


**Arkansas Environmental Federation's
52nd Annual Convention and Trade Show
October 17, 2019**

**Recycling: Impacts on State,
Changing Recycling in General
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Source of information that often addresses issues relevant to solid/hazardous waste recycling issues:

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

Three posts five days a week

Discussion will address:

- A variety of federal and Arkansas issues directly or indirectly related to recycling solid or hazardous waste

2019 Institute of Scrap Recycling Industries Economic Impact Study Addressing Arkansas (and other states)

Importance of Recycling?

- The Institute of Scrap Recycling Industries issued a report titled:

2019 – Economic Impact Study, U.S.-Based Scrap Recycling Industry

- The report includes state-specific data (including Arkansas) in regards to the impact of the scrap recycling industry in terms of jobs, wages, and output.

2019 Institute of Scrap Recycling Industries Economic Impact Study Addressing Arkansas (and other states) (cont.)

Arkansas, jobs created include:

- Direct - 1,252
- Supplier - 1,198
- Induced - 1,181

Economic Impact for Arkansas is:

- Direct - \$262,580,300
- Supplier - \$247,919,300
- Induced - \$197,532,300

Scrap Import Ban: Chinese Government Confirmation for 2019

Challenges for Recycling – Reduction of Demand from a Key International Consumer

Import prohibition began on December 31, 2018.

The import of the following scrap materials are 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.

Scrap Import Ban: Chinese Government Confirmation for 2019 (cont.)

- A significant percentage of U.S. scrap exports to China (approximately 5.6 billion) has been affected
- Tons of recyclable materials in the United States are being stockpiled or sent to landfills because of this development
- The diversion of scrap materials involving the countries of Indonesia, Malaysia, Thailand, and Vietnam is becoming more important.
- Risks associated with these countries include copycat restrictions based on the Chinese measures. (An example cited is Thailand's import ban through 2021 on plastics and electronics.)

Scrap Import Ban: Chinese Government Confirmation for 2019 (cont.)

Contaminant thresholds for certain scrap materials are stated to include:

- Smelt Slag 0.5
- Wood 0.5
- Ferrous 0.5
- Nonferrous 1.0
- Electric Motors 0.5
- Wires and Cables 0.5
- Metal and Appliances 0.5
- Vessels 0.05
- Plastic 0.5
- Autos 0.3

This can amount to a ban in practice.

Recyclables – Changing Markets: National Waste and Recycling Association Issue Brief

Plastics and Paper

- The National Waste & Recycling Association issued a February 2019 Issue Brief titled:

Recyclables: Changing Markets

- In 2016, approximately 41% of paper recovered in North America was exported with about 25% going to Chinese mills
- 20% of post-consumer bottles/33% of non-bottle rigid plastics were exported in 2015
- The European Union exports over 95% of its plastic to China
- China consumed over 50% of the world's recycled paper and plastic in 2016
- While other countries are possible outlets for recyclable materials, they have become overwhelmed by the quantity of materials and imposed their own restrictions.

Solar Panel Recycling: Northeast Recycling Council/GreenMatch Post

The types of materials generated for potential recycling is evolving.

Example – Solar Panels

- The Northeast Recycling Council republished a GreenMatch post titled:

What Happens to PV Panels When Their Life Cycle Ends

- The Northeast Recycling Council post addresses what it characterizes as opportunities for solar panel recycling.
- Concern is expressed from a sustainability standpoint in regards to the end of the life cycle of photovoltaic solar panels.

Solar Panel Recycling: Northeast Recycling Council/GreenMatch Post (cont.)

- The Post includes an infographic that explores the route for recycling PV solar panels.
- Example - four million tons of PV have been installed in Europe and 43,500 tons of PV waste were generated by 2017
- Projected - 60 million tons of PV waste will be generated by 2050.

