

From Washington

The Consumer Product Safety Commission (CPSC) Welcomes ASTM Standard for Crumb Rubber

The Environmental Protection Agency (EPA) and CPSC were tasked by President Barack Obama to conduct a study of synthetic turf/crumb rubber to determine whether the material was harmful to athletes who played on synthetic turf fields with crumb rubber infill. Near the end of the Obama Administration EPA said that it needed an extended amount of time to further study the matter.

Concerned about the impact of such a delay on the crumb rubber and synthetic turf industries, ISRI staff met with the Acting Chairman of the CPSC to express deep concern about further delay when existing studies of the material suggested that they pose no significant risk to human health or the environment. ISRI had also spoken to EPA staff several times about the damage to public confidence in synthetic turf with crumb infill as the public and industry await the results of the federal governments study. The fact that approximately one hundred studies all found no significant harm from the use of synthetic turf playing fields was emphasized numerous times in an effort to have EPA accelerate its efforts.

However, recently, the Consumer product Safety Commission (CPSC) issued a statement welcoming the industry's willingness to adopt a voluntary consensus standard for testing surface materials for heavy metals. While the statement has no regulatory impact, it is important towards sending a message to the public about the industry's commitment to test this material to the U.S. toy standard.

Hopefully, the CPSC statement will allay some of the public's concerns about this material. ISRI met with the acting CPSC chairman before this statement was issued illustrating the regulatory uncertainty caused by the delay in the federal study. This follows several recent studies indicating a low risk from exposure to the crumb rubber. ISRI has also spoken to EPA several times about the damage to the public confidence from this uncertainty even with nearly 100 existing research studies. Additionally, the budgets for CPSC and EPA have been dramatically curtailed which could have a significant impact on the timely completion of the federal studies.

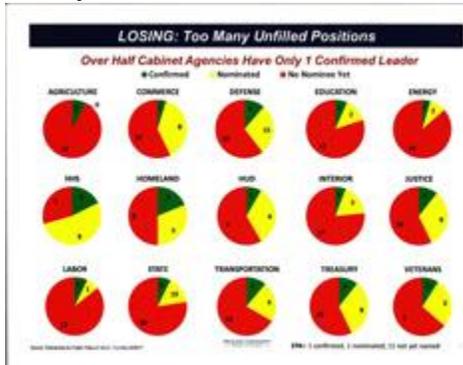
EPA Budget Slashes Recycling Programs

The Trump Administration proposed significant cuts to the overall EPA budget of 31 percent with a workforce reduction of 21 percent. EPA's budget would be cut from \$8.2 billion to \$5.7 billion. This reflects the 'back to basics' goal of EPA administrator Scott Pruitt - returning many of EPA's functions of to the states. Unfortunately, these cuts would also impact the recycling and sustainable materials management programs at the Agency. The budget also significantly reduces the offices that conduct research and enforcement. The Congress, where budgets begin, have reinstated much of the EPA budget. The draft House 2018 Fiscal Year appropriations bill provides \$7.5 billion, a reduction of \$528 million below Fiscal Year 2017 and \$1.9 billion above the administration's request. The House version aims to retain the administration's goals of "reshaping" the EPA workforce and reining in outdated regulations, including the controversial "Waters of the United States" rule. |

While many would welcome such cuts as a way to pare back and control EPA's "overzealousness," it leaves many of these programs with open-ended projects and unleashes outside groups to independently pursue industries without much of the restraints of a government enforcement agency.

For example, when EPA pursues an enforcement action, there are many rules and checks on this power both legal and political. Environmental groups usually remain on the sidelines while these enforcement actions occur. However, if EPA does not take action, an environmental group will bring a citizen suit, media attention, or other strategies against their targets without many restraints. With regard to other programs, EPA’s research programs provide valuable information to protect human health and the environment. An example is the federal research into exposure to crumb rubber used on playing surfaces. In this case, with proper funding, the research should have been completed in a one year timeframe. Instead, with limited funding and the threat of a funding shortfall, such a study cannot be completed in a timely manner providing regulatory certainty to industry, communities, policymakers, parents, and athletes.

