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From: rogers, rick
Sent: Mon 7/7/2014 2:35:39 PM
Subject: FW: Inside EPA on MCHM Lawsuit.

FYI

From: Helms, Greg
Sent: Monday, July 07, 2014 10:19 AM
To: rogers, rick
Cc: Fitz-James, Schatzi; Devlin, Betsy
Subject: Inside EPA on MCHM Lawsuit.

Daily News

Disposal Firms Urge Court To Dismiss Novel Suit On Waste Determinations

Posted: July 3, 2014

Waste disposal companies are asking a federal district court in West Virginia to dismiss a potentially precedent-setting citizen suit stemming from a major chemical spill that tests the extent to which third parties can challenge a state regulatory agency's characterization of waste slated for disposal.

In a recent brief, the companies argued that Resource Conservation & Recovery Act (RCRA) does not permit a court to make a hazardous waste determination regarding remediation waste stemming from the chemical spill last January that temporarily shut down the drinking water supply for 300,000 residents.

Instead, the companies say the plaintiffs should have sought an EPA rulemaking in their attempt to claim waste from the West Virginia chemical spill should have been regulated as hazardous waste rather than sent to a landfill as solid waste -- which must meet less stringent environmental standards than hazardous waste.

But citizen plaintiffs in the case, *City of Hurricane, et al. v. Disposal Service, Inc., et al.*, are firing back, arguing in a June 13 opposition brief that the waste disposal companies are misconstruing RCRA, and contend that the waste at issue meets the statutory definition of hazardous waste, pointing to its "recognized toxicity" and its causing "physical harm to over 100,000 individuals" when the spill occurred.

A state legal source doubts the court will accept the plaintiffs' arguments, saying it is "not a close call" and agreeing with defendants that the court lacks the jurisdiction to make a hazardous waste rulemaking.

At issue in the suit is a third-party challenge of a state regulatory agency's characterization of waste stemming from the January spill of about 10,000 gallons of 4-methylcyclohexane methanol (MCHM), as well as propylene glycol phenyl ether (PPH), from an above-ground tank run by Freedom Industries into West Virginia's Elk River.

The spill contaminated Charleston's potable water supply for days and triggered concerns among lawmakers and others over the adequacy of regulations governing above-ground chemical storage facilities, leading to the push for legislation that would create a new EPA drinking water law program to prevent chemical releases from above-ground storage tanks. The legislation passed the Senate environment committee in April, although sources say there is no "easy path forward" for the bill.

The municipalities are seeking an injunction requiring removal and remediation of numerous truckloads of remediation waste -- which includes a mixture of sawdust and remediation materials from the spill site -- alleging that the state Department of Environmental Protection (DEP) was wrong in deeming the materials non-hazardous.

The City of Hurricane and Putnam County, WV, filed the suit against landfill owner Disposal Service, Inc. (DSI) and landfill operator Waste Management of West Virginia, a subsidiary of Waste Management, Inc.

Mike Callaghan, the attorney for the municipalities and the former head of DEP, has said the suit could be precedent-setting as "it goes against what a regulatory agency has held," testing the extent to which third parties can challenge a state regulatory agency's characterization of waste.

Citizen Suit

The suit was filed under RCRA's citizen suit provision, known as section 7002(a)(1)(B). While no federal drinking water standard has been set for crude MCHM or PPH, the plaintiffs have sought support for their argument by pointing to the West Virginia governor's decision, in the face of the emergency stemming from the spill, to set an emergency screening level and provisional safe drinking water level -- known as a maximum contaminant level (MCL) -- of 10 parts per billion for MCHM in drinking water.

The complaint explains that for each MCL, a corresponding Toxicity Characteristic Leaching Procedure (TCLP) value is typically derived to protect groundwater from those same health threats via leachate from a landfill. In this case, a corresponding provisional TCLP threshold for crude MCHM of 1 part per million (ppm) "should also be recognized" for determining when a substance is a regulatory hazardous waste "at least in the context of this State & Federal Emergency until U.S. EPA or the WV [DEP] establishes a different standard through the rule-making process," the lawsuit says.

But the defendants say the suit should be dismissed on procedural grounds, arguing that the municipalities failed to meet the mandatory 90-day notice to the defendants that they would be filing a citizen suit under section 7002. The defendants note that 90-day notice can be waived if the alleged violation relates to the disposal of hazardous waste, but they lay out arguments why the remediation waste at issue is not a hazardous waste.

"Having failed to provide the required notice, Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction . . ., or in the alternative, for failure to state a claim upon which relief can be granted . . .," they say.

