

CLIENT ALERT

CITIZEN SUIT WATCH: Court Rejects RCRA Citizen Suit Over Diesel Emissions at Railyards

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In *Center for Community Action & Environmental Justice v. Union Pacific Corp.*, No. 2:11-cv-08608, 2012 WL 2086603 (C.D. Cal. May 29, 2012), the U.S. District Court for the Central District of California dismissed a citizen suit brought by several environmental groups against two railroad companies under the Resource Conservation and Recovery Act ("RCRA"),¹ holding that RCRA does not apply to diesel exhaust. The court determined, as a matter of first impression, that the Clean Air Act ("CAA") comprehensively regulates diesel exhaust and leaves no room for RCRA regulation without creating an impermissible conflict with the CAA. The court further reasoned that, even without such a conflict, diesel particulate matter ("DPM") is not solid or hazardous waste subject to RCRA regulation.

I. Case Overview

In October 2011, several environmental groups filed this suit against BNSF Railway Company and Union Pacific Railroad Company seeking declaratory and injunctive relief and alleging that DPM emitted by diesel engine locomotives, trucks, and other equipment operating in and around sixteen railyards throughout California presented an imminent and substantial endangerment to health and the environment in violation of RCRA.²

The railroads moved to dismiss the plaintiffs' claims, contending that Congress provided for comprehensive diesel exhaust regulation under the CAA and thus, that applying RCRA to such emissions would create an impermissible conflict with the CAA. They also argued that even if the two statutes did not conflict, dismissal was nevertheless warranted because the emission of diesel exhaust does not constitute the disposal of solid or hazardous waste under RCRA.

In response, the plaintiffs claimed that RCRA applies to railyard DPM emissions. In their view, the interaction between two CAA provisions created an unintentional "loophole" that allowed railyard emissions to go unregulated. That "loophole" exists because only the federal government may regulate new locomotive emissions,³ even though it cannot regulate indirect sources of air pollution such as railyards.⁴ As a result, for example, California cannot regulate the primary source of DPM emissions at railyards (locomotives), nor can the U.S. Environmental Protection Agency ("EPA") regulate emissions from railyards as indirect sources. The plaintiffs sought to fill this regulatory "gap" through RCRA, claiming that Congress could not have intended to allow DPM to be emitted by engines in one area in the amounts allegedly produced by the railyards.

The plaintiffs further contended that DPM is subject to RCRA regulation because, although the particulate matter in diesel exhaust initially is transported through the air in a gaseous form, it nevertheless should be classified as a solid or hazardous waste under that statute because the gas consists of solid particles that may eventually settle onto water and land near the railyards.

II. Summary of the Dismissal Order

In an unpublished opinion, the court dismissed the plaintiffs' complaint, finding that the plaintiffs had not properly alleged that the railroads are engaged in the disposal of a solid or hazardous waste subject to RCRA.

First, the court held, as a matter of first impression, that the CAA comprehensively regulates diesel exhaust and thus, that applying RCRA to those emissions would create an impermissible conflict between the two statutes. The court did not find the plaintiffs' "loophole" theory persuasive. It explained that, "[a]lthough Congress may not have intended the precise loophole at issue in this case, the prohibition against federal indirect source regulation necessarily contemplates a situation in which indirect sources are largely unregulated." The court further held that "[a]pplying RCRA to indirect sources of air pollution would thwart congressional intent and render the statutory prohibition meaningless. It would be unreasonable to assume that even though Congress expressly prohibited federal indirect source regulation under the [CAA], it implicitly intended to regulate indirect source emissions through the citizen suit provision of RCRA."

The court refused to adopt the plaintiffs' "strained" construction of RCRA because Congress expressly authorized federal CAA indirect source review in some circumstances but did not extend that exception to railyards.⁵ Moreover, the court noted that the CAA allows California to adopt emissions standards for nonroad engines and vehicles other than new locomotive engines⁶ and allows the state to regulate indirect sources of air pollution⁷ so that the regulatory "gap" would not be as wide as plaintiffs would have it. And finally, the court noted that every direct source of DPM in the railyards is regulated by the CAA even though the railyards themselves are not regulated under the Act. Any residual regulatory gap was for Congress to fill, not the court.

The court went on to conclude as a matter of first impression that, putting aside the conflict between the CAA and RCRA, diesel exhaust is not a "solid or hazardous waste" whose disposal is subject to regulation under RCRA.⁸ In the court's view, RCRA's definition of "solid waste" included only "contained gaseous material,"⁹ not uncontained gases like DPM. If DPM could be considered solid waste, any gas that contained compounds, no matter how small, that could be aggregated to form a solid or liquid would be classified as a solid waste subject to RCRA.

The court noted that the CAA provides a comprehensive regulatory framework to address the hazards arising from every compound found in DPM. The CAA's regulation of such hazardous air pollutants is therefore like a "scalpel" that could "address the problem of DPM with precision," which was preferable to "wielding RCRA like a sledgehammer."¹⁰ Moreover, the court emphasized that all diesel exhaust contains DPM; thus, a ruling in the plaintiffs' favor would bring every diesel-burning vehicle within RCRA's reach. But, because Congress and the EPA created comprehensive regulatory schemes for diesel exhaust under the CAA, the court held that Congress did not intend for that exhaust to be subject to the more general provisions of RCRA.

In effect, the court rejected the plaintiffs' argument that a contrary finding would allow polluters to aerosolize solid waste to avoid RCRA liability. The court explained that aerosolizing solid waste does not change its form simply because it is disposed of through the air; RCRA still governs its disposal, storage, and treatment. This case did not fit that scenario because it involved the creation of waste in a gas form, not the aerosolization of solid waste.

For these reasons, the court dismissed the plaintiffs' complaint with prejudice. On June 7, 2012, the plaintiffs filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit.

III. Implications

This decision resolves several issues of first impression in the face of citizen plaintiff attempts to extend the reach of RCRA citizen suit jurisdiction. How the Ninth Circuit resolves the questions of the purported "loophole" in regulation of railyard emissions and the regulation of DPM generally will have broad implications for the railroad industry and for all emitters of DPM. Moreover, because the court held that RCRA does not apply to non-contained gases as a general matter, the appellate consideration of that question could cast a wide net to many other emissions beyond diesel exhaust.

¹ See 42 U.S.C. § 6972(a)(1)(B).

² See *id.*

³ See *id.* § 7543(e)(1)(B).

⁴ See *id.* § 7410(a)(5)(A)(ii). "Indirect sources" of air pollution are any "facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution." *Id.* § 7410(a)(5)(C). "Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources[.]" *Id.*

⁵ See 42 U.S.C. § 7410(a)(5)(B).

⁶ See *id.* § 7543(e)(2)(A)(ii).

⁷ See *id.* § 7410(a)(5)(A).

⁸ See *id.* § 6903(3), (27).

⁹ See *id.* § 6903(27).

¹⁰ *Ctr. for Cmty. Action & Env'tl. Justice*, slip op. at 8.

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