Trump Nominations Process Hinders Agenda



The Trump administration has not nominated the necessary personnel to the various agencies at the same pace as prior administrations at the same point in time. In most cases, only the head of a Department or Agency has been nominated and confirmed. In other cases, only a small handful of political appointees have been placed into offices, leaving the vast majority of the supervisory level offices vacant or with ‘acting’ assistant secretaries who are likely to consist of senior career employees. This failure to nominate political appointments is frustrating the smooth operation of the government including implementing the administration’s regulation reform

initiatives. In particular, EPA only has its administrator confirmed with a small handful of appointees with limited authority to rescind regulations or carry out the functions of the Agency’s various offices. It also enables the career staff to slow-walk reforms and sometimes freeze in place most of the Obama-era policies the president promised to repeal. For example, at the Treasury, the Mutilated Coin Redemption Program cannot move forward without a Mint Director who has the authority to resume the program. The White House has indicated recently that it is speeding up the appointment process and will be submitting many names of people to fill these important roles. However, these nominees must be vetted by the FBI and many sent to the U.S. Senate for confirmation. This process will take time and, in the meantime, important policy changes and government functions will not be achieved.

Overtime Threshold Gets another Review

ISRI members facing complicated labor law changes might get another chance to be heard on the matter now that the U.S. Department of Labor (DOL) has signaled it may move to scale back the Obama-era rule expanding overtime eligibility. In a development most have expected, as ISRI reported earlier this year, the DOL last week dropped its defense of the Obama administration’s overtime rule, but indicated it will defend the agency’s right to set a salary threshold on who qualifies for overtime pay in the future. This means that ISRI members may get the opportunity to help shape a revised rule in the near future through the public comment and rulemaking process.

Late last year, the DOL issued final rules on the Fair Labor Standards Act (FLSA) overtime rules which amended the “white collar” exemptions of the FLSA and stipulated that the Labor Department will raise

the threshold every three years going forward. The overtime rule would have doubled to \$47,476 the salary threshold under which virtually all workers are guaranteed overtime pay if they work more than 40 hours per week. ISRI members and industry at large argued that this new rule would be quite disruptive and seriously damaging to a wide array of workplaces and employees.

The rule was set to take effect last December, but 21 states and various industry groups challenged the rule which resulted in the granting of a preliminary injunction by a federal judge in Texas that temporarily blocked the rule. The Obama administration appealed, leaving the Trump administration to decide whether to continue the appeal or drop it.

Overtime reform is not dead and ISRI members must remain engaged. Despite the latest developments, the Trump Administration has made it clear that it will continue on the path of overtime pay review. In briefs filed on June 30, 2017, DOL asked the 5th Circuit Court of Appeals to uphold the agency's legal authority to set a salary threshold for overtime pay eligibility. However, the agency also submitted a Request for Information to the Office of Management and Budget (OMB) seeking public input on questions that will aid the agency in drafting a new overtime rule.

Labor Secretary Alexander Acosta told Congress earlier this year that an update to the overtime rule might be warranted, but that he had "serious questions" about the previous administration's efforts to double the salary threshold. That "goes far beyond a cost of living adjustment," Acosta said. He went on to say that an inflation-adjusted threshold would be about \$33,000.

Many in the business community are concerned that the overtime threshold will adversely affect employers with limited revenues and could harm many affected employees as well. Creating a "one-size-fits-all" salary threshold for overtime eligibility across the country – inconsiderate of cost of living differences – would not be workable for many employers and, in fact, would harm many affected employees as well. Without sufficient time to plan for the increase, it is arguable that cuts and demotions will become inevitable, and workers will actually end up making less not more.

As the proposed rulemaking process takes hold, ISRI will continue to monitor the situation and call upon its members to engage at the appropriate time to ensure the needs of the recycling industry are heard. In the meantime, if you have any questions about the situation or overtime laws, contact ISRI Government Relations.

State News

State Legislatures Update

Only nine states are still in their regular sessions, but between special sessions and automatic carryover provisions, even bills in those states that have "finished" for the year could easily be revived later this year or next. ISRI is currently tracking over 600 state bills and regulations across the nation; if you'd like to find out what changes could impact your company, visit ISRI's State Legislative Tracking System (www.isri.org/statetracking), or contact Danielle Waterfield (DWaterfield@isri.org) or Justin Short (JShort@isri.org) if you have any questions about the system or legislation impacting your state.

