Solid and Hazardous Waste/Recycling Administrative/Judicial Developments: 2021 – 2022

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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 are identified:

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

Arkansas Medical Marijuana Rules/Waste Issues (Cont.)

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

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

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

Modernizing Public Notice for RCRA Hazardous Waste Permitting/Other Actions

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

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

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

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

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

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

ASTSWMO expressed support.

Non-Hazardous Secondary Material Standard: U.S. EPA Response to American Forest and Paper Association Petition

The United States Environmental Protection Agency published in the January 28th Federal Register a response to an American Forest and Paper Association petition to revise the National Hazardous Secondary Materials regulations. See 87 Fed. Reg. 4536.

Section 129 (a)(1)(D) of the Clean Air Act requires that EPA establish standards for commercial and industrial solid waste incinerators which burn solid waste.

The term solid waste is defined by Section 129(g)(6) of the Clean Air Act to provide that the term solid waste is established by EPA under RCRA.

The NHSM regulations provide the standards and procedures for identifying when non-hazardous secondary materials burned in combustion units constitute solid waste.

EPA is proposing to deny the requested amendments. Instead, EPA is proposing to change the definition of paper recycling residuals.

Proposes to set a numerical limit on the amount of non-fiber materials that may be included for the residuals to be considered a non-waste fuel.

Pyrolysis/Gasification Units – U.S. Environmental Protection Agency Advance Notice of Proposed Rulemaking

Section 129 – Clean Air Act

EPA published a September 8th Advance Notice of Proposed Rulemaking titled:

Potential Future Regulation Addressing Pyrolysis and Gasification Units

EPA is soliciting comments and data to assist the agency in considering potential changes to the Section 129 Clean Air Act regulations or in the alternative development of regulations pertaining to pyrolysis and gasification units undertaking the previously referenced activities.

The ANPRM was published in the Federal Register on September 8th at 86 Fed. Reg. 50296.

Pyrolysis/Gasification Units – U.S. Environmental Protection Agency Advance Notice of Proposed Rulemaking (cont.)

The United States Environmental Protection Agency stated it was seeking information to assist in the potential development of regulations for pyrolysis and gasification units used to convert solid or semi-solid feedstocks to useful products such as:

- Energy
- Fuels
- Chemical commodities

The solid or semi-solid feedstocks referenced include:

- Solid waste (e.g., municipal solid waste, commercial and industrial waste, hospital/medical/infectious waste, sewage sludge, other solid waste)
- Biomass
- Plastics
- Tires
- Organic contaminants in soils and oily sludges

Pyrolysis/Gasification Units – U.S. Environmental Protection Agency Advance Notice of Proposed Rulemaking (cont.)

The agency states it has received inquiries about Section 129 Clean Air Act regulations for solid waste incineration units and potential applicability to pyrolysis and gasification units for a number of process and feedstock types.

Such inquiries apparently led EPA to believe that there is:

> . . . considerable confusion in the regulated community regarding the applicability of CAA section 129 to pyrolysis and gasification units.

RCRA Listed Hazardous Waste/U019/U220: U.S. Environmental Protection Agency Proposal to Grant Delisting Petition for Kalama, Washington, Facility

EPA published a January 20th Federal Register notice proposing to grant a petition to exclude ("Delist") certain hazardous waste generated by a particular facility from a Resource Conservation and Recovery Act list of hazardous waste. See 87 Fed. Reg. 3053.

The materials being delisted are up to 3,500 cubic yards of U019 (benzene) and U220 (toluene) industrial wastewater biological solids per year from a Kalama, Washington, facility.

The facility treatment system is stated to produce biological solids. The biological solids are stated to be designated as U019 (benzene) and U220 (toluene).

RCRA Listed Hazardous Waste/U019/U220: U.S. Environmental Protection Agency Proposal to Grant Delisting Petition for Kalama, Washington, Facility (cont.)

To be delisted, the regulations require sufficient information to allow EPA to determine the waste does not meet any of the criteria under which it was listed as a hazardous waste.

The agency must also have a reasonable basis to believe that factors (including additional constituents other than those for which the waste was listed) could cause the waste to be hazardous waste, that such factors do not warrant retaining the waste as a hazardous waste.

Delisting petition process still occasionally used.

Addressed on a generator specific basis.

