RCRA UPDATE: FEDERAL AND STATE STATUTORY, REGULATORY, AND JUDICIAL DEVELOPMENTS IMPACTING WASTE MANAGEMENT

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On Today’s Menu

Federal and Texas
RCRA Developments In:

- Rulemakings
- Cases/Decisions/Orders
- Enforcement
Rulemakings
Rulemakings: EPA

*Increasing Recycling: Adding Aerosol Cans to the Universal Waste Regulations*

- Docket No.: EPA-HQ-OLEM-2017-0463
- Effective: Feb. 7, 2020
- Requirements for puncturing and draining aerosol cans by UW handlers
- Authorized states not required to add aerosol cans to UW list
Rulemakings: EPA

Modernizing Ignitable Liquids Determinations

• Docket No.: EPA-HQ-OLEM-2018-0830
• Comments Closed: June 3, 2019 (17 comments)
• Update flash point test methods for determining if liquid is characteristically ignitable
• Codify EPA interpretation of aqueous alcohol exclusion
• Codify sampling guidance for multiphase wastes
• Allow uses of non-mercury thermometers in certain test methods
Rulemakings: CCR

**EPA: Federal CCR Permit Program**

- Docket No.: EPA-HQ-OLEM-2019-0361
- Public Hearing: Apr. 15, 2020 (virtual/online only)
- Comments Close: Apr. 20, 2020
- New 40 CFR Part 257, Subpart E
- Federal permits mandatory for CCR units in nonparticipating states
- Three permit types: general permit, permit by rule, individual permit (default approach)
- Utilizes general EPA administrative procedures in Parts 22 and 124 applicable to RCRA permits
Rulemakings: CCR

**EPA: A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure**

- Prepublication Proposed Rule (Feb. 19, 2020)
- Docket No.: EPA-HQ-OLEM-2019-0173
- Allow existing impoundments to request approval to operate with an alternate liner
- Allow use of CCR during unit closure
- Provide additional closure option for units being closed by removal
- Establish requirements for annual closure progress reports
Rulemakings: CCR

EPA: A Holistic Approach to Closure Part A: Deadline to Initiate Closure

• Docket No.: EPA-HQ-OLEM-2019-0172
• Comments Closed: Jan. 31, 2020 (67,215 comments)
• Clay-lined impoundments are “unlined” and all unlined impoundments required to retrofit or close
• Revise deadline by which unlined impoundments and impoundments that failed aquifer location restriction must initiate closure or retrofit
• Allow facilities time to develop alternate waste capacity to before initiating closure
Rulemakings: CCR

EPA: Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles

- Docket No.: EPA-HQ-OLEM-2018-0524
- Comments Closed: Oct. 15, 2019 (129,872 comments)
- Replace 12,400-ton threshold for environmental demonstration with location-based criteria
- Establish single approach for all temporary placement of unencapsulated CCR on the land
- Make annual groundwater monitoring and corrective action data easier to understand and evaluate; requirement to summarize results in executive summary
- Establish alternative groundwater protection standard for boron
- Revise CCR website requirements to ensure information is immediately available to public
Rulemakings: CCR

TCEQ: Chapter 352, CCR Waste Management & Registration Program

- Rule Project No.: 2017-037-352-WS
- Public Hearing: Jan. 9, 2020
- Comments Closed: Jan. 31, 2020
- Anticipated Adoption: May 6, 2020
- Create Chapter 352, adopt federal CCR requirements, implement CCR registration and compliance monitoring program
- Registration application due within 365 days of effective date
- *No* permit requirement; *no* contested case hearing opportunity
Rulemakings: TCEQ

**RCRA Rule Package 1: HB 1953 & Phase I: RCRA Authorization for Parts of Federal Rule Clusters XXIV, XXV, and XXVII**

- Rule Project No.: 2019-085-335-WS
- Comments Closed: Feb. 11, 2020
- Anticipated Adoption: May 20, 2020
- Revise IHW regulations to maintain equivalency with revisions to federal regulations (made Apr. 8, 2015 to Nov. 30, 2018)
- Implement HB 1953: Exclusion for conversion of plastics and other recyclable material through pyrolysis or gasification
- Repeal § 305.149: *Time Limitation for Construction of Commercial Hazardous Waste Management Units*
Rulemakings: TCEQ