Materials Theft

Texas legislators have added a new wrinkle to the state's metals theft laws with the passage of Texas SB 208, adding recordkeeping, reporting, and penalty provisions related to purchase of an "explosive device" by a metal recycling entity. It criminalizes the knowing sale or purchase of an explosive device, and requires recyclers who unknowingly purchase or otherwise obtain such a device to notify the Department of Public Safety; recyclers may also notify law enforcement or the nearest military installation so that the device may be removed or disposed of as soon as possible.

Other bills passed recently are more mundane. **Louisiana** amended penalties related to metals theft, while **Pennsylvania** created a new offense for the theft of secondary metal. **Kansas** delayed the implementation of their statewide reporting system until January 1, 2019, and legislation just passed in **Delaware** clarifies licensing requirements for scrap metal processors, sets requirements for applicants, and sets penalties.

Oklahoma, Kentucky, Maryland, and **Oklahoma** also passed metals theft amendments earlier in the year. To keep updated on the most recent versions of the law, ISRI members are encouraged to visit ISRI's state metals theft law summaries available on ISRI's State Specific Policy Resources pages (www.isri.org/stateresources) and the Metals Theft Law Database (www.isri.org/metalstheftdb).

Recycled Rubber/Artificial Turf

The **District of Columbia** has stolen a march on the states with DC B22-0341. While most of the bill's 124 pages deal with budgetary issues, Title VI, Subtitle J on page 88 includes an indefinite moratorium on "any synthetic turf fields made from crumb rubber or other materials made from recycled tires on property owned or leased by the District." The bill was introduced, amended, and passed by the city Council on the same day, and as of the time of writing was awaiting action by the Mayor. However, even if the provision clears the Mayor's line item veto, the budget still faces approval by Congress.

Currently only two state synthetic turf bills show movement; **California** AB 509 and **Massachusetts** HB 3627. The Massachusetts bill, which received a hearing on June 12 before the Joint Committee on State Administration and Regulatory Oversight, seeks to ban the use of bonds to fund athletic fields or playgrounds constructed with crumb rubber. The California bill's impact is more subtle; along with numerous changes to the state's tire recycling program, it would repeal the current Rubberized Pavement Market Development Act's incentives. Eligibility for future incentives would exclude use for synthetic turf infill, loose rubber nugget or mulch playgrounds, tire-derived fuel, as an intermediate product, or most landfill cover uses. The bill passed the Assembly and Senate Committee on Environmental Quality, but has not received a floor vote.

State Superfund Recycling Equity Act (SREA) Equivalents

South Carolina and **North Carolina** have become the 7th and 8th states, respectively, to enact Superfund Recycling Equity Act (SREA) equivalents their state Superfund laws. Both SC SB 181 and NC HB 402 use a similar strategy to that employed in **Tennessee** last year by simply referencing the provisions of the federal law. Unfortunately, the third SREA equivalent bill that was being considered, **Texas** HB 1856, was held in the Senate until the session adjourned after receiving a unanimous vote in the House.

ISRI has recently added links to our State Policy Resources pages to each state's Superfund law, as well as information on the 8 states (AR, FL, GA, MI, NC, PA, SC, & TN) that have adopted provisions similar to SREA. In the overwhelming number of states without a SREA equivalent statute, it is possible that scrap processors potentially could be subject to liability if the action is brought under the state Superfund law. For more information on state SREA efforts, please contact [Danielle Waterfield](#) at (202) 662-8516.

International

China to Ban Some Scrap Imports by Year End

As reported in an *ISRI Member Alert* on July 18, China notified the World Trade Organization (WTO) of its intent to ban the import of certain scrap materials by year end. Among the **items included on the list** are most scrap plastics ("including polymers of ethylene, styrene, vinyl chloride and PET..."), mixed paper and slags, and drosses.

ISRI has already notified the Office of the United States Trade Representative and the U.S. Department of Commerce on the devastating impact such a ban will have on the global recycling industry, especially because ISRI has heard that China is considering additional notifications in the future on other scrap materials. Upon receiving this information, ISRI immediately briefed U.S. officials in preparation for tomorrow's U.S.-China Comprehensive Economic Dialogue (CED) in Washington.