EPA RCRA Guidance Compendium

2021-2022 Additions

- Regulatory Options for addressing the temporary backlog of containerized hazardous waste needing incineration (addressing generator options facing accumulation timing issues)

- Alcohol-Based Sanitizers: U.S. Environmental Protection Agency Addresses Options for Repurposing/Recycling (pandemic related question addressing oversupply of sanitizers and potential disposal options for a bulk commercial chemical product)

- Applicability of RCRA Organic Emission Standards to Equipment and/or Closure Devices Subpart BB v. Subpart CC

- Land Disposal Restrictions – RCRA Permits/ Waste analysis Plan/Inspection Sampling

- Frequently asked questions about Large Quantity Generator Quick Reference Guides

Underground Storage Tank Releases: EPA Announces the Federal Agency and States Have Conducted More than 500,000 Cleanups

EPA issued a December 1st news release stating the federal agency and its state partners had:

> . . . Reached a milestone of cleaning up more than 500,000 petroleum releases from UST systems across the nation.

EPA characterizes these cleanups as meaning that:

> . . . roughly 90 percent of these releases no longer pose a threat to the public's health or our soil and groundwater.

Arkansas developed its own UST programs and therefore has been delegated this authority by EPA.

The State of Arkansas has at least 30 years of experience regulating USTs including supervising remediation of petroleum releases.

Underground Storage Tank Releases: EPA Announces the Federal Agency and States Have Conducted More than 500,000 Cleanups (cont.)

The federal agency further states that such cleanups "foster reuse and redevelopment, and provide community based economic revitalization."

It is noted that there are at least 61,981 UST releases remaining.

The news release includes a number of charts addressing information such as:

- Percentage in compliance with 2015 spill prevention requirements
- Percentage in compliance with 2015 overfill prevention requirements.
- Percentage in compliance with 2015 corrosion protection requirements
- Percentage in compliance with 2015 release detection requirements
- Percentage of UST facilities meeting the technical requirements in compliance with all TCR categories

Superfund/Initial List of Taxable Substances: Internal Revenue Service Issues Notice 2021-66

The Internal Revenue Service published Notice 2021-66 titled:

> *Superfund: Initial List of Taxable Substances; Registration; Procedural Rules; Request for Comments; Suspension of Notice 89-61 ("Notice 2021-66")*

Notice 2021-66 was published in response to the reinstatement of certain Hazardous Substance Superfund Trust Fund excise taxes on the production or import of listed chemicals.

The Trust Fund was originally funded in part by excise tax revenue generated primarily from excise taxes on:

1) Domestic crude oil and imported petroleum
2) 42 listed hazardous chemicals and metal compounds
3) Imported substances utilizing one or more of the hazardous chemicals in their manufacturing production

Superfund/Initial List of Taxable Substances: Internal Revenue Service Issues Notice 2021-66 (cont.)

This Superfund taxing authority expired in 1995.

The recently enacted Infrastructure Investment and Jobs Act reinstates the excise tax on the production or import of certain chemicals through December 31, 2031.

The domestic crude oil and imported petroleum excise taxes were not reinstated.

PFAS/PFOS: EPA Announces Comprehensive Strategy

Examples

- Potential designation as a CERCLA hazardous substance (Solid waste and wastewater trade associations arguing they are possible recipients) are seeking exemption from CERCLA liability
- SDWA drinking water standards consideration
- Establishing screening levels for five PFAS
- Toxics Release Inventory/Addition of certain PFAS
- Monitoring PFAS in NPDES permits

Title VI Civil Rights Act/Environmental Justice: Earthjustice January 20th Letter to the U.S. Environmental Protection Agency Alleging Violations by Louisiana Department of Environmental Quality/Department of Health

Earthjustice sent a January 20th letter to the United States Environmental Protection Agency alleging violations of Title VI of the Civil Rights Act of 1964 by the Louisiana Department of Environmental Quality and Louisiana Department of Health.

The letter alleges the two Louisiana agencies have subjected:

> . . . Black residents of St. John the Baptist Parish to disproportionate air pollution and related harms from various facilities, including ethylene oxide from various sources and chloroprene from a neoprene production facility.

Title VI prohibits entities receiving federal assistance from engaging in activities that subject individuals to discrimination on the basis of race, color, or national origin.

