

ENVIRONMENTAL NOTES

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RCRA CORRECTIVE ACTION LIABILITY: CAN IT BE IMPOSED ON A COMPANY THAT NEVER OWNED OR OPERATED THE FACILITY?

BY: JESSICA J.O. KING

The North Carolina Court of Appeals recently issued a ruling that will have a significant impact on business transactions involving property subject to a permit or corrective action obligations under the Resource Conservation and Recovery Act (RCRA) or its state equivalents. In *WASCO LLC vs. N.C. Department of Environment and Natural Resources*, the Court ruled a company that did not become involved with a hazardous waste treatment, storage and disposal facility until after the facility was closed has liability as an “operator” under RCRA. The case is a helpful reminder of how commitments made to facilitate a business transaction can evolve into unexpected environmental liability.

Winston Mills owned and operated a textile manufacturing mill in North Carolina (the “Facility”). The Facility used perchloroethylene (“PCE”) as a dry-cleaning solvent and stored virgin and waste PCE in

underground storage tanks (“USTs”). In the 1980s, Winston Mill removed the USTs and entered into a consent order with the North Carolina Department of Environment and Natural Resources (“NCDENR”) (now the North Carolina Department of Environmental Quality) to close the area as a landfill under an approved North Carolina Solid Waste Management Act (“NCSWMA”) closure plan. Winston Mills completed closure of the tank area in the early 1990s.

Shortly after closing the UST area, Winston Mills sold the Facility to Anvil Knitwear, Inc. (“Anvil”). Under the purchase agreement, Winston Mills agreed that it would be responsible for environmental issues at the Facility, and it indemnified Anvil for costs associated with “environmental requirements.” Culligan International (“Culligan”), a company affiliated with Winston Mills, was a co-guarantor under the purchase agreement and shared financial liability with Winston Mills. Through a series of corporate transactions, WASCO purchased and then sold an interest in Culligan. While it owned its interest in Culligan, WASCO provided financial assurance to NCDENR for post-closure care of the Facility. Moreover, Culligan and WASCO informed NCDENR that WASCO was to be contacted as to Culligan’s obligations for RCRA post-closure activities.



In early 2000, NCDENR identified WASCO as the “Responsible Party” for hazardous waste issues at the Facility, and WASCO agreed, signing RCRA permit applications as the “operator” and paying environmental consultants for post-closure work. As late as 2007, WASCO responded to RCRA issues at the Facility, including negotiating a groundwater assessment plan with NCDENR. In 2008, Anvil sold the Facility to Dyna-Diggr, LLC, and WASCO decided it had no further responsibility for RCRA post-closure activities. NCDENR disagreed and notified Dyna-Diggr and WASCO in 2013 that they were both liable for post-closure corrective actions as “owner” and “operator,” respectively.

A RCRA facility “operator” is defined in relevant part by RCRA regulations as “the person responsible for the overall operation of a facility.” NCSWMA and North Carolina hazardous waste regulations incorporate this definition, and further define an “operator” as “any person, including the owner, who is principally engaged in, and is in charge of, the actual operation, supervision, and maintenance of a solid waste management facility....”

WASCO never participated in actual operation of the Facility. It did not hold a hazardous waste permit for the Facility, and it was never in the chain of title to the property. WASCO’s corporate and financial

relationship with the Facility was, at best, complex, and its connection to the Facility’s contamination was at most remote. This gave WASCO strong arguments that it was not an “operator.” In response to claims that its participation in RCRA post-closure care meant it was liable, WASCO said its participation was “voluntary” and did not make it an “operator.”

The Court rejected WASCO’s arguments. It found that WASCO’s involvement after the Facility ceased operation made it a post-closure “operator” for purposes of fulfilling RCRA closure obligations. The Court noted that post-closure “operator” status “. . . is based on an examination of the totality of the circumstances” and, thus, is a fact-specific inquiry. The Court found a number of factors weighed heavily against WASCO in this regard, including that (i) it voluntarily referred to itself as an “operator” of the Facility for RCRA purposes in communications to NCDENR, effectively admitting that status; (ii) it did not deny responsibility for RCRA post-closure care until a new party purchased the Facility; and (iii) it provided financial assurance and performed post-closure care at the Facility for ten years without protest.

What’s the take-away here? It is that companies must be very careful when they assume environmental obligations in business transactions, even if those obligations are just financial guarantees or indemnification. Further, taking an active role in fulfilling existing environmental obligations of the current owner or operator of the Facility is rife with risk. Finally, companies must watch what they say to regulators and not admit to or assume liability they do not have. As WASCO learned the hard way, once you jump in the pool, it’s hard to climb out.