With more than \$5.6 billion in scrap commodities exported from the United States to China last year alone, the trade in specification-grade commodities – metals, paper and plastics – between the United States and China is of critical importance to the health and success of the U.S. based recycling industry. If implemented, a ban on scrap imports will result in the loss of tens of thousands of jobs and closure of many recycling businesses throughout the United States.

The scrap recycling industry is the first link in the global manufacturing supply chain. Recycled materials are key inputs into the production of new, usable commodities for the use in value-add production. In any given year, approximately one-third of the scrap recycled in the United States is prepared for shipment to the export market, and China is the recycling industry's largest customer. This includes more than \$1.9 billion in scrap paper (13.2 million tons) and \$495 million in scrap plastics (or 1.42 million tons).

More than 155,000 direct jobs are supported by the U.S. industry's export activities, earning an average wage of almost \$76,000 and contributing more than \$3 billion to federal, state, and local taxes. A ban on imports of scrap commodities into China would be catastrophic to the recycling industry.

ISRI will continue to follow this development and provide information as soon as it is available. If you have any questions, please contact [Adina Renee Adler](#).

China's Scrap Industry under Scrutiny

We are working hard to keep you as updated as possible on developments in China. Information is coming in fits and spurts. Earlier this month, we learned that the Chinese government is undergoing a nationwide inspection of Chinese scrap processing facilities. It is our understanding that the focus is

mainly on processors of domestically generated material and not on importers, and that in just one week, more than 70 percent of the companies inspected were found in violation of air and water pollution rules, and had incomplete operational documents and/or equipment misuse. The vast majority of these are plastic scrap processors, though a number of nonferrous metals handlers were also found to be out of compliance.

Although domestically focused, anxiety continues to penetrate the market as these activities also create uncertainties for Chinese importers. We are told that only until these inspections are complete will the Chinese government consider restarting reviews of import permits. Without these permits, members are reporting to us that sales are on hold, materials are stuck at Chinese ports or their own yards, and in some cases containers fail inspections without explanation.

As we monitor this situation, we are also working to build support among key government and industry supporters. In Washington, we have met with key officials in the Trump Administration. The U.S. Departments of Commerce and Treasury co-lead with their Chinese counterparts the U.S.-China Comprehensive Economic Dialogue (CED), the primary venue for the two governments to engage in dialogue on priority issues and irritants in the bilateral relationship. Additionally, we have met with key Congressional leadership responsible for trade as they, too, have opportunities to either engage directly with the Chinese government or encourage the Administration to do so.

ISRI continues to gather information and coordinate outreach with key industry players in China, the United States, Europe, and Australia, and we have briefed officials in the European Commission about these events. Although much of the work has been with ISRI at the helm, we believe the opportunity of success only grows when there are more voices in the chorus. We appreciate the information already gathered from members and the work that some of you have done directly with policymakers – we certainly hope to hear from many more of you. Until then, we will keep sending updates on what is occurring in China to elaborate on this and answer your questions directly.

Law Enforcement

ISRI's Law Enforcement Advisory Council Advises Members on Priorities

Eight members of ISRI's Law Enforcement Advisory Council (LEAC) met during the Annual Convention held in New Orleans. The eight members represented state, local and railroad police; state and county prosecutors; public utility security specialists; and crime prevention specialists. The LEAC normally advises ISRI on what information and or programs members should be providing to law enforcement in the fight against materials theft. This year, in addition to asking what ISRI should be telling law enforcement, the LEAC was asked what law enforcement has to say to ISRI. Much of the discussion that followed centered on two topics, stolen material and communications. ISRI members may debate the examples below, but it is important to remember that whether applicable or not, the LEAC represents the perceptions of law enforcement.

Stolen Material

The LEAC referred to ISRI's *Best Practices* and concentration on "the basics." Members are encouraged to remain suspicious when what appears to be new or regulated materials are being brought into yards.

For example, one Midwest utility recently lost more than \$75,000 in spooled wire during the construction of a new sub-station. A utility employee was taking the wire to a recycler during the construction. This is not meant to suggest that recyclers knowingly received the stolen material, but members should ask questions even if the seller appears to have legitimate possession of materials.

The chain of custody of evidence is critical in those theft cases that reach the prosecution stage. Photos taken by recyclers can be crucial in identifying suspects and proving possession. ISRI members are asked to make sure photos are clear and that hats or hoods do not hide the sellers' faces.

