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Environmental Law Section Seminar Presentation
Federal and State Waste Law Update

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The Trump Effect

1/30/17 Executive Order 13771 “Reducing Regulation and Controlling Regulatory Costs”

1. Requires termination of 2 regulations for every “significant” new regulation.
2. Mandates that the net cost (to industry) of a new federal regulation must be zero dollars.
3. Some exceptions allowed.

RESULT: very difficult and timely to promulgate new regulations.

Termination and promulgation require (i) public notice and comment (the APA), and (ii) cost projections and calculations, for all 3 regulations

RCRA and the Clean Water Act

Ecological Rights Foundation v. Pacific Gas and Electric Company, 874 F.3d 1083 (9th Cir. 2017)

- RCRA suit regarding PG&E's discharge of chemicals via stormwater; no NPDES permit was required. *RCRA's "anti-duplication" provision does not preclude a RCRA citizen suit for imminent and substantial endangerment.*
- Even though EPA has the authority to regulate the discharge under the CWA, it has not yet passed regulations for this specific type of activities, so no CWA violation, no inconsistency with RCRA.

RCRA Citizen Suits

Estate of Goldberg ex rel. Rubin v. Gross-Jewett Co., 738 Fed. App'x 897 (9th Cir. 2018)

- 9th circuit held that although it might be upheld on remand, the *equitable defense* of laches to a RCRA citizen suit *should be evaluated differently* than in other contexts because of the public interest and policy at play.

City of Imperial Beach v. International Boundary and Water Commission, 2018 WL 6504081 (S.D. Cal. Dec. 11, 2018)

- *Notice of Intent to Sue was defective* because it did not notify the Defendant that Plaintiff would claim that waste was dispersed by wind, only by water discharge.

Storage

United States v. El-Sherif, 2018 WL 3585284 (D. Kan. July 26, 2018)

Chemicals that remained unused onsite in a lab, some for 10 years or more, were “abandoned”, knowingly stored without a permit: Criminal Liability

- Not stored per good lab standards or instructions
- Past expiration date
- Low market value, tax returns alleged “no assets”
- Radiation contamination > lost license to operate

BUT continuing intent to restart business

Disposal

Center for Biological Diversity (CBD) V. USFS, No. 17-15790 **(9th Cir. May 30, 2019)**

- Allegation that the US Forest Service disposed of hazardous waste through spent lead ammunition used by hunters in a national forest, contributing to the endangerment of the environment by allowing the use of lead ammunition on its property.
- The Circuit Court reinstated RCRA citizen suit, finding the issue to be “*whether owning or managing land on which disposal of solid waste by third parties is ongoing, known and unabated can be a sufficiently active role to permit contributor liability.*”

Transportation

Electronic Manifest User Fee Final Rule, 83 FR 420 **(January 3, 2018), effective June 30, 2018.**

- Fees owed by the Receiving Facility (TSDF) only (“billable event”)
- TSDF also responsible for Returned, Rejected shipments
- Does not include Export shipments (yet)
- EPA will withhold from public access certain data that might present a Homeland Security Risk, otherwise publically available after 90 days
- Not delegable to the states; Georgia does not collect

Definition of Solid Waste

Exclusions from “Solid Waste” = Exclusions from “Hazardous Waste”

- 2008 Rule:
 - Exclusions for hazardous secondary material transferred to a third party for recycling, “transfer-based recycler”.
 - Created the definition of “legitimate recycling” with 2 mandatory factors, and 2 relevant factors.
- 2015 Amendments:
 - Revoked the transfer-based exclusion and created a “verified recycler” exclusion instead, with heightened criteria and requirements.
 - Made all 4 factors for “legitimate recycling” mandatory.

Definition of Solid Waste (*cont'd*)

- **API v. EPA, 883 F.3d 918 (D.C. Cir 2018)**
 - (i) vacated the verified recycler exclusion reinstating the transfer-based exclusion, (ii) reinstated all vacated portions of the 2008 rule, and (iii) made the 4th factor not mandatory again, but only something to be considered.
- **Final Rule, 83 FR 24662 (May 30, 2018) Effective Immediately**
 - Confirmed (i) reinstatement of the transfer-based exclusion applies to recycled hazardous waste, but (ii) other 2015 rule provisions remain valid (K171 and K172 ineligible for the recycling exclusion, the new container standard and emergency preparedness requirements).
- ****California Communities Against Toxics, et al. v. EPA, No. 18-1163 (D.C. Cir. July 2, 2019)**
 - Upheld the EPA Final Rule: **Payment is not indicative of “discard;”** it could be that the generator chose to pay for recycling instead of the more costly disposal option. **Unanimous decision.**

Impact on Authorized State Regulations

- If never adopted the 2008 or 2015 rule, don't have to adopt this one because less stringent, EXCEPT must adopt the "Legitimate Recycling" definition.
- States that did adopt the 2015 rule do not have to change because "broader in scope."

