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THE CUBICAL

Year-End Edition

Happy Holidays From Daniel J. Brown, L.L.C.!!

As 2021 comes to a close, I would like to wish all of you the warmest wishes for a safe and happy holiday season with your families and loved ones. And of course, all the best wishes for a safe - and hopefully more normal - 2022!!

Dan

PFAS, Hazardous Waste & Taxes

In response to a petition from Governor Michelle Lujan Grisham of New Mexico, EPA announced that it will take two separate actions to regulate PFAS-containing wastes under RCRA. Interestingly, in one of these actions, EPA intends to *clarify* - by regulation - that its authority under RCRA's Corrective Action Program can be invoked to require investigation and cleanup of PFAS-containing wastes. EPA's use of the term "clarify" here suggests that EPA believes it already possesses such authority. This apparent belief brings into play one of RCRA's more peculiar nuances. Namely, the definition of "hazardous waste" in the RCRA statute is broader than the definition of the same term in RCRA's implementing regulations.

While this may catch some by surprise, there is a recent example of how the same legal term may be defined differently from one source of legal authority to another. It has been almost ten years since Chief Justice John Roberts delivered the opinion of

the U.S. Supreme Court in *Nat'l Fed'n of Indep. Businesses v. Sebelius* - the first major challenge to the Affordable Care Act. The most controversial issue addressed by the Court was the constitutionality of the so-called "individual mandate" which required individuals to obtain health care insurance coverage. Under the Affordable Care Act, individuals who failed to obtain such coverage would be required to pay a penalty. The Affordable Care Act explicitly stated that this payment was a "penalty," and not a "tax." Famously though, a majority of the justices held that despite this explicit disclaimer, the individual mandate was a "tax" as the term is used in the Direct Tax Clause of the U.S. Constitution. This legal conclusion was critical to the majority's decision to uphold the constitutionality of the individual mandate.

To this day, the Supreme Court's decision on the constitutionality of the individual mandate remains the focus of many legal scholars and political pundits. Leaving the merits of this decision to the side, this kind of legal dichotomy pre-dates *Nat'l Fed'n of Indep. Businesses*. One such example concerns the definition of "hazardous waste" under RCRA. The definition of "hazardous waste" found in EPA's hazardous waste management regulations (see 40 C.F.R. pt. 261) is a highly technical and complex definition encompassing more than 30 pages of double-columned, small-typeface print. However, in the statute itself (see RCRA Section 1004(5)), a "hazardous waste" is simply defined as any solid waste that "may (A) cause, or significantly contribute to an increase in serious ... illness, or (B) pose a substantial ... hazard to human health or the environment when improperly ... managed."

This means that certain wastes, including PFAS-containing wastes, may potentially be regulated under statutorily-driven programs such as RCRA's Corrective Action Program, despite not being considered as a listed or characteristic hazardous waste under 40 C.F.R. pt. 261. While EPA has chosen to avail itself of the rulemaking process to clarify the scope of its authority under RCRA's Corrective Action Program, the fact that it has characterized this action as a clarification betrays a belief that it already possesses the authority to regulate PFAS-containing wastes. What's more, such a belief would extend to other statutorily-driven RCRA programs such as RCRA § 7003. Under RCRA § 7003, EPA has the authority to order the cleanup of hazardous wastes that pose an imminent and substantial endangerment to human health or the environment. This is particularly noteworthy given EPA's recently-announced intention to enhance its environmental justice (EJ) initiatives through the use of its authority under this provision. (To access the EPA memorandum announcing this intention, click here.)

Generators and operators of hazardous waste treatment, storage, and disposal (TSD) facilities should closely monitor EPA's planned regulatory actions with respect to PFAS-containing wastes. In addition, TSD facilities engaging in corrective action activities should be prepared for the prospect that EPA may not wait for the completion of its planned regulatory actions. Rather, it may choose to act now pursuant to authority that it believes it already has.

EHS in 2022 and Beyond: 3 Off-beat Trends

The inaugural edition of The Cubical was published and distributed about two weeks after the Biden Administration took office, and after almost a year after the on-set of the global COVID-19 pandemic. Needless to say, radical change and transformation in EHS regulation at the federal level has been a consistent theme throughout the past year. The Biden Administration has been signaling a clear change in tone and a

more aggressive approach to EHS regulation and enforcement since Day One. Many of the changes they have been pursuing have been discussed in previous editions of The Cubical. However, as the new administration settles in, and as these changes start to take root, a number of trends are starting to emerge that may not be immediately apparent when looking at the latest Executive Orders or EPA press release. In the following series of short articles, I discuss three relatively off-beat trends and their potential impacts in 2022 and beyond.

