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The 2015 RCRA Solid Waste Rule and the 2016 TSCA Reform (The Frank R. Lautenberg Chemical Safety for the 21st Century Act)

BY WILLIAM J. ANAYA

Environmental statutes are creatures of legislative imagination. Each is designed to identify a problem, and the administrative agency with the authority to implement and enforce the environmental statue is tasked with creating an administrative program to address the identified problem. In the federal environmental realm, Congress is the legislature, and the administrative agency is the United States Environmental Protection Agency ("US EPA").

In interpreting these statutes, virtually

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Significant 2015 federal court decisions in environmental law

BY KENNETH ANSPACH

I. Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 ("CERCLA")

A. Preemption

In 2011, in *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) the Supreme Court held that the Clean Air Act and the Environmental Protection Agency (EPA) actions it authorized displaced any federal common law right to seek the setting aside of carbon dioxide emissions standards.

In *Anderson v. Teck Metals, Ltd.*, 2015 U.S. Dist. LEXIS 1035 *28-29, 45

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The 2015 RCRA Solid Waste Rule...

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every word is a term of art – certainly each regulated activity has no plain or universally accepted meaning. Nothing could be more true than the federal regulation of waste, authorized pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.* And, virtually no regulated activity has undergone more scrutiny and change than the regulation of what is known as "Solid Waste" under RCRA – which, according to its definition, can be solid, liquid, or gaseous. Following many changes over the years since RCRA was enacted in 1976, the Solid Waste Rule was once again recently revised, effective as of July 15, 2015, as described below.

The Toxic Substances Control Act 15 U.S.C. §2601 *et seq.*, is not an Act regulating waste, *per se*, but a law designed to provide a mechanism to regulate new and recently developed chemical substances and mixtures that come into contact with human beings through manufacture, processing, distribution in commerce, and eventual disposal in the environment. TSCA articulates the policy of the United States to develop adequate information concerning the effect of chemical substances and mixtures on health and the environment, and that the development of such information should be the responsibility of those who manufacture and process such chemical substances and mixtures.

In addition, TSCA charges US EPA with the authority to: (1) regulate chemical substances and mixtures that present an unreasonable risk of injury to health or the environment, (2) to take action with respect to chemical substances and mixtures which are imminent hazards, and (3) and to exercise authority in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation. It's a heady responsibility for the Agency that was often frustrating for the regulated community and those who seek to the information to be developed pursuant to TSCA.

Both statutes and regulatory programs have grown organically since each was first enacted some 40 years ago – sometimes in fits and starts. In the last twelve months, Congress and US EPA have made significant changes to waste and chemical regulation that deserve some analysis.

The Resource Conservation and Recovery Act (RCRA)

Historical Changes to the RCRA Solid Waste Rule

When Congress initially sought to address the issues associated with waste, Congress defined Solid Waste broadly, as "any garbage, refuse, sludge from a waste 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." RCRA § 1004(27), 42 U.S.C. § 6903(27) (emphasis added). RCRA's definition of Hazardous Waste incorporates the definition of Solid Waste (see RCRA § 1004(7), 42 U.S.C. § 6903(7)), and all Solid and Hazardous Waste is regulated under the RCRA Program implemented by US EPA (and sometimes delegated to selected states, as in Illinois).

In the 1980s, US EPA began interpreting "Solid Waste" and "discarded materials" to include both materials that are disposed of, as well as materials that are recycled. Defining Solid Waste for regulatory purposes is an existential inquiry. That is: Is it waste when it is sent to a recycler or only when it is generated as a waste? If we assume that it is a waste when it is generated as a waste, when does the material lose its existential character as waste and become a valuable product? Does a material originally generated as a waste, but later becomes a valuable product (as in recycled materials), cease to be regulated?

It should come as no surprise that US EPA's definition of "Solid Waste" has spawned a great deal of litigation over the

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years.

For example, in 1987, the D.C. Circuit Court held that US EPA's interpretation exceeded its statutory authority, and that "discarded materials" could not include materials that were "destined for beneficial reuse or recycling in a continuous process by the generating industry itself [because they] are not part of the waste disposal problem." *American Mining Companies v. EPA*, 824 F.2d 1177, 1190 (D.C. Cir. 1987). However, the Circuit Court, surprisingly, also held that "recycled materials" could be regulated, but (apparently) not as Hazardous Waste.

In 1998, US EPA promulgated a Solid Waste Rule seeking to address the generation of by-products associated with the mineral industry, and the mineral industry's practice of recycling (reclaiming) those byproducts – referred to as "Secondary Materials." US EPA's 1998 Solid Waste Rule included a conditional exclusion from the definition of "Solid Waste," for Secondary Material scheduled for reclamation. However, the 1998 Solid Waste Rule prohibited the storage of Secondary Material by the generator, but conditionally allowed storage by the recycler (while simultaneously increasing the regulation of by-products and sludge generated incident to the reclamation process).