They argue the municipalities "fundamentally misconstrue the process for identifying a hazardous waste under RCRA." They say the municipalities fail to show that MCHM has been defined as a regulatory hazardous waste, which would require the chemical being either explicitly listed in regulations as a hazardous waste by EPA, displaying one or more hazardous characteristics of ignitability, corrosivity, reactivity and toxicity under a certain methodology, or showing the waste to be a mixture of a solid and listed hazardous waste.

In particular, the defendants say the city's attempt to rely on an emergency screening level and a provisional safe drinking water level set by the state in the face of the spill's emergency is "a creative approach," but "mere fiction," as the plaintiffs fail to meet RCRA's requirements for being characterized as a hazardous waste.

"Plaintiffs have derived their own regulatory threshold for Crude MCHM based on the screening level provisionally established for drinking water by the Governor of West Virginia in the aftermath of the Freedom Industries chemical spill, arguing that this value 'should also be recognized for the purpose of determining whether a substance when it

becomes a waste under the West Virginia Hazardous Waste regulations is a regulatory hazardous waste for the purposes of those same regulations, at least in the context of this State & Federal Emergency or until U.S. EPA or the [West Virginia] Department of Environmental Protection establishes a different standard through the rule-making process,'" the defendants say.

The plaintiffs "fail to establish that Crude MCHM demonstrates the characteristic of toxicity under the methodology prescribed by RCRA," the defendants say. The fact that crude MCHM does not exhibit any of the four characteristics of hazardous waste is confirmed by permits issued by DEP, the defendants further say.

Defendants' Argument

The defendants argue that the plaintiffs only have two avenues for a solid waste not already regulated as a hazardous waste: to either bring a citizen suit against EPA alleging the administrator "had a non-discretionary duty to regulate such waste as hazardous waste and failed to do so," or to file a rulemaking petition with EPA to regulate the waste as hazardous under RCRA.

The plaintiffs have done neither of these, the waste disposal companies say. "Instead, Plaintiffs attempt to bypass these two prescribed avenues by urging this Court to find that Crude MCHM is a hazardous waste under RCRA."

Further, the defendants say RCRA section 7002 "does not allow the Court itself to make a hazardous waste determination." Rather, the remedies that can be pursued by a citizen suit are either a mandatory injunction or a prohibitory injunction, they say.

The state legal source agrees the court lacks the jurisdiction to make a hazardous waste determination, saying it is an "obvious violation of due process." However, the source says, that in addition to EPA, state regulators could also write a rulemaking declaring the substance a hazardous waste.

In addition, the source disagrees with the plaintiffs that jumping from a governor's emergency order that essentially declared the waste a "statutory hazardous waste" to a determination it is a "regulatory" hazardous waste "is a huge leap," and even in a "widows and orphans" type of case such as this, is "not going to cut it." The plaintiffs wanted to take a shortcut through all the regulatory requirements for determining a waste to be a regulatory hazardous waste, the source speculates.

The defendants and state source also discount the plaintiffs' argument that because methanol -- a component of MCHM -- is a hazardous substance, MCHM should be considered a mixture of solid and hazardous wastes under RCRA. The defendants argue methanol only comprises 1 percent of MCHM, hardly the "sole active ingredient." And the state source says while the argument is "the straightest-face argument" made by the plaintiffs in the case, making such a judgment that MCHM is a hazardous waste due to a minor ingredient it contains would be a "huge stretch."

But in their June 13 opposition brief, the plaintiffs say the defendants "misunderstand RCRA and its purposes." They reiterate arguments about the substance's toxicity and relying on the governor's emergency provisional levels to declare it a hazardous waste.

Further, they say the court "has the authority and responsibility to establish, based upon the emergency standard articulated by the Chief Executive of the State of West Virginia acting pursuant to his constitutional authority to protect public health, a toxicity standard under the [state hazardous waste law] for Crude MCHM of 1 [ppm], above which wastes shall be considered hazardous wastes for the purposes of RCRA Subtitle C."

The plaintiffs say that the remediation wastes at issue contain MCHM at concentrations well above 1 ppm. "Accordingly, the Crude MCHM Wastes and Residues are and should be considered hazardous wastes, both in the context of the statutory definitions . . . and in the context of the 'listed and identified' hazardous wastes subject to the applicable state and federal regulatory schemes."

They also argue that the court should not dismiss the case on procedural grounds due to contentions by defendants over the 90-day-notice because there are disputed jurisdictional facts intertwined with facts central to the merits of the plaintiffs' claims. -- *Suzanne Yohannan (syohannan@iwpnews.com This e-mail address is being protected from spambots. You need JavaScript enabled to view it)*

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See OSWER's new LEAF leach test methods at:

http://epa.gov/wastes/hazard/testmethods/sw846/new_meth.htm

For an overview of hazardous waste regulation see the RCRA Orientation Manual, at:
www.epa.gov/epawaste/inforesources/pubs/orientat/