

CLIENT ALERT

CITIZEN SUIT WATCH: Ninth Circuit Precludes RCRA Citizen Suit Challenges to Diesel Emissions

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Not persuaded by plaintiffs' concerns over a purported "gap" in the regulation of diesel railyard emissions in the Clean Air Act (CAA), the Ninth Circuit held that any gap in the regulation of diesel emissions from railyards as indirect sources under the CAA could not be filled by citizen suit enforcement under the Resource Conservation and Recovery Act (RCRA). The court reasoned that the emission of diesel particulate matter (DPM) does not constitute the "disposal" of solid waste within the meaning of RCRA because the small solid particles in DPM are emitted directly into the air rather than placed on land or water as required by the statute's definition of "disposal." The court's broad ruling in *Center for Community Action and Environmental Justice v. BNSF Railway Co.* has implications for all diesel exhaust emitters and could foreclose future RCRA citizen suit challenges to air emissions beyond DPM.

District Court Decision

Several plaintiff organizations filed suit under RCRA's citizen suit provision¹ in the U.S. District Court for the Central District of California in 2011 alleging that DPM emitted by diesel engine locomotives, trucks, and other equipment in California railyards owned and operated by the defendants presented an imminent and substantial endangerment to health and the environment in violation of RCRA. Members of plaintiffs' groups² live in the vicinity of defendants' railyards and relied upon determinations by the California Air Resources Board (CARB) and the U.S. Environmental Protection Agency (EPA) that DPM is likely to be carcinogenic to humans. According to plaintiffs, defendants' railyards collectively emitted over 160 tons of DPM in to the air in 2005, and plaintiffs argued that Congress left an unintentional loophole in regulating those emissions under the CAA: only the federal government may regulate new locomotive emissions but the federal government may not regulate indirect sources of air pollution like railyards.

In an unpublished decision, the district court granted defendants' motion to dismiss, holding that the CAA comprehensively regulates diesel exhaust by prohibiting federal indirect source regulation in a way that leaves no room for RCRA regulation without creating an impermissible conflict with the CAA. The district court reasoned 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."³ The district court also held that, even if there was no conflict between the two statutes, DPM is not a "solid or hazardous waste" subject to RCRA regulation.⁴

Ninth Circuit Ruling

The Ninth Circuit affirmed the district court's dismissal, but on different grounds—RCRA's definition of "disposal."⁵ RCRA defines "disposal" as discharging, depositing, injecting, dumping, spilling, leaking, and placing any solid waste or hazardous material into or on any land or water so that the waste may enter the environment or be emitted into the air or discharged into any waters.⁶ That definition does not include the act of emitting and, by its terms, it includes only conduct that results in the placement of

solid waste "into or on any land or water."⁷ That placement, in turn, must be so that solid waste may enter the environment, be emitted into the air, or discharged into water. As a result, the unanimous three-judge panel determined that RCRA "'disposal' occurs where the solid waste is *first* placed 'into or on any land or water' and is *thereafter* 'emitted into the air.'"⁸

By contrast, the alleged solid waste at issue in this case (DPM) was not first placed onto land or water, but was first emitted into the air. The court held that to adopt plaintiffs' argument and hold that emissions of DPM qualified as a RCRA disposal "would effectively . . . rearrange the wording of the statute—something that we a court, cannot do."⁹ In addition, because other provisions of RCRA do include the act of emitting, such as the definition of the term "release," the court found that Congress knew how to define "disposal" to include emissions but chose not to.¹⁰

The court rejected plaintiffs' invitation to glean Congress' intent that air emissions be regulated under RCRA from Section 7002 of that statute, which empowers EPA to monitor and control air emissions at hazardous waste treatment, storage, and disposal facilities, because that provision does not provide a private right of action.¹¹ Similarly, RCRA's citizen suit provision does not permit individuals to bring suit to enforce Section 7002. The court thus declared that "the fact that RCRA permits the EPA to regulate air emissions is not to say that it provides 'any person,' by way of its citizen suit provision, a private right of action with respect to those emissions."¹²

The court then examined the legislative history of both the CAA and RCRA to guard against the possibility that the statute's definition of "disposal" could be deemed ambiguous, concluding that the regulation of locomotives and locomotive engines was given exclusively to EPA while the regulation of railyards, as indirect sources of air pollution, was expressly (albeit permissively) left to the states. RCRA does not apply to either. Instead, RCRA was intended to reduce the volume of waste left in landfills and governs land disposal. The CAA does govern air pollutants, but railyards are indirect sources of pollution and as such are excluded entirely from federal regulation. Although plaintiffs sought to close that regulatory "gap," Congress was entitled to leave the regulation of indirect sources like railyards to the states and the court was not free to override that decision.

Implications

The Ninth Circuit's decision marks the first time that an appellate court has ruled on whether a RCRA citizen suit may be used to challenge diesel emissions. That ruling now forecloses plaintiffs' groups' attempts in that circuit to extend the reach of RCRA citizen suits to diesel exhaust as well as RCRA challenges to emissions beyond diesel that are emitted directly into the air rather than onto land or water. Although plaintiffs may attempt their theory in other jurisdictions, the Ninth Circuit's clear textual analysis of RCRA should serve as a useful tool against those suits.

For a copy of the court's ruling, click [here](#).

Click [here](#) for a previous alert on the district court decision.

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¹ 42 U.S.C. § 6972(a)(1)(B).

² Plaintiffs are the Center for Community Action and Environmental Justice, East Yard Communities for Environmental Justice, and Natural Resources Defense Council.

³ *Ctr. for Cmty. Action & Env'tl. Justice v. Union Pac. Corp.*, No. 2:11-cv-08608, 2012 WL 2086603, at *5 (C.D. Cal. May 29, 2012).

⁴ 42 U.S.C. § 6903(3), (27).

⁵ *Ctr. for Cmty. Action v. BNSF Ry. Co.*, No. 12-56086, -- F.3d --, 2014 WL 4085860 (9th Cir. Aug. 20, 2014).

⁶ 42 U.S.C. § 6903(3).

⁷ *Id.*

⁸ *Ctr. for Cmty. Action*, 2014 WL 4085860, at *4.

⁹ *Id.*

¹⁰ *See* 42 U.S.C. § 6991(8).

¹¹ *Id.* § 6942(n).

¹² *Ctr. for Cmty. Action*, 2014 WL 4085860, at *5.

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