With the 1998 Solid Waste Rule, US EPA permitted offsite reclamation and recycling, but indicated that it did not have sufficient statutory authority to promulgate a rule that would allow the generator of the Secondary Material to recycle the Secondary Material itself, as part of the permitted process associated with the generation of the Secondary Materials.

The D.C. Circuit Court was then presented with the question of US EPA's authority to permit in-house recycling. In *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), the Court found that Secondary Materials that are recycled as part of the generator's ongoing process was not an act of disposal or abandonment, but rather a process that US EPA had authority to regulate. *Id.* at 1051-1052.

In the following years, US EPA also developed a working definition of "Legitimate Recycling" – a concept fundamental to US EPA's interpretation of its regulatory authority. Indeed, every generator of waste is of the view that materials it generated as waste are secondary materials that can be recycled – and the removal of the material from the generator's facility was not an act disposal, but an act of recycling. (See, also, CERCLA Section 127, Recycling Transactions, Exempt from CERCLA liability, 42 U.S.C. § 9627.) US EPA and the regulated community have been wrestling with an exemption from liability and regulatory responsibility for legitimate recycling operations. Indeed, various studies commissioned by the Agency have confirmed that sham recycling (attempts to avoid hazardous waste regulation), has caused significant harm to the environment. In 2007, US EPA published those studies and recommended two exclusions for Secondary Materials: (i) Secondary Materials reclaimed by the generator (known as the "Generator-Controlled Exclusion"); and (ii) Secondary Materials reclaimed offsite by someone other than the generator (known as the "Transfer-Based Exclusion").

The 2015 Solid Waste Rule

The deliberative process continued in the court system, within the US EPA, and in the public discourse for several more years, culminating in another revision to the Solid Waste Rule this past year. In summary, the 2015 Solid Waste Rule:

- Retains the Generator-Controlled Exclusion (with some additional requirements);
- Replaces the Transfer-Based Exclusion with a "Verified Recycler Exclusion;"
- Codifies "Legitimate Recycling" and recognizes in-process recycling of commodity-grade materials;
- Establishes a "Remanufacturing Exclusion" for certain, high value, used solvents; and
- Implements better procedures in seeking variance and a non-waste determination.

(i) The Generator-Controlled Exclusion – § 261.4(a)(23)

The 2015 Solid Waste Rule retains the exclusion from hazardous waste regulation for Secondary Materials destined for recycling by the generator – so long as the reclamation/recycling is performed onsite, within the same company, and happens in a timely manner. In addition, in an attempt to provide for the protection of the environment, the 2015 Solid Waste Rule requires that stored Secondary Material destined for recycling is "contained" as that term is defined in the regulation.

In short, "contained" refers to storage in a "unit," (*i.e.*, a pile) that is in good condition, with no leaks, and which does not allow unpermitted releases. Unpermitted releases are those releases not allowed under the RCRA permit, or other applicable permit. In addition, the unit must be properly labeled, and the generator must maintain books and records describing the contents of the contained unit. The generator's logs must also confirm that all of the material within the contained unit (*i.e.*, the stored material) is compatible. Secondary Materials contained in underground storage tanks that meet RCRA hazardous waste standards are presumptively permitted.

In addition, the 2015 Sold Waste Rule requires written recordkeeping in order to establish that the same company is involved, and that the recycling occurred on time. Notices to US EPA are also required, and the entity seeking the exclusion must document that "Legitimate Recycling," as defined by the 2015 Solid Waste Rule, was employed. Finally, the 2015 Rule prohibits the generator from participating in any "speculative accumulation" of Secondary Materials and requires the generator to create and maintain an emergency preparedness and response plan.

As with virtually every other regulated activity, the generator is advised to make a record of compliance with the assistance of consultants and counsel.

(ii) The Verified Recycler Exclusion – § 261.4(a)(4)

The 2015 Solid Waste Rule replaced the 2007 Transfer-Based Exclusion with the "Verified Recycler Exclusion." In order

for Secondary Materials to qualify for this exclusion, those Secondary Materials must go to a "Verified Recycler" – that is, a recycler with a RCRA Permit or an approved variance either from US EPA or a state environmental protection agency with a US EPA approved state program.

The Verified Recycler Exclusion is subject to the same restrictions on speculative accumulation and required recordkeeping as the Generator-Controlled Exclusion. In addition, in order to take advantage of the Verified Recycler Exclusion, the generator must notify US EPA of the claimed exemption (*see* Form 8700-12). And, like the generator, the Verified Recycler must also properly store (*i.e.*, "contain") the Secondary Materials and employ an emergency preparedness and response plan. In addition, the receiving/recycling/reclaiming facility must be physically located in the United States, and the entity seeking the exclusion must keep records and receipts for three years.

Verified Recyclers without a RCRA permit must be able to show that their activities are legitimate, while providing adequate financial assurance. In addition, a Verified Recycler without a RCRA Permit must not have been the target of RCRA violations within the previous three years, or it must provide credible evidence that the facility will properly manage the Secondary Materials. In addition, the Verified Recycler must show that it has the proper equipment and trained personnel to perform the recycling activity. Finally, the Verified Recycler must demonstrate that it will manage the residual materials generated in the recycling process in a responsible manner.