GEORGIA's rules Broader in Scope: 391-3-11-.07(1)
adopted:

- 40 CFR 260.43 with all 4 legitimacy factors (TAR rule),
and
- 261.4(a)(24) with verified recycler exclusion.

Universal Wastes

Proposed Rule to Add Aerosol Cans to the Universal Waste Program, 83 FR 11654 (March 16, 2018)

- Goals: help the retail sector and promote recycling.
- Applies to “intact” containers that dispense a material by means of a propellant or compressed gas. No size limitation, but requests comment.
- Does not apply to containers that are not “hazardous waste” (first a solid waste, i.e. discarded), containers that are already empty (may be recycled as scrap metal), cans that show evidence of leaks or damage, compressed gas canisters and propane cylinders.

Universal Wastes *(cont'd)*

- Impacts:
 - 1. VSQGs may choose to follow the Universal Waste regulations instead of general RCRA rules.
 - 2. Universal wastes are not counted in a generator's status.
 - 3. Permit not required for storage prior to recycling (puncturing and draining).
 - 4. Would reduce the amount sent to municipal landfills.
 - 5. The proposed rule would be less stringent, so states are not required to adopt it.
 - 6. Introduced under the Trump Deregulatory Order.

Hazardous Waste Pharmaceutical Rule

- Creates new Subpart P for Hazardous Waste Pharmaceuticals, mandatory unless VSQG
- Static rules *regardless of amounts generated*
- Can accumulate on-site up to one year
- Applies to “Health Care Facilities,” ***including “Long-Term Care” Facilities***, and Reverse Distributors; OTC and prescription “pharmaceuticals”
- HWPs now subject to RCRA while still at the HCF
- Absolute ban on “sewering”
- Maintains household hazardous waste exemption for pharmas collected during takeback events

Corrective Action

In Re General Electric Company, 2018 WL 3629714 (EAB 2018)

- Consent Decree signed in 2000, draft RCRA corrective action permit proposed in 2014, finalized in 2016: Required GE to excavate massive contaminated sediment and soils and dispose of the excavated material off-site.
- The EAB upheld the majority of the permit: clear error standard in choosing the remedy and NGO could not raise an issue it had not raised during public comment.
- The Board remanded the portions of the permit where (i) possibly conflicted with the Consent Decree and (ii) EPA did not demonstrate sufficient consideration of a waiver of an applicable law that required off-site disposal (the Region failed to explain why a waiver was not appropriate in this case).

Corrective Action: RCRA Requirements vs Consent Decree

- Interpretation of the criteria in the Consent Decree would not supplant the Region's RCRA authority to select a remedy in the final permit; RCRA more pertinent than contract law.
- However, implication that a consent decree could have indicated that its terms would supplant RCRA, as “a kind of private law that the parties have to operate under,” if that had been the parties' intent:

“At the same time, the Consent Decree is a binding court order. . . . Therefore, we nonetheless consider . . . whether or not there is any facial conflict between provisions of the Final Permit and the Consent Decree,” citing numerous Supreme Court decisions holding that *consent decrees bear elements of both contracts and judicial decrees*.

Corrective Action: Must EPA Consider Waivers of Applicable Rules?

- The TSCA regulation itself contemplates a waiver if would not result in an unreasonable risk.
- EPA has waived the provision on numerous occasions through risk-based approvals where equivalent protections are provided.
- GE requested a waiver.
- EPA did not explain in the Administrative Record why alternative protections on site would present an unreasonable risk.

Civil Penalties

Civil Monetary Penalty Inflation Adjustment Rule, 84 FR 2056 (February 6, 2019)

- 2015 Federal Civil Penalties Inflation Adjustment Act Improvements Act
- Increased RCRA statutory maximum of per violation per day penalty ranging from \$74,552 for violations of RCRA, to \$60,039 for failure to comply with an order, for all penalties assessed after January 15, 2019 and occurring after November 2, 2015.
- 2018 Amendments to EPA Penalty Policies still apply
- Georgia still has a \$25,000 per violation (per day) cap

Coal Combustion Residuals

Final Rule Revising the 2015 CCR Rule, 83 FR 36,435 (July 30, 2018):

- Allows suspension of groundwater monitoring requirements if evidence that there is no potential for migration to the uppermost aquifer, and
- Issues technical certifications.

