

**RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW**

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**I. Personal Liability for Environmental Violations.**

**A. Enforcement actions can be directed to owners and operators who engage in violations.**

- 1. All corporations must act through their employees, officers, shareholders and directors.**
- 2. Merely being the person responsible for environmental compliance within a company does not render one an owner or operator.**

**B. Corporations are intended to shield shareholders from personal liability for the debts of the corporation. *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos.* (1993) 67 Ohio St. 3d 274, 287.**

**C. Under some circumstances, the protection of the corporate form can be disregarded, and the shareholders can face personal liability. This is called "piercing the corporate veil."**

**D. The legal standard for piercing the corporate veil is:**

**"(1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere Condominium Unit Owners' Assn., supra at 288.***

**E. In *State of Ohio v. Mercomp, Inc.*, (App. Cuyahoga Cty 2006), 167 Ohio App. 3d 1469, a series of corporations owned by one man flagrantly and repeatedly violated environmental regulations concerning the closure of a landfill over a period of several years. The corporation was formed solely for the purpose of closing the landfill. It served no other purpose. The court was convinced that, because a single shareholder owned and directed the work of the corporation, the persistent and flagrant pattern of violations showed that the corporation was formed for the purpose of evading environmental regulations, and the threat to human health and safety was a tangible harm, the OEPA properly pierced the corporate veil, and imposed civil fines and penalties upon the shareholder.**

- 1. The court found that it was not necessary to examine the degree to which the shareholder conformed to the formalities of maintaining separation of the company from the individual shareholder by maintaining corporate records, separating**

ownership of assets and accounts, and maintaining sufficient capital in the company to fund its operations.

2. The court appeared to be convinced that the pattern of violation showed an intent to use the corporate form to engage in illegal activity, so the fact of sole ownership and control by a single shareholder was enough to meet the first prong of the *Belvedere* test.
- F. The court returned to a more traditional analysis of the factors involved in piercing the corporate veil in *State of Ohio v. S&R Recycling, Inc.*, (App. Columbiana Cty. 2011), 195 Ohio App. 3d 744. There, OEPA sought to impose civil penalties for landfill regulation violations on the two out-of-state shareholders of a corporation that owned a landfill in Ohio. The court found that, while the shareholders did not observe all of the formalities of maintaining a separate existence for the corporation, they did treat the corporation as a separate entity, with its own accounts and property, and they did not hold themselves out to be personally liable for the corporation's obligations. They did not divert funds of the company for their personal use. The corporation had its own contracts with consultants and vendors, and paid its bills and taxes with its own assets. As a result, the state did not prove that the corporation was merely the alter ego of the shareholders, and refused to pierce the corporate veil.
- G. The trend is toward greater efforts by enforcement authorities to seek to impose civil penalties and other liability upon the owners of corporations. Careful adherence to the common law concepts of separation of the assets, accounts and contracts of the corporation has become all the more important.

## **II. Fracking Regulations – Everything but the Squeal.**

- A. Hydraulic fracturing emits significant amounts of volatile organic compounds, particularly methane. This occurs primarily as the producer recovers water and chemicals from the horizontally drilled wells, commonly referred to as “flowback water”.
- B. On April 17, 2012, USEPA issued final regulations requiring capture, processing and reuse of hydrocarbons emitted from flowback water. This was the result of a consent decree issued in a lawsuit by environmental groups that sought to force USEPA to adopt new source performance standards for natural gas wells.
- C. In theory, these regulations will reduce VOC emissions by 95%.

- D. In theory, the sale of recaptured hydrocarbons will generate sufficient revenue to pay for the emission control equipment and processes.
- E. As the technology for recovery of hydrocarbon emissions improves, the cost of doing so may decline, and the market may drive efforts to even further reduce emissions so that hydrocarbons become a product instead of a pollutant. There will be a role for environmental and mechanical engineers in designing recovery technology, and for facility and environmental managers to explore new and better approaches to the recovery of “waste” materials.

### III. Greenhouse Gas Regulations.

- A. As a means to apply political pressure on Congress to adopt cap and trade regulations for greenhouse gases, the Obama administration’s leaders of USEPA threatened to adopt regulations of the gases under the Clean Air Act. Congress did not act, so USEPA adopted a series of regulations that have resulted in regulations of emissions from tailpipes and stationary sources.
- B. An important U.S. Supreme Court case implicitly finds that USEPA is authorized by the Clean Air Act to adopt greenhouse gas regulations. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the court found that a state is precluded from asserting a federal common law claim for nuisance against the emitters of greenhouse gases, in part because Congress preempted such claims by its adoption of the Clean Air Act. The court discussed in some detail the extent of the authority to regulate greenhouse gases granted by the CAA. While the court did not face squarely the question of the validity of GHG regulations, it opened the door for lower courts to find that such regulations are authorized by the Clean Air Act.
- C. The Circuit Court of Appeals for the District of Columbia, which is the appellate court that usually hears challenges of federal regulations, rendered a decision on the validity of the greenhouse gas regulations. In *Coalition for Responsible Regulations, Inc., v. EPA*, Case No. 09-1322 (D.C. Cir. June 26, 2012), the court upheld the regulations, relying on the Supreme Court’s decision in *Massachusetts v. EPA*. Because the D.C. Circuit relied on existing and fairly recent Supreme Court authority, some commentators think it is unlikely that the U.S. Supreme Court will allow a further appeal of the decision to proceed.
- D. The regulations set limits on the amount of permissible emissions of GHG’s, and it is anticipated that those limits will be reduced over time as industry gears up to comply and as USEPA tasks resources to review the wave of permit applications that are anticipated.

**E. Since it looks like these regulations are here to stay, it is time for consultants, environmental managers and contractors to prepare for implementation of compliance programs and for the permit application process.**