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

Contamination Limit/Recyclables: MRF Operator Lawsuit Alleging Connecticut Authority Violation of Sorting/Marketing Agreement

The reduction in demand for recyclables has placed pressure on facilities intaking the material to limit contaminants (affect value, ability to recycle, etc.)

Example

- FCR, LLC filed a May 28th Complaint in Superior Court (Judicial District of Hartford, Conn.) alleging that Materials Innovation and Recycling Authority violated a Recycling Facility Operations and Maintenance Agreement.
- The alleged violations by MIRA include failure to prevent excessive levels of contamination in incoming recyclables.
- This is a term or condition typically addressed in these agreements.

Contamination Limit/Recyclables: MRF Operator Lawsuit (cont.)

- Complaint states that MIRA is a Connecticut public instrumentality which operates the Connecticut Solid Waste Management System. The system processes single-stream recyclables for approximately 70 municipalities throughout the State of Connecticut.
- Further notes that:
 - . . . As part of that system, municipalities' single-stream recyclables are delivered to a MIRA-owned recycling facility located at 211 Murphy Road in Hartford, Connecticut (the "Recycling Facility"). The Recycling Facility sorts and screens incoming recyclables into different categories of recyclables, such as mixed paper, PET plastics, and aluminum cans. These sorted recyclables are then sold in bulk to specialized processing facilities throughout the United States and abroad, where they are turned into reusable raw materials.

Contamination Limit/Recyclables: MRF Operator Lawsuit (cont.)

FCR alleges that MIRA's predecessor entered into an Agreement with the company to operate and maintain the Recycling Facility on a day-to-day basis. The Agreement is alleged to have included terms that addressed definitions of the categories of recyclables FCR must accept and process. Further, it is stated that MIRA agreed that FCR would not need to process loads of recyclables that were contaminated, which were defined as:

. . . loads that consisted of more than five percent unrecoverable materials, or that originated from more than one municipality.

Such loads were to be rejected and MIRA was required to enforce terms of its municipal service agreements with municipalities to ensure they delivered loads to the Recycling Facility that complied with the Agreement's terms

Example of market pressure which is forcing scrutiny in the drafting and litigating of these agreements

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: APC&E Commission ALJ Recommended Decision

Arkansas Issues

- Arkansas Pollution Control and Ecology Commission (“Commission”) Administrative Law Judge (“ALJ”) Charles Moulton issued a Recommended Decision (“RD”) in the proceeding styled In the Matter of Carroll County Solid Waste Authority. See Docket No. 19-001-MISC (Order No. 7).
- The RD addresses the Carroll County Solid Waste Authority (“Authority”) Petition to the Commission to be designated The Carroll County Solid Waste District.
- The Petition was 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.
- Authority is currently a part of the Ozark Mountain Regional Solid Waste Management District (“District”).

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: APC&E Commission ALJ Recommended Decision (cont.)

- 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.
- Act 870 of 1989, codified as Ark. Ann. 8-6-701, et seq., established the original eight regional solid waste planning districts.
- The Commission, through the previously referenced statutory authority, has since granted a number of additional regional solid waste management districts.
- Arkansas currently has 18 regional solid waste management districts.
- Regional solid waste management districts are intended to facilitate local governments in planning and overseeing municipal solid waste management programs and services.
- Also administer recycling grants and waste tire management programs

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: APC&E Commission ALJ Recommended Decision (cont.)

- The Commission approval of a regional solid waste management district must be undertaken pursuant to rules promulgated by that body.
- Counties and municipalities included in the new regional solid waste management district shall cease to be members of any other district.
- Subsequent to the Authority's submission of the Petition to the Commission, the Receiver for the District filed a Petition to Intervene in the proceedings.
- The Receiver for the District argued that the departure of the Authority would negatively impact the financial condition of the District.
- Argued that the Authority should not be permitted to withdraw from the District.

Carroll County Solid Waste Authority Request to Become an Arkansas Regional Solid Waste District: APC&E Commission ALJ Recommended Decision (cont.)