(iii.) Codification of "Legitimate Recycling" – § 260.43

What is Legitimate Recycling? In essence, it is not "sham" recycling. For example, foundry sand cannot be recycled as playground sand, but could be recycled for use in creating industrial molds. Sham, is now more than what is in the eye of the beholder.

The 2015 Solid Waste Rule codifies language that has been in the preamble of earlier versions of the Solid Waste Rule. In order to be "legitimate," the recycling process must: (1) provide a useful contribution to recycling or a product (or an intermediate to a final product); (2) produce a valuable product (or intermediate); (3) the Secondary Material must be managed as a valuable commodity (*i.e.*, not as a waste), and (4) the final product must be comparable to a legitimate product (or intermediate).

(iv.) The "Remanufacturing Exclusion" – § 261.4(a)(27)

According to US EPA, there are 18 high-value solvents used in pharmaceutical, organic chemical process, paints and coatings that can be, and should be, recycled. The 2015 Solid Waste Rule provides an incentive to reclaim those solvents used in those processes. In order for these solvents to qualify under this exclusion, both the generator and the remanufacturer must notify US EPA of the claimed exemption (*see* Form 8700-12), and both the generator and the remanufacturer must jointly develop and maintain a remanufacturing plan, and keep and maintain records for 3 years. Similar to the "contained" requirement discussed above, the spent solvents must be stored in RCRA-compliant containers (*i.e.*, with secondary containment, overfill and spill protection). Finally, the 2015 Solid Waste Rule provides that the prohibition against speculative accumulation also applies to this exemption.

(v.) Revised Variance and Non-Waste Determination Procedures – § 260.30-34

The 2015 Solid Waste Rule also revised the administrative process associated with applications for variances and requests for administrative determinations that certain Secondary Materials are not regulated waste. In the event that an entity applies for a variance or seeks an administrative interpretation that certain Secondary Materials are not waste, that entity is required to file a final application with US EPA (or with an authorized state agency), and demonstrate why the existing exemptions are not adequate.

The request for a variance/waste determination must be limited to a term not to exceed ten years, and after ten years the applicant must either comply with the Solid Waste Rule, or seek another variance or non-waste determination. In the event that a variance or a non-waste determination is issued by US EPA, the reporting parties are required to continue to provide US EPA with current information every two years.

State Authorization

The 2015 Solid Waste Rule is more stringent than the earlier versions of the Rule, and US EPA is requiring authorized states to modify their programs in order to comply with the 2015 Sold Waste Rule. The Illinois Pollution Control Board, for example, just recently revised the Illinois regulatory program consistent with the 2015 Solid Waste Rule. Compliant states are required to implement prohibitions against sham recycling, to implement data tracking methods, and to make appropriate changes to the administrative procedure associated with variances and waste determinations.

Waste Regulation Continues to Impact Generators, Recyclers, Scrap Dealers and Scrap Yard Operators

The 2015 Solid Waste Rule became effective on July 13, 2015, and while it recognizes an exemption for recycled/reclaimed Secondary Materials associated with RCRA regulated processes, entities involved in the generation of these Secondary Materials and facilities involved in reclamation/recycling are not exempt from regulation. To a large extent, recyclers, scrap dealers and scrap yards are experiencing increased scrutiny and regulation – and each is advised to contact environmental counsel to discuss, in confidence, compliance with Storm Water Regulations, Exempt Transactions identified in CERCLA § 127 and the exemptions/regulations referred to in the 2015 Solid Waste Rule.

In the final analysis, generators, operators, recyclers and others are advised to understand the constantly evolving rules and regulations associated with the state and federal regulation of waste – now notably articulated in the 2015 Solid Waste

Rule – and compliance is best shown in a record with admissible evidence of compliance.

The Toxic Substances Control Act (TSCA) and The Frank R. Lautenberg Chemical Safety for the 21st Century Act

Revisions to the current law

The new law mandates that US EPA evaluate existing chemicals with clear and enforceable deadlines for action. Under the old law, US EPA had no such requirement, with manufacturers and distributors waiting a long time for US EPA to clear chemicals distribution in commerce and use by the public. The new law also mandates that US EPA now mandates the Agency use a risk-based safety standard in lieu of the old, risk-benefit balancing standard – and unreasonable risk must be addressed. Under the old law, significant risk might not be addressed based on cost/balancing with no mandate to act or propose action. In addition, US EPA has authority to move more quickly and to require more information from the manufacturer or distributor. Under the old law, US EPA only had authority to require a lengthy rule-making process, and chemicals could enter the market in the absence of Agency action. But now, US EPA must make an affirmative administrative determination on new chemicals before entry into the market place.