**RCRA Rule Package 2**

- Rule Project No.: 2019-086-335-WS
- Informal Stakeholder Meeting: July 26, 2019
- Anticipated Proposal: Sept. 2020
- Tentatively Includes:
  - HW Generator Improvements Rule
  - Response to Vacatur of Certain Provisions of DSW Rule
  - Management Standards for HW Pharmaceuticals
  - Confidentiality Determinations for HW Export/Import Documents
  - E-Manifest System User Fee
  - Foundry Sands
Rulemakings: TCEQ

**IHW Generator and Management Fees Increase**

- Rule Project No.: 2020-010-335-WS
- Anticipated Proposal: June 10, 2020
- Anticipated Comment Period: June 26 - July 27, 2020
- Anticipated Adoption: Nov. 4, 2020
- Generator fee (§ 335.323)
  - Increase from $0.50 to max $2.00 per ton for non-hazardous, and from $2.00 to max $6.00 per ton for hazardous
- Management fee (§ 335.325)
  - Increase by 35%; allow E.D. to adjust up to max based on yearly trends in disposal amounts
  - Phase in over 5 years (i.e., 7% a year increase)
Rulemakings: EPA

Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals

- Docket ID: EPA-HQ-OGC-2019-0406
- Comments Closed: Jan. 2, 2020 (30 comments)
- Applies to permit decisions made by or on behalf of EPA
- New, time-limited ADR process as a precondition to judicial review in federal court (i.e., administrative exhaustion)
- Scope of EAB review limited to findings of fact and conclusions of law that are clearly erroneous
- Allows EPA G.C. to issue dispositive legal interpretation in any EAB case or on any issue addressed by EAB (including enforcement cases)
Cases/Decisions/Orders
**Environmental Technology Council v. EPA, Docket No. 19-1215, D.C. Cir. (filed Oct. 17, 2019)**

- HW recycling and TSD industry suit over increase in user fees under e-manifest system
- Asks court to set aside revised fee schedule and order refunds to industry
- Oct. 1, 2019, user fees per manifest increased 60-115%, with rates locked for 2 years

• Permittee appeal of permit that includes OSHA worker safety requirements
• Permittee argues EPA has no authority to require OSHA compliance
• EPA relies on its “omnibus authority” to protect human health and the environment under RCRA § 3005(c)(3)
Cases/Decisions/Orders: Federal

*California Communities Against Toxics v. EPA*, 928 F.3d 1041 (D.C. Cir. July 2, 2019)

- Challenge to DSW rule transfer-based exclusion
- Argued generators discard hazardous secondary materials by paying third-party to recycle them
- Transfer-based exclusion upheld:
  - EPA determination that legitimate recycling of hazardous secondary materials did not constitute “discard” was reasonable
  - Transfer-based exclusion not arbitrary and capricious
Application by Altair Disposal Services, LLC, for Permit No. IHW-50407, TCEQ Docket No. 2018-0013-IHW/SOAH Docket No. 582-18-1960

- New non-commercial, hazardous waste landfill in Altair, Colorado County
- Commission Decision/Order (Sept. 11, 2019 Agenda): Denied
Application by MedCare Environmental Solutions, Inc., for Medical Waste Processing Registration No. 40294, TCEQ Docket No. 2019-0202-MSW

- New medical waste processing facility El Paso
  - Motions to Overturn: Granted
  - Application: Denied
Application by City of Temple for Permit No. MSW-692B, TCEQ Docket No. 2017-1779-MSW/SOAH Docket No. 582-18-3435

• Expansion of Temple Recycling & Disposal Facility

• Commission Decision/Order (Apr. 24, 2019 Agenda): Granted
Enforcement
Enforcement actions resulted in treatment/minimization/disposal of 4.74M lbs. of hazardous and nonhazardous waste

- Down more than two orders of magnitude from 541.49M lbs. in FY18
- Down from 245.57M lbs. in FY17
- All-time low since tracking statistic in FY12, and EPA only started combining reductions in hazardous and nonhazardous waste in FY16

99% reduction in solid/hazardous waste cleanups from FY18
TCEQ Annual Enforcement Report – FY19

• % of Inspected Waste Facilities in Compliance: 97%

• # of Administrative Orders Issued by Media: Waste = 396

• % of Orders Issued by Media: Waste = 31%

• Estimated Pollutant Reductions (lbs.) from Orders Issued:
  – MSW: 17,052,739
  – Industrial Waste: 315,684
  – Listed Waste: 6,914
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