The ALJ held a Hearing and, after hearing witnesses and arguments, and reviewing exhibits issued the RD which includes both Findings of Fact and Conclusions of Law.

The ALJ found that the Authority met the relevant criteria to separate from the District. This included:

- Population exceeds 25,000
- Has a County Sanitation Authority meeting the requirements of Ark. Code Ann. § 14-223-104
- Has the necessary program, assets, and personnel to run a model Solid Waste Management District

Arkansas Pollution Control and Ecology Commission

Regulation 16: Arkansas Recycling Tax Credit Program

- Arkansas has for a number of years provided eligible facilities establishing or expanding processes that utilize recyclables a tax credit on certain capital cost.
- Eligibility is dependent upon certain criteria such as utilization of certain percentages of solid waste and post-consumer waste.
- ADEQ operates this program in conjunction with the Department of Finance and Administration.
- Regulation 16 promulgated to implement the program.

Arkansas Department of Environmental Quality

- The Tax Credit Program was created by the Arkansas General Assembly through Act 654 of 1993.
- Facilities establishing or expanding processes that utilize recyclables are potentially eligible for 30% tax credit on certain capital costs.
- The tax credit has been very beneficial to manufacturing and processing facilities that have substituted scrap materials or recyclables in lieu of virgin feedstocks.
- An unused tax credit may be carried over for a certain number of years, following the taxable year that the credit originated.

Definition of Solid Waste/Resource Conservation and Recovery Act: D.C. Circuit Court of Appeals 2019 Decision

- Hazardous wastes are subject to a variety of RCRA Subtitle C generation, transportation, treatment, storage, or disposal requirements.
- Materials outside the scope of the term are not regulated as RCRA hazardous wastes (i.e., a material must first be “solid waste” before it can potentially constitute a “hazardous waste”).
- Significant incentive for facilities to fit within the available exceptions to the term “solid waste.”
- The definition of solid waste is a key RCRA jurisdictional term. The solid waste definition includes:
 - . . . any garbage or refuse, sludge from a wastewater treatment plant, water supply treatment plant, or air pollution control facility and other discarded material resulting from industrial, commercial, mining, and agricultural operations and from community activities (emphasis added).

Definition of Solid Waste/Resource Conservation and Recovery Act: D.C. Circuit Court of Appeals 2019 Decision (cont.)

- Since the original enactment of the RCRA Subtitle C regulations EPA, industry, environmental groups, etc., have argued in both the courts and rulemakings as to the appropriate scope of materials that should be encompassed by the term solid waste.
- EPA has struggled to draw a line between what constitutes a discarded material (in) and what is a useful product (not discarded – out).
- Industry groups have argued that EPA's interpretation of the definition improperly encompasses certain reuse of materials while environmental groups have asserted that the agency permits activities that constitute sham recycling.

Definition of Solid Waste/Resource Conservation and Recovery Act: D.C. Circuit Court of Appeals 2019 Decision (cont.)

- U.S. Court of Appeals for the D.C. Circuit on July 2, 2019, issued a decision upholding the transfer-based exemption for hazardous waste under RCRA's definition of solid waste regulations. *California Communities Against Toxics et al., v. EPA*, D.C. Cir. Case No. 18-1163.

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

RCRA issues, both guidance and regulatory, affect reuse and recycling

Example -

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

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.

ADEQ consults EPA RCRA guidance.

Solvent-Contaminated Wipes Exclusion/RCRA Guidance: EPA Addresses Application of Recycling Provisions

- EPA issued a June 11th interpretive letter addressing the RCRA solvent-contaminated wipes exclusions found at 40 C.F.R. 261.4(a)(26) and 40 C.F.R. 261.4(b)(18).
- EPA addressed whether the Exclusions preclude a RCRA generator from using other RCRA recycling provisions such as:
 - Generator-controlled exclusion at 40 C.F.R. 261.4(a)(23)
 - Recyclable material requirements at 40 C.F.R. 261.6

Solvent-Contaminated Wipes Exclusion/RCRA Guidance: EPA Addresses Application of Recycling Provisions (cont.)