Title VI Civil Rights Act/Environmental Justice: Earthjustice January 20th Letter to the U.S. Environmental Protection Agency Alleging Violations by Louisiana Department of Environmental Quality/Department of Health (Cont.)

The Louisiana Department of Environmental Quality is alleged to have violated Title VI by:

1) failing to review the permit renewal applications submitted by the neoprene production facility (Denka Performance Elastomer LLC or "Denka") and to determine whether to renew and strengthen those permits;
2) failing to conduct the public notice and comment process required by Louisiana and federal law for permit renewal applications; and
3) failing to control hazardous air pollution from Denka and other air toxics sources as needed to protect St. John residents from disproportionate, adverse impacts from this pollution.

The complaint asks that the two Louisiana agencies be "brought into full compliance" and asks that specific actions be taken in regards to various permitting/enforcement activities.

Environmental Justice: U.S. Environmental Protection Agency Announces Acceptance of Administrative Complaint Addressing North Carolina Department of Environmental Quality Title VI Violation

The United States Environmental Protection Agency transmitted a January 13th letter to the Southern Environmental Law Center stating it was accepting for investigation an administrative complaint filed against the North Carolina Department of Environmental Quality. See EPA Complaint No. 05RNO-21-R4.

The complaint had alleged that DEQ discriminates against:

> . . . Black, Latino and Native American residents of Duplin and Sampson Counties on the basis of race and national origin in violation of Title VI of the Civil Rights Act of 1964, . . . and EPA's nondiscrimination regulation, at 40 C.F.R. Part 7, . . .

Environmental Justice: U.S. Environmental Protection Agency Announces Acceptance of Administrative Complaint Addressing North Carolina Department of Environmental Quality Title VI Violation (cont.)

The administrative complaint is stated to have specifically addressed DEQ's issuance of:

> . . . three (3) individual swine animal waste management system permits and one (1) certificate of coverage, that authorize the construction and operation of anaerobic digestion animal waste treatment systems to produce renewable energy.

EPA states it conducted a preliminary review of the administrative complaint to determine acceptance, rejection or referral to the appropriate federal agency.

Determined that the complaint met the jurisdictional requirements for acceptance.

Environmental Justice: U.S. Environmental Protection Agency Announces Acceptance of Administrative Complaint Addressing North Carolina Department of Environmental Quality Title VI Violation (cont.)

EPA states it will investigate the following issues:

1) Whether NC DEQ discriminated on the basis of race and national origin against the residents of Duplin and Sampson Counties in violation of Title VI of the Civil Rights Act of 1964 and EPA's implementing regulation at 40 CFR Part 7 by issuing three (3) individual swine animal waste management system permits and one (1) certificate of coverage that authorize the construction and operation of anaerobic digestion animal waste treatment systems to produce renewable energy; and

Environmental Justice: U.S. Environmental Protection Agency Announces Acceptance of Administrative Complaint Addressing North Carolina Department of Environmental Quality Title VI Violation (cont.)

2. Whether NC DEQ has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to the NC DEQ's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether the NC DEQ has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.

Environmental Criminal Enforcement: Public Employees for Environmental Responsibility Analysis Addresses Referrals/Prosecution/Conviction Trends

The Public Employees for Environmental Responsibility issued a January 28th news release analyzing environmental criminal enforcement thus far under the Biden Administration.

Federal and state environmental statutes usually (with a couple of exceptions) impose criminal liability for "knowing" violations.

A particular focus of the study was the number of United States Environmental Protection Agency ("EPA") referrals for prosecution in FY 2021.

PEER describes low criminal environmental enforcement levels under the Trump Administration that are:

> . . . largely unchanged so far under Biden.

Environmental Criminal Enforcement: Public Employees for Environmental Responsibility Analysis Addresses Referrals/Prosecution/Conviction Trends (cont.)

Cited as an example is its concern that EPA referrals for prosecution in FY 2021 fell by one-third from the prior year.

In considering the potential cause for the reduction in case referrals, the focus is on the number of EPA Criminal Investigation Division investigators, who currently total 161.

Contrasted with 175 agents that were employed in 2012 and 261 in 1998.

Environmental Criminal Enforcement: Recent Examples

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

Environmental Criminal Enforcement: Recent Examples (cont.)