ISRI members are also encouraged to make full use of the ScrapTheftAlert.com (STA) system if questionable material is received. The suggestion to "remain suspicious" prompted a LEAC member to point out that STA users should remember there is a *Report Suspicious Activity* option. The vast majority of reports submitted to STA are in response to a theft; however, ISRI members have used the *Report Suspicious Activity* option when questionable materials have been brought to their yards. This option is found in the drop-down menu in the *Theft Type* section of the report.

Communication

Some members of the LEAC, such as the railroad police and public utility security, have jurisdictions that cross state lines and by default cross ISRI chapter lines. For this reason, ISRI members should be prepared to fully explain why agreed upon legislation in one state does not work in another. The LEAC member representing the Union Pacific Railroad questioned why in the past ISRI members in Ohio agreed to registration fees while members in Colorado opposed similar fees. In the discussion that followed, the LEAC member understood the final versions of the Ohio and Colorado laws were part of a give and take process and that ISRI members may accept or oppose single compliance issues in lieu of others.

National Sheriffs Association

Sheriff Greg Champagne of St. Charles Parish, Louisiana, sat in on the morning session of the LEAC meeting. Sheriff Champagne is the current president of the National Sheriffs Association (NSA). His term as president will end during the annual NSA conference to be held the end of June in Reno. Sheriff Champagne advised he will ask the incoming president to appoint him as a permanent member of the LEAC, filling the seat left vacated by retired Sheriff Aaron Kennard.

In the Courts

Court to Hear Challenge to Third-Party Electronic Reporting

Government overreach of its police power and property rights are the central core of a new legal challenge that could impact any ISRI member or private enterprise facing electronic reporting mandates utilizing third-party private database companies. Two ISRI member companies that operate in Omaha, Nebraska are challenging a year-old municipal ordinance designed to clamp down on metals theft. The two companies say the law illegally ties compliance to a privately-driven mandate forcing them to relinquish control of their private property without compensation.

No matter what commodity in which you trade, all ISRI members should be watching closely. At the heart of the matter lies a question of law that has thus far avoided judicial scrutiny: can the government force two private entities into a binding contract against one party's wishes and without compensation or consent.

The implications of compliance with electronic reporting mandates are commonly misunderstood and this question of law is more than ripe for court review. As legislatures across the nation are increasingly granting government agencies the right to require recyclers to convey their records in electronic format for ease of inspection, it is the private sector that is primarily becoming data collection and management agents for the government. The agents control access to the portal required to comply with the law and therefore have tremendous leverage over the regulated entities, including the ability to essentially force recyclers to grant unrestricted royalty-free access and use of any data submitted through the portal.

Omaha Ordinance

In 2015, the Omaha City Council passed an ordinance requiring electronic reporting to the Omaha Police Department by scrap metal recyclers and pawn brokers. The city then contracted with LeadsOnline as the information processor for the Police Department. Scrap metal recyclers and pawn brokers are now required to electronically report their information to LeadsOnline. As seen in many jurisdictions around the nation with similar ordinances, in order to electronically report to the Omaha PD through its vendor LeadsOnline, salvage dealers and pawnbrokers are required to register their businesses on the privately-owned LeadsOnline website. LeadsOnline utilizes a website user agreement ("checkbox contract") that all registering businesses must sign (i.e. agree by checking a box to formalize agreement) before being granted use of the website to report in compliance with the law.

The coerced agreement to this "checkbox contract" is obtained by harnessing the city's police power and its rights to enact ordinances for the public good, safety, and welfare. Compliance with the law is conditioned upon utilizing the services of a privately-owned company with no alternative or options available. As such, acting as agent for the city of Omaha, LeadsOnline has the leverage to effectively force recyclers to enter into a binding contract that relinquishes all rights to control use of their private company records that are reported through the website and indemnifies LeadsOnline for damages if the information is leaked or otherwise misused. The recycler has absolutely no bargaining ability to decline the contract or to set agreeable terms and conditions.