- Second, EPA states that the generator-controlled Exclusion at 40 C.F.R. 261.4(a)(23):
 - . . . excludes certain hazardous secondary materials from the definition of solid waste if they are generated and reclaimed under the control of the same person.

Solvent-Contaminated Wipes Exclusion/RCRA Guidance: EPA Addresses Application of Recycling Provisions (cont.)

- The Exclusion is deemed to potentially apply to the described scenario if the generator of the wipes meets the following conditions:

Conditions that the generator would need to meet under the generator-controlled exclusion can be found at 40 CFR 261.4(a)(23) and include, but are not limited to the following:

- The hazardous secondary material must be generated and reclaimed at the generating facility;
- The hazardous secondary material must be contained as defined in 40 CFR 260.10 (i.e., in a unit that is in good condition with no leaks or other continuing or intermittent unpermitted releases, among other things);
- The hazardous secondary material must not be speculatively accumulated, as defined in 40 CFR 261.1(c)(8);
- Notification is provided as required under 40 CFR 260.42;

Solvent-Contaminated Wipes Exclusion/RCRA Guidance: EPA Addresses Application of Recycling Provisions (cont.)

- The hazardous secondary material is not otherwise subject to material-specific management conditions under 40 CFR 261.4(a) when reclaimed;
- Persons performing the recycling of hazardous secondary materials under this exclusion must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all three factors in 40 CFR 260.43(a) and how the factor in 40 CFR 260.43(b) was considered. Documentation must be maintained for three years after the recycling operation has ceased; and
- The emergency preparedness and response requirements found in subpart M of 40 CFR part 261 must be met.

Solvent-Contaminated Wipes Exclusion/RCRA Guidance: EPA Addresses Application of Recycling Provisions (cont.)

Third, EPA states that characteristically hazardous wipes that have had the solvent removed by centrifuge would not need to be managed as hazardous secondary materials when they no longer exhibit a hazardous waste characteristic.

Finally, the federal agency states that the Exclusions were:

. . . developed to account for two, and management scenarios:
“reusable” solvent-contaminated wipes that are typically sent for laundering and then returned to the facility to be reused in their processes and “disposable” solvent-contaminated wipes that are sent for disposal to a landfill or combustor.

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.

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.

Example of intersection of tax and environmental law

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.

Electronics Recycling: U.S. Attorney (Western District of Washington) Announces Sentencing of Individuals for Alleged Wire Fraud Conspiracy

- The Western District of Washington United States Attorney's Office issued an April 23rd news release announcing two individuals had been sentenced in U.S. District Court in Seattle to 28 months in prison for conspiracy to commit wire fraud.
- The U.S. Attorney states that Craig Lorch and Jeff Zirkle are the owners and Chief Executive Officers of Total Reclaim which is described as the Northwest's largest recycler of electronic waste.

Electronics Recycling: U.S. Attorney (Western District of Washington) Announces Sentencing of Individuals for Alleged Wire Fraud Conspiracy (cont.)

- The individuals are stated to have committed through Total Reclaim to recycle safely electronic products such as flat screen monitors. The news release further states in part that:
 - . . . In marketing Total Reclaim's services, Lorch and Zirkle warned that the products contained hazardous materials that can cause serious health conditions if processed in unsafe conditions such as those that exist in developing countries in Asia. Lorch and Zirkle promised customers that Total Reclaim with not export electronic waste to developing countries. But, in fact, the defendant secretly caused over 8 million pounds of mercury-containing flat screen monitors to be exported to Hong Kong, where they were demolished in an environmentally unsafe manner.
- Total Reclaim is described as formerly the biggest participant in "E-Cycle Washington."

Arkansas Medical Marijuana Rules/Waste Issues

Two of the issues relevant to the solid/hazardous waste /recycling 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

- 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.