- Virginia distillery owner pleads guilty to violating Virginia water pollution control law by dumping 40,000 gallons of industrial waste into a stream
- Louisiana company pleads guilty to tampering with diesel truck emission control monitoring devices
- Montana plant pleads guilty to Clean Air Act violations (negligent endangerment) related to exposure of employees to arsenic (some exceptions to “knowing” requirements)

Environmental Civil Enforcement: Recent RCRA Examples

- Ankeny, Iowa, Laboratory
- Dothan, Alabama, Aircraft Repair Facility
- Story Brook, New York, Pathology Clinic
- Chattanooga, Tennessee, Aircraft Maintenance Facility
- California Chain Retailer
- Warren, Ohio, Paint Coatings Manufacturer
- Bristol, Pennsylvania, Flexible Packaging Manufacturer
- Pulaski County, Arkansas, Blender/Distributor
- Alaska, Coal-Fired Power Plant
- Arkansas Power Generation Company (UIC/Septic) (used Arkansas voluntary disclosure policy)
- Artesia, Mississippi, Cement Plant
- Alaskan U.S. Air Force Base
- New York, New York, Dermatology Clinic
- Baltimore, Maryland, Treatment/Storage Facility

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

- The Region 6 Office of the United States Environmental Protection Agency issued an August 3rd news release describing a settlement regarding alleged hazardous waste violations at what the agency denominates the “US technology Corporation” site in Fort Smith, Arkansas.

- EPA states that the settlement alleges:

  > . . . several companies generated hazardous waste that was proposed for recycling but was instead stored by the owner and operator of UST without a Resource Conservation and Recovery Act (RCRA) permit.

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

- An investigation of the site in 2018 is stated to have determined that the UST facility included a warehouse containing an estimated 10,000 drums and 1,200 super sacks of waste containing:

  > . . . a blend of spent, blast, and related material that when recycled is used to make concrete products known as SBM, totaling about 6,854,400 pounds of material.

- Ten companies, out of the dozens that are stated to have hazardous waste located at the site, agreed to work with EPA to remove quantities of waste beyond their allocated amounts to prevent potential environmental impacts.

Superfund/CERCLA Release Reporting Enforcement

Reminder

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

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

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

Superfund/CERCLA Release Reporting Enforcement (cont.)

Greenwood was in charge of a facility (i.e., a truck) located on Interstate 71 in Bowersville, Ohio ("Facility").

The Facility is stated to consist of a storage container, motor vehicle, rolling stock, or any site or area where a hazardous substance has been deposited, stored, placed, or otherwise come to be located.

Greenwood's truck is stated to have overturned and released approximately 50 gallons of trichloroethylene on September 1, 2020, at or about 11:20 a.m. which spilled from a 55-gallon drum (i.e., the release).

The release included 416.17 pounds of trichloroethylene spilled, leaked, poured, discharged, or escaped into the land surface or subsurface strata, or ambient air.

Superfund/CERCLA Release Reporting Enforcement (cont.)

The release is stated to have exceeded 100 pounds in a 24-hour period therefore constituting a release as that term is defined under Section 101(22) of CERCLA.

Greenwood is stated to have had knowledge of the release on September 1, 2020, at approximately 11:20 a.m. The company is stated to have notified the National Response Center of the release on September 1, 2020, at 5:47 p.m.

As a result, it is alleged that Greenwood did not immediately notify the National Response Center as soon as it had knowledge of the release.

Such alleged failure is stated to be a violation of Section 103(a) of CERCLA.

RCRA Cost Recovery Action/Underground Storage Tank: Federal Court Addresses Scope of the Term Owner

A United States District Court (N.D. California) addressed in a December 16th opinion issues arising out of a railroad's lawsuit to recover remediation costs pursuant to the Resource Conservation and Recovery Act related to a former lessee's underground storage tank release. See Union Pacific Railroad Company v. Hill, 2021 WL 5964595.

Two of the questions the Court considered included:

1) Does lack of present ownership of a UST negate a cause of action pursuant to RCRA (No); and

2) Does voluntary participation in a self-funded state remediation program preclude a defendant from being concurrently sued under the RCRA statute (No)?

RCRA Cost Recovery Action/Underground Storage Tank: Federal Court Addresses Scope of the Term Owner (cont.)