In addition, before the recent revisions to TSCA, a manufacturer/distributor could make a claim of Confidential Business Information (CBI) without substantiation. Now, the statute provides a mechanism for the Agency to review and require CBI claims to be substantiated.

Finally, Congress provided up to $25,000,000 in annual user fees (with additional Congressional appropriations) in lieu of the old law that capped user fees at $2,500 with limited collection authority.

The statute has been revised as follows:

• New Chemicals

Within 90 days, the Agency must make an affirmative finding that the chemical can enter the market or issue:

- a 5(f) order that defines a "present and unreasonable risk," or
- a 5(e) order that "information … is insufficient to permit a reasoned evaluation…," or
- a 5(e) order that the chemical "may present an unreasonable risk," or
- a finding that the chemical is "not likely to present an unreasonable risk. And publish the determination.

By June 2017, the Agency must prioritize **existing chemicals** into high of low priorities. High Priority chemicals are those that may present an unreasonable risk of injury to health or the environment due to a potential hazard and route exposure to susceptible populations. A Low Priority chemical does not meet the criterion of a High Priority.

A chemical found to be a High Priority, triggers mandatory risk evaluation to be completed within 3 years (with a possible 6 month extension).

• New, Risk-based Safety Standard

An "unreasonable risk" determination is made without consideration of costs or other non-risk factors. Risk is measured by the susceptibility to highly exposed populations. In the event of an "unreasonable risk," the Agency must take action to manage the risk – which may include considering the costs and availability of alternatives, or the exemption for "critical uses." The Agency's risk management action must be published within 2 years of completing the risk evaluation.

• New, Manufacture-Requested Assessment Process

The new law establishes a process for manufactures to request the Agency to evaluate specific chemicals. For chemicals already disclosed to the Agency, the manufacturers pay 50% of the costs, and for an evaluation of other chemicals, the manufactures pay 100% of the costs of the evaluation. In general, the request is granted in the Administrator's discretion (and does not count toward the Agency's obligation to review chemicals in general).

• Persistent, Bio-accumulative and Toxic Chemicals (PTB)

The new law also provides a fast-track process for PTB chemicals that have been previously disclosed to the Agency. The risk evaluation process is removed and only a use and exposure assessment is required. The new law provides that exposure to PTB is to be reduced within 3 years, unless the manufacturer requests a risk evaluation by September 22, 2016.

•TSCA Inventory

Under the new law, industry is not required to report on the chemicals they manufactured or processed within the past 10 years in order to determine if those chemicals are "active" and in the marketplace. The TSCA Inventory will not change – but will be designated "active" or "inactive" – and only "active" chemicals will be prioritized by the Agency.

• Ongoing Risk Management Rulemaking

The Agency is required to create Risk Management Rules for chemicals with completed risk assessments that had been completed by June 22, 2016. The Agency expects to issue rules for TCE used in spot cleaning. ,aerosol and vapor degreasing, and Methylene chloride (MC) and N-methylpyrrolidone (NMP) used in paint thinners.

• Confidential Business Information

Under the new law, manufactures must "substantiate" certain claims of CBI, and all CBI claims sunset after 10 years unless the claim is reasserted. The Agency is required to affirmatively review all new chemical ID CBI claims and "screen" (25%) of all non-chemical ID CBI claims. For past CBI claims, US EPA is required to review past chemical ID claims to determine if the claims are adequately substantiated.

• Funding

US EPA now has authority to collect fees from manufactures and processor who submit: (1) test data, (2) a notice of intent to manufacture a new chemical (or a new use for a chemical), as well as (3) those who manufacture or process a chemical that is subject to a risk evaluation and (4) those who request the Agency to conduct a risk evaluation of an existing chemical.

• Federalism

The new law preserves the states' authority to act in those instances where the Agency has not acted. The following state actions are preserved:

- actions taken by the states before April 2016,
- implementation of other environmental laws addressing air, water, waste treatment, disposal, reporting and monitoring,
- co-enforcement authority of identical requirements, and
- actions on chemicals identified as Low Priority by the Agency

In those instances where US EPA has determined that a chemical is safe, then state rules to the contrary are preempted. Or, if the Agency takes final action to address a risk, then any state action on the subject is preempted. In those instances when the Agency imposes a comparable requirement, then state rules are pre-empted (unless the state has obtained a formal waiver or exemption). Finally, all state action is paused during EPA's risk assessment process of High Priority chemicals unless the Agency has missed a statutory deadline.

• Miscellaneous

The new law adds Mercury compounds to the list of banned exports, and requires the Agency to publish an inventory of the mercury supply (used and traded) in the United States by April 1, 2017 – and to update the inventory every three years.

In short, Congress and the Agency have addressed waste and chemical regulation this past year. A process that is organic for sure, and well past time. ■

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Significant 2015 federal court decisions in environmental law

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ELR 20010 (E.D. Wash. 2015), the U.S. District Court for the Eastern District of Washington ruled that the CERCLA supplants federal common law public nuisance claims for damages. In this landmark ruling, the court stated that "CERCLA occupies the field to the exclusion of federal common law" and that "Plaintiffs' federal common law public nuisance claims have been displaced by CERCLA and therefore, must be dismissed." In so ruling, the court held that federal nuisance claims brought by Washington State residents living downstream and downwind of a Canadian metal smelter were displaced by CERCLA.

