-based Decisions
- Frequent Contaminants PCE, Petroleum

ADEQ/Shopping Center Owner 2018
ESCA

# Brownfields: U.S. Environmental Protection Agency Awards East Arkansas Planning and Development District $300,000 for Assessments

EPA announced in an April 25th news release that it had awarded $300,000 to the East Arkansas Planning and Development District("East District").

The $300,000 is targeted for Brownfields assessment grants.

Redevelopment can include any number of uses. The Houston Astros Minute Maid Park is the site of a former 38-acre Brownfield. It was redeveloped pursuant to the City of Houston's "Brownfield Redevelopment Program." The site was an abandoned intercity passenger terminal prior to its redevelopment.

The award to the East District is part of a $54.5 million that EPA distributed to 145 communities nationwide to assess and clean up underutilized properties.

# Hot Springs, Arkansas, Majestic Hotel Brownfield Site: Arkansas Department of Environmental Quality Announces Certificate of Completion/Ribbon Cutting

The Arkansas Department of Environmental Quality issued a Brownfield Certificate of Completion a City of Hot Springs, Arkansas, Brownfield which is the site of the former Majestic Hotel.

The City of Hot Springs acquired the five-acre site in September 2015. It had been condemned following a fire in 2014.

ADEQ states it provided assistance to the City of Hot Springs and enrolled it in the Arkansas Brownfield Program

# Manufacturing Pelletized Slag: Ohio Supreme Court Addresses Application of Use Tax

The Ohio Supreme Court in a May 31st opinion addressed the application of Ohio's use tax to an Ohio facility processing slag. See *Lafarge North America, Inc., v. Testa, Tax Commr.,* 2018 WL 2440300.

Slag is a by-product that separates from molten ore during steelmaking. The Court notes that once separated from the ore:

> . . . molten slag cools and solidifies into a stony substance. From there, it may be crushed into different sizes and used in construction applications, often as a base for roads.

The Ohio Department of Taxation assessed use tax, interest, and a penalty against Lafarge for purchases for fuel and repair parts for equipment used at the Facility to break up and transport the slag from a historical pile which is then sold for road construction.

# Manufacturing Pelletized Slag: Ohio Supreme Court Addresses Application of Use Tax (Cont.)

The Board of Tax Appeals concluded:

> Lafarge is simply moving raw material from a pre-production point of storage, not 'continuing' a manufacturing operation.

The Court further notes in review:

> "the evidence shows that the equipment is not merely facilitating the transportation of slag from 'initial storage' to the screening plant. It is undisputed that after separating slag from the mountain, the bulldozer drives over it, crushing it in the process. To be sure, this action allows the front-end loaders to pick up the slag for transport, but the evidence does not support the conclusion that that is the bulldozer's only purpose.

The Court remands for further review.

# PFOA/PFOS: New York State Drinking Water Quality Council Maximum Contaminant Levels Recommendations

The New York State Departments of Health and Environmental Conservation announced that the New York State Drinking Water Council issued recommendations regarding Maximum Contaminant Levels for PFOA and PFOS.

These man-made chemicals have been used in various industrial applications in consumer products such as:

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

Their properties include resistance to heat, water, and oil.

The Council recommended MCLs of 10 parts per trillion for PFOA and 10 parts per trillion for PFOS.

Federal legislation has been introduced to designate PFAS as CERCLA hazardous substances

# PFAS: New Mexico Environment Department Issues Notice of Violation to United States Air Force (Cannon Air Force Base)

The New Mexico Environment Department announced in a December 4th news release that it issued a Notice of Violation to the United States Air Force ("Air Force") regarding PFAS and Poly-Fluoroalkyl Substances.

NMED states that the Air Force failed to properly address groundwater contamination at Cannon Air Force Base near Clovis, New Mexico.

NMED states that for approximately 40 years:

> . . . Cannon Air Force Base used PFAS, a suite of hundreds of compounds, that was contained in aqueous film-forming firefighting foam (AFFF) used in training and actual firefighting events at the base. Use of PFAS in AFFF at Cannon Air Force Base has now ceased. However, PFAS remains at very high concentrations in groundwater both on and off the base

# Landfills/ Determination of the Presence of PFAS Substances: March 20th California State Water Resources Control Board Order

The California State Water Resources Control Board ("Board") issued a March 20 document entitled:

> *Order for the Determination of the Presence of PER- and Polyfluoroalkyl substances.*

See Order WQ 2019-0006-DWQ

The Order is directed at a list of California landfill facilities.

The Order states in part:

> Your site is identified in **Attachment 1** as a facility that has accepted, stored, or used materials that may contain per- and polyfluoroalkyl substances (PFAS). Therefore, you are required to submit the information in the **Attachment 2** to the appropriate Regional Water Quality Control Board (Regional Water Board) identified in the cover letter.

# Scrap Import Ban: Chinese Government Confirmation for 2019

China intends to implement "the next phase import prohibition beginning on December 31, 2018."

The import of the following scrap materials will be prohibited:

- Slags from iron and steel production: HS codes 2618.00.10.01, 2619.00.00.10, 2619.00.00.30
- Post-industrial plastic scrap (8 product lines): All HS codes under 3915
- Shredded auto parts: HS 7204.49.00.10
- Scrap metal and electrical appliances for ferrous recovery: HS 7204.49.00.20
- Scrap metal and electrical appliances (including small motors and wires) for copper recovery:
  HS 7404.00.00.10
- Scrap metal and electrical appliances (including small motors and wires) for aluminum recovery: HS 7602.00.00.10
- Vessels for shipbreaking: HS 8908.00.00.00

Solid wastes are also listed.