Trend No. 1: Confess Thy Sins

At a recent conference, the new director of the SEC's Division of Enforcement, Gurbir Grewal, signaled an aggressive approach to enforcement that would include "seeking admissions of wrongdoing as a condition of settlement in certain instances." (See Schoeman, P. & Sparling, P., *New SEC Enforcement Division Director Signals Policy Shifts, Including Potential Emphasis on Admissions of Wrongdoing*, JD Supra, Oct. 26, 2021.) As EHS professionals know, so-called "no admissions" clauses are a common feature of enforcement settlement negotiations with federal and state regulatory agencies. From the standpoint of the regulated community, such clauses facilitate settlement of enforcement matters by eliminating or significantly reducing the risk of a settlement agreement being used against the settling entity in lawsuits further on down the road.

But, what if a "no admissions clause" were not available? Given the recent statements from the director of SEC's Division of Enforcement, it would not be a stretch to imagine EPA taking a similar stance. This is especially so given EPA's aggressive tone on enforcement since the new administration stepped into office at the beginning of the year. Similarly, it would not be a stretch to imagine a similar approach being taken by environmental regulatory agencies in a number of states.

Such a stance would likely only be taken in more egregious enforcement matters. Nonetheless, a regulated entity should not necessarily assume that a "no admissions clause" will always be available as a matter of course. Regulated entities should keep this in mind when considering and analyzing their respective compliance risks.

Trend No. 2: Show Me the Money

The Build Back Better bill (a/k/a the "Reconciliation Package") recently passed by the U.S. House of Representatives includes a provision that if enacted, would increase OSHA's maximum penalty authority by a factor of ten. The maximum penalty allowable for willful and repeated violations under the Occupational Safety and Health Act would increase from $70,000 to $700,000 per violation, and the maximum penalty for serious and non-serious violations would increase from $7,000 to $70,000 per violation. The ultimate fate of the Reconciliation Package is still up in the air. And, even if some version of it becomes law, there is skepticism as to whether the increases in OSHA's maximum penalty authority will survive. Still the same, this attempt to increase OSHA's maximum penalty authority is generally reflective of the Biden Administration's aggressive tone on enforcement.

On the environmental side of the ledger, EPA operates under enforcement guidelines that of call for penalties considerably less than the maximum allowed by the governing statutes for which it is responsible. EPA still has plenty of scope to go

after significantly larger penalty amounts without the need for any statutory increase in its maximum penalty authority. It is entirely possible EPA may take an attempted ten-fold increase in OSHA's maximum penalty authority as one more signal to significantly ramp up its own penalty collection efforts.

Trend No. 3: An Article of Faith

There are a number of EPA regulatory programs relating to the notification and reporting of chemical imports, usage, and emissions that include certain exemptions for "articles." The precise definition of "article" varies depending on the regulatory program involved, but generally speaking, it is a manufactured item: (i) that is formed to a specific shape or design; (ii) that has an end use function which is dependent on its shape or design; and (iii) whose chemical composition is not impacted by its end use. Regulatory programs with article exemptions include TSCA and EPA's TRI reporting program. The general idea behind these exemptions is a belief that regulated chemicals present a relatively lower risk to human health and the environment if they are incorporated into articles than if they exist in other forms such as liquids or bulk solids.

Recently, there have been indications that these exemptions may be on their way out. These indications have come from several different corners. First, there have been several recent regulatory actions taken by EPA under TSCA that would include reporting requirements with respect to articles containing PFAS. (See Beck, N., Reese, R., Wall, G., & Leopold, M., *EPA May Require Companies to Know All the Chemicals in the Products They Make or Sell,* The Nickel Report - Hunton Andrews Kurth, Oct. 4, 2021.) Second, at a recent conference, Michal Freedhoff, the head of EPA's chemicals program, made statements which seemed to signal further weakening of the article exemption under TSCA. (See Beck, et al.) Third, and finally, under the version of the defense authorization package for Fiscal Year 2022 that is currently circulating in Congress, the article exemption found in EPA's TRI reporting regulations would not apply to reportable PFAS. (See *PFAS, TRI Reporting, and Defense Authorization: Round 2*, The Cubical, Oct. 28, 2021. To access this article, click here.)

This particular trend is perhaps the clearest and most advanced of the three discussed herein. The disappearance of article exemptions from EPA's regulatory programs may have significant impacts on the activities of regulated entities across a variety of chemicals reporting programs.

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