As most everyone knows, Internet sites that collect data from users have a broad set of terms and conditions that favor the legal rights and monetary interests of the Internet site owner. Plaintiffs in the Omaha case are arguing that LeadsOnline is taking advantage of its "agent" status to procure information for its own benefit. As evidence of the fact, the allegations point to the LeadsOnline website user agreement which demands concessions from the recyclers such as the grant of an "unrestricted" and "royalty-free" license to utilize the reported data. Plaintiffs in this case fully outlined these concerns to the city council prior to enactment of the ordinance but were ultimately ignored.

Once the reporting business accepts the website user agreement (i.e. "checks the box") – which is mandatory to complete the registration process for reporting - neither the Omaha PD nor the city of

Omaha has any control over how LeadsOnline utilizes the data that is reported. This is because in the small print of the “checkbox contract” the business owner is required to completely release control of the data to a third-party, thus removing its “confidential” status under applicable consumer privacy protection laws. Plaintiffs in the case argue that LeadsOnline utilizes this “checkbox contract” to get around confidentiality laws and subvert any authority the city of Omaha has to restrict use of the reported data for law enforcement purposes only.

Constitutional Questions

The reason all ISRI members should be watching this case closely stems from the fact that the questions of law hit on fundamental constitutional rights that are threatened by these reporting laws involving third-party vendors. Property rights and individual liberties such as the right to contract are quietly under siege by legislative activity that is going unchallenged and mostly unnoticed by the general public. For instance, the law considers business records to be private property protected under the Fifth Amendment of the Constitution. Yet, the Omaha ordinance facilitates the taking of this private property without compensation by allowing the city’s agent to essentially seize control of the recyclers’ data through its website user agreement. Furthermore, this “checkbox contract” also forces Omaha recyclers to indemnify LeadsOnline for damages as well as take any litigation to Dallas, Texas where LeadsOnline is headquartered and laws differ. There is no negotiation allowed, thus creating essentially a government-endorsed one-sided contract in violation of the 14th Amendment’s right to be free from governmental interference with the right to bargain and contract.

The Plaintiffs in the Omaha litigation have made it clear that they are not challenging the reporting ordinance itself but the fact that its implementation allows LeadsOnline to exceed the government’s authority. These companies have been in the scrap metal recycling business in Omaha and Nebraska for many years. They have long complied with state and city laws requiring them to report specific information to law enforcement.

In fact, the recyclers are in full support of halting scrap metal theft and are willing to give all of the required information directly to the Omaha Police Department. They have indicated they will comply with the Omaha ordinance but not under the conditions of the LeadsOnline “checkbox contract” that forces them to relinquish control and sign over complete unrestricted access and use of the reported data to a commercial for-profit database company. Nothing the recyclers are asking for in the lawsuit changes this or seeks to reduce the required information.

The lawsuit challenges only the fact that the mandated reporting process allows for LeadsOnline to gain access and use of proprietary information. This information includes confidential matters such as clients’ names, drivers licenses, finger prints, and sensitive commercial data that belong to their customers, many of whom are Omaha residents. Specifically, the objectionable language that is being challenged is found in the LeadsOnline website Terms & Conditions contract:

“4.9 Subject to the terms of this Agreement, Reporting Business hereby grants to Leads a perpetual, irrevocable, unrestricted, non-exclusive, royalty free license to use, copy, distribute, display, reproduce, transmit, modify, and otherwise use such Data in accordance with and to the extent allowed by the terms of this Agreement. Also subject to the terms of this Agreement,

Reporting Business hereby waives all rights to any claim against Leads for any alleged or actual infringements of any proprietary rights, rights of privacy and publicity, moral rights, ownership rights and rights of attribution in connection with such Data.

6.8 This Agreement shall be governed by and construed in accordance with the laws of Texas, without regard to conflicts of laws provisions. Sole and exclusive jurisdiction and venue for any action or proceeding arising out of or related to this Agreement shall be an appropriate state or federal court located either in Dallas County or Collin County, Texas.”

The Omaha legal challenge raises the question of the cost the public willing is to pay for some of these electronic reporting initiatives. This question is not aimed at the monetary costs alone but suggests that individual liberties and basic constitutional rights are at risk. Businesses use websites to advertise, provide information, sell products and reach new customers. This is all good. However, the appeal may wane when one considers the fact that such benefits come only after one agrees to give up one’s fundamental property and liberty rights such as the right to contract. This is what is at stake in Omaha.