B. Arranger Liability

In the 2009 case of *Burlington Northern & Santa Fe Ry. v. United States*, 556 U.S. 599 (2009), federal and state agencies brought actions against a supplier of pesticides and a property owner seeking to recover remediation costs at a site contaminated by hazardous substances. The supplier sold pesticides to an agricultural chemical distributor located at the contaminated site which was partially on the owner's property, and the agencies contended that the supplier and the owner were potentially responsible parties for the remediation costs as arrangers under CERCLA, 42 U.S.C.S. § 9607(a)(3). The arranger category of responsible persons under CERCLA extends to any person who by contract, agreement, or otherwise arranged for disposal or treatment, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances. The U.S. Supreme Court held that the supplier's knowledge of minor, accidental spills at the site was insufficient to establish that the supplier arranged for the disposal of hazardous substances within the meaning of CERCLA, since there was no showing that the supplier took intentional steps to dispose of the substances.

Following on *Burlington Northern*, in *Vine St. LLC v. Borg Warner Corp.*, 776 F.3d 312 (5th Cir. 2015) the court held Borg Warner was not liable as an arranger under § 107(a)(3)) of CERCLA, 42 U.S.C.S. § 9607(a)(3), for the actions of its former subsidiary, Norge, which furnished dry cleaning equipment, design assistance, and an initial supply of PERC to the cleaning business. The court found that there was no intent on the part of the subsidiary to dispose of the chemical. The court found that "under Burlington Northern, the plaintiff must establish that the purported arranger took 'intentional steps to dispose of a hazardous substance.' 556 U.S. at 611. Thus, CERCLA arranger liability is premised upon an intentional act directed toward the disposal of hazardous waste." No such intentional act was found here.

Arranger liability was also at issue in *Consolidation Coal Co. v. Ga. Power Co.*, 781 F.3d 129 (4th Cir. 2015). There the court held that where a utility company sold used electrical transformers at auction and the buyer's facility became contaminated with PCBs from the transformers, the utility was not liable under 42 U.S.C.S. § 9607(a)(3) as an arranger because there was no direct evidence that it intended, even in part, to arrange for the disposal of PCBs through the sales, and there was no circumstantial evidence from which a reasonable juror could infer that the utility so intended.

Likewise, in *United States v. Dico, Inc.*, 808 F.3d 342 (8th Cir. 2015) the court held that the evidence did not demonstrate as a matter of law that a seller of contaminated buildings "arranged" for disposal within the meaning of 42 U.S.C.S. § 9607(a)(3), so the district court improperly entered summary judgment holding the seller strictly liable for contamination that resulted from the buyer's disassembly and storage of the buildings. Further, the court found that summary judgment was improperly granted where fact issues existed regarding the seller's intent in making the sale.

C. Indemnification

In *Peoples Gas Light & Coke Co. v. Beazer East, Inc.*, 802 F.3d 876 (7th Cir. 2015), the court held that a 1920 agreement between plaintiff and defendant's predecessor barred plaintiff's claim for contribution against defendant under § 113(f)(3)(B) of CERCLA, 42 U.S.C.S. § 9613(f)(3)(B), because the language of the agreement unambiguously absolved defendant of any and all "liability of any character" resulting from its operation of the coke plant, and the agreement's language was broad enough to absolve defendant of liability for contribution costs under CERCLA. In so doing the court noted that:

> Section 107(e)(1) of CERCLA provides:
>
> No indemnification, hold harmless, or similar agreements or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.
>
> 42 U.S.C. § 9607(e)(1).
>
> At first blush, this section appears internally inconsistent. However, we have joined other federal courts of appeals in reconciling these two sentences by construing them to mean that responsible parties may not transfer their CERCLA liability, but may obtain indemnification

for that liability.

II. Clean Air Act, 42 U.S.C. §§ 7401–7671q ("CAA").

A. Preemption

In *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685 (6th Cir. 2015), the court construed the states' rights savings clause, 42 U.S.C.S. § 7416, of the CAA, which states, in pertinent part:

> [N]othing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) *any requirement* respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112 [42 USCS § 7411 or 7412], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section. (Emphasis added.)

The court held that § 7416 expressly preserved the state common law standards on which the nearby property owners had sued for nuisance and trespass, where the phrase "any requirement" was broad enough to encompass common law rules, and state courts were parts of the state for purposes of § 7416.

B. Hazardous Air Pollutants

In *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Supreme Court held that the Environmental Protection Agency ("EPA") interpreted the Clean Air Act, 42 U.S.C.S. § 7412(n)(1)(A), unreasonably when it deemed cost irrelevant to the decision to regulate power plants because the statutory directive of determining whether power plant regulation was "appropriate and necessary" required at least some attention to cost, which included more than the expense of complying with regulations. The Court reasoned that Chevron deference directed courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administered, but even under this deferential standard, agencies had to operate within the bounds of reasonable interpretation. Finally, the Court further reasoned that it was unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly made cost irrelevant to the appropriateness of regulating power plants.