The Court expressed its belief that Congress intended to impose UST regulatory responsibility on past tank owners in certain circumstances, not just present owners.

Since Hill admitted to using the UST on or after November 8, 1984, the Court held Hill to be an owner within the meaning of the statute.

The Court also concluded that ownership status is not controlled by the removal of a UST from the property.

The Court concluded that remedial activities do not necessarily preclude a simultaneous federal suit.

Remedial action alone was deemed to not always moot the endangerment caused by a defendant's actions.

Orphaned Oil and Gas Wells/Infrastructure Law: U.S. Dept. of Interior Announces Availability of $1.15 Billion in State Funding

The United States Department of Interior announced that $1.15 billion is available to the states from the recently enacted Infrastructure Law for remediating orphaned oil and gas wells.

DOI announcement references the availability of $26,448,000 for the State of Arkansas for Phase I eligibility.

DOI states nearly every state with documented orphaned wells submitted a Notice of Intent indicating interest in applying for a formula grant to finance the closure and remediation of orphaned wells and well sites.

Orphaned Oil and Gas Wells/Infrastructure Law: U.S. Dept. of Interior Announces Availability of $1.15 Billion in State Funding (cont.)

Allocation of funds are stated to have been determined using:

- Data provided by states from the submitted Notice of Intents
- Job losses in each state from March 2020 through November 2021
- Number of documented orphaned oil and gas wells in each state
- Estimated cost of cleaning up orphaned wells in each state

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

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

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

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

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

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

White County, Arkansas: Arkansas Department of Energy and Environment - Division of Environmental Quality and Ampler Development LLC Enter into Elective Site Cleanup Agreement

Arkansas Brownfield/ESCA Program

The Arkansas Department of Energy and Environment – Division of Environmental Quality and Ampler Development LLC entered into a November 17th Electric Site Cleanup Agreement. See LIS No. 21-118.

The ESCA addresses a facility located in Searcy, Arkansas

DEQ describes an ESCA as a means to address historic contamination on a site without penalty and with known objectives.

White County, Arkansas: Arkansas Department of Energy and Environment - Division of Environmental Quality and Ampler Development LLC Enter into Elective Site Cleanup Agreement (cont.)

A Burger King restaurant is stated to have been constructed on the Site.

Ampler is stated to have provided its consultant a Phase I Site Environmental Assessment which identified recognized Environmental Conditions associated with the Site.

A Limited Phase II ESA was completed at the Site.

Such Phase II is stated to have detected volatile organic compounds and Total Petroleum Hydrocarbons-Gasoline Range Organics.

Ampler submitted a request to DEQ for entrance into an ESCA seeking environmental regulatory closure for activities to the Site's historical operations.

The ESCA provides sequential tasks for Ampler to undertake to obtain a no further action letter.

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

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

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

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

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

Milro was undertaking remediation after being retained by the Plaintiffs.

State Farm was paying for Milro's services.

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

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

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

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

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

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

PFOA/PFOS Litigation - Insurance Coverage: New York Appellate Court Addresses Whether Policies Provide a Duty to Defend

The New York Supreme Court, Appellate Division addressed in a January 6th decision whether two insurance companies had a duty to defend an insured for damages related to the release of certain chemicals. See Tonoga, Inc. v. New Hampshire Insurance Company, et al., 2022 WL 52903.

The relevant insurance policies had pollution exclusion provisions.

PFOA and/or PFOS concentrations were subsequently discovered in Petersburg's municipal water supply exceeding advisory levels.

PFOA and/or PFOS were also identified in leachates from a municipal landfill.

Note landfills/wastewater will be scrutinized because they inevitably accept materials with PFAS.

PFOA/PFOS Litigation - Insurance Coverage: New York Appellate Court Addresses Whether Policies Provide a Duty to Defend (cont.)

TI entered into a Consent Agreement with DEC that required the company to assist in certain remedial measures.

A number of lawsuits were filed against TI alleging it negligently allowed PFOA and/or PFOS to pollute local water supplies, air and soil.

The Plaintiffs in the actions alleged bodily injury and property damage.

The insurance policies excluded coverage for bodily injury and property damage caused by pollution.

PFOA/PFOS Litigation - Insurance Coverage: New York Appellate Court Addresses Whether Policies Provide a Duty to Defend (cont.)