WASCO LLC v. N.C. Department of Environment and Natural Resources, No. COA CVS 1438 (N.C. Ct. App. Apr. 18, 2017)

INCREASE IN CHEMICAL SECURITY VULNERABILITY ASSESSMENTS LIKELY UNDER NEW DHS STANDARDS

BY: ETHAN R. WARE

The Department of Homeland Security (DHS) Chemical Facility Anti-Terrorism Standards (CFATS) program identifies and regulates high-risk chemical facilities to ensure that security measures are in place to reduce the risk of misappropriation or misuse of chemicals by terrorists. The CFATS regulatory program uses a risk-assessment methodology to identify high-risk chemical facilities. DHS determines risk profiles by requiring facilities that have specific threshold quantities of chemicals of interest to complete a questionnaire, known as a Top-Screen Analysis, regarding their chemical holdings. Facilities determined to be high-risk must submit a Security Vulnerability Assessment and Site Security Plan or Alternative Security Program to DHS for approval. The plan must include security measures that meet the risk-based performance standards established by DHS.

The Department performs an authorization inspection at high-risk facilities prior to granting approval of a Site Security Plan. Once the facility's plan is approved, DHS conducts regular compliance inspections to verify that the facility is implementing the agreed-upon security measures.

Because of recent revisions to the Top Screen Analysis, more than 17,000 chemical facilities may be required to complete a new TSA. This will undoubtedly result in some of them having to prepare or update a Security Vulnerability Analysis and Site Security Plan, tasks that can be very costly. DHS began sending notices to chemical facilities throughout the nation on a rolling basis in April 2017 indicating that the new enhanced risk assessment methodology

must now be used. "Some facilities...previously not covered under CFATS will find themselves covered, and some currently covered facilities may no longer be considered high risk," the DHS CFATS website reports.

The CFATS program is one of those reporting and recordkeeping requirements that EHS professionals must add to their chemical management plans. One way for facilities to avoid the program is to either substitute another chemical for the COI and/or decrease the quantity of COI held so that it is below the threshold quantity at which the program applies.

The CFATS program website provides webtools to assist with the new TSA and can be found at <https://csat-help.dhs.gov>.

D.C. CIRCUIT COURT LIMITS EPA'S SHAM RECYCLING RULE

BY: PHILLIP L. CONNER

The United States Court of Appeals for the District of Columbia Circuit recently rejected portions of an EPA rule designed to distinguish true recycling from "sham recycling" under the Resource Conservation and Recovery Act ("RCRA"). Materials that are legitimately recycled, meaning they meet one of EPA's recycling exclusions, are generally excluded from regulation under RCRA. On the other hand, materials that are actually discarded or used in a manner constituting disposal, despite claims of being recycled or reused, are subject to full regulation under RCRA. The trick has been in figuring out the fine distinctions that separate true recycling from sham recycling. Prior to issuance of the rule, the concept of sham recycling was addressed only in EPA guidance documents. The rule attempted to provide more clarity on the issue through revisions to the definition of "solid waste."

Under RCRA, a material must first meet the definition of solid waste to be considered a hazardous waste. RCRA regulations provide certain exemptions from the definition of solid waste for materials that are recycled. According to EPA guidance documents and interpretations, a material being recycled must serve a legitimate purpose to qualify for the recycling exemption, such as providing an effective substitute for virgin material. Recycling of material that does not provide a recognizable benefit is deemed “sham recycling” and does not qualify for the recycling exemption.

In 2008, EPA promulgated a rule altering the definition of solid waste as it pertains to certain hazardous secondary materials that are recycled. Secondary material is essentially the residue of an industrial process, and it includes such things as spent materials, byproducts and sludges. The rule excluded secondary materials from the definition of solid waste in the following two circumstances:

(1) the generator controlled the recycling of those materials; and (2) the generator transferred the materials to an off-site recycler whom the generator had audited to ensure compliance with proper recycling practices. These two exclusions were known respectively as the “Generator-Controlled Exclusion” and the “Transfer-Based Exclusion.” To qualify for either of these exclusions, the secondary materials had to meet certain legitimacy factors set forth in the rule to demonstrate that there was no sham recycling.



The 2008 rule was challenged by several organizations. The American Petroleum Institute argued that the rule unlawfully regulated materials referred to as petroleum refinery catalysts. The Sierra Club argued that the rule was not sufficiently protective of human health and the environment. In 2015, EPA promulgated a revised rule. Still not satisfied, these organizations and others filed suit in the D.C. Circuit. The provisions of the 2015 rule that were challenged include expansion of the legitimacy factors and replacement of the “Transfer-Based Exclusion” with the “Verified Recycler Exclusion.”