In *Del. Dep't of Natural Res. & Envtl. Control v. EPA*, 785 F.3d 1 (D.C. Cir. 2015), the court ruled that EPA improperly promulgated rules to allow backup generators to operate without emissions controls up to an annual maximum number of hours as part of an emergency demand-response program, since the EPA did not respond to concerns that the rules threatened the efficiency and reliability of the electrical energy grid by creating incentives for backup generators to enter the capacity markets. The court further found that EPA also relied upon faulty evidence in basing the maximum hours on comments from a prior rule-making which did not apply to individual emergency generators. The court further found that EPA also failed to explain the adoption of a nationwide rule which had the potential to distort organized energy markets, and did not address the alternative of a more limited rule which potentially could achieve the same outcome without posing risks to organized energy markets.

C. Enforcement

In *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197 (D.D.C. 2015), the court entered a consent decree arising from alleged violations of the CAA and related California Health and Safety Code violations by defendants Hyundai Motor Company, Hyundai Motor America, Kia Motors Corporation, Kia Motors America, and Hyundai America Technical Center, Inc. (collectively, "Defendants"). The United States, on behalf of EPA and in conjunction with the California Air Resources Board, sought monetary penalties and injunctive relief against Defendants for allegedly falsifying fuel economy and greenhouse gas emissions claims for over one million Hyundai and Kia vehicles with model years 2012 and 2013 that will emit more than four million metric tons of greenhouse gases in excess of what the automakers certified to EPA." The penalties included a $100 million fine, the largest in the history of the CAA.

D. Greenhouse Gas Emissions ("GHG").

On October 23, 2015, at 80 FR 64662, to be published at 40 CFR Part 60, EPA established final emission guidelines for states to follow in developing plans to reduce GHG emissions from existing fossil fuel-fired electric generating units (EGUs). Specifically, the EPA established: Carbon dioxide (CO[2]) emission performance rates representing the best system of emission reduction (BSER) for two subcategories of existing fossil fuel-fired EGUs--fossil fuel-fired electric utility steam generating units and stationary combustion turbines; state-specific CO[2] goals reflecting the CO[2] emission performance rates; and guidelines for the development, submittal and implementation of state plans that establish emission standards or other measures to implement the CO[2] emission performance rates, which may be accomplished by meeting the state goals. In *Chamber of Commerce v. EPA*, 2016 U.S. LEXIS 980, 136 S. Ct. 999, 194 L. Ed. 2d 18, 84 U.S.L.W. 3439 (2016), this rule was stayed by the U.S. Supreme Court pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit.

III. Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. §§ 1251-1387 ("CWA").

A. Enforcement

On December 22, 2014, EPA announced that XTO Energy, Inc. ("XTO"), a subsidiary of ExxonMobil and the nation's largest holder of natural gas reserves, would spend an estimated $3 million to restore eight sites damaged by unauthorized discharges of fill material into streams and wetlands in connection with hydraulic fracturing operations. The complaint alleged violations of §§

301(a) and 404 of the Clean Water Act (CWA), which prohibit the discharge of dredge and/or fill material to waters of the United States except in compliance with a permit issued by the U.S. Army Corps of Engineers. The consent decree resolves the unauthorized discharges of dredged and/or fill material at eight sites in Harrison, Marion, and Upshur Counties in West Virginia. (XTO Energy, Inc. Settlement 2014 ENVTL PROT. AGENCY, http://www.epa.gov/enforcement/xto-energy-inc-settlement-2014).

On March 4, 2015, XPLOR Energy SPV-1, Inc. ("XPLOR"), an Oklahoma corporation based in Southlake, Texas, was sentenced for violating the CWA to three years of probation and to pay a $3.1 million monetary penalty. The monetary penalty includes payments of $2.5 million to the United States Treasury and $600,000 to the Louisiana Department of Environmental Quality Trust Fund. In November 2014, XPLOR pled guilty to one felony count of knowingly discharging produced water generated as part of oil and gas production in the Breton Sound Area of the Gulf of Mexico in violation of the CWA, § 1319(c)(2)(A). (Summary of Criminal Prosecutions, ENVTL PROT. AGENCY) (Xplor Energy) http://www.justice.gov/usao-edla/pr/xplor-energy-sentenced-felony-clean-water-act-violation).