The Court concludes that whether a substance is unambiguously an irritant, contaminant or pollutant within the meaning of pollution exclusion is situational.

Holds that under the TI situational facts that PFOA and PFOS are pollutants within the meaning of the exclusions.

Some of the facts cited in support of this proposition include:

- Byproducts and waste materials were discharged into the environment as part of TI's routine processes
- Fabrics were soaked in solutions containing PFOA and/or PFOS
- Ovens discharged vapor through Facility smokestacks
- TI employees are alleged to have poured the PFOA and/or PFOS down floor drains and sinks
- TI employees are alleged to have routinely transported waste containing PFOA and/or PFOS to the municipal landfield

Wastewater Pond Closure/Insurance Coverage: Federal Appellate Court Addresses Claim Notice Issue

The United States Court of Appeals for the Sixth Circuit addressed in a December 14th Opinion whether insurance coverage was properly denied because of the failure of the policyholder to notify the insurance company “as soon as practicable”.

Coverage was sought for costs associated with the closure of wastewater ponds.

Canton Drop Forge manufactures metal parts for the energy, aerospace, and transportation industries.

Oil accumulated in its wastewater ponds.

Wastewater Pond Closure/Insurance Coverage: Federal Appellate Court Addresses Claim Notice Issue (cont.)

In 2013 EPA formally notified Canton that its ponds violated state and federal regulations for two reasons:

1) The ponds constituted surface impoundments of hazardous waste and lacked a permit
2) Failure to determine whether the used oil on the bottom and sides of the ponds constituted hazardous waste

Canton sent a letter to Travelers Casualty & Surety Company in November 2016 seeking insurance coverage for the previously referenced closure costs.

Travelers denied the request on several bases which included failure to provide timely notice of the claims.

Wastewater Pond Closure/Insurance Coverage: Federal Appellate Court Addresses Claim Notice Issue (cont.)

The Court notes that the terms of the primary insurance policy required Canton to give notice of an occurrence affecting coverage "as soon as practicable."

Late notice is stated to potentially prejudice an insurer if they:

> . . . lose options to protect their interests, "leaving them to deal with decisions made by the insured."

The Court concludes that Canton failed to give timely notice.

Why:

- EPA's request that the ponds be closed in 2012
- EPA and Ohio's order that the ponds be closed in 2014

The Court notes that Travelers was not notified until Canton had already negotiated its liabilities with EPA and Ohio and spent over $5,000,000.

Nuisance/RICO: Landowners File U.S. District Court Action Against Oklahoma Licensed Marijuana Cultivation Facility

Keith and Stephanie Grant filed a Complaint in the United States District Court alleging causes of action involving nuisance and violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") by an Oklahoma marijuana cultivation facility.

The Complaint alleges that the Oklahoma licensed marijuana cultivation facility (referenced as Flying Bud Farms, LLC) is adjacent to the Plaintiffs' property/residence.

The marijuana grow operation is alleged to be approximately 50 feet from the Plaintiffs' property line.

Nuisance/RICO: Landowners File U.S. District Court Action Against Oklahoma Licensed Marijuana Cultivation Facility (cont.)

The Complaint alleges that the cultivation Facility causes:

- Odor that can be detected by the Plaintiffs and has caused allergy symptoms
- Noise from industrial fans and construction equipment
- Flooding from alteration of a flood plain
- Illumination at night by industrial lights shining into Plaintiffs' residence
- Increase in traffic

Nuisance/RICO: Landowners File U.S. District Court Action Against Oklahoma Licensed Marijuana Cultivation Facility (cont.)

As a result of these alleged activities, the Complaint alleges that the cultivation Facility is a nuisance.

Plaintiffs' Complaint recognizes that Oklahoma provides licenses for the legal cultivation of marijuana.

Plaintiffs allege that cultivation is still illegal under federal law because marijuana is a controlled substance under the Controlled Substances Act.

Allege that the manufacture, distribution and sale of this substance is racketeering activity under RICO.

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

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

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

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

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

Many flow control disputes have been addressed by the courts.

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

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

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

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

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

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

The Woolworth Road Landfill is owned by Shreveport.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Beneficial uses include:

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

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

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

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

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

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

Consequently, such containers are not eligible for CRV redemption.

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

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

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

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

Arkansas Recycling Tax Credits: Reminder

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

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