The four legitimacy factors in the 2015 rule are as follows: (1) the recycled material must provide a useful contribution to the recycling process; (2) the recycling process must produce a valuable product or intermediate; (3) the persons controlling the recycled material must manage the material as a valuable commodity; and (4) the product of the recycling process must be comparable to a legitimate product or intermediate. Industry petitioners argued that Factors 3 and 4 of the legitimacy test exceeded EPA’s RCRA authority because these factors unlawfully regulated non-discarded materials.

In its decision, the Court disagreed with the industry petitioners regarding Factor 3 of the legitimacy test, thereby retaining Factor 3 as part of the rule. However, the Court agreed with the industry petitioners that Factor 4 exceeded EPA’s authority. Specifically, EPA’s 2015 rule provides three options for satisfying Factor 4. First, the recycled material

is comparable to a legitimate product if it does not exhibit a hazardous characteristic not exhibited by the legitimate product. Second, the recycled material is comparable to a legitimate product if it has comparable levels of hazardous constituents. Third, even if the recycled material has high levels of hazardous constituents as compared to a raw material, recycling can still be legitimate if the recycler conducts health and environmental studies showing that the hazardous constituents are not harmful. In evaluating the Factor 4 criteria, the Court found that EPA failed to articulate a concrete standard for determining what contaminant levels in a recycled material were significant in terms of health and environmental risks. The Court reasoned that recycling of a material can still be legitimate even though the material may have high levels of hazardous constituents. Consequently, the Court vacated Factor 4.

Replacement of the “Transfer-Based Exclusion” with the “Verified Recycler Exclusion” resulted in a new standard governing when transferred materials qualify as solid waste, and industry petitioners argued that this change also exceeded EPA’s RCRA authority. The Court agreed with the industry petitioners that the Verified Recycler Exclusion exceeded EPA’s authority and ordered EPA to reinstate the prior Transfer-Based Exclusion. This allows materials sent to a recycling facility to be excluded from regulation as a hazardous waste so long as reasonable efforts are made to ensure proper reclamation.

Industry is hopeful this decision will further one of the goals of RCRA, which is to promote recovery of resources from spent or used materials rather than dispose of them.

American Petroleum Institute v. EPA, No. 09-01038 (D.C. Cir. July 7, 2017).

TWO RECENT CASES SPOTLIGHT ABILITY OF THIRD PARTIES TO ACCESS FACILITY INFORMATION

BY: HENRY R. “SPEAKER” POLLARD, V

Facility owners and operators and property developers need to meet environmental permit or performance criteria, but they also face significant compliance and logistical challenges in just managing and reporting information about their operations, permit compliance and releases of regulated substances. Much of these data are required by agencies to assess compliance and to ascertain risks to human health or the environment. However, agencies are not the only users of this information. Third parties, such as environmental groups, the media and even competitors, typically can access the information because it is part of the public record. That the information may be available to the public is an important factor in gauging the compliance or litigation risks that can arise from meeting seemingly routine reporting obligations.

Two recent, but very different, cases highlight this point. First, in *Environmental Integrity Project v. Environmental Protection Agency*, the United States Circuit Court of Appeals for the District of Columbia (“D.C. Circuit”) reviewed EPA’s duties under Clean Water Act (“CWA”) § 308 and the federal Freedom of Information Act (“FOIA”) concerning the disclosure of information provided to EPA by a company pursuant to the CWA. Specifically, environmental groups sought access to certain power plant commercial and financial information that did not meet the definition of “trade secrets” under either statute. CWA § 308 provides basic authority to EPA to require regulated dischargers of wastewater or stormwater to perform monitoring and recordkeeping and report compliance and other information to EPA. It expressly

protects trade secrets from disclosure to the public, but appears to offer no such protection to other information gathered by EPA, even if it is potentially sensitive commercial and financial information. On the other hand, the federal FOIA statute excludes from disclosure not only trade secrets, but also certain other commercial and financial information (“Exemption 4”), among other things. The court resolved these conflicting disclosure standards by relying on an APA provision prohibiting any subsequently enacted statute from overriding a provision of the APA (such as Exemption 4) unless the subsequently enacted statute does so expressly. The court held that CWA § 308 was subsequently enacted to Exemption 4, but that it does not expressly override it, so that Exemption 4 controlled in that case. Accordingly, EPA was not obligated under the FOIA or the CWA to disclose the commercial and financial information sought by the environmental groups.