On May 14, 2015, EPA announced that three subsidiaries of North Carolina-based Duke Energy Corporation, the largest utility in the United States, pleaded guilty to nine criminal violations of the Clean Water Act at several of its North Carolina facilities and agreed to pay a $68 million criminal fine and spend $34 million on environmental projects and land conservation to benefit rivers and wetlands in North Carolina and Virginia. Four of the charges are the direct result of the massive coal ash spill from the Dan River steam station into the Dan River near Eden, North Carolina, in February 2014. The remaining violations were discovered as the scope of the investigation broadened based on allegations of historical violations at the companies' other facilities. Under the plea agreement, both Duke Energy Carolinas and Duke Energy Progress, must certify that they have reserved sufficient assets to meet legal obligations with respect to its coal ash impoundments within North Carolina, obligations estimated to be approximately $3.4 billion. (Summary of Criminal Prosecutions, ENVTL.PROT. AGENCY (Duke Energy Progress, Inc.; Duke Energy Business Services, LLC; and Duke Energy Carolinas, LLC) http://www.justice.gov/opa/pr/duke-energy-subsidiaries-plead-guilty-and-sentenced-pay-102-million-clean-water-act-crimes).

On August 19, 2015 Mississippi Phosphates Corp. plead guilty to a Clean Water Act violation and agreed to transfer 320 acres to the Grand Bay National Estuary. Mississippi Phosphates Corp. ("MPC"), a Mississippi corporation which owned and operated a fertilizer manufacturing facility located on Bayou Casotte in Pascagoula, Mississippi, pleaded guilty to a felony information charging the company with a criminal violation of the Clean Water Act. As part of the guilty plea, MPC admitted discharging more than 38 million gallons of acidic wastewater in August 2013. The discharge contained pollutants in amounts greatly exceeding MPC's permit limits, resulting in the death of more than 47,000 fish and the closing of Bayou Casotte. MPC also admitted that, in February 2014, MPC discharged oily wastewater from an open gate on a storm water culvert into Bayou Casotte, creating an oily sheen that extended approximately one mile down the bayou from MPC. Because MPC is in bankruptcy and is obligated to assist in funding the estimated $120 million cleanup of its site, the court accepted the parties' agreement for MPC to transfer 320 acres of property near to its Pascagoula plant to become a part of the Grand Bay National Estuarine Research Reserve, which is managed by the Mississippi Department of Marine Resources as part of the National Oceanic and Atmospheric Administration's National Estuarine Research Reserve System. (Summary of Criminal, Prosecutions, ENVTL.PROT.AGENCY (Mississippi Phosphates Corporation) http://www.justice.gov/opa/pr/mississippi-phosphates-corp-pleads-guilty-clean-water-act-violation-and-agrees-transfer-320). ■

While original sources were consulted for each entry in this article, the author gratefully acknowledges the American Bar Association, Section on Environment, Energy and Resources Law, the Year in Review 2015 as a source for much of the information herein. The 2015 Year in Review may be found at <http://www.americanbar.org/content/dam/aba/publications/yir/2015/YIR2015_complete_final.authcheckdam.pdf>.

For more information, please contact Ken Anspach at anspachlawoffice.com or 312-407-7888.

Upcoming CLE programs

TO REGISTER, GO TO WWW.ISBA.ORG/CLE OR CALL THE ISBA REGISTRAR AT 800-252-8908 OR 217-525-1760.

September

Thursday, 09/01/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 09/08/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 09/08/16- Webcast—Monetizing Intellectual Property. Presented by IP. 12:30 p.m. - 2:15 p.m.

Friday, 09-09-2016- Webcast—Telemedicine: Diagnosing the Legal Problems. Presented by Health Care. 9:00 a.m. - 11:00 a.m.

Wednesday, 09/14/16- Webcast—Hot Topic: Union Dues/Fair Share—Friedrichs v. California Teachers Association. Presented by Labor and Employment. 10:00 a.m. - 12:00 p.m.

Wednesday, 09-14-16—Webinar—2016 Military Law Overview. Presented by Military Affairs. 12:00 p.m. - 1:15 p.m. (maybe later).

Thursday, 09/15/16- CRO—Family Law Table Clinic Series (Series 1). Presented by Family Law. 8:30 am - 3:10 pm. Vid: NONE THESE WILL NOT BE RECORDED OR ARCHIVED.

Friday, 09-16-06- CRO and Live Webcast—The Fear Factor: How Good Lawyers Get Into (and avoid) Bad Ethical Trouble. Master Series Presented by the ISBA—WILL NOT BE RECORDED OR ARCHIVED. 9:00 a.m. - 12:15 p.m.

Wednesday, 09-21-16—Webcast—Restorative Practice in Illinois: Practical and Creative Alternatives to Resolve Civil and Criminal Matters. Presented by Human Rights. Part 1- 10:00 a.m. - 12:00 p.m. Part 2- 1:00 p.m. - 3:00 p.m.

Thursday, 09-22-16- Webcast—Family Law Changes and Mediation Practice. Presented by Women and the Law. 11:00 a.m. - 12:00 p.m.

Thursday, 09/22/16- CRO and Webcast—Recent Developments in E-Discovery in Litigation. Presented by Antitrust. 1:00- 5:15 pm.