Coal Combustion Residuals *(cont'd)*

Utility Solid Waste Activities Group v. EPA, 901 F.3d 414 (D.C. Cir. 2018)

- Challenge to the 2015 CCR Rule by both industry and environmental groups. Court found the rule was too weak, vacating provisions:
 - (i) allowing unlined and clay-lined surface impoundments to continue operations, and
 - (ii) exemption of inactive impoundments from regulation. Remanded to EPA.

QUERY: Because the federal rule is now in flux, what is the impact to a state's program?

Georgia CCR Update

Preliminary EPA approval of GA Permit Program

1. Does not *include* Endangered Species requirements
2. Does not *exclude* any inactive impoundments
3. Adopted portions of the Federal CCR regulations that have since been vacated (but all CCR impoundments are being closed) :
 - Allowance for unlined impoundments to continue receiving coal ash unless they leak
 - Classification of “clay-lined” impoundment as lined

Public Hearing August 6, 2019

Comments Due August 27, 2019

CCR and The Clean Water Act

Tennessee Clean Water Network v. Tennessee Valley Authority, 905 F.3d 436 (6th Cir. 2018)

- Plaintiffs sued the TVA under the Clean Water Act for “discharge” of a pollutant from a coal ash pond through groundwater.
- Not only is this not covered by the CWA, but, *such a holding would have directly conflicted with RCRA and the CCR rule which “specifically addresses the disposal of coal [ash] as solid waste.”*

See Also, **Sierra Club v. Virginia Electric & Power Company, 903 F.3d 403 (4th Cir. 2018)**, for the same result.

Approval Status of Georgia Rules

AUTHORIZATION OF GEORGIA HAZARDOUS WASTE REGULATIONS

Proposed 83 FR 39975 (August 13, 2018); Finalized 84 FR 5603 (February 22, 2019)

- Conditional Exclusions for Solvent Contaminated Wipes
- Electronic Manifest Rule
- Revisions to the Definition of Solid Waste
- Imports and Exports of Hazardous Waste
 - Not delegable to the states
- Generator Improvements Rule
- Paperwork Burden Reduction Rules

UST Program Update

State Rules (391-3-15) Incorporating EPA's 2015 Regulations Became Effective December 2017

- Stricter requirements for spill/overflow prevention and release detection
- New systems already meeting most requirements; existing systems have until December 2020
- Implementation guide available on EPD's website
- Submitted State Program Approval application 8/2018

Risk Based Corrective Action Workbook

- Offers a consistent approach for determining risk and establishing cleanup targets
- Guidance and workbook available on EPD's website

Solid Waste Handling Permit Reviews

EPD Permit Reviews became effective March 2018:

- 1) Existing facilities being phased in over 5 year period – plan to complete by 7/1/2023
- 2) 176 Operating Solid Waste Facilities
- 3) October 2018 EPD Guidance Document: must file application for permit review every 5 years for permit to remain in effect

Permit Review Wave Number	Permit Review Date	Filing Deadline	Early Filing Date
1	3/1/2020	9/1/2019	9/1/2018
2	11/1/2020	5/1/2020	5/1/2019
3	7/1/2021	1/1/2021	1/1/2020
4	7/1/2022	1/1/2022	1/1/2021
5	7/1/2023	1/1/2023	1/1/2022

Solid Waste - Landfills

EPA Advance Notice of Proposed Rulemaking: Revisions to the Criteria for Municipal Solid Waste Landfill Advances in Liquids Management, 83 FR 66210 (December 26, 2018)

Seeks information/comments on:

1. Removing the prohibition on adding bulk liquids
2. Creating a particular class of MSWLF units to operate with increased moisture content (e.g. for biodegradation and landfill gas generation)
3. Establishing revised criteria for liquids management

RCRA Citizen Suits

LAJIM, LLC v. General Electric Co., Nos. 18-1522, 18-2880 (7th Cir. March 4, 2019)

- GE was remediating groundwater contamination pursuant to a state order issued 10 years before. Citizen suit rejected: it's not just a question of liability but also of what is *necessary* to protect against irreparable harm.



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