The second case is *Waterkeeper Alliance v. EPA*, a case we reported on in our May 2017 issue. This case involved a challenge by environmental groups to a 2008 rule by EPA that excluded all animal feeding operations (“AFOs”) from hazardous substance release reporting obligations and smaller AFOs from reporting releases of extremely hazardous substances to states and localities. The environmental groups prevailed, and the D.C. Circuit recently denied EPA’s and the agricultural industry’s request for a rehearing. As we noted in our earlier article, and barring further appeal to and reversal by the U.S. Supreme Court, agricultural operations have lost an important and cost-saving exclusion from those reporting duties. Environmental groups have been pressuring EPA, the states, and AFOs for years for more information concerning specifics of many AFO operations, particularly as to animal waste management. With the loss of this regulatory

exclusion, the release reporting required of AFOs will provide these groups and other third parties with much more information about emissions and other types of releases from AFO operations. This opens more AFOs to the risk of citizen suit enforcement.

These cases prompt several considerations related to third party access to information submitted to agencies, namely that the regulated facility or developer should: (1) understand exactly what information is required to be reported, being careful to note differences among federal, state and local requirements; (2) evaluate, seek and preserve available exemptions from agency disclosure of facility and development information; and (3) craft filings, communications, records and reports submitted to an agency (or that can be obtained by an agency in exercising its compliance authority) based on the assumption that the documentation may be accessed at some point by third parties looking for insights into operations and compliance. Environmental laws require transparency as to many aspects of facility operations to assure regulatory and permit compliance, and agencies are compelled under FOIA laws to disclose much of that information to third parties when requested. Following these pointers will help to control what exists in the agency



record, protect sensitive business and operational information, and mitigate the risks of disclosure of that record to third parties.

Environmental Integrity Project v. EPA, 2017 WL 2324136, No. 16-5109 (D.C. Cir. May 30, 2017); *Waterkeeper Alliance v. Environmental Protection Agency*, 853 F.3d 527 (D.C. Cir. 2017).

EPA MARKS FIRST ANNIVERSARY OF TSCA REFORM WITH THREE IMPLEMENTING RULES

BY: RYAN W. TRAIL

On the first anniversary of the Frank R. Lautenberg Chemical Safety for the 21st Century Act (also known as the TSCA Modernization Act of 2015), EPA promulgated three significant rules to implement the Act. The Act stands as the first significant amendment to the Toxic Substance Control Act (TSCA) since its inception in 1976 and significantly modifies EPA's responsibilities for several issues related to chemical safety. The three new rules establish: (i) the process for identifying high priority chemicals for risk evaluation and low priority chemicals for which no risk evaluation is needed, (ii) the process for evaluating high priority chemicals to determine if they present an unreasonable risk to health or the environment, and (iii) industry reporting requirements for chemicals manufactured or processed over the past ten years.

The risk evaluation rule establishes a framework under which EPA will first announce a chemical to be prioritized, giving the public 90 days to submit relevant information on the chemical. Next, EPA will screen the chemical using the following criteria: (1) hazard and exposure potential; (2) persistence and bioaccumulation; (3) potentially exposed and

susceptible populations; (4) storage near drinking water sources; (5) conditions of use of the chemical; and (6) volume of the chemical manufactured or processed. Following screening, EPA will propose to designate a chemical as either high priority or low priority. High priority chemicals are ones that present an unreasonable risk to health or the environment. Low priority chemicals do not. This determination will be published for public comment for 90 days.

EPA's next rule establishes a process for evaluating high priority chemicals for determination of reasonable or unreasonable risk to health or the environment. A risk evaluation may be initiated by EPA or by the manufacturer of the chemical. The scope of a risk evaluation includes hazards, potential exposures, conditions of use, potentially exposed or susceptible populations, a conceptual model of the chemical's relationship with humans and the environment, and an analysis plan. EPA will also assess adverse health and environmental effects of the chemical and the duration and intensity of exposures to the chemical. It will then make a risk characterization and determination of whether the chemical presents an unreasonable risk to health or the environment. EPA's draft risk evaluation will be published for public comment for 60 days, and a final risk evaluation must be published no later than three and a half years after identifying the high priority chemical.

The third rule requires manufacturers and importers to provide retrospective electronic notification to EPA of chemical substances manufactured or imported for commercial purposes during the past ten years. EPA will use these notifications to distinguish active substances from inactive substances and will include this distinction in the TSCA Inventory.

In addition to the three rules, EPA also released the list of the first ten chemicals to undergo risk

evaluation. It also released guidance on how people interested in drafting and submitting risk evaluations to EPA should do so. All in all, EPA has taken significant steps in a relatively short period to implement the most significant amendment in TSCA's history.

Procedures for Prioritization of Chemicals for Risk Evaluation Under the Toxic Substances Control Act

Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act

TSCA Inventory Notification (Active-Inactive) Requirements



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