Thursday, 09/22/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Monday, 09/26/16- Friday, 09/30/16—CRO—40 Hour Mediation/Arbitration Training Master Series. Presented by the ISBA. 8:30 am - 5:45 pm each day. MASTER SERIES WILL NOT BE ARCHIVED.

Friday, 09-30-16—DoubleTree Springfield—Solo and Small Firm Practice Institute Series. A Balancing Act: Technology and Practice Management Solutions. Presented by GP, SSF. 8:00 a.m. - 5:10 p.m.

October

Wednesday, 10-05-16—CRO—Cybersecurity: Protecting Your Clients and Your Firm. Presented by Business Advice and Financial Planning; co-sponsored by IP (tentative). 9:00 a.m. - 5:00 p.m.

Thursday, 10/06/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 10-06-16—Webcast—Nuts and Bolts of EEOC Practice. Presented by Labor and Employment. 11:00 a.m. - 12:30 p.m.

Monday, 10-10-16—CRO and Fairview Heights, Four Points Sheraton—What You Need to Know to Practice before the IWCC. Presented by Workers Compensation. 9:00 a.m. - 4:00 p.m.

Thursday, 10/13/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 10-13-16—IPHCA, Springfield—Open Meetings Act: Conducting the Public's Business Properly. Presented by Government Lawyers. 12:30 - 4:00 p.m. This program will not be recorded and put in the archives.

Thursday, 10-13-16—CRO and webcast—Limited Scope Representation: When Less is More. Presented by Delivery of Legal Services. 1:00 p.m. - 5:00 p.m.

Wednesday, 10-19-2016—Webcast—Tips for Combating Compassion Fatigue. Presented by Women and the Law. 10 a.m. - 11 a.m.

Wednesday, 10-19-16- CRO and Live Webcast—From Legal Practice to What's Next: The Boomer-Lawyer's Guide to Smooth Career Transition. Presented by Senior Lawyers. 12:00 p.m. to 5:00 p.m.

Thursday, 10/20/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association - Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Friday, 10/21/16- Galena, Eagle Ridge Resort—Obtaining a Judgement and Collections Issues. Presented by: Commercial Banking, Collections, and Bankruptcy. 8:50 am - 4:30 pm

Wednesday, 10-26-16—Webcast—Federal Rule of Civil Procedure 56—Summary Judgement a Refresher Course. Presented by Federal Civil Practice. 12:00 – 2:00 p.m.

Wednesday, 10-19-16—DoubleTree Bloomington 10-27-16—Holiday Inn, Bloomington—Real Estate Law Update 2016. Presented by Real Estate. 8:15 a.m. – 4:45 p.m.

Friday, 10-28-16—CRO—Solo and Small Firm Practice Institute Series. Title TBD. Presented by GP, SSF. ALL DAY.

November

Wednesday, 11-02-16—Linder Conference Center, Lombard—Real Estate Law Update 2016. Presented by Real Estate. 8:15 a.m. – 4:45 p.m.

Thursday, 11-03-2016—Webcast—Settlement and Severance Agreements: The Non-Pecuniary Terms. Presented by Labor and Employment. 1:00 p.m. – 3:00 p.m.

Thursday, 11/03/16- Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Thursday, 11/10/16- Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

Friday, 11-11-16—CRO and live Webcast—Motion Practice from Pretrial through Post Trial. Presented by Civil Practice and Procedure. 8:50 a.m. - 4:00 p.m.

Thursday, 11/17/16- CRO—Family Law Table Clinic Series (Series 2). Presented by Family Law. 8:30 am – 3:10 pm. Vid: NONE THESE WILL NOT BE RECORDED OR ARCHIVED.

Thursday, 11/17/16- Webinar—Introduction to Boolean (Keyword) Searches for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00- 1:00 pm.

December

Thursday, 12-01-2016—Webcast—Written Discovery: Knowing What to Ask for and How to Get It—Part 1. Presented by Labor and Employment. 1:00 p.m. – 3:00 p.m.

February

Monday, 02-13 to Friday, 03-17—CRO—40 Hour Mediation/Arbitration Training. Master Series, presented by the ISBA—WILL NOT BE ARCHIVED. 8:30 -5:45 daily.

March

Thursday, 03-09 and Friday, 03-10—New Orleans—Family Law Conference NOLA 2017. Presented by Family Law. Thursday: 12:00 pm – 5:45 pm; Reception 5:45- 7:00 pm. Friday: 9:00 am – 5:00 pm. NO VIDEO- THIS PROGRAM WILL NOT BE IN THE ARCHIVE

April

Wednesday, 04-19 to Friday, 04-21—Starved Rock State Park—Allerton Conference—Title TBD. Presented by Civil Practice and Procedure. Wednesday: 12:00 p.m. – TBD. Thursday: TBD. Friday: TBD-12:00 p.m. Vid: None—THIS PROGRAM WILL NOT BE IN THE ARCHIVE

June

Friday, 06-02-2016—NIU Conference Center, Naperville—Solo and Small Firm. Title TBD. ALL DAY. ■

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